C.A. 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 United States as Appellee and Cross-Appellant

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JURISDICTIONAL STATEMENT

This action was filed in the United States District Court for the District of New Union. Jurisdiction in the district court was based on 28 U.S.C. § 1331 and 5 U.S.C. § 702. The district court entered summary judgment under Fed. R. Civ. P. 56 on June 2, 2011. This Court has jurisdiction of that final judgment under 28 U.S.C. § 1291. Appellant and State of Progress, as Appellee and Cross-Appellant, filed their Notices of Appeal which were timely under Fed. R. App. P. 4(a)(1).

STATEMENT OF THE ISSUES

1. **UNDER THE UNITED STATES CONSTITUTION AND SUPREME COURT PRECEDENT, DOES NEW UNION HAVE STANDING WHEN IT HAS FAILED TO ASSERT ANY COGNIZABLE INJURY IN ITS SOVEREIGN CAPACITY OR ITS *PARENS PATRIAE* CAPACITY?**

2. **UNDER § 404 OF THE CLEAN WATER ACT, DOES LAKE TEMP CONSTITUTE A JURISDICTIONAL WATER OF THE UNITED STATES WHEN IT HAS THE UNEQUIVOCAL ABILITY TO HARBOR INTERSTATE COMMERCE?**

3. **UNDER § 404 OF THE CLEAN WATER ACT, DOES THE ARMY CORPS OF ENGINEERS HAVE AUTHORITY TO ISSUE PERMITS WHEN MULTIPLE FEDERAL REGULATIONS RESOLVE THE AMBIGUOUS STATUTE IN FAVOR OF CORPS JURISDICTION?**

4. **UNDER THE CLEAN WATER ACT, DOES THE OFFICE OF MANAGEMENT AND BUDGET'S NONBINDING RECOMMENDATION TO THE ENVIRONMENTAL PROTECTION AGENCY ABROGATE THE AGENCY'S AUTHORITY WHEN IT STILL RETAINS THE ULTIMATE VETO POWER?**

STATEMENT OF THE CASE

Plaintiff–Appellant, the State of New Union ("New Union"), shares a border with Intervenor–Appellee, the State of Progress ("Progress"). (R. 4). Defendant–Appellee, the United States, is arguing on behalf of the Environmental Protection Agency ("EPA") and the Army Corps of Engineers ("COE"). (R. 3). New Union alleges the COE erred by issuing a permit to the Department of Defense ("DOD") for the discharge of slurry containing spent munitions into

Lake Temp under § 404 of the Clean Water Act ("CWA"). (R. 3). New Union further alleges that a permit should have been issued by the EPA under § 402 of the CWA.

All three parties moved for summary judgment on the four separate issues. (R. 5). New Union takes issue with district court's ruling that: (1) New Union does not have standing; (2) the slurry being used qualifies as fill material; and (3) the Office of Management and Budget's ("OMB") involvement did not violate the CWA. (R. 10-11). Progress takes issue with district court's ruling that: (1) New Union does not have standing and (2) Lake Temp is navigable. (R. 1).

STATEMENT OF THE FACTS

Lake Temp is body of water located on a DOD military reservation wholly within the State of Progress. (R. 4). The lake contains water at varying levels depending on the season and rainfall. (*Id*.). No water is present in the lake during drought years, which occurs approximately once every five years. (*Id*.). At its highest level, Lake Temp is oval-shaped, three miles wide, and nine miles long. (R. 3-4). Lake Temp contains no surface output. (R. 4). In other words, it is the bottom most collecting point for runoff from surrounding mountains. (*Id*.).

Lake Temp is used as a stopover for birds during their migrations, which has attracted hundreds to thousands of hunters during the last 100 years. (*Id*.). Because the lake is a military property, the DOD has posted signs every 100 yards 25 feet from the lake's edge; warning of danger and that entry is illegal. (*Id*.). However, the DOD is aware that hunters and bird watchers use Lake Temp despite the signs and has failed to take additional action to limit access. (*Id*.). Most importantly, about one quarter of those people are from out of state. (*Id*.).

The Imhoff Aquifer is located almost 1,000 feet below Lake Temp. (*Id*.). The aquifer generally follows the outline of the lake but is slightly larger with five percent of the aquifer

extending into New Union. (*Id.*). The only New Union resident located near that portion of the aquifer is Dale Bompers (Bompers). (*Id.*). Bompers does not use water from the aquifer—or plan to in the future—as the water is not potable due to high levels of sulfur. (R. 4, 6). Under New Union state law, residents will not have rights in the ground water until the New Union Department of Natural Resources ("DNR") issues a permit for withdraw. (R. 6-7). No one, including Bompers, has ever applied for a withdrawal permit from the Imhoff Aquifer. (R.7).

The DOD has proposed to construct a facility on the shore of Lake Temp to dispose of munitions. (R. 4). An Environmental Impact Statement ("EIS") was completed in 2002 in which no concerns were raised by New Union. (R. 6). The facility will allow the DOD to mix munitions with compounds, creating an inert mixture, to ensure the contents pose no explosive hazard. (*Id.*). Any solids will be pulverized, combined with the inert mixture, and then added to water to form slurry. (*Id.*). This slurry will be sprayed evenly on dry portions of the lake bed over several years. (*Id.*) Lake Temp will ultimately be six feet higher with two more square miles of available surface area. (*Id.*). The slurry, a solid soon after being dispersed, will eventually be covered by soil and sediment runoff from the surrounding mountains. (R. 4-5). However, the DOD project will have no discernable effect on the Imhoff Aquifer.

SUMMARY OF THE ARGUMENT

The EPA and COE have taken into account decades of litigation and rule changes to properly implement the CWA. That experience has come to fruition in the case of Lake Temp. New Union's challenge to the DOD project is essentially asking this Court to turn back the clock and ignore all progress made thus far. This Court should deny the injunction because New Union failed to assert any injury to give rise to standing, or allege any improper application of the CWA.

