TEAM # 53

IN THE UNITED STATES COURT OF APPEALS
FOR THE TWELFTH CIRCUIT

C.A. No. 11-1245

STATE OF NEW UNION,

Petitioner-Appellant-Cross-Appellee,

-vs-

UNITED STATES,

Respondent-Appellee-Cross-Appellant,

-vs-

STATE OF PROGRESS,

Intervenor-Appellee-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, 2010.

BRIEF OF THE PETIONER-APPELLEE-CROSS-APPELANT STATE OF NEW UNION

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JURISDICTIONAL STATEMENT

On June 2, 2011, the district court granted the United States motion for summary judgment, and entered a judgment that "State of New Union's action is dismissed." 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 PRESENTED FOR APPEAL

This appeal presents the following issues:

I. 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 ground water in the state.

II. Whether the Corps and the EPA have jurisdiction to issue a permit under CWA Section 404, 33 U.S.C. §1344, because Lake Temp is navigable water under CWA Section 301(a), 404(a), and 502(7), 33 U.S.C. §§ 1311(a), 1362(7).

III. Whether the Corps has jurisdiction to issue a permit under the CWA Section 404, 33 U.S.C. § 1344, or the EPA has jurisdiction to issue a permit under CWA Section 402, 33 U.S.C. § 1342, for the discharge of slurry into Lake Temp.

IV. Whether the decision by the OMB that the COE had jurisdiction under CWA Section 404, 33 U.S.C. § 1344, and the EPA did not have jurisdiction under CWA 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 CWA.

STATEMENT OF CASE

I. Procedural Background

New Union asserted that the Environmental Protection Agency ("EPA") has sole jurisdiction to issue a permit for this discharge under its CWA § 402 authority, and sought judicial review under 28 U.S.C § 1331 and the Administrative Procedure Act ("APA") 5 U.S.C. § 702.

The District Court granted summary judgment in favor of the United States. In doing so, the Court held that New Union lacked standing to challenge the discharge permit, and that the Army Corps of Engineers ("Corps") had authority under § 404 of the Clean Water Act ("CWA") to issue a discharge permit to the Department of Defense ("DOD"). The Court also held that the dispute resolution role exercised by the Office of Management and Budget ("OMB") did not violate the CWA. From the Order of the District Court granting summary judgment for the United States, the State of New Union and State of Progress ("Progress") appeal.

The Secretary of the Army argues, on behalf of the United States, that New Union does not have standing to appeal the issuance of the permit, and that the Corps has jurisdiction to issue a § 404 permit based on the navigability of Lake Temp and the United States Supreme Court ruling in *Southeast Alaska Conservation Council v. Coeur Alaska, Inc.*, 129 S. Ct. 2458 (2009). The Secretary also argues that intervention in the permit issuance process by the OMB did not violate the CWA, and subsequently filed a motion for summary judgment on behalf of the United States.

New Union filed a cross motion for summary judgment, asserting its standing to appeal the permit issuance and the navigability of Lake Temp. Furthermore, New Union argues that the classification of the discharge as a pollutant rather than fill material demands that the authority to issue a discharge permit of any kind belongs solely to the EPA under § 402 of the CWA. Lastly, New Union argues that the participation of the OMB in the permit issuance process is a violation of the CWA.

The cross motion for summary judgment filed by the Progress asserts that New Union does have standing, but that the intended discharge by the DOD does not require a permit under

§§ 404 or 402 of the CWA. In the alternative, Progress argues that the Corps has jurisdiction to issue a § 404 permit, and that the participation of the OMB did not constitute a violation of the CWA.

II. Factual Background

The litigation in the present case revolves entirely around a naturally intermittent body of water known as Lake Temp. Nestled in scenic Progress near the border of New Union, the fully enclosed lake benefits from a steady flow of surface water from an eight hundred square mile watershed of the surrounding interstate mountains. Though the water levels recede during seasonal dry spells, the lake often maintains a surface area of up to three miles wide and nine miles long. During migration seasons, ducks have traditionally used the lake as a stopover in the course of their migration to and from warmer southern climates. Accordingly, thousands of duck hunters from Progress and other nearby state haves continuously utilized the lake over the past century for recreational purposes.

Approximately one thousand feet below the bed of Lake Temp lies the Imhoff Aquifer. Though it follows the general contours of the lake, the aquifer extends beyond the natural boundaries of the water's surface, and a portion of it ventures across the border into New Union. Dale Bompers owns, operates, and resides on a ranch located directly above a portion of the aquifer in the State of New Union. Traces of sulfur in the aquifer preclude potability and safe agricultural use without subsequent treatment.

