Team No. 40

CA. No. 11-1245

IN THE UNITED STATES
COURT OF APPEALS FOR THE TWELFTH CIRCUIT

STATE OF NEW UNION,
Appellant and Cross-Appellee,
v.
UNITED STATES,
Appellee and Cross-Appellant,
v.
STATE OF PROGRESS,
Appellee and Cross-Appellant.

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

Brief for Samuel L. Jackson, GOVERNOR,
State of Progress, Appellee and Cross-Appellant.

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JURISDICTIONAL STATEMENT

Federal district courts have original jurisdiction over any civil action arising under the laws of the United States, including the Clean Water Act (CWA or Act), 33 U.S.C. §§ 1251 *et seq*. (2006), and the Administrative Procedure Act (APA), 5 U.S.C. § 500 *et seq* (2006). 28 U.S.C. § 1331 (2006). The United States Court of Appeals for the Twelfth Circuit has jurisdiction of appeals from a final decision of the United States District Court for the District of New Union. 28 U.S.C. §§ 1291, 1294(1) (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, and in its *parens patriae* capacity as protector of its citizens who have an interest in the groundwater in the state.

II. Whether the District Court erred in holding that the COE has jurisdiction under § 404 of the CWA over Lake Temp, an isolated, intermittent, and intrastate body of water.

III. Whether the COE has jurisdiction under § 404 of the CWA to issue a permit for the discharge of slurry containing spent munitions into Lake Temp.

IV. Whether OMB's encouragement to issue a § 404 permit for the fill material to be discharged into Lake Temp is proper under the CWA.

STATEMENT OF THE CASE

The State of New Union filed a suit in the United States District Court for the District of New Union pursuant to the APA, 5 U.S.C § 702. (R. at 3). New Union is seeking review of a permit issued by the U.S. Army Corps of Engineers (COE) to the U.S. Department of Defense (DOD) under § 404 of the CWA. (R. at 3). New Union argues that DOD's proposed activities instead require a permit issued by the EPA under § 402 of the CWA. (R. at 3). The State of

Progress intervened in accordance with Rule 24 of the Federal Rules of Civil Procedure as a defendant. (R. at 3). New Union, the United States, and Progress filed motions for summary judgment. (R. at 3).

The district court granted the defendant's motion for summary judgment, holding that New Union has no standing, a § 404 permit is appropriate because Lake Temp is navigable water and the Lake Temp slurry is fill material, and the Office of Management and Budget's (OMB) involvement in the permitting decision did not violate the CWA. (R. at 10-11). This court granted review on June 2, 2011.

STATEMENT OF THE FACTS

Lake Temp is an isolated, intermittent, intrastate body of water located on an otherwise arid military reservation in the State of Progress. (R. at 3-4). The lake is fed by seasonal runoff from surrounding mountains largely located within Progress. (R. at 4). Due to the seasonal nature of the runoff, the lake's topography varies dramatically throughout the year. (R. at 3-4). At its highest water point, the lake is located entirely within the State of Progress. (R. at 4). During dry seasons, the lake's depth and surface area are much smaller. (R. at 4). The lake is fully dry during the dry season on average once every five years. (R. at 4).

The lake is situated above the Imhoff Aquifer, which lies approximately 1,000 feet below ground and largely follows the contours of the lake. (R. at 4). Although the aquifer extends slightly beyond the lake at its greatest extent, 95% of the aquifer is located within the boundaries of the military reservation, in the State of Progress. (R. at 4). The land between the lakebed and aquifer is unconsolidated alluvial fill. (R. at 5). The remaining portion of the aquifer extends below the State of New Union. (R. at 6). New Union's statutes allow any of its citizens to withdraw groundwater in the state, pending New Union's grant of permission. (R. at 6).

When the wet season coincides with their migration, waterfowl have been known to land on the lake during the course of their travel across Progress. (R. at 4). During these seasons, a small number of sportsmen each year trespass onto the military reservation to hunt on the lake. (R. at 4). The great majority of these hunters are residents of Progress. (R. at 4). To prevent trespassing, the DOD has posted signs at frequent intervals along a Progress state highway that runs along the edge of the military reservation. (R. at 4).

The DOD proposes to discharge spent munitions into Lake Temp. (R. at 4). Before discharge, the DOD will empty the munitions of liquid, semi-solid, and granular contents, and will treat these materials to ensure they are not explosive. (R. at 4). The DOD will grind and pulverize the remaining solid components, which consist principally of metals. (R. at 4). These materials will be mixed with water to form slurry, and sprayed onto dry areas of the lake. (R. at 4). The liquid components of the slurry will evaporate soon after discharge. (R. at 4). The lakebed will be continually graded to allow for continued runoff from the surrounding mountains. (R. at 4). When the operation is complete, the solid components of the slurry will raise the lakebed by several feet. (R. at 4).

DOD prepared an Environmental Impact Statement (EIS) regarding the Lake Temp Project in 2002. (R. at 6). New Union never commented on the EIS. (R. at 6). Following the EIS process, the COE granted a permit for the Lake Temp Project pursuant to § 404 of the CWA and EPA guidelines. (R. at 3). EPA did not exercise its authority to veto the permit. (R. at 9).

STANDARD OF REVIEW

Summary judgment is appropriate when there is no "genuine dispute as to any material fact." Fed. R. Civ. P. 56(a). This court must review *de novo* the presented questions of law. *Theriot, Inc. v. United States*, 245 F.3d 388, 395 (5th Cir. 1998). Thus, this court must review *de*

novo the district court's decision to grant summary judgment regarding New Union's standing, whether Lake Temp constitutes navigable water, whether COE or EPA has permit-issuance authority, and whether the OMB's actions were allowed under the CWA.

SUMMARY OF THE ARGUMENT

The district court erred in holding that New Union did not have standing to challenge the actions of the OMB, COE, and EPA in its sovereign and *parens patriae* capacities. New Union has suffered an injury-in-fact that is directly traceable to the COE's grant of permit to the DOD, and the failure of EPA to veto that permit. New Union's has presented evidence which indicates that the Lake Temp Project could pollute New Union's groundwater. This pollution falls within the zone of interests meant to be protected by the CWA. If New Union's requested relief, that the EPA be given permit-issuing authority and the right to veto COE's permit, is granted, its injury will be redressed. New Union thus satisfies the requirements for Article III standing. New Union also satisfies the requirements for *parens patriae* standing because its interests go beyond those of its individual citizens and effect a substantial portion of its population.

Although New Union has standing to challenge the § 404 permit for the Lake Temp Project, its remaining claims fail on their merits. The distict court improperly concluded that Lake Temp, due to its size and use by interstate hunters, is subject to COE jurisdiction under the CWA. As an isolated, intermittent body of water, the lake is not susceptible to use in interstate commerce. Likewise, there is no evidence of a connection between wetlands associated with the lake and navigable waters. The unauthorized use of Lake Temp for non-commercial hunting does not constitute commercial activity, while any related commercial activities are insufficiently linked to the purpose of the CWA to support federal authority under the Commerce Clause.

Thus, the extension of COE jusidiction over Lake Temp disregards the State of Progress's power over local water use.

Assuming Lake Temp is subject to CWA jurisdiction, the district court correctly concluded that the proposed discharge requires only a permit under § 404 of the Act. Under the CWA, the COE maintains sole permitting authority over discharges of "fill material." Because the CWA did not define "fill material," deference must be given to implementing regulations authored by the COE and EPA. The slurry in the instant case is materially identical to material deemed within the COE's jurisdiction under § 404, because munitions qualify as "fill material" under COE/EPA regulations. Consistent with the purpose of the CWA, the Lake Temp Project will prevent the discharge of pollutants into traditionally navigable waters.