The lower court was correct in holding that New Union failed to articulate any allegation of injury in its sovereign capacity or in its *parens patriae* capacity as a representative of its citizens. New Union has failed to produce any evidence of current or future groundwater pollution. New Union even admits its injury is speculative by stating "the exact timing and severity of the pollution's impact on the portion of the Imhoff Aquifer located in New Union depends upon the direction, rate, and flow of groundwater in the aquifer." Most notably, New Union even concedes that it doesn't know the top and bottom elevations of the aquifer. Thus, no injury has occurred.

In regards to Dale Bompers ("Bompers"), he is the only New Union citizen located near Lake Temp and has never used nor plans to use the groundwater supplied by the Imhoff Aquifer. In fact, no New Union citizen can access such water without first acquiring a permit from the DNR. Thus, New Union cannot assert an injury to a "significantly substantial segment of its population" and lacks *parens patriae* standing.

Even if New Union had standing, Progress has failed to assert a valid reason to remove Lake Temp from the jurisdictional reach of the CWA. Under § 404, Lake Temp is a jurisdictional water of the United States. The CWA puts forth statutory definitions that if a body of water falls within those definitions, the CWA applies. The statute clearly affords jurisdiction to bodies of water that have the ability to harbor interstate commerce. Lake Temp has various activities that take place constituting interstate commerce.

Contrary to New Union's claim, there has been no violation of the CWA neither through the EPA's interpretation nor OMB's involvement. The interpretation at issue is the definition of fill material. The CWA does not define fill material which determines whether permits are issued under §§ 402 or 404. EPA and COE regulations resolve the issue by clearly defining fill material

as any discharge that raises the bottom elevation of a waterbody. A ruling in favor of New Union will create confusion and uncertainty for future permit applicants.

In regard to OMB's involvement, the EPA and the COE simply sought guidance from OMB: a senior office of the executive branch. That guidance was taken as a recommendation and not as an order. Such a recommendation does not violate the CWA because the EPA may veto the DOD's permit at anytime. The EPA's decision not to veto the permit deserves *Chevron* deference because the agency was interpreting its own regulation.

This Court should not allow states, such as New Union, to come in this late in the process to object to a project that has been progressing unimpeded for over nine years. Furthermore, the EPA and COE achieved the goal of the CWA by correctly interpreting all statutes, regulations, and case law. Thus, this court should deny the injunction.

Standard of Review

Summary judgment is appropriate when "there is no genuine dispute as to any material fact and [the moving party] is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c)(2). A district court's ruling on a motion for summary judgment is reviewed de novo. *Nicini v. Morra*, 212 F.3d 798, 805 (3rd Cir. 2000); *B.B. v. Cont'l Ins. Co.*, 8 F.3d 1288, 1291 (8th Cir. 1993).

ARGUMENT

This case turns on four separate, interrelated issues. First, New Union does not have standing under current Supreme Court precedent because it failed assert a cognizable injury. Second, the Lake Temp permit issued under § 404 of the CWA is valid because Lake Temp is a jurisdictional water of the United States. Third, federal regulations make it clear that material

used as fill requires a 404 permit. Finally, OMB's involvement has no bearing on the EPA's final determination not to veto the DOD's permit.

I. NEW UNION LACKS STANDING AS IT HAS FAILED TO ARTICULATE ANY ALLEGATION OF INJURY IN ITS SOVEREIGN CAPACITY OR IN ITS *PARENS PATRIAE* CAPACITY AS A REPRESENTATIVE OF ITS CITIZENS.

New Union has failed to carry its burden of proving that it will be injured by the complained-of activity. The evidence of present and future injury presented by New Union is speculative at best. New Union has failed to produce any evidence that pollution of groundwater owned or regulated by New Union is imminent or will ever happen. Thus, the lower court was correct in holding that New Union lacks standing is 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 of the state.

A. The history and the evolution of standing to its current requirements.

The constitution of the United States limits the jurisdiction of federal courts to "cases" and "controversies." U.S. Const. art. III, § 2. Case law has established that the constitutional minimum for standing centers upon three elements. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992). First, New Union must have suffered an "injury in fact." *Id.* That is, "an invasion of a legally protected interest" which is: (a) "concrete and particularized" and (b) "actual or imminent, not 'conjectural' or 'hypothetical.'" *Id*. (quoting *Whittmore v. Ark.*, 495 U.S. 149, 155 (1990)) (internal citations omitted). Second, there must be a "causal connection" between New Union's injury and the discharge authorized by the COE: "the conduct complained of." *Id.* The injury has to be "fairly traceable" to the challenged action of the COE, and "not the result of the independent action of some third party not before the court." *Id*. at 560-561 (quoting *Simon v. E.*

Ky. Welfare Rights Org., 426 U.S. 26, 41-42 (1976)). Third, it must be "likely," as opposed to mere speculation, that the injury will be "redressed by a favorable decision." *Id*. at 561.

New Union, as the party invoking federal jurisdiction bears the burden of establishing these three elements. *Id. at 561* (quoting *FW/PBS, Inc. v. City of Dall.*, 493 U.S. 215, 231 (1990)), *overruled on other grounds by City of Littleton v. Z. J. Gifts D-4, L.L.C*, 541 U.S. 774 (U.S. 2004). These elements are an indispensible part of New Union's case and "each element must be supported in the same way as any other manner on which the plaintiff bears the burden of proof." *Id*. Although New Union may have presented general factual allegations at the pleading stage, those allegations are presumed to embrace the facts necessary to decide a motion to dismiss. *Id*. However, now addressing the summary judgment motion, New Union cannot rely on "mere allegations," but must "set forth" by affidavit or other evidence "specific facts." Fed. R. Civ. P. 56(e).

