TEAM #46

UNITED STATES COURT OF APPEALS
FOR THE TWELFTH CIRCUIT

C.A. No. 11-1245

STATE OF NEW UNION,

Appellant-Cross-Appellee,

v.

UNITED STATES,

Appellee-Cross-Appellant,

v.

STATE OF PROGRESS,

Appellee-Cross-Appellant.

On Appeal from the Order of the United States District Court for the District of New Union
Civ. No, 148-2011, Dated June 2, 2011.

BRIEF OF THE APPELLEE-CROSS-APPELLANT UNITED STATES

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JURISDICTIONAL STATEMENT

The United States District Court for the District of New Union has original jurisdiction over civil actions that arise under the laws of the United States, including the Clean Water Act, 33 U.S.C. § 1251 *et seq*. 28 U.S.C. § 1331 (2006). Jurisdiction to hear appeals from final decisions of the United States District Court for the District of New Union lies with the United States Court of Appeals for the Twelfth Circuit. 28 U.S.C. §§ 1291 , 1294(1) (2006).

STATEMENT OF THE ISSUES PRESENTED FOR APPEAL

This appeal presents the following issues:

I. Whether failing to participate in the NEPA EIS process prohibits New Union from challenging the Corps' action.

II. Whether New Union's claimed injury in fact is too speculative and attenuated to establish constitutional standing because the probability of occurrence is currently unknown and the extent of the environmental impact is uncertain.

III. Whether the Corps of Engineers' determination that Lake Temp qualifies as a navigable water of the United States for the purposes of 33 U.S.C. §§ 1344 and § 1362 is a permissible construction of the Clean Water Act warranting *Chevron* deference or alternatively, whether the Corps' determination should be afforded *Skidmore* deference due to the complexity in the regulatory scheme.

IV. Whether the Corps had the authority to issue a permit under § 404.

V. Whether EPA's decision not to veto the permit following OMB's decision is subject to judicial review and if the decision not to veto is reviewable, under 5 U.S.C. § 706 (2)(A) does a rational connection exist between the facts and EPA's decision to satisfy the arbitrary and capricious standard?

STATEMENT OF THE CASE

The State of New Union filed a complaint against the United States in the United States District Court for the District of New Union. (R. at 3.) The State of Progress intervened. (R. at 3.) New Union alleged that a permit issued to the Department of Defense (DOD) for the discharge of a slurry of spent munitions into Lake Temp (located on a United States military

reservation within Progress) pursuant to § 404 of the Clean Water Act (CWA) should have been issued by the EPA under § 402 instead. (R. at 3.) New Union sought a ruling that the § 404 permit issued by the U.S. Army Corps of Engineers (Corps) was invalid. (R. at 3.)

On June 2, 2011, the District Court granted the United States' motion for summary judgment. (R. at 10-11.) The District Court held that: (1) New Union has no standing; (2) the Corps had jurisdiction to issue at § 404 permit; and (3) the Office of Management and Budget's (OMB) dispute resolution between the Environmental Protection Agency (EPA) and the Corps did not violate the Clean Water Act. (R. at 10-11.)

New Union and Progress filed timely appeals from the District Court's decision. (R. at 1.) New Union appeals the District Court's grant of summary judgment on the issues of New Union's lack of standing, the Corps jurisdiction to issue a § 404 permit, and OMB's compliance with the CWA when it resolved a dispute between the Corps and the EPA. (R. at 1.) Progress appeals the District Court's decision that the Corps had jurisdiction to issue a § 404 permit. (R. at 1.) The United States requests that this court affirm the District Court's decision finding that New Union does not having standing, that the Corps had jurisdiction to issue a § 404 permit, and that the OMB's dispute resolution between the EPA and the Corps did not violate the CWA. (R. at 1-2.) This court granted review on September 15, 2011. (R. at 2.)

STATEMENT OF THE FACTS

In preparing to alter Lake Temp by using fill material to raise the high-water mark, the DOD sought the necessary permit under § 404 of the CWA, 33 U.S.C. § 1344 from the Corps. (R at 3.) The Corps and the EPA sought advice from OMB as to whether the action was appropriately permitted under § 404 or § 402 of the CWA. (R. at 9.) OMB, pursuant to Executive Order No. 12,088, resolved the dispute between the agencies, deciding the action fell within the

Corps' § 404 jurisdiction. (R. at 10.) EPA did not veto this decision. (R. at 9.)

The DOD plans to develop a facility to combine munitions of solid and semi-solid characteristics with various chemicals, resulting in chemically inert slurry, which will then be used to raise the water level at Lake Temp. (R at 4.) Various chemicals to be used are included in the definition of "hazardous chemicals" within § 311 of the CWA. (R at 4.) Water will be introduced to allow for discharge via multi-port pipe. (R at 4.) In the process of depositing the fill material, Lake Temp will grow substantially, resulting in an overall increase of two square miles, although it will remain within the borders of Progress. (R at 4-5.) In addition, Lake Temp will rise an additional six feet as a result of the DOD project.

The proposed filling will occur at Lake Temp—wholly in the state of Progress—a body of water in existence for over 80 percent of every decade. (R at 4.) During the low watermark period, the DOD will commence the process of layering the munitions slurry over the bare floor of Lake Temp. (R at 4.) Following the discharge, the Corps will continually ensure the unimpeded flow of water into Lake Temp, thereby maintaining the hydrologic system. (R at 4.)

Although Lake Temp fluctuates in size, it does not feed any lesser bodies of water and is fed solely by watershed. (R at 4.) Roughly following the shoreline of Lake Temp, the Imhoff aquifer lies almost 1,000 feet below the lake bed, and extends beyond the borders of Lake Temp. (R at 4.) The aquifer is primarily within Progress, with roughly five percent in New Union. (R at 4.) Dale Bompers, a resident of New Union and landowner, lives over the fraction of the aquifer within New Union's boundaries. (R at 4.) He is unable at this time to remove water from the aquifer because it is both non-potable, and requires a permit from New Union, which has not been sought by Mr. Bompers. (R at 4.) New Union has documented the high level of sulfur in the aquifer since the DOD proposed the construction. (R at 4.)

