Team #45

UNITED STATE COURT OF APPEALS
FOR THE TWELTH CIRCUIT

C.A. No. 11-1245

STATE OF NEW UNION,

Petitioner-Appellant-Cross-Appellee,

v.

UNITED STATES,

Respondent-Appellee-Cross-Appellant,

v.

STATE OF PROGRESS,

Appellee and Cross-appellant

On Appeal from the Order of the United States District Court for the District of New Union, Civ. 148-2011, Dated June 2, 2011.

BRIEF OF THE RESPONDENT-APPELLEE-CROSS-APPELLANT

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JURISDICTIONAL STATEMENT

I. Jurisdiction Below

The district court had jurisdiction pursuant to Section 509(c) of the Clean Water Act and 28 U.S.C. § 1331 (2006). In dismissing the Complaint, the district court found permit issued to the Department of Defense ("DOD") was valid because New Union lacked standing, the U.S. Army Corps of Engineers ("Corps") had jurisdiction to issue a Section 404 permit, and the Office of Management and Budget's ("OMB") dispute resolution between the Corps and the Environmental Protection Agency ("EPA") did not violate the Clean Water Act. This appeal seeks review of that decision.

II. Jurisdiction on Appeal

On June 2, 2011, the district court granted the United States' motion for summary judgment, and entered a judgment dismissing New Union's action. Therefore, the district court's order is a final decision, and this Court has jurisdiction pursuant to 28 U.S.C. § 1291 (2006).

STATEMENT OF THE ISSUES PRESENED FOR APPEAL

This appeal presents the following issues

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

III. Whether the Corps has jurisdiction to issue a permit under the Clean Water Act Section 404, 33 U.S.C. § 1344, because Lake Temp is navigable water under Clean Water Action Sections 301(a), 404(a), and 502(7), 33 U.S.C. §§ 1311(a), 1344(a), 1367(7).

IV. Whether the Corps has jurisdiction to issue a permit under Clean Water Act Section 404, 33U.S.C. § 1344, or the EPA has jurisdiction to issue a permit under Clean Water Action Section 402, 33 U.S.C. 1342, for the discharge of slurry into

Lake Temp.

V. Whether the decision by the OMB that the Corp had jurisdiction under Clean Water Act Section 404, 33 U.S.C. § 1344, and that the EPA did not have jurisdiction under Clean Water Act Section 402, 33 U.S.C. § 1342, to issue a permit for DOD to discharge slurry into Lake Temp and EPA's acquiescence in OMB's decision violated the Clean Water Act.

STATEMENT OF THE CASE

I. Procedural Background

New Union filed a suit in the United States District Court for the District of New Union seeking review of an individual permit issued by the Secretary of the Corps to the DOD to discharge a slurry of spent munitions into Lake Temp, a lake wholly within a military reservation owned by the United States in the State of Progress. After filing, the State of Progress successfully obtained status as an intervener in accordance with Rule 24 of the Federal Rules of Civil Procedure in the case before the District Court and in petition for review filed with the Court of Appeals.

On June 2, 2011, the District Court rendered its decision on the motion and cross-motions for summary judgment filed by New Union, the United States, and the State of Progress. The United States filed the motion for summary judgment on the basis that New Union does not have standing to appeal the permit issuance; the Corps has jurisdiction to issue a permit for the discharge of fill under Section 404 of the Clean Water Act; and the participation by the OMB in the decision did not violate the Clean Water Act. New Union filed a cross-motion in opposition to the government, and the State of Progress filed a cross-motion in support New Union's standing and in support of the Corps' jurisdiction under Section 404 and of OMB's role in the

decision-making. The District Court granted the United States' motion for summary judgment by holding that New Union did not have standing, the Corps had jurisdiction to issue a Section 404 permit, and OMB's involvement did not violate the Clean Water Act. New Union and the State of Progress both filed appeals with the United States Court of Appeals for the Twelfth Circuit, which has granted certiorari to review the claims.

II. Factual Background

Lake Temp is an oval-shaped body of water that acts as a water basin with no outflow for the eight hundred square mile water shed of surrounding mountains. R. at 4. Lake Temp is 3 miles wide and nine miles long at its largest during the rainy season. R. at 4. It is smaller during the dry season, and completely dry once every five years. R. at 4. Although some of the mountains in the watershed are in New Progress, Lake Temp is wholly within the State of Progress, even at its fullest. R. at 4. There is an aquifer, the Imhoff Aquifer, located roughly one thousand feet below Lake Temp. R. at 4. The Imhoff Aquifer generally follows the contours of Lake Temp, but is slightly bigger, so five percent of the aquifer is located within New Union's border. R. at 4. The Imhoff Aquifer contains such a high level of sulfur already that it cannot be consumed or used in agriculture without being treated first. R. at 4.

Lake Temp and the Imhoff Aquifer have varying effects on the citizens of New Union, Progress, and other states. The first entity affected by Lake Temp is a citizen of New Union. Dale Bompers owns, operates, and lives on a ranch in New Union that is located above the part of the Imhoff Aquifer located in New Union. R. at 4. However, because of the toxicity of the aquifer, Mr. Bompers has never used, and does not plan to ever use the water from the aquifer on

his ranch. R. at 6. In fact, even if the water in the aquifer were usable, Mr. Bompers would not be able to use that water without first getting a permit from the New Union Department of Natural Resources ("DNR"). R. at 6. Currently, the DNR has not issued any such permits, so Mr. Bompers harm is even further removed. R. at 6-7.

The second entity affected by Lake Temp is a group composed of the thousands of duck hunters and bird watchers from Progress and elsewhere who have used Lake Temp over the last one hundred years. R. at 4. This is because ducks have historically used Lake Temp as a stopover in their migration between the Arctic and southern climates. R. at 4. Also, there is a Progress state highway that intersects with several New Union roads, which runs along the southern side of the lake. R. at 4. This highway is located within one hundred feet of the lake, making it easy for travelers to stop along the lake for duck hunting. R. at 4. Even though the DOD posted no trespassing signs along the lake when it purchased the land in 1952, the DOD has never forced people to leave or taken stronger measures to ensure compliance. R. at 4. As a result, state and interstate travelers still use the lake to the same extent they used it before the 1952 purchase. R. at 4.