When the suit is one challenging the legality of government action or inaction, "the extent of facts that must be asserted (at the summary judgment stage) or proved (at the trial stage) to claim standing depends upon whether the plaintiff is the object of the action at issue." *Lujan*, 504 U.S. at 561. If the plaintiff is the object, there is ordinarily little question that the action or inaction has caused injury and a judgment preventing or requiring the action will redress it. *Id*. at 562. However, as in this case, if the asserted injury "arises from the government's allegedly unlawful regulation . . . of *someone else*, much more is needed" as causation and redressability ordinarily hinge on the response of a regulated third party to the government action. *Id*. Thus, when the plaintiff is not the object of the government action or inaction challenged, standing is not precluded but is ordinarily "substantially more difficult to establish." *Id*.

B. New Union lacks standing in its sovereign capacity, as owner and regulator of the ground water in the state, because New Union has failed to prove any injury to it or its citizens and has failed to prove any foreseeable injury.

New Union cannot prove an injury to support standing in its sovereign capacity despite the relaxed standing requirement the Supreme Court has afforded to the states. In 2007, the Supreme Court concluded that states have a particularly strong interest in the standing analysis. *Mass. v. Env't Prot. Agency*, 549 U.S. 497 (2007) ("*Mass. v. EPA*"). A litigant to whom Congress has "accorded a procedural right to protect his concrete interests"—here, under the CWA, the right for federal district courts to entertain suits brought by "a person or persons having an interest which is or may be adversely affected," 33 U.S.C. § 1365(a), (g) (2011),—"can assert that right without meeting all the normal standards for redressability and immediacy." 549 U.S. at 517. When a litigant is vested with a procedural right, that litigant has standing if "there is some possibility the requested relief will prompt the injury-causing party to reconsider the decision that allegedly harmed the litigant." *Id*. at 518 (quoting *Sugar Cane Growers Cooperative of Fla. v. Weneman*, 289 F.3d 89, 94-95 (2002)).

Despite the relaxed standing requirements for states set forth in *Mass. v. EPA*, New Union still fails to assert any cognizable injury. New Union, as the bearer of the burden of proof, has failed to present any evidence that the discharge authorized by the COE permit will cause injury to it or its citizens. (R. 5) New Union even admits its shortcomings, stating the exact timing and severity of the pollution's impact on the portion of the Imhoff Aquifer located in New Union depends upon the direction, rate, and flow of groundwater in the aquifer. (R. 6). Most importantly, New Union acknowledges that it does not even know the top and bottom elevations of the aquifer throughout its expanse. (*Id.*).

New Union asserts the only way to establish evidence regarding the movement of pollutants in the Imhoff Aquifer is through drilling and sampling from a grid of monitoring wells. (*Id*). If the installation of such grid-wells began today, conclusive results will not be available until after the permitted activity begins. (*Id*). However, a detailed study was already conducted to determine the environmental impact of the permitted discharge. (*Id*.). The sole purpose of the EIS is to "compile and consider all relevant information before taking action which might have significant environmental effects." 42 U.S.C. § 4321 (2011). The EIS revealed that no significant environmental impact would occur from the DOD's permitted discharge. (R. 6).

New Union even had the opportunity to object to the scope of the EIS and suggest the completion of drilling and sampling grids but decided not to do so. (*Id*.). New Union now asserts that it is willing to install and operate these wells to collect data but cannot do so without permission from the DOD. (*Id*.). The DOD has not granted them access because New Union has not filed any applications to install the wells. (*Id*.). This only reiterates the fact that New Union is admitting its injury is speculative and it had the capability to develop proof but failed to do so. Instead, New Union should have objected to the scope of the EIS, which would require a supplemental EIS (an ongoing duty to examine the significant environmental effects of the permitted discharge) to be completed prior to the final EIS. 42 U.S.C. § 4321. By objecting to the scope of the EIS, the DOD could have expanded the scope of the EIS to include a grid of monitoring wells. The DOD followed all EIS procedures correctly and there is no proven environmental impact relating to the permitted discharge.

In *Mass. v. EPA,* while the injury was deemed speculative, enough evidence was presented to establish a possible injury-in-fact. 549 U.S. at 521-23. The Court determined that

the presented evidence alleged a sufficient injury: the rise in sea levels resulting from global warming. *Id.* at 521. The Court supported its finding with a detailed report which concluded, "greenhouse gases are accumulating in the Earth's atmosphere as a result of human activities, causing surface air temperatures and subsurface ocean temperatures to rise." *Id.* at 511. Additionally, climate scientist Michael MacCracken stated, "qualified scientific experts involved in climate change research have reached a strong consensus that global warming threatens . . .a rise in sea levels . . . and severe and irreversible changes to the natural ecosystems." *Id.* at 521 (internal quotations omitted). Affidavits of private studies were supplied to the Court stating that "global sea levels rose somewhere between ten and twenty centimeters over the 20th century as a results of global warming." *Id.* at 522. Thus, the Court determined that there was a significant injury-in-fact. *Id.*

At best, New Union has presented circumstantial evidence that contaminated water from the permitted activity will enter the Imhoff Aquifer, as the land between the lakebed and the aquifer is primarily unconsolidated alluvial fill. (R. 6). However, this information is too speculative to give rise to an injury-in-fact. New Union has failed to provide evidence that water from Lake Temp will even reach the Imhoff Aquifer. Compared to the injury in *Mass. v. EPA*, New Union has not established a cognizable injury. Thus, the lower court was correct in holding that New Union has failed to meet its burden of proving injury.

C. New Union lacks standing in its *parens patriae* capacity because there has been no injury to a significantly substantial segment of New Union's population as Dale Bompers is the only resident near Lake Temp and does not use, nor has any future plans to use, the Imhoff Aquifer.