The DOD has operated a military reservation on the shores of Lake Temp since 1952. There are many signs of travelers and recreational enthusiasts using Lake Temp, including clearly worn tracks left by boats entering the water, as well as the DOD's general knowledge of individuals trespassing onto the reservation to use Lake Temp. (R at 4.) The DOD has not taken any action to stop travelers from embarking onto the water, nor is there a fence prohibiting access. (R at 4.) Because of New Union's close proximity to the lake, and therefore the DOD's reservation, thousands of individuals recreationally use Lake Temp to hunt and bird watch. (R at 4). Furthermore, in the past one hundred years, around a quarter of those enthusiasts were interstate residents, enjoying Lake Temp. (R at 4.) Lake Temp serves as an attraction to those hoping to experience the migratory season of the ducks, travelling north. (R at 4.)

In deciding to issue a permit to the DOD, the Corps fulfilled the steps required under the CWA and the National Environmental Policy Act (NEPA), including completing a mandatory Environmental Impact Statement (EIS). (R. at 6) New Union failed to participate throughout the permit process; the state did not voice any concerns during the EIS notice and comment period. (R. at 6.)

STANDARD OF REVIEW

Summary judgment is to be granted, "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). Questions of law such as these are reviewed on appeal *de novo*. *Pierce v. Underwood*, 487 U.S. 552, 558 (1988).

SUMMARY OF THE ARGUMENT

The District Court appropriately granted summary judgment in favor of the Corps; that decision should not now be disturbed. New Union is barred from challenging the action because

it failed to raise any concerns during the EIS comment period and has not alleged any injury in fact to support standing. Should its claim proceed to the merits, New Union presented insufficient evidence to support the position that Lake Temp does not qualify as a navigable water of the United States. Similarly, New Union's claim that the permitted action falls properly within the EPA's jurisdiction under CWA §402 is unsubstantiated by the facts and case law.

Although New Union had ample opportunity throughout the EIS scoping and notice period to voice concerns over the nature and type of permit under consideration, the state, at no point, raised any concerns. (R. at 6.) New Union's failure to participate in the EIS process left the Corps uninformed of the state's position and contentions. Because New Union concedes its potential injuries are uncertain, these alleged environmental consequences are not so obviously connected to the proposed action that the Corps had constructive notice to consider them without specific comment during the EIS scoping. (R. at 6.) By declining to participate in the EIS process, New Union has waived a right to challenge the action and is now barred from proceeding. *See Vermont Yankee Nuclear Power Corp. v. Natural Res. Def. Council, Inc.*, 435 U.S. 519 (1978).

A lack of standing to challenge the action also bars New Union from proceeding. New Union claims injury in fact based on alleged potential, future contamination of the groundwater. As the scope, severity, and probability of injury remain unknown, these allegations are merely speculative and insufficient to support the "perceptible harm" necessary to establish standing. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 53 (1992). As New Union made no effort to conduct, or even request, the additional studies necessary to ascertain any potential contamination, the state cannot assess a specific timeframe for the injury and has not presented a reasonable basis for fearing future adverse consequences. *See Friends of the Earth, Inc. v.*

Laidlaw Envtl. Services (TOC), Inc., 528 U.S. 167 (2000); (R. at 6.) Failure to establish an actual, concrete injury prevents New Union from challenging the permit.

The Corps and EPA reasonably classified Lake Temp as a navigable water subject to regulation under the CWA. Congress entrusted these agencies with the administration of the CWA; their interpretation of the legislation is, therefore, entitled to *Chevron* deference. *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984). As the definitions of "navigable waters" provided by Congress in the CWA and the Supreme Court in *Rapanos* are ambiguous, the agencies are best positioned to understand the statutory policy behind the CWA in relation to the specific facts at issue. *Id*. The Corps, considering the congressional intent of protecting the interstate waters and wildlife through the CWA, reasonably determined Lake Temp was navigable based on the lake's size and use in interstate commerce. (R. at 7.) Because the Corps' decision results in a permissible construction of an ambiguous term in the CWA, this court should give deference to that decision. *Chevron*, 467 U.S. at 843.

The dual permitting system of the CWA grants the Corps authority to issue permits for fill material discharge, while the EPA regulates permits for pollutant discharges. 33 U.S.C. § 1342 (2006), 1344. The Corps correctly classified the material DOD proposes to place inside Lake Temp as "fill material" within the context of the CWA because the material will change the lake's bottom elevation. *See* 40 C.F.R. § 232.2. Because modifying the lake's elevation is the sole, dispositive question in determining qualification as "fill material," the agency classification is correct and the § 404 permit action appropriate. *See Coeur Alaska, Inc. v. Southeast Alaska Conservation Council*, 557 U.S. 261 (2009). That the DOD is the regulated entity has no bearing on the appropriate permit; Congress specifically designated the Corps as the agency responsible for issuing permits to the public and federal and state agencies. 33 U.S.C. § 1323(a) (2006). As

the Corps has authority to issue the permit under § 404, EPA has no jurisdiction to permit the action under § 402.

The CWA grants EPA authority to veto any Corps permit under § 404 if the Administrator determines the anticipated environmental harm will be unacceptable. 33 U.S.C § 1344. EPA did not veto the DOD's permit to fill Lake Temp. (R. at 10.) OMB's exercise of its dispute resolution responsibilities under Executive Order No 12,088 did not hamper EPA's veto power. Exec. Order No. 12,088 at § 1-602. EPA's decision not to veto the permit is wholly discretionary and not subject to judicial review. *See Heckler v. Chaney*, 470 U.S. 821, 831 (1985). Should the court now decide to review EPA's decision not to veto, the decision will survive an arbitrary and capricious examination because it is consistent with previous judicial decisions. *See Coeur*, 557 U.S. 261.

ARGUMENT

I. NEW UNION IS TIME-BARRED AND ESTOPPED FROM RAISING THIS CLAIM BECAUSE THE STATE DID NOT OBJECT TO THE PROPOSED ACTION DURING THE EIS SCOPING AND COMMENT PERIODS.

The Corps acted in compliance with the Council on Environmental Quality (CEQ) regulations on the NEPA requiring agencies to provide a mandatory comment period on all environmental impact statements (EIS). 40 C.F.R. § 1503 (2011). New Union did not object to the proposed action during the NEPA process and should not now be allowed to challenge the action. (R. at 6).

A comment period encourages public participation and educates an agency through the experience and input of the commentators. *Chocolate Mfrs. Ass'n of U.S. v. Block*, 755 F.2d 1098, 1103 (4th Cir. 1985). During this period, it is "incumbent upon intervenors . . . to structure their participation so that it is meaningful, so that it alerts the agency to [their] position and

contentions." *Vermont Yankee*, 435 U.S. 519, 553 (1978). Admittedly, NEPA holds the agency primarily responsible for ensuring its actions are in compliance with the statute, and the flaws in an EIS may so apparent that they need not be specially identified to preserve a challenge. *Dep't of Transp. v. Pub. Citizen*, 541 U.S. 752, 765 (2004). To later raise an issue without first addressing the matter during the comment period, the challenger must show a clear and significant effect from the proposed actions and establish a clearly obvious connection between the agency action and the alleged environmental harms. *Id*.