The third entity affected by Lake Temp is the DOD. This is because the DOD is proposing to use Lake Temp in munitions discharge. R. at 4. The DOD plans to construct a facility on the shore of Lake Temp to receive and prepare a wide variety of munitions to discharge into the lake. R. at 4. This process involves the new facility taking munitions and emptying them of liquid, semi-solid, and granular contents, mixing them with other chemicals to make sure they are not explosive, and then mixing the resulting solution with water to create a

slurry. R. at 4. The facility will then spray the slurry evenly on the floor of the dry lake bed, so that eventually the entire lakebed will be raised by several feet. R. at 4. This process will take several years, but after completion the project will not recur and alluvial deposits from the run off into the basin will eventually restore the lake to its pre-operation condition. R. at 4. Even though this process will increase the surface area of the lake by two square miles, the lake will still not intrude on New Union in any way. R. at 4-5. The Corps granted the DOD a discharge permit for the project pursuant to Section 404 of the Clean Water Act. R. at 3.

SUMMARY OF THE ARGUMENT

The district court granted the United States' summary judgment motion to dismiss New Union's claims by ruling that New Union did not have standing, the Corps did have jurisdiction and properly exercised that jurisdiction in granting the DOD's discharge permit, and the OMB properly resolved the dispute between the Corps and the EPA in favor of the Corps.

In order to have standing to sue in the federal courts, the plaintiff has to prove that there is an actual injury suffered, there is a causal connection between the harm and the defendant's action, and the injury can be redressed by the courts. Although the Court has ruled that state-plaintiffs have a more relaxed standing requirement than individual or group plaintiffs, New Union lacks standing here. The harm New Union claims is not certain or imminent enough to qualify as harm redressable by the courts. Along with this relaxed standing, states are also granted standing as *parens patriae* to bring suits on behalf of their citizens. However, the one citizen New Union uses to claim *parens patriae* also has not suffered any harm and will not suffer imminent harm in the future from the DOD's Lake Temp project.

Even if New Union does have standing, its claims fail because the permit issued to the DOD by the Corps is valid under the Clean Water Act. The Clean Water Act regulates navigable waters, which Congress defined as waters of the United States. Waters of the United States have been defined to include waters that have substantial impacts on interstate commerce. Lake Temp is a navigable water because the duck hunting and bird watching activities at the lake substantially affects interstate commerce. As a result, Lake Temp falls under the jurisdiction of the Clean Water Act.

The overall purpose of the Clean Water Act is to prevent the pollution of the waters of the United States. However the Clean Water Act also allows for the EPA and the Corps to issue discharge permits under certain circumstances. The EPA has jurisdiction over all pollution discharges that meet the requirements of Section 402 and the Corps has jurisdiction over all fill or dredged material that meet the requirements of Section 404. The Corps and the EPA have defined fill material to include materials that either convert a water to dry land or change the bottom elevation of a water. The discharged proposed by the DOD falls within the definition of fill material, therefore it is governed by the Corps, not the EPA.

However, Section 404 also allows for the EPA to veto Corps permit granting decisions. When the EPA considers exercising this authority, it creates a disagreement between two executive agencies. Several Executive Orders allow for the OMB to step in and resolve such disputes between executive agencies. As a result, the OMB has the authority to review and issue opinions regarding the permitting decisions of the Corps and the EPA under Section 404. In this case, the OMB resolved the dispute by determining that the EPA should not intervene in the

Lake Temp project because the Corps properly granted the Section 404 permit to the DOD for the discharge into Lake Temp.

The district court correctly granted the United States' summary judgment motion. Therefore, the judgment of the district court should be affirmed.

STANDARD OF REVIEW

Questions of law evaluated by this Court are reviewed *de novo*. *Theriot, Inc. v. United States*, 245 F.3d 388, 395 (5th Cir. 1998). Review of federal agency action is governed by the Administrative Procedure Act, 5 U.S.C. § 551 (2006), and federal agency action should only be overturned if it "relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or to the product of agency expertise." *Motor Vehicle Mfrs. Ass'n of the U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983).

ARGUMENT

I. THE DISTRICT COURT CORRECTLY DETERMINED THAT THE STATE OF NEW UNION DOES NOT HAVE STANDING IN ITS SOVEREIGN CAPACITY AS OWNER AND REGULATOR OF GROUNDWATER IN THE STATE OR IN ITS *PARENS PATRIAE* CAPACITY AS PROTECTOR OF ITS CITIZENS WHO HAVE AN INTEREST IN THE GROUNDWATER IN THE STATE.

Article III of the U.S. Constitution limits the federal courts' power to decide cases and controversies, but factors that would trigger the judicial review of a case or controversy have not yet been specifically established. U.S. Const. art. III. At the very least, courts are limited by jurisdictional components that must be established in every case. *Lujan v. Defenders of Wildlife*,

504 U.S. 555 (citing *Whitmore v. Arkansas*, 495 U.S. 149, 155 (1990)). Among these components is standing, or rather, an individual's authority to bring a lawsuit. A plaintiff establishes standing by showing that (1) he has suffered an imminent injury in fact; (2) a casual connection exists between the action and the injury; and (3) the injury will be redressed by a favorable decision. *Lujan*, 504 U.S. at 560-61 (citations omitted). New Union failed to satisfy the injury element of standing and thus, the District Court of New Union was correct in finding that New Union does not have standing. R at 6-7.

Traditionally, a plaintiff or petitioner establishes standing when he first shows that he has suffered an injury in fact that is both concrete and particularized, and actual or imminent. Lujan, 504 U.S. at 560-61. Second, the plaintiff must establish a fairly traceable casual connection between the challenged action and the injury, and third, the party must demonstrate that it is likely that the injury will be redressed by a favorable decision. *Id.* In this case, the first element—the harm element—is at issue. In *Lujan*, the court found that the plaintiffs lacked standing, because they failed to satisfy the injury requirement by alleging an uncertain future harm. *Id.* at 564. The plaintiffs argued that federally supported actions jeopardizing certain endangered species taking place in Egypt and Sri Lanka would harm them in various ways. *Id.* at 562. More specifically, two members of Defenders of Wildlife had visited the relevant parts of Egypt and Sri Lanka in the past and hope to do so again in the future. *Id.* at 563. Justice Scalia noted that "[s]uch 'some day' intentions—without any description of concrete plans, or indeed even any specification of *when* the some day will be," were not enough to establish injury. *Id.* at 564.