Lake Temp became part of a military reservation in 1952, and the DOD subsequently erected signposts along the highway at intervals of 100 yards, 25 feet from the edge of the road that warned of danger and that entry was illegal. However, there is no fence surrounding the

lake, and there are clearly visible trails leading from the road to the lake. These trails evidence the dragging of rowboats and canoes between the highway and the lake, which suggests continued recreational use by the citizens of Progress and New Union. Despite actual knowledge on the part of the DOD that the community continues to use Lake Temp for hunting and bird watching, the agency has taken no further measures to restrict entry.

The DOD has proposed to construct a facility on the shore of Lake Temp to process and dispose of a wide variety of munitions. The spent munitions discharge consists of liquid, semi-solid, and granular contents, many of which are found on the § 311 list of hazardous substances in the CWA. These harmful substances will then be mixed with a variety of other chemicals to combat volatility, and pulverized into a toxic, primarily metallic compound. From that point, the DOD plans to introduce water to the compounds to create a makeshift "slurry," to be sprayed into Lake Temp from a movable multi-port pipe. The intention of the DOD is to spray the toxic discharge evenly over the entirety lakebed. This process should take several years, but will ultimately raise the lakebed by several feet, and add approximately two square miles to the surface area of the water.

Another likely consequence of this process will be the obstruction of runoff from the surrounding mountains. To combat this, the Corps plans to grade the edges of the lakebed to allow unimpeded flow from the watershed. Accumulating precipitation, alluvial deposits from the mountains, and the position of Lake Temp at the low point of the basin should allow the lake to maintain its water levels, despite the permeability of the Imhoff Aquifer below.

The Secretary of the Army, acting through the Corps, issued an individual permit to the DOD to discharge spent munitions byproduct into Lake Temp, under the alleged authority of §

404 of the CWA. The EPA, as Administrator of the CWA, consequently undertook an analysis to determine whether it should veto the § 404 permit. The OMB then intervened, and directed the EPA not to exercise its administrative authority to veto the permit.

SUMMARY OF ARGUMENT

The State of New Union has standing to file suit in this matter under two common law doctrines: prudential standing and *parens patriae*. The State of New Union has standing under the doctrine of prudential standing because it satisfies the "zone of interests" test established *Lujan v. National Wildlife Federation*, 497 U.S. 871, 883 (1990). The discharge of toxic slurry into Lake Temp authorized by the Corps is within purpose of the CWA and granting the State New Union standing in this matter would protect the rights and policies underlying the CWA. The State of New Union also has standing under the *parens patriae* doctrine. *Parens patriae* allows the State of New Union to file suit on behalf of its citizens and its own quasi-sovereign right. The quasi-sovereign right threaten by the discharge of toxic slurry into Lake Temp is the State of New Union's duty to protect integrity the groundwater within its borders under the Public Trust Doctrine.

Lake Temps is a navigable water under the CWA because it is a traditionally navigable water and it is a navigable-in-fact water, which satisfies Justice Kennedy's navigable water test in *Rapanos v. United States*, 547 U.S. 715 (2006). Lake Temp is a traditionally navigable water because it has been used by interstate travelers and is a navigable-in-fact water due to its recreational and economic value to hunters and other citizens that use it. These two factors combined support the finding of Lake Temp as a navigable water under the CWA.

The express congressional objectives of preservation and environmental protectionism are the framework in which in all actions under the CWA should be analyzed.

Under this framework the court should find that the Corps does not have jurisdiction to issue a §404 permit to the DOD because the discharge by the DOD does not fit within the Corps jurisdiction granted under the CWA. The Corps current revised interpretation of "fill material" under §404 is an unreasonable interpretation an and impermissible construction of the statute in light of the CWA's overarching goal of reducing pollution of United States waters. Less judicial deference should be afforded to the agency's interpretation due to inconsistent interpretations through time.

If regulation is found to be reasonable, then under the current interpretation of the regulation the Corps abused its discretion when it failed to follow its own regulation in giving a permit to DOD because the discharge at issue does not legitimately fit within the definition and interpretation of "fill material" under § 404 of the CWA. Since the discharge by the DOD does not constitute fill material, the Corps does not have jurisdiction to issue a §404 permit to the DOD.