When considering DOD's permit, the Corps complied with the NEPA regulations, 42 U.S.C. §§ 4321-4370H (2006), including observing the scoping and mandatory notice periods. 40 C.F.R. § 1503.1 (2011), (R. at 6.) By failing to raise their concerns regarding the Imhoff Aquifer during the EIS scoping or comment periods, New Union did not provide the Corps with contrary information to inform the decision making process. *See Chocolate Mfrs. Ass'n*, 755 F.2d at 1103. New Union should not, now, be allowed to question the decision when they declined to participate in the process. *See Vermont Yankee*, 435 U.S. at 553-54.

Although New Union is not objecting to an insufficiency in the EIS, its objection to the Corps' action could have been raised during the comment period. The failure to do so can only be rectified through showing the proposed actions will cause clear and significant effects and establishing an obvious connection between the agency action and the alleged environmental harms. *See Dep't of Transp.*, 541 U.S. at 765. As even New Union admits that the alleged harm is uncertain, (R. at 6), any flaw in the EIS is not "so obvious" that the Corps should have known to address the matter without New Union's comment. *Dep't of Transp.*, 541 U.S. at 765. Because New Union failed to participate in the EIS process, it is now estopped from raising claims that the agency action is inappropriate.

II. NEW UNION, HAVING FAILED TO SHOW THE PERMITTED LAKE FILL WILL CAUSE ACTUAL AND CONCRETE INJURY, LACKS STANDING TO BRING THIS ACTION.

By failing to establish standing, New Union has not presented a "case" or "controversy" addressable by the federal courts under Article III, § 2, of the Constitution. U.S. CONST. art. III. *See e.g.*, *Sprint Communications Co., L.P. v. APCC Services*, *Inc.*, 554 U.S. 269 (2008). To have standing, a plaintiff must demonstrate: (1) an injury in fact that is both "concrete and particularized" and "actual or imminent"; (2) a fairly traceable causal connection between the challenged action and alleged injury; and (3) a likelihood that a favorable decision will redress the harm. *Defenders of Wildlife*, 504 U.S. at 560-61 (1992). These three elements define an "irreducible constitutional minimum of standing," which all plaintiffs must demonstrate to bring a case or controversy within Article III. *Id.* at 560. When a plaintiff, such as New Union, complains of injury caused by the government's regulation of a third party, "standing is not precluded, but it is ordinarily 'substantially more difficult' to establish." *Id.* at 562 (internal citations omitted).

A. Although under *Massachusetts v. EPA* a state petitioner is granted "special solicitude" in the standing analysis, the substantive requirements for standing are not affected.

Recognizing a state "surrender[s] certain sovereign prerogatives when it enters the Union," the Court, in *Massachusetts v. EPA*, established a "special solicitude" in the standing analysis for states seeking judicial review of federal agency action. *Massachusetts v. EPA*, 549 U.S. 497, 518-21 (2007). Although the Court acknowledged the unique position of states bringing suit, it determined Massachusetts satisfied standing based on "the most demanding standards of the adversarial process." *Id.* at 521. The case did not develop a relaxed standing test for states, but rather allowed Massachusetts's claim because the state established an actual and imminent risk of harm. *Id.* As the owner of significant coastal real estate, Massachusetts

successfully alleged a particularized injury as a landowner because inundation and flooding would damage seaside property. *Id.* at 522-23. Appellate courts interpret this decision as only presenting "the limited proposition that, where a harm is widely shared, a sovereign, suing in its individual interest, has standing to sue where that sovereign's individual interests *are harmed*, wholly apart from the alleged general harm." *Ctr. for Biological Diversity v. U.S. Dept. of Interior*, 563 F.3d 466, 476-77 (D.C. Cir. 2009) (emphasis added); *see also Citizens Against Ruining The Env't v. EPA*, 535 F.3d 670 (7th Cir. 2008).

New Union cannot obtain standing solely on the basis of its sovereign statehood. In its sovereign capacity, New Union can only obtain standing through a showing of harm. *Massachusetts v. EPA*, 549 U.S. at 518-21. As New Union introduced insufficient evidence supporting an injury caused by the agency action, to which this court can address a remedy, the "special solicitude" for sovereign states is of no effect in this case. *See Massachusetts v. EPA*, 549 U.S. at 518-21 (2007); *see* discussion *infra* Parts II.B-D.

B. New Union's alleged injury is not actual or imminent under either theory of standing (sovereign or *parens patriae* capacity).

The injury in fact requirement necessary to establish standing demands a showing of harm to more than a "cognizable interest"; to survive a standing analysis the plaintiff must be "among the injured." *Defenders of Wildlife*, 504 U.S. at 563 (1992). Standing requires "perceptible harm," and cannot be satisfied by the "pure speculation and fantasy" of a far-removed and improbable injury. *Id.* at 566-67. The injury must be suffered by the plaintiff; a real or abstract injury to the environment is insufficient to establish Article III standing. *Friends of the Earth, Inc. v. Laidlaw Envtl. Services (TOC), Inc.*, 528 U.S. 167, 181 (2000) (finding plaintiff's inability to recreate in local river an actual personal injury separate from the environmental harm of water pollution). Although a plaintiff's actual injury must be more than

his "special interest" in the matter being regulated, a direct impact to the plaintiff's recreational, aesthetic, or economic interests can support standing. *Id.* A plaintiff must allege individualized, personal harm, even for recreational or aesthetic injuries, and cannot rely on adverse impacts to the public at large. *See Sierra Club v. Morton*, 405 U.S. 727 (1972) (holding the Sierra Club lacked standing to challenge a ski development in a national forest because the complaint relied on the impairment to future generations and failed to allege any specific member would be affected by the development).

Regardless of the nature of the harm, a plaintiff must demonstrate a concrete timeframe for the injury to satisfy the actual or imminent requirement. *See Defenders of Wildlife*, 504 U.S. at 563 (finding intent to travel abroad "some day" without specific plans or definitive timeline too remote to establish injury in fact from agency failure to apply the Endangered Species Act to actions outside the United States). Additionally, anticipated future injuries should show a plaintiff's reasonable fear of adverse consequences from the defendant's actions. *Laidlaw Envtl. Services (TOC), Inc.*, 528 U.S. 167 (finding "reasonable fear" that illegal discharges will prevent local residents from recreating in the river when they have done so in the past); *but see City of Los Angeles v. Lyons*, 461 U.S. 95 (1983) (determining plaintiff's fear that he might in the future be illegally choked by police officers was not a reasonable or imminent to support standing).