While *Lujan* addresses the standing with environmental groups as plaintiffs, courts treat plaintiff states differently. (*Massachusetts v. E.P.A.*, 549 U.S. 497, 518 (2007)(citing *Lujan*, 504 U.S. 555) ("It is of considerable relevance that the party seeking review here is a Sovereign State and not, as it was in *Lujan*, a private individual")). Under common law authority, the *parens patriae* doctrine creates an exception to the normal rules of standing applied to private citizens and organizations by recognizing the special role that at state plays in pursuing its quasi-sovereign interest in the well-being of its citizenry. *West Virginia v. Comcast Corp.*, 705 F. Supp.2d 441, 446 (E.D. Pa. 2010)(quoting *Alfred L. Snapp & Son, Inc. v. Puerto Rico ex. rel.*, 458 U.S. 592, 607 (1982)). For instance, the court in *Alfred* found that a state has an interest, "in the health and well-being—both physical and economic—of its residents in general." *Alfred*, 458 U.S. at 607.

In addition to the *parens patriae* doctrine, the Supreme Court has recognized that a state can invoke standing in protection of its proprietary interests. In *Georgia v. Tennessee Copper Co.*, Georgia sought to protect its citizens from pollution arising from outside its borders. 206 U.S. 230 (1907). Distinguishing the case from a suit between private parties, the court noted that Georgia had standing to sue where a citizen may not, because the state owns a small portion of the affected territory and the monetary measure of the damage is small. *Id.* at 237. Rather, as a state, Georgia can sue for an injury to it in its capacity of *quasi-sovereign*, and in this capacity, "the State has an interest independent of and behind the titles of its citizens, in all the earth and air within its domain." *Id.* In *Massachusetts*, the Supreme Court explicitly stated the premise from *Tennessee Copper* that a state's standing claim should be treated with particular generosity.

549 U.S. 497. Having surrendered some of their sovereign abilities to protect their environments when they entered the union, states now must rely on Congress to help protect their "quasi sovereign interests," and thus, experience a more relaxed standing requirement. *Id.* at 520.

Applying this relaxed state standing requirement and *parens patriae*, New Union does not have standing to sue in this matter, because New Union fails to meet the injury in fact requirement. New Union attempts to sue under *parens patriae* as a representative of Dale Bompers. R at 4. Mr. Bompers does own, operate, and reside in a ranch above the Imhoff Aquifer in New Union. R at 4. Mr. Bompers claims that the pollution in Lake Temp will ultimately harm his economic interest in the value of his ranch. R at 6-7. While this is a valid interest warranting state protection under *Alfred*, New Union has not proved that Mr. Bompers will actually suffer economic harm. *Alfred*, 458 U.S. at 607.

Specifically, Mr. Bompers asserts that the value of ranch will be diminished if the Imhoff Aquifer below his ranch is contaminated by the permitted discharge. R. at 6. No proof has been offered to show that the discharge will reach the aquifer. R at 6. Even if the discharge reaches the aquifer, the aquifer is neither potable nor suitable for agriculture. R at 4. Given that Mr. Bompers will not be economically harmed by the discharge into Lake Temp, New Union does not have standing through its *parens patriae* capacity.

The *Massachusetts* court noted the certainty of harmful effects of climate change in general. 549 U.S. at 521("the global retreat of mountain glaciers, reduction in snow-cover extent, the earlier spring melting of rivers and lakes, [and] the accelerated rate of rise of sea levels during the 20th century relative to the past few thousand years..."). While the court discussed

those general harms, the court primarily focused on the actual harm to Massachusetts's coastlines. *Id.* at 518. Thus, this harm analysis should be focused on the Imhoff Aquifer, rather than Lake Temp, as the lake is wholly within the boundaries of the State of Progress. R at 4. The court in *Massachusetts* did speak of future harms, but Massachusetts coastlines had already been negatively impacted and further future harm was imminent and widespread. *Id.* at 522. Conversely, New Union cannot present evidence to establish that the pollutants from Lake Temp will move into the Imhoff Aquifer located within New Union's boundaries, and New Union cannot show when the pollutants would be expected to reach the aquifer. R at 5-6. Thus, New Union does not meet the relaxed standard for standing under *Massachusetts*, and by extension, New Union cannot meet the traditional standing requirement under *Lujan*. 549 U.S. 497; 495 U.S. 149. The District Court of New Union correctly ruled that New Union does not have the requisite standing to bring this suit.

II. THE DISTRICT COURT WAS CORRECT IN RULING THAT THE CORPS OF ENGINEERS HAD JURISDICTION TO ISSUE A PERMIT UNDER CLEAN WATER ACT SECTION 404 BECAUSE LAKE TEMP IS NAVIGABLE WATER UNDER CLEAN WATER ACT SECTION 502(7), THROUGH THE CLEAN WATER ACT'S OVERALL SCHEME OF PROTECTING THE NATION'S WATERS, AND THROUGH THE LAKE'S IMPACT ON INTERSTATE COMMERCE.