In addition, the intervention of the OMB constituted an unlawful assumption of the administrative role of the EPA, and thus a violation of the CWA. This violation effectively prevented a proper Chevron statutory interpretation analysis. Furthermore, the EPA blatantly disregarded its administrative responsibility to veto the §404 permit under the CWA, a violation that constituted final action subject to judicial review.

STANDARD OF REVIEW

When a district court upholds on summary judgment an agency's conclusions, an Appellate Court reviews the district court's grant of summary judgment *de novo*, while reviewing the agency's decision for abuse of discretion. *Molina-Crespo v. U.S. Merit Systems Protection Bd.* 547 F.3d 651, 663(6th Cir. 2008). Furthermore, a district court's interpretation of

the CWA and its implementing regulations is review *de novo*. *Northwest Environmental Defense Center v. Brown*, 640 F.3d 1063, 1069 (9 Cir. 2011).

ARGUMENT

I. 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 INTERESTS IN THE GROUNDWATER IN THE STATE.

In order for the judiciary to effectuate justice and remedy a case or controversy, a party must have standing. Standing is the common law doctrine setting out the requirements one must have to bring a suit before a court in the United States. Standing requirements ensure that "a matter before the federal courts is a proper case or controversy under Article III" and that the "Federal Judiciary respects 'the proper-and properly limited-role of the courts in a democratic society." *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 341 (2006) (quoting *Allen v. Wright*, 468 U.S. 737, 750 (1984)); *See Marbury v. Madison*, 5 U.S. 137 (1803); U.S.C. Const. Art. III § 2, cl. 1.

A federal court must dismiss a case if the plaintiff fails to meet the constitutional requirements of Article III. *See DaimlerChrysler*, 547 U.S. at 340-41; *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC)*, Inc., 528 U.S. 167,180 (2000)(The Court has "an obligation to assure ourselves that [petitioner] had Article III standing at the outset of the litigation."). To establish Article III standing courts require a plaintiff to show that they have suffered "an injury in fact" that is concrete and particularized, actual or imminent, and not conjectural or hypothetical; the injury is fairly traceable to the challenged action of the defendant; and it is likely and not merely speculative that the injury will be redressed by a favorable decision. *Friends of the Earth*, 528 U.S. at 180-81 (citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555,

560-61 (1992)). A plaintiff has the burden of establishing all three prongs of this common law standing test. *See Lujan,* 504 U.S. at 561.

However, the Supreme Court has recognized two different avenues in which a plaintiff can have standing aside from the strict adherence to the standing test established by *Friends of the Earth* and *Lujan*, which are prudential standing and *parens patriae*. Prudential standing is a "judicially self-imposed limits on the exercise of federal jurisdiction," that allows the court to determine standing within the purview or "zone of interest" of a statute or constitutional right as they fit in the constitutional "case" or "controversy" requirement. *Bennett v. Spear*, 520 U.S. 154, 162 (1997)(quoting *Allen v. Wright*, 468 U.S. 737, 751 (1984)). Whereas, *parens patriae* allows for a state to file suit in its sovereign capacity or as protector of a "quasi-sovereign" interest on behalf of its citizens. *See Mass v. E.P.A.*, 549 U.S. 497 (2007). The State of New Union meets Article III standing requirements under both prudential standing and *parens patriae* common law doctrines, and should therefore be granted standing in this matter.

A. The State of New Union satisfies the Article III standing requirements under the common law doctrine of prudential standing.

The doctrine of prudential standing reaffirms the judiciary's power to determine a party's standing in relation to judicial self-government and the interests of a particular statute or constitutional right, in addition to Article III's "case" or "controversy" requirement. *See Elk Grove Unified School Dist. v. Newdow*, 542 U.S. 1(2004). Prudential standing, consists of a set of judge–made rules forming an integral part of judicial self–government. *Joint Stock Society v. UDV North America, Inc*., 266 F.3d 164 (3d Cir. 2001). Inquiry as to standing involves both the constitutional limitations on federal court jurisdiction and prudential limitations on its exercise. *Warth v. Seldin*, 422 U.S. 490 (1975). In addition to these constitutional requirements, the courts have imposed a "prudential" requirement that the plaintiff show the injury he or she has suffered