The OMB acted in accordance with the "unitary executive" framework established by the Constitution when it resolved the COE and EPA's dispute concerning the proper permit for the Lake Temp Project. The EPA did not have a legitimate reason under § 404(c) to veto the permit granted to DOD because no "unacceptable adverse effects" will results from the § 404 permit, and the OMB's resolution of conflicting agency interpretations is acceptable under the CWA.

ARGUMENT

I) NEW UNION HAS DEMONSTRATED AN INJURY TO ITSELF AND ITS CITIZENS WHICH ESTABLISHES ARTICLE III STANDING IN BOTH ITS SOVEREIGN CAPACITY AND *PARENS PATRIAE* CAPACITY.

The Constitution limits the power of federal courts to resolving "cases" and "controversies." U.S. Const. art. III, § 2. To bring a suit in federal court, a plaintiff must 1) allege suffering an injury-in-fact 2) fairly traceable to the complained of conduct that is 3) likely to be redressed by a favorable decision. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992). The Supreme Court has recognized that "States are not normal litigants for the purpose of

invoking federal jurisdiction," and are "entitled to special solicitude in [a] standing analysis," which grants New Union a degree of leniency in the application of these standards. *Massachusetts v. EPA*, 549 U.S. 497, 518, 520 (2007). When bringing suit under the APA the complainant must 1) identify some final agency action and 2) demonstrate that its claims fall within the zone of interests of the relevant statute. *Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871, 882-83 (1990).

In order to maintain *parens patriae* actions, a state must 1) articulate a "quasi-sovereign" interest apart from those of the represented parties and 2) allege an injury to a substantial segment of its population. *Alfred L. Snapp & Sons, Inc. v. Puerto Rico ex rel. Barez*, 458 U.S. 592, 607 (1982). The Second Circuit has also held that the represented individuals must be unable to obtain complete relief in a private suit in order for a state to maintain *parens patriae* standing. *People by Abrams v. 11 Cornwell Co.*, 695 F.2d 34, 40 (2d Cir. 1982), *vacated in part on other grounds*, 718 F.2d 22 (2d Cir. 1983).

The District Court improperly held that New Union has not alleged an injury-in-fact to itself or its citizens, and that New Union lacks standing in its sovereign and *parens patriae* capacity.

A) <u>New Union has Article III standing in its sovereign capacity because it has raised a material issue of fact regarding an injury-in-fact that is traceable to the actions of the United States and is likely to be redressed by a favorable decision of the court.</u>

Even a "small probability of injury is sufficient" to satisfy the injury-in-fact requirement for Article III standing. *Vill. of Elk Grove Village v. Evans*, 997 F.2d 328, 329 (7th Cir. 1993), *see also Friends of the Earth, Inc. v. Gaston Copper Recycling Corp.*, 204 F.3d 149, 160 (4th Cir. 2000) (holding that an increased risk of pollution downstream from nearby pollution constituted an injury-in-fact); *Mountain States Legal Found. v. Glickman*, 92 F.3d 1228, 1235

(D.C. Cir. 1996) (holding that an incremental increase in risk of forest fires was an injury-in-fact for standing purposes); *Sierra Club, Lone Star Chapter v. Cedar Point Oil Co.*, 73 F.3d 546, 556 (5th Cir. 1996) (holding that mere concern of impairment to recreational use of water by pollution sufficed as an injury-in-fact). Allegations supporting standing must be supported in "the manner and degree of evidence required at the successive stages of the litigation." *Defenders of Wildlife*, 504 U.S. at 561. In order to survive a motion for summary judgment, a party need only show a "genuine dispute as to any material fact." Fed. R. Civ. P. 56(a). A party may "rely on circumstantial evidence . . . to prove both injury-in-fact and traceability." 204 F.3d at 163; *see also Shaw v. Hunt*, 517 U.S. 899, 905 (1996) (allowing circumstantial evidence to establish standing for a gerrymandering challenge).

1) New Union has raised a material issue of fact regarding whether or not the proposed discharge will pollute groundwater in New Union.

The DOD intends to deposit slurry containing hazardous substances, chemicals, and metals on the bed of Lake Temp. (R. at 4). New Union has shown that the land between the lakebed and aquifer is largely unconsolidated alluvial fill. (R. at 5). This is circumstantial evidence that this pollution will reach the Imhoff Aquifer. (R. at 5). Because of the nature of this fill, contaminated water from Lake Temp may enter the Imhoff Aquifer. (R. at 5). No evidence has been introduced to contradict this assertion. It is merely argued that New Union has failed to present direct evidence regarding the migration of the pollution to the aquifer.

As sovereign regulator of its groundwater, New Union necessarily suffers an injury when its water is polluted by actors outside of the state's domain. *See Georgia v. Tennessee Copper Co.*, 206 U.S. 230, 237 (1907), ("The state has an interest . . . in all the earth and air within its domain. It has the last word as to whether its mountains shall be stripped of their forests and its inhabitants shall breathe pure air."). New Union has presented sufficient circumstantial evidence

that it will potentially suffer an injury above the bar set by a requirement of only a "small probability" and of "special solicitude" that is given to state plaintiffs. *Evans*, 997 F.2d at 328; *Massachusetts v. EPA*, 549 U.S. at 520. With no contrary evidence presented, there is at least a material issue of fact regarding this assertion. New Union thus satisfies the injury-in-fact requirement for Article III standing. New Union "must be given the opportunity to present evidence on this issue in a forum that will enable the finder of fact to evaluate the credibility of the testimony." *Natural Res. Def. Council, Inc. v. Watkins*, 954 F.2d 974, 981 (4th Cir. 1992).

The DOD asserts that New Union should be time-barred from bringing this suit, since New Union never commented on the EIS that was completed regarding this project. (R. at 6). However, while New Union's alleged injury to its groundwater is based on issues addressed in the EIS, the case itself deals with the correct permit-issuing authority for the project in question (R. at 2, 6). New Union is not alleging that the EIS was insufficient. Therefore, New Union not only fulfills the injury-in-fact requirement, but should not be time-barred from bringing a case, merely because its injury concerns issues discussed in the EIS.

2) New Union's alleged injury can be traced to the decision that the COE may issue a permit to DOD, and would be redressed by reversal of that decision.

In *Federal Election Com'n v. Akins*, the Supreme Court recognized that when an agency decision is based on improper legal grounds, parties injured by that decision have standing to contest it. 524 U.S. 11, 25 (1998). The aggrieved party's injury is traceable to, and redressable by reversal of, such agency action "even though the agency [may], in the exercise of its lawful discretion, reach the same result for a different reason." *Id.* at 25. Under *Akins*, New Union's grievance can be traced to the OMB's decision to grant permit-issuing authority to the COE instead of EPA.

In *Akins*, a group of voters brought suit against the Federal Election Commission (FEC). *Id.* at 18. They sought to prove that FEC had improperly excluded the American Israel Public Affairs Committee (AIPAC) as a "political committee" under the Federal Election Campaign Act of 1971. *Id.* at 18. This classification meant that AIPAC was not required to disclose information about it members, contributions, and expenditures. *Id.* at 16, 18. Even if FEC had agreed that AIPAC was a political committee, it could have decided against requiring AIPAC to produce the information that the voters desired. *Id.* at 25. Nevertheless, the court held that the voters' grievance could be traced to the FEC's interpretation of "political committee" and could be redressed by a reversal of that interpretation. *Id.* at 25.