Under the Clean Water Act, the Corps has authority to regulate discharge of fill material into navigable waters, yet the term navigable waters is vague. 33 U.S.C. § 1344 (2006). This vagueness has caused much consternation over what and where the Corps has jurisdiction. As a result, Congress and the courts are constantly struggling to define the term so that it allows the Corps to accomplish the goals of the Clean Water Act while staying within the bounds of the

Constitution. The Clean Water Act itself defines navigable waters as "the waters of the United States, including the territorial seas." 33 U.S.C. § 1362 (2006). The Supreme Court once held navigable waters to mean waters that are "navigable in fact." *The Daniel Ball*, 77 U.S. 557, 563 (1870). Then, Congress further expanded the definition of waters of the United States to encompass any waters that were used for interstate commerce or any waters that could affect interstate commerce if destroyed. 33 C.F.R. § 328.3 (1993) The courts have also tried to clarify the meaning of waters of the United States by holding that Congress extended "jurisdiction over the nation's waters to the maximum extent permissible under the Commerce Clause of the Constitution." *Natural Res. Def. Council, Inc. v. Callaway*, 392 F. Supp. 685, 686 (D.D.C. 1975); *see also United States v. Byrd*, 609 F.2d 1204, 1209 (7th Cir. 1979)("Congressional intent [was] to extend [Congressional] water pollution regulations to all the 'navigable waters' within its constitutional reach."). Recently, the Court has tried to limit the Corps jurisdiction by defining "waters of the United States" as "relatively permanent, standing or continuously flowing bodies of water 'forming geographic features' that are described in ordinary parlance as 'streams[,] ... oceans, rivers, [and] lakes.'" *Rapanos v. United States*, 547 U.S. 715, 739 (2006)(plurality). The Court has also held that small ponds cannot count as navigable solely because migratory birds use them as stopovers. *Solid Waste Agency of N. Cook County v. U.S. Army Corps of Engineers*, 531 U.S. 159, 171 (2001).

Over the years, courts have defined and re-defined the power Congress holds under the Commerce Clause. Generally, courts have held that in order for Congress to have power through the commerce clause, it has to regulate activities that substantially affect interstate economic

activities. *Wickard v. Filburn*, 317 U.S. 111, 125 (1942). More recently the Supreme Court reigned some of Congress' power by further defining what constitutes substantial effects. *See, e.g., United States v. Lopez*, 514 U.S. 549, 560 (1995) ("Where economic activity substantially affects interstate commerce, legislation regulating that activity will be sustained."). In *Lopez*, the Court dealt with the question of whether Congress could regulate the Gun-Free School Zones Act, which made it a federal offense to possess a firearm within a school zone. 514 U.S. at 551. The Court held that Congress did not have the power through the Commerce Clause to regulate the Act because it was not part of a larger economic scheme of regulation nor did it substantially affect interstate commerce. *Id.* at 561. The Court also set out three different situations in which Congress could use the Commerce Clause to regulate activities. Congress may regulate: "the use of channels of interstate commerce," "the instrumentalities of interstate commerce . . .even though the threat may come only from intrastate activities", and "activities having a substantial relation to interstate commerce." *Id.* at 558-59. The Court then loosened these requirements by holding that Congress can also regulate intrastate activity if that activity is part of a larger regulatory scheme. *Gonzales v. Raich*, 545 U.S. 1, 22 (2005)(holding that Congress had power to regulate the Controlled Substance Act through the Commerce Clause and prevent a California woman from growing her own medicinal marijuana because doing so would violate the larger regulatory scheme.)

Congress' Commerce Clause authority also allows it to regulate matters concerning the environment when it validates an overall regulatory scheme. *Hodel v. Virginia Surface Min. & Reclamation Ass'n, Inc.*, 452 U.S. 264, 282 (1981). In *Hodel*, a group of coal producers

challenged Congress' authority to regulate mining activity under the Surface Mining Control and Reclamation Act of 1977. *Id.* at 273. The Court held, that despite the fact that the activity being regulated was intrastate, the "power conferred by the Commerce Clause [is] broad enough to permit congressional regulation of activities causing air or water pollution, or other environmental hazards that may have effects in more than one State." *Id.* at 282.

Additionally, courts have specifically held that under Congress' Commerce Clause power, the Corps can regulate waters in order to fulfill the objective of the Clean Water Act. *United States v. Deaton*, 332 F.3d 698, 707 (4th Cir. 2003). In *Deaton*, James Deaton bought a twelve-acre parcel of land to develop into a residential subdivision, but the parcel contained a wetland. *Id.* at 702. Instead of getting a permit with the Corps, Mr. Deaton dug a ditch across his property in attempt to drain the wetland. *Id.* at 703. When Deaton argued that the Corps' regulation of his land was unconstitutional, the Fourth Circuit Court of Appeals held that the Corps' jurisdiction was constitutional because it fell under Congress' authority to uphold the directive of the Clean Water Act under the Commerce Clause. *Id.* at 707-08.

Courts then progressed to hold that Congress has the power to regulate intrastate activity if it will substantially affect interstate commerce. *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 258 (1964). After the passage of the Civil Rights Act, a motel in Atlanta, near major highways and interstates, sought to prevent the Act from being enforced because Congress "exceeded its power to regulate commerce." *Id.* at 243. The Court held that Congress did have the power to regulate intrastate activity if it substantially affected or harmed interstate commerce. *Id.* at 258. The Court stated the test for authority under the Commerce Clause was

whether the activity affected more than one state and had substantial relation on a national interest. *Id.* at 255. The fact that the motel's clients were largely out-of-state travelers, along with the national interest of giving equal protection to all citizens, shaped the Court's decision.

Courts have specifically held the Corps' jurisdiction over waters that are visited by interstate travelers bringing economic activity qualifies as regulation of activities that substantially affect interstate commerce. *State of Utah By & Through Div. of Parks & Recreation v. Marsh*, 740 F.2d 799, 803-04 (10th Cir. 1984); *Byrd*, 609 F.2d at 1210. In *Marsh*, the state of Utah sued the Corps for violating its jurisdictional authority after the Corps claimed jurisdiction over Utah Lake, a "body of water located entirely within Utah, with no navigable tributary or outlet extending beyond the borders of the State of Utah." *Marsh*, 740 F.2d at 800-01. The Corps claimed the State violated the Clean Water Act by failing to get a permit in removing a cofferdam and subsequently placing the removed material in the lake. *Id.* The Tenth Circuit Court of Appeals held that the Corps did not exceed its authority in "that the discharge of dredged or fill material into Utah Lake by plaintiff or others could well have a substantial economic effect on interstate commerce." *Id.* at 803. The Court held that the recreational opportunities that attracted over six thousand out-of-state residents showed that the lake substantially affected interstate activity. *Id.*

Additionally, the courts have held that the Corps has jurisdiction over waters that attract out-of-state travelers. *Byrd*, 609 F.2d at 1210. In *Byrd*, a land developer discharged fill material in a wetland adjacent to Lake Wawasee without a permit from the Corps. *Id.* at 1206. The Seventh Circuit Court of Appeals held that the Corps had jurisdiction over the wetlands because

Byrd's filling activities had the potential of affecting interstate commerce through the out-of-state visitors to Lake Wawasee. *Id.* at 1210; *See also Gibbs v. Babbitt*, 214 F.3d 483, 493-94 (4th Cir. 2000)(Holding that Congress has the power to regulate the protection of red wolves since wolves provided a $29.2 billion industry from interstate travelers.)