State standing is "not monolithic and depends on the role a state takes when it litigates in a particular case." *Conn. v. Cahill*, 217 F.3d 93, 97. In *Alfred L. Snapp & Son v. P.R.*, 458 U.S. 592, 601-02 (1982), the modern-day *parens patraie* standing case, the Supreme Court explained

how the capacity in which a state sues has an impact on the standing analysis and drew a distinction between states proprietary and quasi-sovereign interests:

> [Quasi-sovereign interests] are not . . . proprietary interest, or private interests pursued by the State as a nominal party. They consist of a set of interests that the State has in the well-being of its populace. . . . A quasi-sovereign interest must be sufficiently concrete to create an actual controversy between the State and the defendant.

The *Snapp* Court formulated the test for *parens patraie* standing asserting that a State must: (1) "articulate an interest apart from interests of particular private parties, *i.e.*, the State must be more than a nominal party;" (2) must "express a quasi-sovereign interest" in either (a) the "health and well-being—both physical and economic—of its residents in general," or (b) "not being discriminatorily denied its rightful status within the federal system;" and (3) must "allege injury to a sufficiently substantial segment of its population." *Id*. at 607. The *Snapp* Court applied its test, *post-hoc*, to the public nuisance cases of *Missouri v. Illinois*, 180 U.S. 208, 241 (1901), and *Georgia v. Tennessee Copper Co.*, 206 U.S. 230 (1907), finding that the "injury to the public health and comfort was graphic and direct," thereby giving those parties *parens patraie* standing that satisfied Article III's case or controversy requirement. *Snapp*, 458 U.S. at 604.

A state does not have standing as *parens patriae* to bring an action against the Federal Government. *Mass.* v. *Mellon*, 262 U.S. 447, 485-486 (1923). However, a state, under some circumstances, may sue in that capacity for the protection of its citizens. *Mo.* v. *Ill.*, 180 U.S. at 241. Jurisdiction has been exercised in cases involving boundaries and jurisdiction over lands and their inhabitants and in cases directly affecting the property rights and interests of a state. *Id.* New Union's claim directly affects its property rights and interests; thus, it can sue in a *parens patriae* capacity if it meets the test set forth in *Snapp*.

The view that a state's *parens patriae* standing sufficed for Article III standing was not called into question until the recent Supreme Court decision of *Mass. v. EPA*. The Court ruled that Massachusetts had Article III standing and cited the three-part *Lujan* test, by focusing its initial analysis on the State's proprietary interest as property owners. *Mass.*, 549 U.S. at 516. As stated above, the Court relaxed the standing requirements for states in regards to the *Lujan* standing analysis as they were not obligated to "meet all the normal standards for redressability and immediacy." *Id.* at 516-517.

However, the *Mass. v. EPA* Court then added another prong to its analysis—"one which muddled state proprietary and *parens patriae* standing." *Conn. v. Am. Elec. Power Co.*, 582 F.3d. 309, 337 (2009). The Court found that injury to a state as "quasi-sovereign" is a sufficient concrete injury under Article III. *Id.* The finding of such injury is reinforced by the fact that the State is also a landowner and suffers injury to its land. *Id.* The Court opined, "given that procedural right and Massachusetts's stake in protecting its quasi-sovereign interest, Massachusetts is entitled to special solicitude in our standing analysis." *Id*. at 520. The Court then briefly analyzed state standing under the *Lujan* injury, causation, and redressability test—in Massachusetts' capacity as a property owner, not as a quasi-sovereign—and found that Massachusetts had satisfied those requirements. *Id.* at 521-525.

The issue is whether the *Mass. v. EPA*'s discussion of state standing has an impact on the analysis of *parens patriae* standing. That is, "what is the role of Article III *parens patriae* standing in relation to the test set out in *Lujan*?" *Am. Elec. Power Co.*, 528 F.3d at 338. And "does a state asserting *parens patriae* standing have to satisfy both the *Snapp* and *Lujan* tests?" *Id.* However, we need not answer those questions as New Union cannot satisfy the first prong of the *Lujan* test, as stated above, nor can it satisfy the third prong of the *Snapp* test in regards to

Dale Bompers as there has been no injury.

New Union has failed to allege injury to a "sufficiently substantial segment of its population." Dale Bompers owns, operates, and resides on a ranch located above the small portion of the Imoff Aquifer and is the only New Union citizen residing near Lake Temp. (R. 4). Bompers does not presently use the Imhoff Aquifer, as it is not potable or fit for agricultural use without treatment because of the naturally occurring sulfur in the aquifier. (R. 6). Most importantly, he has no definite plan to use the Imhoff Aquifier in the future. (*Id*.).

However, under a New Union statute regulating use of groundwater, Bompers cannot even use groundwater from the aquifer without a permit from DNR. (*Id*.). The statute requires DNR to determine that these permitted withdrawals will not deplete groundwater over a twenty-year period. (*Id*.). Additionally, the statute gives withdrawal preference to owners of land above the groundwater if withdrawals are limited by threatened depletion. (*Id*.). However, no one has rights in groundwater "unless and until the DNR issues a withdrawal permit." (*Id*.).

At best, the only injury Bompers can allege is a decrease in property value, not enough for New Union to assert *parens patriae* standing. (R. 4). Bompers has suffered no injury nor will he suffer a future injury because he does not nor does he plan to use the groundwater. (R. 6). Thus, New Union has failed to allege an injury to a sufficiently substantial segment of its population and lacks standing in its *parens patriae* capacity.

II. LAKE TEMP IS NAVIGABLE BECAUSE OF ITS ABILITY TO HARBOR INTERSTATE COMMERCE AND WILL CONTINUE TO BE NAVIGABLE UNDER GUIDANCE SET FORTH BY THE EPA AND COE.