As in *Akins*, New Union's complaint deals with an agency's interpretation of a governing statute. New Union argues that the OMB lacked authority to grant the COE power to issue DOD a permit for discharging slurry into Lake Temp. (R. at 2). New Union avers that EPA actually had permit-issuing authority for this discharge of materials under the CWA. (R. at 2). This case mirrors *Akins* in that, even if EPA is granted authority to deny a permit to DOD, it may choose not to do so. However, New Union asserts that EPA was preparing to veto the COE's permit-issuance prior to OMB's involvement, and that EPA was told by OMB, in violation of law, not to exercise its veto power. (R. at 9). New Union's central argument is thus about an agency misinterpretation, as in *Akins*, and should be conferred standing. Further, because EPA was preparing to veto the COE's permit, if the court grants New Union's requested relief, its injury is even more likely to be redressed than the injury that conferred standing to the voters in *Akins*. The Supreme Court's holding in *Akins* makes it clear that New Union satisfies all of the constitutional requirements for Article III standing, especially considering that states are granted a degree of leniency under *Massachusetts v. EPA*.

3) New Union's interests are within the zone-of-interests of the CWA and affected by a final agency action.

In order to maintain standing in an APA action, plaintiffs must be "adversely affected or aggrieved . . . within the meaning of [the] relevant statute," interpreted as falling within the "zone of interests" of the statute. 5 U.S.C. § 702 (2006); *See, e.g.*, *Nat'l Wildlife Fed'n*, 497 U.S. at 883. This injury must be caused by a "final agency action." *See id.* at 882. The Supreme Court has held that "the APA require[s] only that 'the interest sought to be protected . . . [be] *arguably* within the zone of interests to protected or regulated by the statute . . . in question.'" *Nat'l Credit Union Admin. v. First Nat'l Bank & Trust Co.*, 522 U.S. 479, 488 (1998) (emphasis added) (quoting *Ass'n of Data Processing Service Organizations, Inc. v. Camp*, 397 U.S. 150, 153 (1970)).

The CWA was enacted to "maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a) (2006). Under the Act, Congress' policy is to "recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution, [and] to plan the development and use (including restoration, preservation, and enhancement) of land and water resources." 33 U.S.C. § 1251(b) (2006). New Union's alleged injury is pollution to its groundwater. The CWA intends to preserve the chemical integrity of water, and allow states to regulate their own water. New Union's grievance is well within the zone of interests of the CWA.

A final agency action must "mark the consummation of the agency's decisionmaking process" and be an action from which "rights or obligations have been determined" or "legal consequences will flow." *Bennett v. Spear*, 520 U.S. 154, 178 (1997). In *Ohio Valley Envtl. Coal. v. U.S. Army Corps of Eng'rs*, the Southern District of West Virginia held that issuance of a permit to discharge fill material under the CWA constituted a final agency action. 479

F.Supp.2d 607, 621 (S.D. W. Va. 2007), *rev'd on other grounds*, 556 F.3d 177 (2009). In the instant case, the OMB's determination that the COE had the authority to issue a permit to DOD, and its order that EPA should not veto that permit, marked the consummation of the agency's decision making process. The decision determined the rights and obligations of the relevant agencies, as well as of DOD. It is, therefore, a final agency action. New Union satisfies both the constitutional and prudential requirements for Article III standing, and must be allowed to proceed with the suit based on that standing.

B) New Union meets the requirements to assert *parens patriae* standing because it has alleged a quasi-sovereign interest which affects a substantial portion of its population.

In order to assert *parens patriae* standing, a state must articulate a quasi-sovereign interest separate from those of the citizens it seeks to represent, and allege an injury to a substantial portion of its population. *Snapp*, 458 U.S. at 607. Some courts also require that represented individuals be unable to obtain complete relief in a private suit in order for a state to maintain *parens patriae* standing. *Cornwell*, 695 F.2d at 40.

1) New Union's interest in protecting its groundwater is a well-recognized quasi-sovereign interest which stands apart from the interests of represented citizens.

A state has a quasi-sovereign interest in "the health and well-being- both physical and economic- of its residents in general." *Snapp*, 458 U.S. at 607. A state's quasi-sovereign interest in its waters is a long-recognized tenet. *See Hudson County Water Co. v. McCarter*, 209 U.S. 349, 355 (1908), ("But it is recognized that the state, as quasi-sovereign and representative of the interests of the public, has a standing in court to protect the atmosphere, the water, and the forests within its territory[.]"); *see also Connecticut v. Am. Elec. Power Co.*, 582 F.3d 309, 334-35 (2d Cir. 2009) ("[A] state's interests in protecting both its natural resources and the health of

its citizens have been recognized as legitimate quasi-sovereign interests since the turn of the last century."), *cert. granted*, 131 S.Ct. 813 (2010), *rev'd on other grounds*, 131 S.Ct. 2527; *Satsky v. Paramount Communications, Inc.*, 7 F.3d 1464, 1469 (10th Cir. 1993) ("Although the Supreme Court has not expressly defined what is a 'quasi-sovereign' interest, it is clear that a state may sue to protect its citizens against 'the pollution of the air over its territory; or of interstate waters in which the state has rights.'" (citation omitted)); *California v. United States*, 180 F.2d 596 (9th Cir. 1950) ("The State is asserting an interest in the subject matter as the absolute owner of the water, and as parens patriae on behalf of all its citizens. That is a sufficient interest in the subject matter to entitle it to be heard[.]").

Articulating a quasi-sovereign interest indicates assertion of an interest apart from those of the citizens a plaintiff seeks to represent. *See West Virginia ex rel. McGraw v. CVS Pharmacy*, 646 F.3d 169, 180 (4th Cir. 2011) ("[The] State must articulate an interest apart from the interests of particular private parties, also known as a quasi-sovereign interest." (internal quotation marks omitted)); *Massachusetts v. Bull HN Info. Sys., Inc.*, 16 F.Supp.2d 90, 96 (D. Mass. 1998) (conflating quasi-sovereign interest and interest apart from those of private parties); *In re Hemingway*, 39 B.R. 619, 622 (N.D.N.Y. 1983) (categorizing quasi-sovereign interests as those which are apart from the particular parties). The court in *Snapp* provides that one indication of a State's *parens patriae* standing is when the injury is one that the State would attempt to address through its lawmaking powers. 458 U.S. at 607.

New Union is seeking to protect groundwater within its domain of statutory regulation. (R. at 6). Rights to this groundwater are not limited to owners of the land above it. (R. at 6). New Union already addresses access to groundwater through its sovereign lawmaking powers. New Union, as any other state, has a quasi-sovereign interest in protecting and regulating its natural

resources for current and future citizens who may wish to avail themselves of those resources. This quasi-sovereign interest goes beyond the individual interests of private parties whom New Union would represent in a *parens patriae* capacity.

2) Pollution of New Union's groundwater would injure a substantial segment of the state's current and future citizens.

The quasi-sovereign requirement for *parens patriae* standing is conceptually similar to the requirement that a substantial segment of the state's population be injured. *Bull HN Info. Sys.*, 16 F.Supp.2d at 98. Both requirements serve to prevent states from standing in for a citizen's essentially private dispute. *Id.* at 98-99. The raw number of individuals directly involved in a case is not dispositive for the substantial-segment test. *People v. Mid Hudson Med. Grp., P.C.*, 877 F.Supp. 143, 148 (S.D.N.Y. 1995). "[T]he indirect effects of the injury must be considered . . . in determining whether the State has alleged injury to a sufficiently substantial segment of its population." *Snapp*, 458 U.S. at 607. New Union's quasi-sovereign interest in its groundwater functions to protect the rights of all of its current and future citizens. New Union has specifically opted not to limit groundwater withdrawals to the owners of land above such water. (R. at 6). Every current and future citizen has potential access to this resource, subject to New Union's regulation. Therefore, a substantial segment of the population's rights are invaded by the injury that New Union alleges.

3) Future citizens injured by pollution to New Union's groundwater would be unable to achieve the relief, currently available to New Union, of preventing that pollution.