New Union considers itself "among the injured" based on groundwater ownership. However, because New Union merely speculated that harm will result from DOD's actions, providing no concrete evidence on the scope or severity of the groundwater pollution, New Union failed to establish a concrete and particularized injury in fact. *See Defenders of Wildlife*, 504 U.S. at 563; (R. at 5-6). New Union acknowledges the extent of the pollution is presently unknown and has not yet undertaken activities to determine the veracity of its allegations. (R. at

6.) New Union's alleged harm is vague and uncertain—the sediments, if they travel to the groundwater at all, may or may not reach the aquifer beneath New Union and may or may not be sufficient to cause injury. Massachusetts demonstrated a concrete injury through potential lost shoreline in *Massachusetts v. EPA*, but New Union has not shown a cognizable harm from the injury. 549 U.S. at 523. Even if the sediments reach the aquifer beneath New Union, the state has not demonstrated how that injury to the environment equates to an injury to the sovereign. *See Sierra Club*, 405 U.S. 727.

Establishing "imminence" of the injury is difficult when New Union failed to prove that an injury is likely. The alleged harm, being of unknown probability, severity, and extent, is akin to the *Defenders of Wildlife's* eventual, "some day" visits to foreign countries because New Union has failed to provide a timeline for when this alleged pollution would ever reach the aquifer within its jurisdiction. *Defenders of Wildlife*, 504 U.S. at 563. Although New Union presented circumstantial evidence of potential contamination, without more evidence than the area's geology, their allegations and fear are "speculation" and "conjecture" that one of any number of possibilities will actually occur. *See City of Los Angeles*, 461 U.S. 95.

Mr. Bompers's supposed injuries are of equally unknown probability, severity, and extent as those New Union claims in its sovereign capacity. Mr. Bompers's alleged harm from contaminated water in the aquifer is, again, a "some day" claim—he has not used the water, has not applied for a permit to do so, and does not currently have any definitive plans for when he might extract water. *Defenders of Wildlife*, 504 U.S. at 563; (R. at 6.) Additionally, Mr. Bompers did not demonstrate how any additional sediments in the aquifer will decrease his property value, as the water cannot, in its present state, be used for drinking or agriculture without treatment due to naturally occurring sulfur deposits. (R. at 6.) Because he cannot currently use the water, Mr.

Bompers's fears of being unable to do so in the future are unreasonable, unlike the *Laidlaw* plaintiffs who feared curtailment of their current enjoyment of the river. *See Laidlaw Envtl. Services (TOC), Inc.*, 528 U.S. 167. The District Court correctly ascertained New Union failed to satisfy constitutional standing because neither Mr. Bompers nor the state in its sovereign capacity experienced perceptible harm from the DOD's permitted activities.

C. New Union failed to demonstrate an injury caused by the permitted DOD actions.

To satisfy the second standing requirement, causation, New Union must demonstrate a "causal connection" linking the permitted DOD activity and the alleged injury in fact. *Defenders of Wildlife*, 504 U.S. at 561. New Union has not established this linkage. The only evidence supporting potential contamination is the area's hydrogeology and an assumption that the sediments will enter the Imhoff aquifer by traveling with the lake water through the unconsolidated alluvial fill. (R. at 5.) Whether or not the sediments will reach Imhoff and to what extent will depend on the specific hydrogeologic behavior of the land between the lakebed and the aquifer, which is currently unknown. (R. at 6.) New Union asserts this knowledge can be ascertained through groundwater monitoring wells on the reservation, but has failed to take any steps to initiate a monitoring program. (R. at 6.) Because New Union did not make an effort to determine the flow between the lake and aquifer, including failing to raise the issue during the EIS process when the government would have conducted further investigations, New Union should not, now, be able to establish standing on circumstantial allegations of causation.

D. The Court cannot redress New Union's alleged injuries.

In addition to failing to establish an injury in fact caused by the permitted activities, New Union also did not demonstrate that a court could remedy its problem. "It must be 'likely,' as opposed to merely 'speculative,' that the injury will be 'redressed by a favorable decision."

Defenders of Wildlife, 504 U.S. at 563 (quoting *Simon v. Eastern Ky. Welfare Rights Org*. 426 U.S. 26, 38, 43 (1976)). External factors or entities not party to the suit may lessen the impact of a court ruling, resulting in a claim without judicial remedy. *Id.* at 568 (plurality) (determining respondents failed to demonstrate redressability because the Court could only direct the Secretary of Interior to revise the regulation, but unless other agencies were bound by the Secretary's decision, the injury would not be addressed). The relief must remedy the specific injury alleged by the plaintiff, and cannot "bootstrap a plaintiff into federal court." *Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83 (1998) (finding the plaintiff's satisfaction from bringing a suit an insufficient remedy for standing).

As a remedy to its alleged injury, New Union seeks a ruling that the § 404 permit is invalid. (R. at 3.) This limited remedy available to the court will only restrict the Corps' ability to issue a permit. The court in this action does not have the authority to prohibit EPA from issuing a permit under § 402. EPA did not veto the Corps permit even though the Administrator has authority to do so if the permitted action will have an unacceptable adverse effect on the environment. 33 U.S.C. § 1344 (2006). This indicates EPA considers any consequences from the action acceptable. Should the Court invalidate the Corps' permit, EPA could sanction the activity under § 403, in which case the plaintiff's alleged injuries would remain unresolved. The uncertain effect of the court's remedy is insufficient to satisfy the standing requirement.

The redressability of Mr. Bompers's injury is also uncertain, as he complains of decreased property value from his inability to use the aquifer. (R. at 6.) However, as the water is not currently potable or suitable for use in agriculture, and New Union has not specified the additional harm from the sedimentation, it is unclear how Mr. Bompers's situation will be improved by a favorable decision. *See Defenders of Wildlife*, 504 U.S. at 563; (R. at 6.)