"Navigability" has lost its strict interpretation. The term is now used to determine which waters fall within the jurisdiction of the CWA. Thus, the more applicable term is "jurisdictional waters." To be a jurisdictional water under the CWA, a waterbody must meet certain criteria.

Since the inception of the CWA, bodies of water that have an ability to harbor interstate commerce have been considered jurisdictional. Furthermore, as the CWA evolves in the future, bodies of water that have the ability to harbor interstate commerce will continue to be jurisdictional.

A. The court below was correct in determining that Lake Temp is Navigable because of its innate ability to harbor interstate commerce.

Lake Temp falls within the jurisdiction of the CWA because of its ability to harbor interstate commerce. The power to regulate navigable waters originates in the Commerce Clause of the United States Constitution. Additionally, the terminology used by CWA § 404, 33 U.S.C. § 1344 (2011), includes, "navigable waters," which is further defined in § 502(7), 33 U.S.C. § 1362(7) (2011), as "waters of the United States including territorial seas." The COE's federal regulation definition further identifies "waters which are currently used, or were used in the past, or may be susceptible to the use in the future in interstate commerce." 33 C.F.R. § 328.3 (2011). Including, "waters such as *intrastate* lakes, which the use, degradation or destruction of which could affect interstate commerce." *Id.* (emphasis added). Waters are jurisdictional if they are, or could be used, by interstate or foreign travelers for recreational purposes. *Id.*

The Supreme Court has only been called upon to determine the jurisdictional limits of the CWA when water bodies fall outside this statutory definition. These cases provide the basic framework for making a determination of jurisdiction when the body of water lacks the innate ability to harbor interstate commerce as Lake Temp does.

In *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121 (1985), the Supreme Court was forced to determine whether isolated wetlands with no connection to interstate commerce were intended to be jurisdictional under the CWA. The body of water in question did not fall within the statutory definitions of "navigable waters." However, the Court ruled that

wetlands adjacent to traditional navigable water are waters of the United States. *Id*. at 139. The Court noted the difficulty in determining the limits of navigable waters and, therefore, stated the COE is given latitude to make those decisions where there is a close connection between the navigable river and wetlands. *Id*. at 134.

In *Solid Waste Authority of Northern Cook County v. United States Army Corps of Engineers*, 531 U.S. 159 (2001) ("*SWANCC*"), the Supreme Court concluded that isolated, non-navigable intrastate ponds were not subject to CWA jurisdiction merely because they could serve as habitat for migratory birds. Speculating whether or not birds would stop over at a pond, and possibly be shot by hunters, did not establish jurisdiction. In *SWANCC*, the Migratory Bird Rule was the sole basis for asserting jurisdiction because there was no other indication of interstate commerce. The Court concluded that that Migratory Bird Rule would not, in and of itself, establish CWA jurisdiction.

In 2006, the Supreme Court decided *Rapanos v. United States*, 547 U.S. 715 (2006). In *Rapanos*, the Court was to determine whether a fifty-four acre parcel with "sometimes-saturated soil conditions" was a jurisdictional "water of the US." *Id*. at 720. Ultimately, the Court issued five opinions with no single opinion commanding a majority of the Court. The plurality opinion, authored by Justice Scalia, stated that "waters of the United States" extended beyond traditional navigable waters to include "relatively permanent, standing or flowing bodies of water." *Id*. at 739. The plurality clarified that relatively permanent waters "do not necessarily exclude" streams, rivers, or lakes that might dry up in extraordinary circumstances, such as drought and seasonal rivers with contain continuous flow during some months of the year but no flow during dry months. *Id*.

These cases are factually distinguishable from the case at hand due to one major factor: interstate commerce. The water bodies discussed above were unable to be deemed as jurisdictional under the traditional statutory definition. Thus, creating a need for a jurisdictional determination to ensure the proper reaches of the CWA. Lake Temp has the unequivocal ability to foster interstate commerce, which is statutorily enumerated. Thus, there is no need to apply the tests set forth in the cases above.

Unlike, *SWANCC*, Lake Temp has had a presence of migratory birds and interstate travelers for over 100 years. (R. 4). These interstate travelers specifically use Lake Temp for recreational purposes as evidenced by the various paths present along the shores. The paths indicate that these interstate travelers launch their boats to venture onto Lake Temp for various recreational purposes. (*Id.*). Contrary to Progress' claim, Lake Temp falls within the statutory definition of jurisdictional waters under the CWA because of the various commerce related activities that take place.

Congress is empowered to regulate and protect the instrumentalities of interstate commerce, and/or persons or things in interstate commerce, even though the action may be solely from intrastate activities. *U.S. v. Morrison*, 529 U.S. 598, 609 (2000). Due to Congress' broad ability to regulate interstate commerce, Lake Temp harbors such commerce within the meaning of the Commerce Clause and the CWA. Therefore, the lower court was correct in determining that Lake Temp is a jurisdictional water under the CWA because multiple interstate commerce activities are currently taking place.

B. The EPA and COE have put forth new guidance which deems Lake Temp to be a jurisdictional water under the CWA.

In July 2011, the EPA and COE put forth guidance on the jurisdictional limits of the CWA to clarify how they will make jurisdictional determinations in the future. While the draft

guidance does not yet have the power of law, it gives valuable insight into how these agencies will make future jurisdictional determinations. Previous guidance only addressed jurisdictional reaches in terms of certain individual sections of the CWA. Here, the 2011 guidance addresses terms of the entire CWA and ensures the most uniform definition of the CWA's jurisdictional reach to date.

Courts acknowledge the need for deference to the EPA in light of "the complexity and technical nature of the statutes and the subjects they regulate . . . and EPA's unique experience and expertise." *E.I. du Pont de Nemours & Co. v. Train*, 430 U.S. 112, 135 n.25 (1977). Such expertise is due deference even when the question is one of statutory interpretation and jurisdiction. *Id*. Moreover, "an agency's expertise is superior to that of a court when a dispute centers on whether a particular regulation is reasonably necessary to effectuate any of the provisions or to accomplish any of the purposes of the Act the agency is charged with enforcing; the agency's position, in such circumstances, is therefore due substantial deference." *Id*.