The Second Circuit requirement that represented citizens be incapable of achieving full relief is typically satisfied when the State seeks broader relief than private litigants would. *Bull HN Info. Sys.*, 16 F.Supp. at 101. In *Mid Hudson*, Mr. Boardman, a deaf individual, was denied interpretive services at a hospital. 877 F.Supp. at 145. The Attorney General's Office

investigated the hospital's practices in providing interpretive services. *Id.* The Attorney General, based on this investigation, brought a suit claiming that the hospital discriminated against the hearing impaired. *Id.* The complaint sought relief beyond the needs of Mr. Boardman. *Id.* at 147. The court held that even though Mr. Boardman could seek relief for himself, it would not encompass the full relief the Attorney General sought for all current and future deaf patients. *Id.* at 149.

New Union seeks to prevent the pollution of its groundwater in the Imhoff Aquifer. This prevention would preserve the right to potential access to this water for current and future citizens. If this action is dismissed, future citizens will be incapable of obtaining relief regarding their right to this groundwater. Thus, New Union's complaint meets the Second Circuit's private relief requirement. The court below erred in holding that New Union failed to satisfy the requirements of *parens patriae* standing. New Union should be allowed to bring this suit under both Article III and *parens patriae* standing.

II) THE COE LACKS JURISDICTION OVER A DISCHARGE OF FILL MATERIAL INTO LAKE TEMP.

While New Union has presented sufficient evidence to survive a motion for summary judgment on the issue of standing, its remaining claims must ultimately fail. Congress enacted the CWA to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. §1251(a). The Act provides that "[i]t is the policy of Congress to recognize, preserve, and protect the primary responsibilities and rights of States to . . . plan the development and use . . . of land and water resources." 33 U.S.C. § 1251(b). Under § 404, the Act authorizes the COE to "issue permits . . . for the discharge of . . . fill material into . . . navigable waters." 33 U.S.C. § 1344(a) (2006). The COE has defined "navigable waters" to encompass "those waters

that . . . are presently used, or have been used in the past, or may be susceptible for use to transport interstate or foreign commerce." 33 C.F.R. § 329.4 (2011).

COE regulations notwithstanding, "[p]recise definitions of 'navigable waters of the United States' or 'navigability' are ultimately dependent on judicial interpretation." 33 C.F.R. § 329.3 (2011). The Supreme Court has held that a body of water is subject to COE jurisdiction only if (1) the body itself is navigable, or (2) if non-navigable, the body maintains a continuous surface water connection and/or a "significant nexus" with traditionally navigable waters. *Rapanos v. United States*, 547 U.S. 715 (2006).

A) There is no evidence that Lake Temp has been or is susceptible to use in interstate commerce.

In *Solid Waste Agency of N. Cook County v. U.S. Army Corps of Engineers* (*SWANCC*), the Supreme Court rejected COE jurisdiction over bodies of water that were materially identical to Lake Temp. 531 U.S. 159, 174 (2001). There, the COE asserted jurisdiction over an abandoned mining site encompassing "a scattering of permanent and seasonal ponds of varying size . . . and depth." *Id.* at 163. The COE argued that the ponds in question qualified as "navigable waters" under § 404 due to their use as habitat by migratory birds traveling across state lines. *Id.* at 164-65. The Court rejected this basis for jurisdiction, concluding that the term "navigable" in § 404 signifies COE's "traditional jurisdiction over waters that were or had been navigable in fact or which could reasonably be so made." *Id.* at 172 (citing *United States v. Appalachian Elec. Power Co.*, 311 U.S. 377, 407-408 (1940)).

The District Court's emphasis on the difference in size between Lake Temp and the ponds in *SWANCC* in distinguishing the cases is misplaced. Like the ponds addressed in *SWANCC*, Lake Temp is an isolated, intermittent body of water that is confined wholly within the State of Progress at its highest level. (R. at 3-4). Although COE regulations state that wholly

intrastate bodies may support interstate commerce, these waters are deemed navigable for purposes of § 404 jurisdiction only if used to transport goods that eventually cross state lines. *See* 33 C.F.R. § 329.6(b) (2011). There is no evidence to suggest that the lake has been used to transport interstate commerce, nor is there reason to believe that it may be susceptible for such use. The lake maintains no surface water connection with an interstate body of water sufficient to transport commerce. (R. at 4).

An interpretation of § 404 that expands the COE's jurisdiction over isolated waters beyond those that are navigable-in-fact is "not fairly supported by the CWA." *SWANCC*, 531 U.S. at 167. The size of a body of water is insufficient to establish navigability. While COE regulations suggest "the presence of recreational craft may indicate that a waterbody is capable of bearing some forms of commerce," this alone does not support COE jurisdiction. 33 C.F.R. § 329.6 (2011). Surely individual ponds in *SWANCC* were capable of supporting watercraft (the largest of these ponds covered "several acres" and were "several feet" deep), yet the COE did not rely on this physical characteristic to assert jurisdiction. *See SWANCC*, 531 U.S. at 164-65. In fact, some of the ponds addressed in *SWANCC* were permanent in nature, suggesting a greater degree of navigability. Because Lake Temp demonstrates no history of use for interstate commerce, and is not susceptible to such use, the Court must follow the *SWANCC* ruling to find that Lake Temp is not subject to COE § 404 jurisdiction.

B) Non-navigable wetlands within Lake Temp maintain no connection with traditionally navigable waters.

The COE defines wetlands as "areas that are inundated or saturated by surface or ground water at a frequency and duration sufficient to support . . . a prevalence of vegetation typically adapted for life in saturated soil conditions." 40 C.F.R. § 232.2 (2011). Although the record is inconclusive, some or all of Lake Temp may qualify as wetlands under this definition. In

Rapanos v. United States, the court considered whether CWA authority applies to wetlands that do not contain and are not adjacent to traditionally navigable waters. 547 U.S. 715 (2006). While a majority agreed that the wetlands in question were not subject to CWA jurisdiction, Justice Scalia's plurality opinion and Justice Kennedy's concurrence are founded on distinct interpretations of the CWA.

Under the Scalia standard, § 404 jurisdiction extends only to those wetlands with a "continuous surface connection to bodies that are 'waters of the United States' in their own right." *Id.* at 742. By contrast, Justice Kennedy relied on *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121 (1985), to conclude that wetlands are subject to § 404 jurisdiction when they, "either alone or in combination with similarly situated lands in the region, significantly affect the chemical, physical, and biological integrity of other covered waters more readily understood as 'navigable.'" *Rapanos*, 547 U.S. at 759, 780 (Kennedy, J., concurring).

In *Marks v. United States*, the Supreme Court held that a plurality decision must be interpreted on its "narrowest grounds;" however, there is significant disagreement among the courts as to whether the Scalia or the Kennedy opinion is rightly understood to be the "narrowest." 430 U.S. 188, 193 (1977). The Courts of Appeals for the Seventh and Eleventh Circuit have relied upon Justice Kennedy's "significant nexus" test. *United States v. Gerke Excavating, Inc.*, 464 F.3d 723, 724–25 (7th Cir. 2006); *United States v. Robison*, 505 F.3d 1208, 1221–22 (11th Cir. 2007). On the other hand, the Courts of Appeals for the First and Eighth Circuits have concluded that wetlands are covered under § 404 upon meeting either test. *United States v. Johnson*, 467 F.3d 56, 66 (1st Cir. 2006); *United States v. Bailey*, 571 F.3d 791, 799 (8th Cir. 2009). Continued confusion aside, Lake Temp fails to meet the criteria necessary to justify § 404 jurisdiction under either test.

Lake Temp maintains no outflow, negating the possibility of a continuous surface water connection with traditionally navigable waters. (R. at 4). Thus, under the Scalia test, wetlands impacted by the Lake Temp fill project are not subject to COE jurisdiction under § 404. Likewise, under the Kennedy test, nothing in the record indicates that Lake Temp – either alone or in combination with similarly situated bodies of water – "significantly affect[s] the chemical, physical, and biological integrity of other covered waters more readily understood as 'navigable.'" *Rapanos*, 547 U.S. at 780.