However, the Court has somewhat restricted the Corps' jurisdiction under the Clean Water Act by holding that while some wetlands can be covered under the navigable waters definition, wetlands that are not directly adjacent to navigable waters do not fall under of the Corps' jurisdiction. *Rapanos*, 547 U.S. at 757. *Rapanos* involved three consolidated cases where saturated fields that "lie[d] near ditches or man-made drains that eventually empt[ied] into traditional navigable waters," were being claimed under the Corps jurisdiction as wetlands. *Id.* at 729. The Supreme Court held, in a plurality opinion, that the fields in question were not under Corps jurisdiction because they were not substantially adjacent to navigable waters nor did they contain adequate surface connection to be deemed wetlands. *Id.* at 742. The Court defined "waters of the United States" to "include only relatively permanent, standing or flowing bodies of water. This definition refers to water as found in "streams," "oceans," "rivers," "lakes," and "bodies" of water "forming geographical features." *Id.* at 732-33. Justice Scalia expounded upon what is meant by "relatively permanent" by explaining the term did not "exclude streams, rivers, or lakes that might dry up in extraordinary circumstances, such as drought." *Id.* at 733 n.5.

Finally, the Court held that the Corps jurisdiction under navigable waters does not extend to small, shallow gravel pits where the sole reason for jurisdiction is over migratory birds. *Solid Waste Agency of N. Cook County*, 531 U.S. at 171. In *S.W.A.N.C.C.*, twenty-three suburban

Chicago cities sought to use a former gravel pit mining operation for a disposal site of solid waste. *Id.* at 162-63. In order to utilize the site, the seasonal gravel ponds, measuring as small as one-tenth of an acre and several inches deep, would have to be filled. *Id.* at 163. The Corps claimed jurisdiction under the "Migratory Bird Rule" since there had been spotted a number of migratory bird species in the small gravel ponds. *Id.* at 164. The Migratory Bird Rule extended the Corps jurisdiction to intrastate waters that were protected under the Migratory Bird Treatises or migratory birds that crossed state lines. *Id.* The Court held, in a five to four decision, the Migratory Bird Rule unconstitutional in that overstepped the Corps' jurisdiction over navigable waters. *Id.* at 171. The Court held that allowing the Corps to have jurisdiction over such "ponds and mudflats" with the Rule "would result in a significant impingement of the States' traditional and primary power over land and water use." *Solid Waste Agency of N. Cook County*, 531 U.S. at 174; *but see Deaton*, 332 F.3d at 707 (holding that the Corps asserting jurisdiction over a wetland under the Clean Water act did "not invade an area of authority reserved to the states. The power to protect navigable waters is part of the commerce power given to Congress by the Constitution, and this power exists alongside the states' traditional police powers.").

Here, in our case, Lake Temp is navigable because protecting and regulating the streams that affect interstate commerce is part of a larger activity regulated by Congress. Similar to the regulatory aims in the Controlled Substances Act in *Gonzalez* that allowed Congress to control individual marijuana growers in California, the goal of the Clean Water Act to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters" allows the Corps to have jurisdiction over Lake Temp. 33 U.S.C. § 1251 (2006). Unlike the attenuated aims of the

Gun Free School Zone Act that the Court rejected as a reasonable exercise of Congressional power under the Commerce Clause, here regulating the fill material in Lake Temp ensures the health of the lake along with ensuring that the nation's water quality is standardized. Similar to the Court's concerns in *Hodel*, that without a national standard the coal mining industry would create a race to the bottom, it is important that the Corps regulates what groups do to waters to ensure filling operations are proper and do not escalate to rampart, reckless dumping.

Also, Lake Temp is navigable because the economic activity generated by out-of-state hunters substantially affects interstate commerce. Similar to the impact of major interstate highways in *Heart of Atlanta, Inc.*, Lake Temp is situated near a state highway that intersects with several roads that lead to another state, so it is easy for out-of-state visitors to reach the lake. R. at 4. Also, the economic impact of hunting migratory birds in America generates 1.3 million dollars annually with over 2.3 million migratory bird hunters. U.S. Fish & Wildlife Service, 2006 National Survey of Fishing, Hunting, and Wildlife-Associated Recreation at 57,76, Tables 1,20, *available at* http://www.census.gov/prod/2008pubs/fhw06-nat.pdf. Here, thousands of duck hunters have traveled to Lake Temp over the past one hundred years, with a quarter of them being from out of state. R. at 4. Similar to *Marsh* and *Byrd*, the economic impact of interstate hunters and wildlife watchers shows Congress can regulate the permit process here to ensure the recreational economic impact of Lake Temp continues. Petitioners may argue that DOD discouraged hunting by posting warning signs on the highway. R. at 4. However, the base did not make substantial barriers to prevent interstate hunters through the years, despite knowing that hundreds of trespassers, bird watchers and hunters, use the lake every year. The economic impact

of out-of-state hunters and bird watchers traveling to Lake Temp substantially affects interstate commerce, making Lake Temp under the Corps' jurisdiction.

Although the Corps' jurisdictional reach has been pushed back recently through limiting their control over adjacent wetlands, Lake Temp is clearly under the Corps' jurisdiction as a relatively permanent, standing body of water. Unlike the varying acres of wetlands in *Rapanos*, Lake Temp is a nine-mile lake that is clearly demarcated. Although Lake Temp's level and size fluctuate throughout the year, the lake is only wholly dry once every five years. As a result, Lake Temp clearly falls within the definition and examples listed by Justice Scalia in *Rapanos*.