III. LAKE TEMP IS A NAVIGABLE BODY OF WATER UNDER TRADITIONAL NAVIGABILITY ANALYSIS OF CASELAW, AS WELL AS DESERVING *CHEVRON* DEFERENCE

The CWA, as enacted, is an attempt to protect resources previously thought unimportant or perhaps not as useful as the developments made after filling and destroying the body of water. Considering the vast marine life, cleansing properties and advanced ecological balancing occurring within our Nation's water supply, it is no wonder Congress wishes to require permits and safeguards every time one wishes to alter certain bodies of water. Lakes, oceans, rivers, deltas and the like qualify as traditional bodies of water and are navigable under § 1362(7) of the CWA and are regulated. *Rapanos v. U.S.,* 547 U.S. 715, 732 (2006). However, as obvious as the last point is, it is equally so that not all waters fit the standard definition of a body of water sufficient under §1362(7). *Id.* at 733. Our nation has wetlands, intermittent streams and lakes of every imaginable character; these too are within the contemplation of Congress, if certain characteristics are present. 33 U.S.C. § 1251(a)(2). It is following Congressional intent and the language of the CWA that Lake Temp ought to be found to sufficiently satisfy § 1362(7), and therefore is under the protections of the CWA. Under § 502(7) of the act, the term "navigable waters" is defined as being: "The waters of the United States." 33 U.S.C. § 1362 (7).

After progressing from a commerce-based understanding of navigability in *The Daniel Ball* (body of water being "navigable" requires "navigability-in-fact") the Court began widening the breadth of the term, to accommodate the spirit of the new Clean Water Act. This shift ultimately includes *Rapanos v. U.S.*, when, while considering the definition of "navigable" as it pertains to non-traditional waters in close proximity to traditional bodies of water, the Court shed a somewhat fractured yet informative light on the scene. 547 U.S. 715. Justice Kennedy's nexus argument, which has been adopted by some circuits as the controlling law of *Rapanos*, addresses

wetlands and those channels and waters that rely on the traditional body of water' s designation as navigable. As such, his test in *Rapanos* is not particularly illuminating, although the gist of it supports the ultimate conclusion that Lake Temp is in fact "navigable".

A. The Corps' determination that Lake Temp is navigable is entitled to *Chevron* deferene because it is within the agency's authorization and a permissible construction of the Clean Water Act.

The Corps determined after *SWANCC* that clarifying the definitional details of "navigable waters" was in order, and as such published for notice and comment in 2003 the *Advanced Notice of Proposed Rulemaking on the Clean Water Act Regulatory Definition of "Waters of the United States."* 68 Federal Register 10 (10 Jan. 2003), pp. 1991-1998. Subsequently, the Corps' developed and issued 33 C.F.R. § 328.3(a). As such, the Corps' definitions within 33 C.F.R. § 328.3(a) hold the force of law and are to be analyzed using the *Chevron* framework. *Chevron, U.S.A., Inc. v. Natural Resources Defense Council* 467 U.S. 837, 844-45 (1984). Alternatively, the Corps' determination that Lake Temp is navigable falls under the framework laid out in *United States v. Mead Corp.*, 533 U.S. 518 (2001) (complexity, importance, and consideration of administration of the statute are indicators that *Chevron* deference may apply). Initially, the inquiry centers on whether the challenge is based on the wisdom of the agency, or whether it asserts that the agency action is unreasonable or outside of the Congressional grant of authority. *Chevron, U.S.A., Inc.,* 467 U.S. at 865. Where the challenge questions the wisdom of the agency, absolute deference will be given to the agency, as it is entrusted with decision making power by the Executive and must be respected. *Chevron U.S.A., Inc.,* 467 U.S. at 865. Preliminarily, the action under analysis must carry with it the force of law, or alternatively can be given *Chevron* deference depending on the importance of the administration of the Act, the complexity of the regulatory scheme, and consideration afforded over a period of time. *Barnhart v. Walton,* 535

U.S. 212, 222 (2001).

The Clean Water Act, although perhaps overly ambitious, reflects the importance of the goals set forth. The statute recognizes the increased need for healthy hydrologic ecosystems, as well as continued health for marine life. 33 U.S.C. § 1251(a)(1). Additionally, Congress recognized that for proper administration of the Act, both the Corps of Engineers and EPA are required to oversee the dual nature of the permitting process. 33 U.S.C. §§ 1342, 1344. By delegating this power to the Corps and EPA, and leaving the statute ambiguous as to many key terms, Congress recognized that a regulatory scheme geared toward the abovementioned goals would necessarily be as complex as it is expansive. Without impliedly leaving decision making to the agencies, Congress would, in effect, be creating a wholly useless law, where the courts are left to determine on a case-by-case basis, the boundaries of the regulatory scheme.

Following the determination that the agency's actions warrant a *Chevron* analysis, the court must grant deference where: (1) Congress has either explicitly or implicitly spoken. If it is found that Congress has not explicitly spoken, the court may not substitute its own construction of the statute, but must evaluate (2) whether the agency's action is a permissible construction of the statute. *Chevron U.S.A Inc.,* 467 U.S. at 842.

B. Congress impliedly manifested its intent that the Corps make determinations that certain bodies of water qualify as "navigable" "waters of the United States."

Congress made it clear, by the passage of the CWA—and the inclusion of § 1344—that the Corps is responsible for determining the applicability of fill material permitting requirements. 33 U.S.C. § 1344. Specifically, the CWA authorized the Corps to grant permits under § 1344, based on the definition of "navigable waters" in 33 U.S.C. § 1362(7). While certainly able to significantly direct the Corps in the permitting process, Congress left the definition of

"navigable" open to interpretation and the Corps has done just that by issuing 33 C.F.R. § 328.3 (2011). It is through the authorization of the CWA that the Corps has arrived at the following definition for waters subject to the Corps' permitting procedure.

> "(a) The term waters of the United States means
>
> (1) All waters which are currently used, or were used in the past, or may be susceptible to use in interstate or foreign commerce, including all waters which are subject to the ebb and flow of the tide. . .
>
> (3) All other waters such as intrastate lakes, rivers, streams (including intermittent streams), mudflats, sandflats, wetlands, sloughs, prairie potholes, wet meadows, playa lakes, or natural ponds, the use, degradation or destruction of which could affect interstate or foreign commerce including any such waters:
>
> (i) Which are or could be used by interstate or foreign travelers for recreational or other purposes"

33 C.F.R. § 328.3 (2011).

While Congress has not explicitly left the ability to define "navigable" to the Corps," it nevertheless requires that the Corps issue permits regarding fill material; a task clearly requiring the Corps to make some determination as to what will qualify as a "navigable" body of water. This implicit command to define the meaning of the term, coupled with the Corps' ability to take action against those who fail to obtain a permit, demonstrates the degree to which the agency has been entrusted with the force of law.