Although there is evidence that the discharge into Lake Temp will impact the Imhoff Aquifer, this significant nexus between the lake and the aquifer is insufficient to support § 404 jurisdiction. Courts generally have held that groundwater does not constitute "navigable water" under the CWA. *See e.g., Vill. of Oconomowoc Lake v. Dayton Hudson Corp.*, 24 F.3d 962, 964-96 (7th Cir. 1994) ("The omission of ground waters from [CWA] regulations is not an oversight."); *Exxon Corp. v. Train*, 554 F.2d 1310, 1331 (5th Cir. 1977) (holding that the CWA does not support federal authority to "control the disposal of wastes into deep wells."). However, some courts have concluded that groundwater with a demonstrated hydrological connection to navigable surface water may fall under § 404 jurisdiction. *See e.g., McClellan Ecological Seepage Situation (MESS) v. Weinberger*, 707 F.Supp. 1182, 1196 (E.D. Cal. 1988) ("groundwater [must be] naturally connected to surface waters to constitute 'navigable waters'"), *judgment vacated on other grounds, MESS v. Perry*, 47 F.3d 325 (9th Cir. 1995); *Washington Wilderness Coal. v. Hecla Min. Co.*, 870 F.Supp. 983, 990 (E.D. Wash. 1994); *Sierra Club v. Colorado Ref. Co.*, 838 F.Supp. 1428, 1434 (D. Colo. 1993).

No evidence has been presented to suggest that the Imhoff Aquifer shares a hydrological connection with navigable surface water. "When . . . wetlands' effects on water quality are

speculative or insubstantial, they fall outside the zone fairly encompassed by the statutory term 'navigable waters.'" *Rapanos, 547 U.S. at 780.* Because the record reflects no surface water connection or significant nexus between Lake Temp and traditionally navigable water, the COE lacks jurisdiction under § 404 to regulate the proposed discharge.

C) The unauthorized use of Lake Temp by interstate hunters does not confer navigability.

Article I, Section 8 of the U.S. Constitution provides Congress with the power to "regulate Commerce . . . among the several States." U.S. Const. art. I, § 8. Congress' Commerce Clause authority, "though broad indeed, has limits." *Maryland v. Wirtz*, 392 U.S. 183, 196 (1976). Fundamental and enduring constitutional principles of federalism serve as an essential check on unrestrained federal power, without which this authority will "effectually obliterate the distinction between what is national and what is local." *N.L.R.B. v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 37, 57 (1937). To guard against overreach, the Supreme Court has limited Congress's Commerce Clause power to three broad categories: "[1] Congress may regulate the use of the channels of interstate commerce. . . . [2] Congress is empowered to regulate and protect the instrumentalities of interstate commerce . . . . [3] Congress' commerce authority includes the power to regulate those activities . . . that substantially affect interstate commerce." *United States v. Lopez,* 514 U.S. 549, 558-59 (1995) (citations omitted).

The stated objective of the CWA is to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. §1251(a). However, the COE's jurisdiction under the CWA extends only to "navigable waters." 33 U.S.C. § 1344(a). This jurisdictional element is essential to ensure that COE authority under § 404 is consistent with the Commerce Clause. *See Lopez*, 514 U.S. at 561 (holding that a jurisdictional element is essential to "ensure, through case-by-case inquiry, that the [object or activity] in question affects interstate

commerce"). Thus, an extension of CWA jurisdiction over the Lake Temp Project is consistent with the Commerce Clause only if (1) Lake Temp itself serves as a channel of interstate commerce (as a navigable water), or (2) the proposed discharge into Lake Temp significantly affects interstate commerce.

1) Due to its isolated, intermittent character, Lake Temp itself is not properly understood as a channel of interstate commerce.

As discussed above, the record reflects no current or historical use of the lake as a means of transport of commercial goods, nor is there any reason to believe that such use may be possible. *Supra* at 16. The COE and State of New Union argue that Lake Temp "has been part of the highway of interstate commerce for interstate hunters." (R. at 7). Far from a "highway," however, it seems a more suitable analogy is that of an isolated parking lot. While one may imagine that a car placed on the lot may move freely within the limited pavement, it strains the imagination to assume that the lot is in any way suitable for use in interstate commerce.

2) The proposed discharge into Lake Temp will not significantly affect interstate commerce.

The Supreme Court has approved federal efforts to regulate activities that, in aggregate, substantially affect interstate commerce. *See e.g., Gonzales v. Raich*, 545 U.S. 1 (2005) (holding that homegrown marijuana "frustrate[s] the federal interest in eliminating commercial transactions in the interstate market in their entirety"); *Wickard v. Filburn*, 317 U.S. 111 (1942) (holding that the combined effects of wheat grown for personal consumption has a substantial effect on the interstate commodity market). However, this power does not extend to the regulation of activities with only an attenuated connection to interstate commerce. *See e.g., United States v. Morrison*, 529 U.S. 598, 617 (2000) (rejecting federal legislation targeting domestic violence on the grounds that such activity only marginally affects interstate commerce);

Lopez, 514 U.S. 549 (rejecting federal authority to regulate the possession of a firearm near a school on the grounds that such activity does not substantially effect interstate commerce).

(a) *The unauthorized use of Lake Temp for non-commercial hunting does not constitute commercial activity.*

The record suggests that "[h]undreds, perhaps thousands of duck hunters . . . [have] used [the lake] over at least the last one hundred years." (R. at 4). Even assuming that "thousands" represents a more accurate estimation, there is nothing to indicate that more than a few dozen individuals use the lake in any given year. The majority of these individuals have been residents of Progress, further reducing the number of individuals who have conceivably crossed state lines to use the lake. (R. at 4).

There is no evidence in the record that the minority of hunters that traverse the border between New Union and Progress engage in any commercial activity in the State of Progress. There is nothing to indicate, and no reason to believe, that these interstate hunters sell the waterfowl they capture on Lake Temp. Unlike commercial products purchased in Progress, the ducks do not belong to the state or any of its citizens, and their capture within the state does not constitute a commercial transaction. For these reasons, the unauthorized use of the lake for sport is better understood as a hobby than a commercial enterprise.

(b) *The proposed fill project at Lake Temp will not significantly affect interstate commerce.*

Granting that the out-of-state hunters engage in any related commercial activity while in Progress, the link between the proposed fill project and this secondary commercial activity is far too attenuated to support federal regulation under the Commerce Clause. Subjecting Lake Temp to CWA jurisdiction merely because out-of-state hunters that use the lake may purchase products or services in Progress suggests unlimited federal authority over the nation's waters.

Under the principle articulated by the court below, it seems *any* interaction between interstate travelers and a body of water would seem sufficient to justify CWA jurisdiction. For example, an out-of-state hiker who traverses an otherwise entirely isolated pond may have purchased his or her boots across state lines. Surely, in the words of the *SWANCC* court, these secondary commercial activities are "a far cry, indeed, from the 'navigable waters' and 'waters of the United States' to which the [CWA] by its terms extends." 531 U.S. 159.

Finally, granting the dubious conclusion that CWA jurisdiction is conferred through the hunters' secondary commercial activity, the fill project will not impact this activity in any meaningful way. The slurry will be sprayed only in dry areas, and the only impact on the Lake evidenced in the record is the expansion of its surface area. (R at 4). There is no evidence to suggest that this change in the lake's topography will inhibit future hunting or any secondary commercial activity will be significantly affected.

D) The extension of federal authority over Lake Temp infringes on the State of Progress's power over local land and water use.