The 2011 guidance acknowledges that when a waterbody does not have a surface connection to an interstate water or a traditional navigable water but has a significant physical, chemical, or biological connection between the two, both water bodies should be protected under the CWA. United States Environmental Protection Agency, *Draft Guidance on Identifying Waters Protected by the Clean Water Act*, 13 (June 27, 2011), http://www.epa.gov/indian/pdf/wous_guidance_4-2011.pdf. Furthermore, a body of water that "contributes flow to a traditional navigable water or interstate water, either directly or indirectly by means of other tributaries," is jurisdictional under the 2011 Guidance. *Id.* at 11.

The Imhoff Aquifer lies directly below Lake Temp. (R. 4). As a result, Lake Temp has the potential to contribute flow to the underlying aquifer. The aquifer lies within New Union and

the State of Progress making it an interstate body of water. (*Id.*). Lake Temp is a jurisdictional water under the CWA because of its ability to harbor interstate commerce and the potential affect on the integrity of the underlying interstate aquifer. A determination by this Court that Lake Temp is jurisdictional not only complies with the current statutory framework of the CWA but also with the EPA and COE's procedures in the future.

III. A PERMIT ISSUED BY THE COE UNDER § 404 OF THE CWA WAS PROPER BECAUSE JOINT EPA AND COE FEDERAL REGULATIONS UNAMBIGUOUSLY DEFINE FILL MATERIAL.

Section 404 of the CWA states that the COE "may issue permits, . . . for the discharge of dredged or fill material into . . . [waters of the United States]." 33 U.S.C. § 1344(a). While section 402 of the CWA states that the EPA has jurisdiction to "issue a permit for the discharge of any pollutant . . . [e]xcept as provided in section[] . . . 404." 33 U.S.C. § 1342(a) (2011). However, the Supreme Court has interpreted this to mean that only one agency will have the authority to issue a permit. *Coeur Alaska, Inc. v. Se. Alaska Conservation Council*, 129 S. Ct. 2458, 2467 (2009). As a result, the COE has jurisdiction if the material is fill; otherwise, jurisdiction falls to the EPA.

The CWA does not define fill material, but the definition is set out in two separate federal regulations: one relating to the EPA under 40 C.F.R. § 232.2 (2011), and the other relating to the COE under 33 C.F.R. § 323.2(c) (2011). Consequently, the EPA and the COE have worked to resolve the uncertainty found in the plain language of § 404. Their efforts have been successful in providing the public, permit applicants, and the courts, with a bright line rule. The continued application of the federal regulations strikes a balance between providing clarity to the statute while still addressing environmental concerns.

A. Prior definitions of fill material caused ambiguity and costly litigation due to inconsistent language and interpretation.

The previous versions of § 40 C.F.R. 232.2 and 33 C.F.R. § 323.2 contained different definitions of fill material. During the years those regulations were in force, it became clear to both the EPA and COE, that differing definitions caused unwanted confusion because of the language used in the agencies' respective definitions. Prior to 2002, the EPA's regulation read, "fill material means any 'pollutant' which replaces portions of the 'waters of the United States' with dry land or which changes the bottom elevation of a waterbody *for any purpose*." 40 C.F.R. § 232.2 (2001) (emphasis added). The EPA's regulation was simplistic by only looking to the effect of the discharged material. The COE's regulation read, "the term fill material means any material *used for the primary purpose* of replacing an aquatic area with dry land or of changing the bottom elevation of an [sic] waterbody." 33 C.F.R. § 323.2(e) (2001) (emphasis added). In contrast to the EPA definition, the COE's regulation was concerned with the purpose for which the material was being disposed. Operating under this framework, applicants and courts could come to differing conclusions on whether or not a § 404 permit was required. They often did.

In *Bragg v. Robertson*, the plaintiffs challenged the issuance of a § 404 permit for mining operations. 72 F. Supp. 2d 642, 655-56 (S.D. W. Va. 1999), *vacated on grounds that did not reach the merits in Bragg v. W. Va. Coal Ass'n*, 248 F.3d 275, 288 (4th Cir. W. Va. 2001). Using the COE's definition, the court was forced to perform a subjective analysis to decide the primary purpose for disposing excess soil. *Id*. at 656. The permit was permanently enjoined because, in the court's view, excess soil resulting from mining operations is discarded primarily for waste disposal purposes. *Id*. at 657, 664.

The COE's authority was also questioned in *Resource Investments, Inc. v. United States Army Corps of Engineers*, 151 F.3d 1162 (9th Cir. 1998). Unlike the plaintiffs in *Bragg*, the

landfill development company in *Resource Investments* challenged the denial of a 404 permit. *Id*. at 1165. The company argued a 404 permit should never have been necessary as the primary purpose of the landfill was to dispose of waste. *Id*. Although the project required excavation of wetlands and construction, which changed the bottom elevation, the court focused on the ultimate goal of the project: to dispose of municipal waste. *Id*. at 1163, 1168. The trash being placed in the landfill could have ultimately required a 402 permit for operation; however, as a result of the court's ruling, the initial construction—a major displacement of wetlands—was not overseen by the COE.