Where the court finds that Congress has not explicitly granted the agency discretion in the matter, the *Chevron* framework progresses to evaluate whether the Secretary's determination is *reasonable*. *Chevron U.S.A. Inc.,* 467 U.S. at 842-43.

C. The Corps' definition as applied to Lake Temp is a permissible construction of the term "Navigable Waters" and therefore is entitled to *Chevron* deference.

While the inquiry in this phase of *Chevron* focuses on the agency's construction of the statute, it merely requires *some* permissible construction. *Chevron U.S.A. Inc.,* 467 U.S. at 843.

Furthermore, the agency's interpretation and answer will be given deference if that construction is reasonable. *United States v. Mead Corp.*, 553 U.S. 218, 229 (2001). Based on the Supreme Court's explanation that "navigable" is less important, although not impotent, the Corps' extension of § 1362(7) to Lake Temp is perfectly reasonable. *Duncan* v. *Walker*, 533 U.S. 167 (2001). Lake Temp is used by interstate travelers—a fact known but not remedied by the Department of Defense—who utilize Lake Temp to boat, hunt and generally pursue recreational activities. (R at 4).

By determining that Lake Temp is navigable, the Corps continues to validate the existence of the term "navigable" in 33 U.S.C. § 1362(7). Without this determination, the term is rendered impotent and superfluous, an outcome not sanctioned by the Supreme Court. *Duncan* v. *Walker*, 533 U.S. at 174. Additionally, to further marginalize the term "navigable" would be in direct contradiction with the Court's determination in *Rapanos.* 547 U.S. 715, 734 (2006) (where "navigable," although not requiring absolute "navigability-in-fact" requires "at least the ordinary presence of water").

An argument based on statutory construction is a permissible method of showing reasonableness of an agency determination. *Barnhart v. Walton*, 535 U.S. 212, 219 (2002) (where agency determination that duration requirement resolves conflict between "impairment" and "inability", thereby avoiding surplusage). In the same manner, the Corps avoids rendering the term meaningless, by allowing for navigability to be satisfied by the use of interstate travelers who are, in fact, traversing Lake Temp. (R at 4).

In *Rapanos*, although the Court spends a considerable amount of time tackling the issue of non-traditional bodies of water as "navigable", it also reaffirms that "navigable" applies to "relatively permanent" bodies of water such as rivers, streams, and bodies of water forming

geologic features like oceans and lakes. *Rapanos v. U.S.* 547 U.S. 715, 716 (2006) (plurality test). Furthermore, the *Rapanos* definition excludes sheet-water runoff and ephemeral flows only in existence during storm drainage. *Rapanos* 547 U.S. at 733. This understanding also reflects the previous holdings in *SWANCC* and *United States v. Riverside Bayview Homes*. 474 U.S. 121, 133 (1985) (holding that the term "navigable" is one of broad inclusion). Therefore, based on statutory construction, as well as relying on the limits placed upon "navigable" by the Supreme Court, the determination that Lake Temp is subject to the CWA is a reasonable construction of 33 U.S.C. § 1362(7).

Given the statutory ambiguity Congress left in the CWA, the Corps rightfully stepped in to provide meaning to the statute such that the goals of the Act are carried forward. By denying the Corps determination that Lake Temp is navigable, the Court would effectively render both the term "navigable" as well as 33 U.S.C. § 1344 (enabling Corps' permitting process), meaningless. Therefore, the Corps construction of the term "navigable" is reasonable, which requires the courts to afford *Chevron* deference and affirm the decision below, with regard to navigability.

IV. THE CORPS HAD THE AUTHORITY TO ISSUE A PERMIT FOR THE DISCHARGE OF FILL MATERIAL PURSUANT TO § 404 AND THEREFORE THE EPA WAS PRECLUDED FROM ISSUING A PERMIT FOR THE DISCHARGE OF POLLUTANTS PURSUANT TO § 402.

The CWA utilizes a dual permitting system. Section 402 allows the EPA to issue permits for the discharge of pollutants, while § 404 allows the Corps to issue permits for the discharge of dredged or fill material. 33 U.S.C. § 1342, 1344 (2006). If a substance fits within the regulatory definition of "fill material," the Corps has the authority to issue a permit for its discharge under § 404 and the EPA lacks the authority to issue a permit for the discharge as a pollutant under § 402. 33 U.S.C. §1344(a) (2006); *Coeur Alaska, Inc. v. Southeast Alaska Conservation Council*,

129 S. Ct. 2458, 2467 (2009).

A. The slurry that the Department of Defense will spray into Lake Temp fits within the regulatory definition of "fill material."

Fill material is defined as "material placed in waters of the United States where the material has the effect of . . . [c]hanging the bottom elevation of any portion of a water of the United States." 40 C.F.R. § 232.2 (2011). In this case, the spraying of the slurry into Lake Temp will result in the lakebed being raised by several feet. (R. at 4.) Therefore, the slurry qualifies as fill material, allowing the Corps to issue a permit under § 404.

The designation of the slurry as fill material based on its effect of raising the bottom elevation of Lake Temp is confirmed by amendments made to the definitions of the terms "fill material" and "discharge of fill material" in 2002 when the EPA and the Corps sought to establish an effects-based definition, rather than the previously used purpose-based definition. Claudia Copeland, Cong. Research Serv., RL 31411, Controversies Over Redefining "Fill Material" Under the Clean Water Act 3 (2009). While "[t]he standard for issuance of a [§] 402 permit is compliance with the effluent limitation and toxic pollutant control provisions" of the Clean Water Act, § 404's focus on the discharge of fill material is primarily concerned with "the loss of a portion of the water body itself." *Id.* at 2. Section 404's concern with the loss of a portion of the water body confirms the designation of the slurry in this case as fill material given its effect on the lakebed.

The slurry that will be discharged into Lake Temp will consist of the liquid, semi-solid and granular contents of munitions (including substances designated as hazardous under § 311 of the Clean Water Act); chemicals that are used to treat the munitions' contents; and ground, pulverized metals. (R. at 4.) The hazardous nature of some contents of the slurry does not change

the designation of the slurry as fill material. The sole distinction in the CWA as to the potentially harmful contents of materials discharged is made in § 402 based on whether the material is designated as a "toxic pollutant injurious to human health" pursuant to 33 U.S.C. § 1317. 33 U.S.C. § 1342(k). There is no suggestion that the slurry that will be discharged into Lake Temp contains any toxic pollutants and therefore the hazardous nature of some contents of the slurry does not affect its designation as fill material subject to a § 404 permit. The contents of the slurry, although partially hazardous, do not have any further bearing on the determination of whether an applicant must seek a § 402 or § 404 permit. The Supreme Court has made it clear that "if the discharge is fill, the discharger *must* seek a § 404 permit from the Corps." *Coeur*, 129 S. Ct. at 2469 (emphasis added).