Also, the Corps' jurisdiction over Lake Temp, though related to migratory birds, is justified by the economic activity of the hunters and sportsmen who use the lake for the migratory birds. In addition, unlike the small, gravel ponds in *S.W.A.N.C.C.*, Lake Temp is three miles wide and nine miles long. R. at 3-4. While in *S.W.A.N.C.C.* the five justice majority focused on how the Corps jurisdiction under the Migratory Bird Rule impinged on states' interests in regulating their waters, here, the Corps' authority over Lake Temp rests on the presence of out-of-state travelers, not solely on the existence of migratory birds in the lake. While *S.W.A.N.C.C.* may have overruled protecting water solely because of migratory birds, it did not stop Congress from regulating waters that housed migratory birds and also generated an economic impact through interstate travelers.

Lake Temp is a navigable water under the Clean Water Act's definition and thus within the jurisdiction of the Corps. Because of the overall regulatory scheme of protecting and regulating the nation's waters under the Clean Water Act, the Corps has jurisdiction over Lake

Temp under Congressional Commerce Power. Also, Lake Temp is navigable because it is a relatively permanent, standing body of water that hosts thousands of out-of-state hunters and sportsmen bringing interstate commerce to the lake and the State of Progress.

III. THE TRIAL COURT CORRECTLY GRANTED SUMMARY JUDGMENT WHEN IT CORRECTLY DETERMINED THAT THE CORP OF ENGINEERS HAS JURISDICTION TO ISSUE A PERMIT FOR THE DISCHARGE OF SLURRY INTO LAKE TEMP BY THE DEPARTMENT OF THE DEFENSE UNDER SECTION 404 OF THE CLEAN WATER ACT.

The Clean Water Act was enacted by Congress in 1972 to be one of the most important environmental protection statutes in the United States. Congress passed the statute in order to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a) (2006). The stated goal of the Clean Water Act is to eliminate water pollution. *Id.* at § 1251(a)(1). However, in recognizing that sometimes there are no alternatives, the Clean Water Act established permitting programs to regulate discharges into the "waters of the United States." 33 U.S.C. § 1267(7) (2006). *See* 33 U.S.C. §§ 1342,1344 (2006). Section 402 of the Clean Water Act allows the EPA to issue permits for the regulated discharge of pollutants and Section 404 of the Clean Water Act allows the Corps to issue permits for the discharge of dredge or fill material. 33 U.S.C. §§ 1342, 1344. The EPA and the Corps have defined fill material as anything that changes the bottom elevation of waters of the United States. 40 C.F.R. § 232.2 (2008). The slurry discharge planned by the DOD's munitions facility at Lake Temp falls with definition of fill material. As a result, the slurry discharge falls within the permitting jurisdiction of the Corps, not the EPA.

The Clean Water Act was enacted to provide a regulatory system for cleaning and

maintaining the waters of the United States. 33 U.S.C. § 1251. One of the ways the Clean Water Act tries to accomplish this goal is by regulating discharges into the waters of the United States through permitting programs. The pertinent programs to this case involve the discharge programs set up and run by the EPA pursuant to Section 402 of the Clean Water Act and the Corps pursuant to Section 404 of the Clean Water Act. 33 U.S.C. §§ 1342, 1344.

Section 402 of the Clean Water Act establishes the rules and guidelines for the National Pollution Discharge Elimination System ("NPDES") program administered by the EPA. Section 402(a)(1) states that:

> Except as provided in sections 1328 and 1344 of this title, the Administrator may, after opportunity for public hearing, issue a permit for the discharge of any pollutant, or combination of pollutants, notwithstanding section 1311(a) of this title, upon condition that such discharge will meet either (A) all applicable requirements under sections 1311, 1312, 1316, 1317, 1318, and 1343 of this title, or (B) prior to the taking of necessary implementing actions relating to all such requirements, such conditions as the Administrator determines are necessary to carry out the provisions of this chapter.

§ 1342(a)(1). This program requires permits for any and all discharges of pollutants that meet the requirements of the Act. *Id.* The Administrator of the EPA requires dischargers to apply for permits in order to discharge. *Id.* at § 1342. The Administrator of the EPA then reviews the application and determines whether to allow a discharge permit. *Id.* If the Administrator of the EPA gives the discharger a permit, the permit describes exactly how much of each pollutant the discharger is allowed to discharge according to what is environmentally sustainable. *Id.* This determination is different depending on the body of water the discharger is using. *Id.* However, Section 402 also states that there are two types of discharges that are not covered by the NPDES program. *Id.*

One of these exemptions is for the discharge program governed by Section 404 of the Clean Water Act. 33 U.S.C. § 1342. Section 404 governs discharge of dredged or fill material and states that:

> (a) Discharge into navigable waters at specified disposal sites
> The Secretary may issue permits, after notice and opportunity for public hearings for the discharge of dredged or fill material into the navigable waters at specified disposal sites. Not later than the fifteenth day after the date an applicant submits all the information required to complete an application for a permit under this subsection, the Secretary shall publish the notice required by this subsection.

33 U.S.C. § 1344(a). The Secretary of the Corps is in charge of issuing discharge permits for dredged or fill material into waters of the United States. § 1344(a), (d). The Corps and the EPA have worked together to define what constitutes dredge or fill material under the statute. 33 C.F.R. § 323.2 (2008); 40 C.F.R. § 232.2.

The Corps defines fill material as material that replaces "any portion of a water of the United States with dry land; or [changes] the bottom elevation of any portion of a water of the United States." 33 C.F.R. § 323.2(e)(1), (2). The only restriction on this definition is that trash or garbage is not included as fill material. 33 C.F.R. § 323.2(e)(3). The Corps further defines more explicitly what is meant by "fill material" by providing a nonexclusive list of materials commonly used in construction and mining processes. 33 C.F.R. § 323.2(f). Slurry is included as a fill material in the definition. *Id.* Slurry is defined as "a thin, watery mixture of a fine, insoluble material. . . ." Webster's New World Dictionary of the American Language 1343 (Second College Ed. 1980).