The competing definitions of fill material were of significant importance in *West Virginia Coal Association v. Reilly*, 728 F. Supp. 1276, 1285 (D. W. Va. 1989). Several coal associations and companies argued the EPA lacked jurisdiction to prohibit the use of certain treatment ponds in mining operations. *Id*. at 1282. In essence, the plaintiffs were claiming the EPA did not have jurisdiction under § 402 because the COE had jurisdiction under § 404. *Id*. The plaintiffs' argument centered upon the COE's "primary purpose" definition of fill material. *Id*. at 1285. The confusion was understandable given the COE's definition was materially different from that of the EPA's. *Id*. at 1286. The court ultimately sided with the EPA because the primary purpose of the treatment ponds was to dispose of waste. *Id*. at 1287. The court went so far as to say, "had the [COE] defined fill material in the same manner as EPA, . . . then it would appear that EPA would indeed lack jurisdiction [to issue a 402 permit]." *Id*. at 1286-87. This hypothetical change became a reality in 2002 when the EPA and COE regulations were updated to mirror each other.

These cases demonstrate the confusion caused prior to 2002. Applicants took huge chances by going through the permitting process. They would first have to make an educated guess as to how an agency would interpret the purpose of a project. Even if a permit was granted,

an applicant faced the possibility of his or her permit later being enjoined by a court. Likewise, the EPA and COE would issue permits believing they were properly applying the CWA statutes only to have a district or appellate court see things differently. The subjective element of the COE's definition, coupled with the conflicting EPA definition, made the 404 permitting process inconsistent and ineffective.

B. Current federal regulations defining fill material remove any ambiguity by clearly establishing what qualifies as fill material.

The EPA and COE federal regulations defining fill material were changed in 2002. The new regulations provide clear guidance that was lacking in the previous versions. Both regulations are now identical in their definition of fill material:

> [T]he term fill material means material placed in waters of the United States where the material has the effect of: (i) Replacing any portion of a water of the United States with dry land; or (ii) Changing 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). Most notably, the primary purpose test and the exception for material discharged primarily to dispose of waste were removed from the COE's regulation. These changes were made in direct response to the confusion resulting from the pre-2002 versions and cases such as those discussed above. *Final Revisions to the Definition of "Fill Material"*, 67 Fed. Reg. 31,129, 31,131 (May 9, 2002).

The EPA and COE proposed the rule change in 2000 and opened it to comments. *Id*. Over a two year period, the agencies received over 17,200 comments covering a slew of implications including the rule's consistency with: (1) the CWA; (2) judicial decisions; (3) prior agency guidance; and (4) current regulatory practice. *Id*. at 31132. The agencies determined that an effects-based test was both justified and consistent with the CWA. *Id*. This reasoned and

thought-out process eliminated the subjective test that previously plagued § 404 permitting and replaced it with an unambiguous objective test.

As mentioned, the current regulations do not exempt material disposed of for the purpose of waste. The effects-based test cannot be truly objective if the waste exemption remained. This result allows a 404 permit when the impact is beneficial but prohibits the same permit when the purpose is for waste disposal, even though the material and environmental consequences are identical. *Id*. at 31,133. Such an exemption would bring back the subjective element the rule change eliminated.

The case law prior to 2002 shows exactly how history will repeat itself if this Court grants an exception for the slurry being used by the DOD. Granting New Union's motion would effectively read back in the "purpose of waste disposal" exception the EPA and COE removed from § 404 consideration. The result would again be a case-by-case subjective analysis in every challenge to a 404 permit. We are asking this case not to turn back the clock.

C. The use of a pollutant in fill material does not change the effects-based test.

The proper way to reconcile §§ 402 and 404 is through the application of the effects-based test mentioned above. This solves the courts' difficulty in reviewing CWA permits while still addressing the concerns of parties like New Union.

Changes to federal regulations have clarified what is meant by fill material; however, they do nothing for what is meant by the term pollutant as used in § 402. Unlike fill material, pollutant is defined by statute in CWA § 502 to include "munitions" as well as "rock" and "sand" along with various other examples. 33 U.S.C. § 1362(6). The broad scope of the definition caused some discussion by the Supreme Court in *Coeur Alaska* where the slurry discharged by a mining operation qualified as both a pollutant and fill material. 129 S. Ct. at

2468. Although the Court upheld the 404 permit on separate grounds, the plaintiffs conceded that the slurry qualified as fill material. *Id*. The plaintiffs were concerned with fill material being applied so broadly that 404 permits would authorize the discharge of solids such as "'feces and uneaten feed,' 'litter,' and waste produced in 'battery manufacturing.'" *Id*. The Court left open the possibility of a challenge in such extreme circumstances but those facts were not present in *Coeur Alaska*, nor are they present here. *Id*. Therefore, *Coeur Alaska* does little to answer the issue presented by New Union.

No case has ever classified discharge as a pollutant to the exclusion of fill material for good reason: the effects-based test makes the pollutant/fill material determination irrelevant. A strict interpretation of the CWA's definition would qualify virtually all fill material as a pollutant and require a 402 permit. This cannot be the case. Such an application of § 502 would eliminate all practical use of § 404 because all fill material would be covered exclusively by § 402. "[W]hen possible, courts should construe statutes . . . to foster harmony with other statutory . . . law." *Digital Equip. Corp. v. Desktop Direct*, 511 U.S. 863, 879 (1994). The EPA and COE regulations allow for harmony between §§ 502, 404, and 402.

The current understanding of §§ 402 and 404 permitting provide for a division of labor between the EPA and the COE. It is not for any arbitrary basis as suggested by New Union. It is important to note the EPA's continuing role in the Lake Temp project. Before, during, and after the permit is issued, the EPA retains what has been called veto authority. 33 U.S.C. § 1344(c). It can revoke or suspend the DOD's permit at any time should an unforeseen adverse impact on the environment later be discovered.