In *Coeur*, the Supreme Court addressed the concerns of environmental groups about discharges of certain solids which are restricted by EPA standards, but which could permissibly be discharged pursuant to a § 404 permit issued by the Corps. The Court squarely addressed these concerns, stating: "If, in a future case, a discharger of one of these solids were to seek a § 404 permit, the dispositive question for the agencies would be whether the solid at issue-for instance, 'feces and uneaten feed'-came within the regulation's definition of fill." *Id.* at 2468. Here, the slurry clearly falls within the definition of fill material because it will raise the lakebed elevation by several feet, allowing the Corps to issue a permit under § 404.

B. Because the Corps has the authority to issue a permit under § 404, the EPA may not issue a permit under § 402

The Supreme Court has interpreted to the CWA in a manner such that "if the Corps has authority to issue a permit for a discharge under § 404, then the EPA lacks authority to do so under § 402." *Coeur*, 129 S. Ct. at 2467. EPA's own regulations governing the issuance of §402

permits confirms this: "The following discharges do not require [§ 402] permits . . . [d]ischarges of dredged or fill material into waters of the United States which are regulated under section 404 of CWA." 40 C.F.R. § 122.3(b); *Coeur Alaska, Inc. v. Southeast Alaska Conservation Council*, 129 S. Ct. 2458, 2467-68 (2009).

The Corps' status as part of the DOD does not bear on its ability to issue a permit for the discharge of fill material under § 404. In fact, Congress specifically contemplated that the Corps, as a permitting agency, would be in a position to issue permits to other federal agencies carrying out projects requiring the discharge of fill material:

> Each department, agency, or instrumentality of the executive, legislative, and judicial branches of the Federal Government (1) having jurisdiction over any property or facility, or (2) engaged in any activity resulting, or which may result, in the discharge or runoff of pollutants . . . shall be subject to, and comply with, all Federal, State, interstate, and local requirements, administrative authority, and process and sanctions respecting the control and abatement of water pollution in the same manner, and to the same extent as any nongovernmental entity . . . . The preceding sentence shall apply (A) to any requirement whether substantive or procedural (including any recordkeeping or reporting requirement, any requirement respecting permits and any other requirement whatsoever), (B) to the exercise of any Federal, State, or local administrative authority, and (C) to any process and sanction, whether enforced in Federal, State, or local courts or in any other manner.

33 U.S.C. § 1323(a).

The acts of government agencies are afforded a presumption of regularity unless there is clear evidence to the contrary. *U.S. v. Chemical Foundation*, 272 U.S. 1 (1926); *U.S. Postal Service v. Gregory*, 534 U.S. 1 (2001). Although New Union alleges that the Corps issuing a permit to the DOD represents a "classic conflict of interest," a mere allegation of conflict of interest, without more, is not sufficient to overturn the presumption of regularity that attached to the Corps' action in issuing the permit under § 404. As noted by the District Court, "[t]he [Corps] followed its normal procedures in terms of public notice at all stages of its NEPA

activities." (R. at 6.)

A permit issued by the Corps under § 404 does nothing to diminish the goals of the Clean Water Act. Section 101 of the Clean Water Act professes to make it a national goal to eliminate the discharge of pollutants into navigable waters by 1985. 33 U.S.C. § 1251(a)(1). However, this goal was clearly modified by the establishment of the permitting programs that allow for the discharge of pollutants, dredged material and fill material. 33 U.S.C. § 1342, 1344.

V. OMB'S DISPUTE RESOLUTION WAS IN COMPLIANCE WITH EXECUTIVE ORDER 12,088, DID NOT PRECLUDE FURTHER ACTION BY EPA, AND DID NOT VIOLATE THE CWA.

A. OMB's involvement furthered the policies of the Executive Branch by resolving the dispute internally and did not prevent EPA from vetoing the permit.

EPA's participation in the dispute resolution procedures outlined in Executive Order 12,088, "Federal Compliance with Pollution Control Standards," furthered Executive Branch policy objectives and did not violate the letter or spirit of the CWA. The Executive Order charges the EPA Administrator with resolving conflicts between executive agencies regarding the CWA. Exec. Order No. 12,088 at § 1-602, 43 Fed. Reg. 37, 635 (Oct. 13, 1978). The order further directs the Administrator to refer unresolved agency conflicts to the Director of the Office of Management and Budget (OMB). *Id.* The Director, in resolving the issue, looks to EPA's judgment on technological and statutory interpretation matters. *Id.* at § 1-603. Although OMB is involved in conflict resolution, the order states unequivocally: the "procedures are in addition to, not in lieu of, other procedures . . . for the enforcement of applicable pollution control standards." *Id.* at § 1-602.

The Order provides a mechanism for agencies within the executive branch to resolve controversies in accordance with the president's policy and administrative objectives. *Id.* This

mechanism ensures the President controls proper execution of the laws. Based on respect for separation of powers, courts should give the same regard to administrative dispute resolution procedures created by the president, such as this order, as they show congressionally mandated remedies. *Tennessee Valley Auth. v. United States*, 13 Cl. Ct. 692 (1987). The decision not to veto a permit implicates policy questions within the Executive's purview and the Constitution vests in the President the authority to ensure agencies consistently execute the laws. U.S. CONST. art. II, §3. As Executive Order 12,088 does not limit remedies otherwise authorized by Congress, the judiciary should respect the "Executive's clear indication that its agencies should employ that branch's own procedures before proceeding to court." *TVA v. EPA*, 278 F.3d 1184 (11th Cir. 2002) (holding Executive Order 12,088 did not bar judicial review).

Notwithstanding any determination by OMB, EPA under § 404, EPA is *authorized* to "deny or restrict the use of any defined area for specification (including the withdrawal or specification) at a disposal site" whenever the Administrator determines the proposed use will have "unacceptable adverse effect[s]" on the environment. 33 U.S.C § 1344 (emphasis added). Congress granted EPA discretion, by law, to determine whether or not the permitted action has unacceptable adverse effects. Because Executive Order 12,088 ensures the availability of other procedures to enforce pollution control standards, EPA retained this discretion after the OMB decision. Exec. Order No. 12,088 at § 1-602. OMB's involvement, therefore, represents only the final step of the internal Executive Branch dispute resolution process, not the final action available to EPA or the public. *See TVA v. EPA*, 278 F.3d 1184.