One of the issues in determining whether a discharge should be regulated by the Corps or the EPA involves purpose of the discharge. If the purpose is to actually fill the

body of water affected, then the discharge clearly falls under Section 404's jurisdiction. *See* 33 U.S.C. § 1344. However, if the purpose is primarily to dispose of waste with the side-effect of filling the body of water affected, the issue is less clear because the goal of the Clean Water Act is to eliminate precisely those kinds of disposals. 33 U.S.C. § 1251. However, in *Kentuckians for Commonwealth Inc. v. Rivenburgh*, the Fourth Circuit held that the latter purpose is still governed by Section 404. 317 F.3d 425, 430 (4th Cir. 2003). In *Rivenburgh* the Corps issued a permit to a mining company that allowed for the company to discharge the overburden from mining into valleys in Appalachia. *Id.* at 431. The petitioners argued that the exclusion of trash or garbage from the definition of fill meant that the Corps violated the Clean Water Act in granting the permit for discharges that are only waste. *Id.* at 432-33. However, the court held that the practice and regulations of the Corps and the EPA meant that fill material was not limited to only beneficial discharges. *Id.* at 445-48. As a result, the court determined that the Corps had the authority to issue permits for pure waste discharges. *Id.*

This conclusion is further supported by the current regulation defining fill material, passed after the litigation in *Rivenburgh* began. 33 C.F.R. § 323.2; 40 C.F.R. § 232.3. The current regulation focuses on the effects of the fill converting the water to dry land or changing the bottom elevation of the water, not the purpose of the fill. *Id.* As a result, the discharge involved in this case falls under the fill definition because even though the main purpose is to discharge waste, the discharge fits the effects definition of changing the bottom elevation of the body of water. R. at 4.

After the Fourth Circuit determined that waste could constitute fill material, the next issue was to determine whether the use of the Section 404 permitting program excludes the use of the Section 402 permitting program. This issue arises because waste that constitutes fill material often involves innocuous materials along with hazardous pollutants. *See, e.g., Coeur Alaska, Inc. v. Southeast Alaska Conservation Council*, 129 S.Ct. 2458 (2009). However, the definitions of fill material by the Corps and the EPA do not explicitly include hazardous materials because those are typically governed by Section 402. *See, e.g.*, Proposed Revisions to the Clean Water Act Regulatory Definitions of "Fill Material" and "Discharge of Fill Material", 65 Fed. Reg. 21,292 (April 20, 2000).

In *Coeur Alaska*, the Court held that as long as the fill material met the definitional requirement of altering the elevation of the lake, then the discharge was governed by Section 404, not Section 402. *Id.* In *Coeur Alaska*, a gold mining company requested a permit to discharge slurry into a nearby lake in order to get rid of waste from the mining process. *Id.* at 2464. The slurry was created by the "froth flotation" process. *Id.* This process involved the mining company putting crushed rock into tank with a mixture of water and chemicals that will cause gold to separate from the rock. *Id.* The Section 404 permit from the Corps provided for the discharge of the remaining rock, water, chemical mixture, and slurry into a lake three miles away from the mine. *Id.* The Court held that even though there was a chemical component to the discharge that otherwise might have been subject to a Section 402 permit, the material fell under the definitions of the Section 404 permit program. *Id.* at 2467-68. The Court held that the

most significant issue for the permit program is whether "the substance to be discharged [is] fill material . . . ?" *Id.* at 2469. In *Coeur Alaska*, the Court held that since the material was slurry, and slurry was explicitly included as an example of fill material in the definition, the mine's discharge permit had to be issued under Section 404. *Id.* Similarly, the discharge in this case is defined as slurry. R. at 4. Though not from a mining process, the slurry in this case is similar to the slurry in *Coeur Alaska*. Both discharges include chemicals and granular solids mixed with water.129 S.Ct. at 2463; R. at 4. As a result, the district court correctly held that Corps' Section 404 permit was proper. R. at 10.

However, the slurry in this case is slightly different from the slurry listed in the definition of fill material. In this case, the slurry is not made as a part of a mining process, it is made during a munitions disposal process, yet the Corps' definition of fill material allows slurry specifically related to mining wastes. 33 C.F.R. § 323.2(f); R. at 4.Where the issue involves agency interpretation of a regulation, the court is required to defer to the interpretation of the administrator of the regulation "unless it is plainly erroneous or inconsistent with the regulation." *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410, 414 (1945). In *Seminole Rock*, the Court upheld the Administrator of the Office of Price Administration's decision and discretion to assess and implement a price ceiling on goods sold in March of 1942. *Id.* at 411-19. As a result, the Corps' decision in this case that all slurry, mining related or not, is governed by Section 404 is given deference. The slurry in this case is of the same basic composition as the slurry from mining processes, therefore inclusion of non-mining related slurry in the definition of fill material is not "plainly erroneous or inconsistent with the regulation." As a result, the DOD's

proposed slurry discharge requires a Section 404 permit, not a Section 402 permit.

However, despite the discretion and authority given to the Corps, the EPA maintains some control over the Corps' permit program. 33 U.S.C. § 1344(c). Section 404(b) sets out guidelines, established by the EPA, that the Corps has to follow in order to administer a permit under Section 404. Id. Section 404(c) also allows for the Administrator of the EPA to veto or restrict the Corps' granting of a permit if the Administrator determines that the discharge,

> [W]ill have an unacceptable adverse effect on municipal water supplies, shellfish beds and fishery areas (including spawning and breeding areas), wildlife, or recreational areas. Before making such determination, the Administrator shall consult with the Secretary. The Administrator shall set forth in writing and make public his findings and his reasons for making any determination under this subsection.

Id. In effect, the Section 404 permitting program gives the Corps authority to issue permits, but also gives the EPA the final authority to change or revoke those permits if the Administrator believes the discharge will cause too much harm. However, in this case, the EPA decided to not veto the Corps' granting of a permit. As a result, the Corps maintains the authority and discretion to grant and administer the discharge permit for the DOD's munitions plant.