Although the EPA is qualified to review issues involving pollutants, that does not mean the COE is unqualified. The COE had to consider Progress's water quality standards prior to

issuing a permit just as it does for every permit. 33 C.F.R. § 320.4(d) (2011). Furthermore, CWA § 401 states, "any applicant for a [404] permit . . . shall provide the [COE] a certification from the State in which the discharge originates or will originate, and that such discharge will comply with the applicable provisions of section[] . . . 303," among other sections of the CWA. 33 U.S.C. § 1341(a)(1) (2011). Section 303 pertains to water quality standards, which states are mandated to maintain and oversee including maximum daily loads and effluent limitations of certain discharges. 33 U.S.C. § 1313 (2011). In short, the COE have a regulation that reiterates what the CWA already requires. This is a clear example of how the EPA, COE, and state inspectors are all actively involved in the Lake Temp project and provide overlapping supervision to alleviate any of New Union's concerns.

IV. OMB PROVIDED A RECOMMENDATION PERMISSIBLE UNDER THE CWA WHICH PROMPTED THE EPA TO ALLOW THE DOD'S PERMIT UNDER § 404 AND THAT DECISION DESERVES CHEVRON DEFERENCE.

The ultimate decision of whether a § 404 permit is applicable rests with the EPA's veto power derived from 404(c). Specifically, the statute authorizes the EPA to prohibit, deny, or withdraw the issuance of a permit "after notice and opportunity for public hearings" to determine "that the discharge of such material . . . will have an unacceptable adverse effect on municipal water supplies, . . . , wildlife, or recreational areas." 33 U.S.C. § 1344(c). With approximately 60,000 permits issued each year, the EPA has taken final veto action 13 times over the last 39 years. United States Environmental Protection Agency, *Clean Water Act: Section 404(c) "Veto Authority"*, http://water.epa.gov/type/wetlands/outreach/upload/404c.pdf, (last visited Nov. 15, 2011). This is a testament to: (1) the EPA's willingness and ability to exercise its veto power and (2) the COE's ability to correctly apply § 404. OMB provided input to the EPA, (R. 9), but the

deference given to the EPA is from its decision not to veto the DOD's permit, not OMB's recommendation.

A. OMB's involvement did not violate the CWA because its role was limited to providing a recommendation, not a directive.

New Union is correct in that OMB has no statutory authority to supplement its opinion for that of the EPA's in final approval or disapproval of a 404 permit. That, however, it not what happened in this case. OMB simply provided a recommendation that EPA followed, but was not bound to do so. OMB is senior to federal agencies in that "[i]t reports directly to the President and helps a wide range of executive departments and agencies across the Federal Government to implement the commitments and priorities of the President." The White House, *The Mission and Structure of the Office of Management and Budget*, http://www.whitehouse.gov/omb/organization_mission/ (last visited Nov. 15, 2011).

The EPA does not operate in a vacuum. In fact, it excels at receiving input from groups outside of the agency including individuals, corporations, community organizations, other agencies, and senior executive branch offices such as OMB. This is evident in the commenting procedures used to create the federal regulations previously mentioned and the commenting procedures in vetoing a 404 permit. 33 U.S.C. § 1344(c). In that vein, the EPA and the COE were simply seeking guidance on an interagency issue from the those most apt to provide insight: a senior government office that oversees both agencies. But that guidance is not binding.

The EPA was never under a duty to follow OMB's recommendation. If it were, that would mean the EPA is presumably still bound by OMB's recommendation and precluded from exercising 404 veto authority. That is not the case. The EPA retains its veto power while a 404 permit remains in effect. 33 U.S.C. § 1344(c). The request for OMB's guidance prior to the

EPA's decision should not now be levied against the EPA in its pursuit to find the most appropriate solution.

B. The EPA's decision receives Chevron deference because the agency was interpreting its own regulation.

The determination that OMB's involvement in the Lake Temp project was permissible then leaves the issue of whether the EPA's decision not to veto the DOD's permit was appropriate. Since a decision was made by the EPA, the question is, what level of deference should that decision carry? The only reason for not vetoing the permit was that § 404 was the applicable statute. That is the decision at issue. The rule in *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), controls this Court's ruling and requires the EPA receive the highest level of deference.

Chevron deference is appropriate when Congress has not "directly spoken to the precise question at issue" and an agency's interpretation "is based on a permissible construction of the statute" where "the statute is silent or ambiguous with respect to the specific issue." *Id*. at 842-43. The agency's decision is given deference unless it is "arbitrary, capricious, or manifestly contrary to the statute." *Id*. at 844.

There a slew of cases applying *Chevron* but the most analogous to this case is *Coeur Alaska*, 129 S. Ct. 2458. The Court did not apply *Chevron* to the issue of defining fill material but rather to the EPA's determination that another CWA statute, under § 306, did not apply to 404 permits. *Id*. at 2469. Section 404 did not mention § 306 so the Court found Congress's silence meant they had not directly spoken to the statute's relation to § 404. *Id*. at 2471. The Court then relied on the EPA's interpretations and applications of agency regulations to find the EPA's decision not to apply § 306 to 404 permits was based on a permissible construction of § 404. *Id*. at 2473-74.

Like *Coeur Alaska*, this case finds silence in § 404 that leads to ambiguity. Namely, Congress did not define fill material in the CWA. The EPA and the COE, jointly, have resolved the issue through federal regulations and applied that understanding to the Lake Temp project. The Lake Temp permit was the culmination of a notice, hearing, and commenting process, a completed environmental impact statement, and was doen after seeking guidance from OMB. (R. 6, 9). This type of attention and dedication in carrying out the purpose of the CWA is neither arbitrary nor capricious.

CONCLUSION

The EPA and COE have interpreted and applied the CWA to the Lake Temp project in accordance with statutory, regulatory, and case law. This Court should find that New Union lacks sufficient standing. Furthermore, Lake Temp is navigable under the CWA, the slurry to be used is fill material, and OMB's involvement was not in violation of the CWA. As a matter of law, this Court should grant summary judgment in favor of the United States and deny the injunction.

Respectfully submitted,

TEAM #41