As the *SWANCC* court noted, "where an administrative interpretation of a statute invokes the outer limits of Congress' power, [the Court will] expect a clear indication that Congress intended that result." *SWANCC*, 531 U.S. at 172 (citing *Edward J. DeBartolo Corp. v. Florida Gulf Coast Building & Constr. Trades Council*, 485 U.S. 568, 575 (1988)). The Supreme Court has long recognized state power over local land and water use. *See, e.g.*, *Hess v. Port Authority Trans-Hudson Corporation*, 513 U.S. 30, 44 (1994) ("[R]egulation of land use [is] a function traditionally performed by local governments").

The CWA provides no such "clear indication" to support federal authority over local land and water use decisions due to attenuated and insubstantial effects on interstate commerce. Quite the opposite, the Act reaffirms the primacy of the role of state governments, "to prevent, reduce,

and eliminate pollution, to plan the development and use . . . of land and water resources." 33 U.S.C. § 1251(b). For this reason, the extension of federal authority over Lake Temp exceeds Congress' authority under the Commerce Clause, and the determination that the lake is subject to CWA jurisdiction must be reversed.

III) ASSUMING LAKE TEMP IS SUBJECT TO CWA JURISDICTION, THE PROPOSED DISCHARGE REQUIRES ONLY A PERMIT UNDER SECTION 404 OF THE ACT.

The State of Progress strongly maintains that the proposed discharge of fill material into Lake Temp falls outside the jurisdiction of the CWA. However, should the court find that the lake is subject to CWA jurisdiction, the court must affirm the District Court's conclusion that the project requires only a § 404 permit from the COE.

A) The COE maintains sole permitting authority over discharges of fill material under the CWA and COE/EPA implementing regulations.

The CWA authorizes distinct yet complementary permitting programs to regulate the discharge of pollutants into the nation's waters. Section 404 of the Act grants the COE the authority to "issue permits . . . for the discharge of . . . fill material" into navigable waters. 33 U.S.C. § 1344(a). Likewise, under § 402, EPA has the authority to "issue [permits] for the discharge of any pollutant, or combination of pollutants" into such waters "[e]xcept as provided in" § 404. 33 U.S.C. § 1342(a) (2006). Interpreting this language, the Supreme Court has held that COE jurisdiction under § 404 precludes EPA jurisdiction under § 402. *Coeur Alaska, Inc. v. Se. Alaska Conservation Council*, 557 U.S. 261 (2009). Thus, where a discharge qualifies as "fill material" subject to COE regulation under § 404, the discharge does not require a duplicative permit under § 402.

The CWA defines "pollutant" to include *inter alia*, "munitions, chemical wastes, . . . rock, [and] sand . . . discharged into water." 33 U.S.C. § 1362(6) (2006). Because the CWA does

not provide a comprehensive definition of "fill material," Congress left the task of interpreting this phrase to the COE and EPA. For decades following the enactment of the CWA, the COE and the EPA maintained distinct definitions of "fill material" under § 404. Seeking to "clarify the Section 404 regulatory framework and generally to be consistent with existing regulatory practice," the agencies released joint regulations in 2002 to harmonize the distinct definitions. Final Revisions to the Clean Water Act Regulatory Definitions of "Fill Material" and "Discharge of Fill Material", 67 FR 31129-01 (May 9, 2002). These joint regulations define "fill material" as *inter alia* "material placed in waters of the United States where the material has the effect of…[c]hanging the bottom elevation of any portion of a water of the United States." 40 C.F.R. § 232.2, 33 C.F.R. § 323.2(e)(1)(ii) (2011).

1) Deference must be given to the COE/EPA regulations, and the agencies must follow these regulations.

When Congress clearly allows the COE and EPA's definition of "fill material" to be used to implement the CWA, deference must be given to this definition. *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842 (1984). Administering the complexities of the CWA would be impossible if the agencies were not given deference in how to carry out the law. *See Natural Res. Def. Council v. EPA*, 859 F.2d 156, 202 (D.C. Cir. 1988).

The definition of "fill material" in the joint regulations can properly be struck down only if the interpretation "exceeds the bounds of the permissible." *Barnhart v. Walton*, 535 U.S. 212, 218 (2002). However, the joint regulation is at least reasonable and permissible. The definition is consistent with the mutually exclusive § 404 and § 402 permitting processes. Although an alternative definition may be equally reasonable, the *Chevron* standard instructs the courts to use the text of the agency's regulation unless it is found to be unreasonable. *See Chevron,* 467 U.S.

837 (to uphold the agency's construction, the Court need not conclude that the agency's interpretation is the only one allowable under the statute).

Further, the Supreme Court held that administrative agencies must abide by their regulations. *See e.g., United States ex rel. Accardi v. Shaughnessy*, 347 U.S. 260 (1954). Thus, if the slurry in the instant case qualifies as "fill material" under COE/EPA regulations, the COE is solely responsible for permitting the Lake Temp Project under § 404.

B) The district court correctly concluded that the slurry in the instant case is materially identical to fill material deemed within the COE's jurisdiction under § 404.

As in *Coeur Alaska*, the materials to be discharged in the instant case fit within both the definition of a "pollutant" under the CWA and the definition of "fill material" as established through COE/EPA regulations. There, the slurry consisted of mining waste including crushed rock and sediment mixed with water. 557 U.S. 261. Here, the slurry consists of a mixture of water and pulverized solid elements of spent munitions. (R. at 3). In addition to solid materials, both slurries contain pollutants subject to regulation under EPA performance standards. *Id.* Finally, and most crucially, in both cases the slurry would raise the bottom elevation of the body of water in which it is discharged. *Id.*

The Appellant argues that the composition of the slurry in the instant case differs materially from the slurry addressed in *Coeur Alaska*. However, the COE and EPA found the slurry in the instant case to be comparable enough to qualify as fill material. The court may reverse this decision only if it finds that the agencies erred in concluding that a slurry containing spent munitions qualifies as fill material under 40 C.F.R. § 232.2 and 33 C.F.R. § 323.2(e)(1)(ii).

1) Munitions qualify as fill material under COE/EPA regulations.

Listed examples of fill material in COE/EPA regulations are representative, not exhaustive. The regulations state that examples of fill material "include, but are not limited to: rock, sand, [etc.]" 40 C.F.R. § 232.2, 33 C.F.R. § 323.2(e)(2) (2011). The exclusion of munitions from this representative list does not indicate a desire to cabin the regulation of discharges of spent munitions in § 402. This faulty conclusion is undercut through reference to the section immediately following. COE/EPA explicitly state, "[t]he term fill material does not include trash or garbage." 40 C.F.R. § 232.2, 33 C.F.R. § 323.2(e)(3) (2011). Quite unlike the definition of "fill material," the language plainly suggests that this list is exhaustive. Munitions are not trash or garbage, envisioned as "feces and uneaten-feed" by the *Coeur Alaska* court. 557 U.S. at 129. Munitions more logically fit under the definition of "fill material."

2) Deference must be given to the COE's application of the fill material definition to the Lake Temp Project.

An agency's interpretation of its own regulations is reviewed with a "plainly erroneous" standard. *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410, 414 (1945). The plain language of the joint regulations indicates that the proposed discharge into Lake Temp qualifies as "fill material." Thus, the COE's application of the definition of "fill material" to the proposed slurry must be given deference. *See Gardebring v. Jenkins*, 485 U.S. 415, 430 (1988) (holding that deference is appropriate except when an "alternate reading is compelled by the regulation's plain language").

C) Consistent with the purpose of the CWA, the Lake Temp Project will prevent the discharge of pollutants into traditionally navigable waters.

Because the proposed discharge into Lake Temp will prevent a similar discharge into traditionally navigable waters, a § 404 permit is consistent with the stated purpose of the CWA.