The Secretary of the Corps, and not the Administrator of the EPA, had the authority to grant the discharge permit to the DOD for the munitions plant on Lake Temp. The proposed discharge has been classified as slurry, which is an example of fill material as defined by the Corps and the EPA. Although the slurry discharged by the DOD is somewhat different from the mining slurry specifically listed in the definition, it is similar

enough that it is not clearly inconsistent with the regulatory definition. Also, the Corps retained its discretion and authority when the EPA declined to exercise its veto power over the Corps. As a result, the district court's judgment should be affirmed and the DOD should be allowed to continue its plans to construct and operate the munitions facility on Lake Temp.

IV. THE TRIAL COURT CORRECTLY GRANTED SUMMARY JUDGMENT WHEN IT CORRECTLY DETERMINED THAT THE OFFICE OF BUDGET AND MANAGEMENT DID NOT IMPOPERLY INTERVENE IN THE PERMIT ISSUANCE PROCESS WHEN IT INFORMED THE EPA THAT THE CORPS AND NOT THE EPA HAD JURISDICTION TO ISSUE THE DISCHARGE PERMIT.

The Clean Water Act explicitly states that it is to be administered by the Administrator of the EPA. 33 U.S.C. § 1251(d) (2006). However, the statute also allows for various exceptions to this general rule. § 1251(a). *See*, *e.g.*, 33 U.S.C. § 1344 (2006). Also, the constitutional structure of the executive, of which the EPA is a part, establishes presidential oversight and control over the whole executive. U.S. Const. art. II, §§ 1, 3. Therefore, there are various provisions of the Clean Water Act that allow for, and sometimes require, coordination between the EPA, other agencies, and the President. *See*, *e.g.*, § 1344. To further the required presidential involvement in the executive, Reagan established a regulation that requires the OMB to oversee rules and regulations executed by executive agencies, and Carter established a regulation that allows for the OMB to resolve disputes between and within agencies. Federal Compliance With Pollution Control Standards, 43 Fed. Reg. 47,707 (Oct. 13, 1978) (revoked in part on other grounds by Greening the Government Through Leadership in Environmental Management, Pres. Exec. Order, 54 Fed. Reg. 23,344 (Apr. 21, 2000)); Exec. Order No. 12291, 46 Fed. Reg. 13,193 (Feb.

17, 1981).

The Constitution charges the President, the executive, with the duty of executing the laws implemented by Congress. U.S. Const. art. II, § 3. The EPA is the part of the executive in charge of executing the environmental laws passed by Congress, which is reflected by the Clean Water Act's general designation of the Administrator of the EPA as the administrator of the statute. 33 U.S.C. § 1251(d). The relevant parts of the Clean Water Act grant authority to two separate executive agencies for implementing two separate permitting programs. 33. U.S.C. § 1342 (2006); § 1344. Generally Section 402 grants the EPA exclusive authority to issue discharge permits for pollutants, and Section 404 grants the Corps exclusive authority to issue discharge permits for dredge and fill materials. *Id.*

However, Section 404(b) allows for the Administrator of the EPA to veto or restrict of the Corps' granting of a permit if the Administrator determines that the discharge, "[W]ill have an unacceptable adverse effect" on the body of water receiving the discharge. § 1344(c). In effect, the Section 404 permitting program gives the Corps authority to issue permits, but also gives the EPA the final authority to change or revoke those permits if the Administrator believes the discharge will cause too much harm. *Id.* As a result, Section 404 sometimes requires cooperation between the agencies in order to issue a valid permit.

However, sometimes the agencies cannot come to a unified decision. As a result, many presidents have issued executive orders to ensure the smooth and efficient functioning of the executive in the face of certain discrepancies, overlap, and

disagreements. *See, e.g.*, Exec. Order No. 12088. 43 Fed. Reg. at 47,707. In Executive Order No. 12291, President Reagan recognized that more presidential oversight is required to ensure better executive efficiency. 46 Fed. Reg. at 13,193. This Order starts by establishing that the purpose of the Order is "to reduce the burdens of existing and future regulations, increase agency accountability for regulatory actions, provide for presidential oversight of the regulatory process, minimize duplication and conflict of regulations, and insure well-reasoned regulations." *Id.* The Order also made the Director of the OMB the overseer of the agencies, and requires agencies to report to the Director of the OMB when creating and implementing new rules and regulations. *Id.* at 13,194.

Furthermore, in Exec. Order No. 12088, President Carter determined that the OMB would be the final arbiter in any disputes involving water pollution control standards. 43 Fed. Reg. at 47,707. The Order states that the OMB "shall consider unresolved conflicts" over pollution controls standards if the Administrator of the EPA cannot resolve the conflicts between the agencies. *Id.* As a result, this order gives the OMB the authority to resolve disputes that arise between the EPA and the Corps. In this case, the EPA and the Corps disagreed as to whether the DOD should get a fill material discharge permit. R. at 9. As a result, it was proper for the OMB to step in and resolve the dispute.

Presidents have granted the OMB executive oversight authority to ensure the efficiency of the executive. The OMB properly exercised this authority when it settled a dispute between the EPA and the Corps. R. at 9. The Corps issued a permit to the DOD pursuant to its Section

404 authority. R. at 3. However, the EPA considered using its veto power to repeal the grant of the permit, creating an agency dispute. R. at 9. As a result of this agency dispute, the OMB stepped in to resolve the conflict by determining that the Corps properly exercised its authority under Section 404 in issuing the permit. R. at 9. Therefore, the OMB's involvement in the permitting process was proper and correctly upheld by the district court.

CONCLUSION

The district court correctly dismissed New Union's complaint because New Union lacks standing, Lake Temp is a navigable water subject to Clean Water Act jurisdiction, the Corps has the authority to issue the discharge permit under Section 404, and the OMB's dispute resolution between the EPA and the Corps was proper and did not violate the Clean Water Act. As a result, the decision of the trial court should be affirmed.

Respectfully submitted.

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Attorneys for the Appellee and Cross-Appellant