B. EPA's discretionary decision not to engage in further enforcement actions under the CWA is not reviewable.

EPA did not undertake the actions required by the CWA in order to veto the permit, such as offering a period for public notice and comment, consultation with Secretary of Defense, or

public notice of findings supporting the veto. As such, there was no final determination under CWA § 404(c) and the court can only review EPA's decision not to take further enforcement actions. Such decisions are presumptively unreviewable; the Supreme Court recognizes "an agency's decision not to prosecute or enforce . . . is a decision generally committed to an agency's absolute discretion." *Heckler v. Chaney*, 470 U.S. 821, 831 (1985). Agencies' discretionary decisions not to enforce laws and regulations are generally unsuitable for judicial review. *Id.* Agencies are better equipped than the courts to balance the variables necessary to assess enforcement actions, such as the technical determination of whether a violation occurred, proper resource allocation, probability of success on the merits, Executive policy objectives and agency priorities. *Id* at 831-32.

Congress did not provide EPA specific guidelines to follow in deciding which Corps permits to veto under CWA § 404. The CWA simply authorizes the Administrator to veto any disposal permit "whenever he determines, after notice and opportunity for public hearings, that the discharge of such materials into such area will have an unacceptable adverse effect on municipal water supplies, shellfish beds and fishery areas (including spawning and breeding areas), wildlife, or recreational areas." 33 U.S.C. § 1344. The absence of further direction indicates Congress left enforcement decisions to EPA's discretion. The Court's presumption that discretionary non-enforcement decisions are unreviewable is unrebutted in this situation, making EPA's decision not to review the Corps permit outside the scope of judicial review.

C. EPA's decision, if subject to review, was neither arbitrary nor capricious

i. If reviewed, EPA's decision not to engage in further enforcement activities should be examined under an arbitrary and capricious standard.

If EPA's decision is reviewable, "[t]he reviewing court shall hold unlawful and set aside agency action, findings, and conclusions found to be arbitrary, capricious, an abuse of discretion,

or otherwise not in accordance with law. . .” 5 U.S.C. § 706(2)(A). Circuit courts across the country consistently apply the arbitrary and capricious standard of review to CWA § 404 decisions. *See e.g., James City County, Va. v. E.P.A.*, 12 F.3d 1330, 1337 n.4 (4th Cir. 1993); *Norfolk v. United States Army Corps of Engineers*, 968 F.2d 1438, 1445 (1st Cir.1992); *Holy Cross Wilderness Fund v. Madigan*, 960 F.2d 1515 (10th Cir.1992).

ii. Because EPA acted in accordance with *Coeur*, the decision not to veto the permit was neither arbitrary nor capricious.

Actions reviewed against an arbitrary and capricious standard must demonstrate a “rational connection between the facts found and the choice made.” *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (internal citations omitted). The Supreme Court stresses the judiciary applies a narrow review under this standard and does not “substitute its judgment for that of the agency.” *Id.*; *see also James City County*, 12 F.3d 1330 (reversing district court’s countermanding of an EPA veto, when the trial judge based his determination on disputed facts rather than EPA’s failure to provide a rational connection between the facts and its veto decision).

As shown in Part IV.A, EPA acted consistently with *Coeur* in concluding the Corps had authority to issue the permit. Spraying the slurry into Lake Temp, as proposed by the DOD, will raise the lakebed elevation by several feet. (R. at 4). Because the discharge is properly categorized as fill material based on the agencies’ “effects-based” definition, both the Corps and EPA agree the activity is properly permitted under § 404. *See Coeur* 129 S. Ct. at 2469. EPA’s approval of the Corps’ authority to issue a permit under §404 is, therefore, rationally based, consistent with *Coeur*, and cannot be considered arbitrary and capricious. *See State Farm Mut. Auto. Ins. Co.*, 463 U.S. at 43.

EPA's deferral to the Corps in not vetoing the permit is also rationally based in presumption of regularity afforded government agencies in the absence of clear evidence to the contrary. *See Chemical Foundation*, 272 U.S. 14-15. The agencies' regulations prohibit the Corps from permitting discharge "which will cause or contribute to significant degradation of the waters of the United States." 40 C.F.R. § 230.10 (2011). Because New Union failed to substantiate its claims that the discharge will result in any adverse impacts, let alone a "significant degradation" of Lake Temp or the Imhoff Aquifer, EPA acted rationally in determining the Corps properly considered the environmental consequences of the permitted activity. *See State Farm Mut. Auto. Ins. Co.*, 463 U.S. at 43.

CONCLUSION

New Union should not be permitted to bring this action. New Union opted not participate in the EIS process and failed to raise any concerns during project's the scoping or notice periods. Furthermore, New Union cannot properly satisfy the standing requirements to challenge the Corps' determination. New Union failed to demonstrate *actual* or *imminent* harm in its sovereign capacity or to its citizens. The lack of evidence supporting future harm makes any fear of adverse consequences unreasonable. Additionally, the "special solicitude" afforded states under *Massachusetts v. EPA*, is not accompanied by a relaxed standing standard, so New Union cannot sufficiently support their phantom injury.

The DOD properly sought a permit from the Army Corps of Engineers, who, pursuant to both Supreme Court precedent and statutory construction, determined Lake Temp to be within the meaning of "navigable" in section 1362(7) of the CWA. This determination, because it flows from the Congressional authority granted to the Corps, and is a permissible construction of the CWA, is to be afforded *Chevron* deference.

The Corps' subsequent determination that ground munitions constitute "fill material" under 40 C.F.R. § 232.2 (2011) is sanctioned by § 1342, 1344 of the Clean Water Act, and therefore under *Coeur*, the EPA is precluded from issuing a § 402 permit.

That the COE is a division of the DOD and also issuing the permit is of no matter. To not allow the Corps to permit various DOD projects would effectively render the CWA's fill material sections meaningless for a wide range of large, national projects.

Finally, the OMB's participation in this process is well within its role as mediator between executive agencies when the Administration's position must be clarified. The OMB faithfully executed its duty, and did not foreclose the possibility of an EPA veto. The fact that the EPA did not take further action is not indicative of the OMB's improper actions. The lack of EPA action does not then make the OMB's actions incorrect.

For the foregoing reasons, the United States respectfully requests the Court AFFIRM with respect to the lower court's decision that New Union lacks the necessary standing to challenge the permit, that the Corps rightfully exercised its jurisdiction in issuing the § 404 permit, and that the OMB did not violate the CWA by determining that the Corps has jurisdiction.