As noted above, CWA jurisdiction does not extend to groundwater without hydrological connection to traditionally navigable waters. *Supra* at 18. Thus, any potential effect of the Lake Temp Project on the Imhoff Aquifer falls outside the scope of Congressional intent under § 404 of the CWA, as that section focuses exclusively on navigable waters. The District Court correctly concluded that the proposed discharge will allow for the disposal of spent munitions in a manner that does not impact bodies of water within the purpose of the statute.

D) The COE is the appropriate permitting authority for the Lake Temp Project.

Rationality and efficiency are served when the COE/EPA joint regulations are respected. Industry would be burdened and unproductive if every applicant for a § 404 permit had to check whether its proposed activities require a § 402 permit instead. Further, the CWA gives the COE and EPA responsibilities that correspond to their expertise. The COE's superior knowledge of fill material, construction, and navigability qualify the agency to regulate fill material. EPA oversight of COE permitting utilizes the EPA's skill in evaluating environmental consequences.

Congress intended the EPA to administer the CWA. 33 U.S.C. § 1251(d) (2006). Pursuant to section 404(b)(1), the EPA wrote guidelines demanding the COE to evaluate the environmental impact of any proposed discharge of dredged or fill material. 40 C.F.R. § 230-33 (2011), 33 C.F.R. § 320-31 (2011). Known as the 404(b)(1) guidelines, these regulations create a rigorous process that ensures § 404 permits will not have an adverse effect on the environment and that the EPA will likely agree with COE's final determination on the application. The EPA is also involved in the § 404 permit process through its ability to veto permits resulting in "unacceptable adverse effects." The CWA authorizes the EPA Administrator to veto a § 404 permit in specific, limited cases. 33 U.S.C § 1344(c) (2006). The Act states, "[t]he Administrator is authorized to prohibit the specification of any defined area as a disposal site . . . whenever he

determines, after notice and opportunity for public hearing, that the discharge . . . will have an unacceptable adverse effect on municipal water supplies, shellfish beds and fishery areas (including spawning and breeding areas), wildlife, or recreational areas." *Id*. Here, the EPA properly did not veto.

IV) OMB'S ENCOURAGEMENT TO ISSUE THE PROPER PERMIT FOR THE LAKE TEMP PROJECT IS ACCEPTABLE UNDER THE CWA.

Although the EPA considered vetoing the § 404 permit authorizing the Lake Temp Project, the OMB demonstrated that that EPA could not properly veto DOD's permit and properly applied the accepted statutory interpretation of the CWA. OMB's involvement neither intended nor caused the COE or EPA to consider factors external to the CWA. The COE's permit issuance does not have an "appearance of impartiality" and EPA agreed with the COE's decision.

A) EPA does not have a legitimate reason under § 404(c) to veto the permit granted to DOD because no "unacceptable adverse effects" will results from the § 404 permit.

33 U.S.C. § 1344(c) (2006) authorizes the EPA Administrator to veto a § 404 permit in specific, limited cases. In relevant part the statute grants, "The Administrator is authorized to prohibit the specification of any defined area as a disposal site…whenever he determines, after notice and opportunity for public hearing, that the discharge…will have an unacceptable adverse effect on municipal water supplies, shellfish beds and fishery areas (including spawning and breeding areas), wildlife, or recreational areas." *Id*. Here, the EPA properly did not veto.

Three of these elements are not relevant in the instant case. First, no municipal or private water supply systems use Lake Temp. *See*, 40 C.F.R. § 230.5 (2011) (defining municipal water supply). Second, Lake Temp does not contain any shellfish beds or fishery areas. Third, DOD's fill material will not affect any legal recreational area. Neither the owners of the lake nor, anyone

with a legal right to use the lake, use it in a recreational capacity. DOD is unlikely to grant trespassing duck hunters a license and their continual trespass will not give rise to ownership rights because individuals cannot adversely possess land against the government. *United States v. Stubbs*, 776 F.2d 1472 (10th Cir. 1985) (holding that individuals cannot obtain ownership rights by adverse possession against the Federal Government).

Finally, there is no evidence of "unacceptable adverse effects" on wildlife. At most, ducks have land on Lake Temp during migration twice a year four out of every five years. Presumably, the ducks have another established route for years when Lake Temp is dry. DOD's operation will occur during a dry year, when ducks would not be using Lake Temp. The resulting greater surface area may benefit the ducks, as a greater number will be able to use Lake Temp as a stop-over.

B) The EPA's discretional choice not to initiate a § 404(c) veto is not subject to judicial review because § 701(a)(2) of the APA bars review of discretionary agency action.

Congress granted discretion to the EPA in § 404(c), so the court cannot review the EPA's decision not to initiate the veto process. *See, e.g., City of Olmstead Falls v. U.S. Envtl. Prot. Agency*, 266 F.Supp.2d 718, 722-23 (N.D. Ohio 2003) (the court lacks jurisdiction to review discretional EPA choices). Judicial review is denied when, "agency action is committed to agency discretion by law." 5 U.S.C. § 701(a)(2) (2006). The Administrator is "authorized," not required, to veto a § 404 permit when he deems a veto would be permitted under the statute. 33 U.S.C. § 1344(c). Courts have found that veto authorization under § 404(c) is discretionary. *See e.g., Pres. Endangered Areas of Cobb's History, Inc. v. U.S. Army Corps of Eng'rs*, 87 F.3d 1242, 1249 (11th Cir. 1996) ("The Administrator is authorized rather than mandated to overrule the Corps.").

The EPA has interpreted its § 404(c) powers as discretionary as well. The EPA adopted regulations explaining that the Administrator "may" veto if he believes a permit will result in "unacceptable adverse effects." 40 C.F.R. § 231.3(a) (2011). This discretionary interpretation is consistent with the statute's language.

1) Section 701(a)(2) of the APA is applicable because no standard regulates the initiation of the 404(c) veto process.

Section 701(a)(2) is applicable when "statutes are drawn in such broad terms that in a given case there is no law to apply." *Citizens to Pres. Overton Park, Inc. v. Volpe*, 401 U.S. 402, 410 (1971). Judicial review is appropriate when EPA vetoes a permit because the court has a standard against which to judge the EPA action. In this case, if EPA had vetoed, the court would have to nullify the decision because no "unacceptable adverse effects" result from DOD's permit. On the other hand, no applicable law governs when EPA must begin the multi-step process that may or may not result in a veto. Here, the EPA never initiated this veto process. Thus, the court would have no standard to review EPA's inaction.

C) Even if EPA's discretional decision is subject to judicial review, the court must apply the APA § 706(2)(a) arbitrary or capricious standard.

Even if the court determined that EPA's option not to veto DOD's permit was subject to review, the court could invalidate EPA's decision only if it was, "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(a) (2006). The court may deem agency action arbitrary or capricious when it does not comply with the regulating statute. *Motor Vehicle Mfrs. Ass'n of U.S. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983). Given the facts, one could logically conclude that the Lake Temp Project will not cause "unacceptable adverse effects." Therefore, not vetoing the permit is in accordance with § 404(c) and cannot be arbitrary or capricious.

Although a deferential standard is applied, the courts also conduct a meaningful review when applying the arbitrary or capricious standard. *A.L. Pharma, Inc. v. Shalala*, 62 F.3d 1484, 1491 (D.C. Cir. 1995) (courts "do not hear cases merely to rubber stamp agency actions"). To achieve these dual goals, the court reviews the administrative record containing information the agency used to make its decision and an explanation of the action taken. *Fla. Power & Light Co. v. Lorion*, 470 U.S. 729, 743 (1985). Actions will be upheld if "a rational connection between the facts found and the choice made" exists. *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168 (1962).

1) The courts cannot properly apply a § 706(2)(a) standard when no record exists.

There is no administrative record because the EPA never initiated the 404(c) process. Without a record, the court cannot perform a § 706(2)(a) review. This problem highlights why discretionary inaction is not subject to judicial review. A record will rarely exist when the agency does not act, but without a record the court cannot uphold or nullify the agency's action. Requiring a record is important because the court should not review evidence *de novo*, include new evidence, or substitute its opinion for a judgment the agency is solely authorized to make. *SEC v. Chenery Corp.*, 332 U.S. 194, 196 (1947). If declining to veto a § 404 permit is subject to review, the court will either fall back on reasonableness, which would show EPA's actions were not arbitrary or capricious, or conclude that it cannot review EPA's inaction without a record.

D) <u>OMB's resolution of conflicting agency interpretations is acceptable under the CWA.</u>

OMB did not directly or indirectly issue a § 404 permit. It respects COE's exclusive authority to issue permits concerning fill material and asked EPA to do the same. OMB did not decide which permit was appropriate for the Lake Temp Project. The COE granted a § 404

permit before OMB was involved. OMB only resolved EPA's mistaken concern that a § 402 permit was necessary. Subsequently, the EPA properly did not take any actions concerning the Lake Temp Project permit. Therefore, the most logical conclusion is that EPA only considered factors allowed by the statute in deciding not to act.

1) No evidence shows OMB's involvement intended or caused the EPA to consider factors external to § 404.

"To support a claim of improper political influence on a federal administrative agency, there must be some showing that the political pressure was intended to and did cause the agency's action to be influenced by factors not relevant to the controlling statute." *Town of Orangetown v. Ruckelshaus*, 740 F.2d 185, 188 (2d Cir. 1984). This test is practical and fact-specific. Courts do not focus on whether outside influence is theoretically permissible. They consider whether, in the instant case, the agency considered irrelevant factors when making a decision. *ATX, Inc. v. U.S. Dept. of Transp*., 41 F.3d 1522 (D.C. Cir. 1994) ("Judicial evaluation of the pressure must focus on the nexus between the pressure and the actual decision maker"). No evidence exists that "extraneous factors intruded into the calculus of consideration." *Peter Kiewit Sons' Co. v. U.S. Army Corps of Eng'rs*, 714 F.3d 163, 170 (D.C. Cir. 1983). When agency inaction is prescribed by the statute, one logically concludes that the agency used a permissible decision making process, absent any evidence of irrelevant considerations.

When multiple examples suggest the decision maker's concern with issues outside the statute, the court may find improper influence. For example, improper political influence invaded the FDA's 2006 rejection of a Citizen Petition to switch Plan B, an emergency contraceptive, from a prescription drug to an over-the-counter drug without age or point of sale restrictions. The White House opposed the application due to key constituents' anti-abortion views. *Tummino v. Torti*, 603 F.Supp.2d 519, 523 (E.D.N.Y 2009). White House officials expressing their policy

and desired outcome to the FDA would not be improper influence on its own. *Id.* Evidence showed the FDA used White House concerns to the exclusion of statutorily necessary factors in the decision making process. *Id.* The FDA decided to reject the application before scientific reviews were complete and did not follow an expert panel's recommendation. *Id.* The court overturned the FDA's decision due to improper influence. *Tummino*, 603 F.Supp.2d at 547-9. OMB's interaction with the EPA is readily distinguished from *Tummino*. No widespread, bad-faith decision-making is evident in the EPA's agreement that a § 404 permit is proper for the Lake Temp Project. Absent *Tummino*-like evidence, the court presumes public officials have performed their duties properly. *Sokaogon Chippewa Cmty. (Mole Lake Band of Lake Superior Chippewa) v. Babbitt*, 929 F.Supp. 1165, 1176 (W.D. Wis. 1996); *Envtl. Def. Fund, Inc. v. Blum*, 458 F.Supp. 650, 663 (D.D.C. 1978). Here, the court must assume the EPA only took factors allowed under the CWA into consideration. This assumption is reasonable because the EPA's inaction is the only permissible decision under § 404.

2) Even if a less stringent "appearance of impartiality" standard is used, OMB did not improperly influence the COE or the EPA.

Even if the court used a more relaxed standard, OMB's involvement would not be improper influence. An "appearance of impartiality" standard was used in a case concerning a quasi-adjudicative administrative process. *Pillsbury Co. v. F.T.C.*, 354 F.2d 952, 964 (5th Cir. 1966). Orders are the output of an adjudicative process. The Lake Temp Project permit dispute may be quasi-adjudicative because a permit is a license, which falls under the category of an order. 5 U.S.C. § 551(8) (2006). Beyond the shared classification as an "order," the *Pillsbury* case and the disagreement between the COE and the EPA are radically different.

In *Pillsbury*, an administrative case, judged by the FTC, was pending when senators attacked the judge with probing questions and declared his view of the case incorrect. Judgment

after this interference would have an "appearance of impartiality." The plaintiff would be deprived of its procedural due process by not having an unbiased judge. *Pillsbury,* 354 F.2d at 963. Here, there was no adversarial trial. Only the COE undertook an adjudicative action, by granting the DOD a permit. The COE's grant could not have an "appearance of impartiality" because the OMB was not involved at the time. In regards to the EPA, no parties were before it, no verdict pending. Where individuals' due process is at stake, providing an impartial decision maker is crucial. Here, there are no due process concerns.

The "appearance of impartiality" standard is not applicable here because the facts of this case differ so greatly from the context in which this standard was used. Moreover, courts after *Pillsbury* declined to follow this standard, instead favoring an external factors test. *See e.g.*, *Press Broad. Co. v. FCC*, 59 F.3d 1365, 1369 (D.C. Cir. 1995) (extraneous factor test applied to agency adjudication); *Koniag Inc. v. Andrus*, 580 F.2d 601, 610 (D.C. Cir. 1978) (*Pillsbury* does not apply when agency is not judging a pending issue).

3) The Constitution allows OMB involvement in agency dispute and misunderstanding resolution.

The Constitution created a "unitary executive" in which the President is the sole head. *See e.g.*, *Morrison v. Olson*, 487 U.S. 654, 727 (1988); *Myers v. United States*, 272 U.S. 52, 47 (1926). Agencies utilize their expertise to help complete the vast amount of administration necessary to run the United States. However, the President is ultimately charged with the responsibility to "take care that the laws be faithfully executed." U.S. Const. art. II, § 3. Acting under the direction of the President, the OMB fulfills this duty by overseeing agency actions. Here, the proper permitting regime was largely settled through precedent, statutory interpretation, and agency regulation. The OMB ensured that the CWA was "faithfully executed" by resolving an interagency dispute regarding the proper permit for the Lake Temp Project.

CONCLUSION

As the owner and regulator of the groundwater within its sovereign territory, the State of New Union properly brought this claim to review the § 404 permit to allow for the discharge of fill material into Lake Temp. However, the District Court improperly concluded that Lake Temp, due to its size and use by interstate hunters, is subject to CWA jurisdiction. This court must respect our nation's federalist tradition by maintaining the necessary distinction between the national and the truly local. For these reasons, the State of Progress respectfully requests that this court REVERSE the decisions of the District Court denying New Union standing to challenge the permit and extending CWA jurisdiction to Lake Temp. In the alternative, the District Court correctly concluded that the slurry to be discharged into Lake Temp qualifies as "fill material" under joint EPA/COE regulations. The role of OMB as an intermediary between the agencies enables the Constitutional principal of a "unitary executive," and ensures swift resolution of pending agency actions. Thus, should this court conclude that Lake Temp is subject to CWA jurisdiction, the State of Progress respectfully requests that this court AFFIRM the decision of the district court with respect to the COE's exclusive permitting authority over the Lake Temp Project.

Respectfully Submitted

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Counsel for Samuel L. Jackson, Governor