falls within the "zone of interests" that the statute was designed to protect. *See Lujan*, 497 U.S. 871, 883 (1990). The purpose of the "zone of interests" test is "to exclude those plaintiffs whose suits are more likely to frustrate than to further statutory objectives." *Clarke v. Securities Indus. Ass'n*, 479 U.S. 388, 397 (1987). Under the "zone of interests" test standing is barred only if the "interests are so marginally related to or inconsistent with the purposes implicit in the statute that it cannot reasonably be assumed that Congress intended to permit the suit." *Id*. at 399. The test is satisfied if the plaintiff establishes that its interests "share a 'plausible relationship' to the policies underlying" the statute. *Ocean Advocates v. Corps of Engineers*, 361 F.3d 1108, 1121 (9th Cir. 2004); *See generally, Association of Data Processing Service Orgs. v. Camp*, 397 U.S. 150, 153 (1969).

The prudential standing doctrine is satisfied here because violations of the APA and violations of the CWA relate to the chemical integrity of Lake Temp and the Imnoff Aquifer. If the Corps permit to the DOD under §404 of the CWA is allowed to stand, New Union's groundwater in the Imhoff Aquifer and the interests of New Union citizens and hunters that use Lake Temp and the shores around it will sustain an injury-in-fact that is fairly traceable to the DOD's discharge and the permit granted by the Corps for such a discharge. The State of New Union presented evidence that contaminated water from the permitted activity will enter the Imhoff Aquifer. The District Court found this evidence to be circumstantial and unpersuasive. However, the District Court erred in its interpretation of the law regarding the weight and sufficiency of evidence to substantiate Article III standing. The District Court used the heightened evidentiary standard of summary judgment on the merits to decide whether or not the State of New Union had enough evidence to support standing on its claim. *See* Fed. Rule Civ. Proc. 56(e). During the pleading stage of litigation when standing is at issue, the plaintiff need

only give "general factual allegations of injury resulting from the defendant's conduct" because it is presumed that "general allegations embrace those specific facts that are necessary to support the claim." *Bennett,* 520 U.S. at 168 (quoting *Defenders of Wildlife, supra,* at 561, (quoting *Lujan,* 497 U.S. at 889).

Summary judgment on the merits of the claims for violations of the CWA or the APA will determine if that presumption is true, but standing should not be entered into the evaluation of the evidence. Therefore, there was enough evidence to support injury-in-fact related to New Union's groundwater for the purposes of standing.

Further, injury-in fact is not limited to the potential groundwater contamination that may come from the DOD's facility. The violations of APA that are at issue are directly linked to violations of the CWA and have a plausible relationship to the intent of Congress when it codified the purpose of the CWA as, "the protection and propagation of fish, shellfish, and wildlife and provides for recreation in and on the water." 33 U.S.C. § 1251. Allowing the Corps permit to stand will cause the release of toxic slurry into Lake Temp contrary to the regulatory scheme and purpose of the CWA. The State of New Union's interest in preventing the unlawful discharge of toxic slurry, violations of the APA, and groundwater contamination satisfies the "zone of interests" test of prudential standing because it concurs with CWA's legislated purpose.

The other elements of standing, causation and redressibility are also satisfied by the State of New Union. Both the potential contamination of New Union's groundwater and the violations of the CWA and APA are fairly traceable to the Corps permit granted to the DOD because if the Corps denied the permit application the DOD would not have the permission to discharge pollutants into Lake Temp. If this Court enjoins the Corps from granting the DOD a permit under CWA §404 the injury-in-fact to the State of New Union can be prevented and redressed.

Therefore, this Court should find that the State of New Union has standing under the common law doctrine of prudential standing.

B. The State of New Union satisfies the Article III standing requirements under the common law doctrine of *parens patriae*.

The doctrine of *parens patriae* is appropriate in the present case because the State of New Union is asserting injuries against the United States that are procedural. The doctrine of standing for a State is relaxed when it is filing suit in its capacity as a quasi-sovereign to protect its interests and those of its citizenry from threats that endanger the public's health or welfare. Environmental contamination or threats, interstate water rights, and the general economy of the state are covered within the doctrine due to the State's interest independent of and behind the titles of its citizens, in all the earth and air within its domain." *Georgia v. Tennessee Copper Co.*, 206 U.S. 230, 237 (1907).

In *Mass v. EPA*, the Supreme Court upheld the doctrine of *parens patriae* for States because they are "entitled to special solicitude in our standing analysis." 549 U.S. at 518–20; *see also Conn. v. Am. Elec. Power Co. Inc.*, 582 F.3d 309, 337–38 (2d Cir.2009) , *rev'd on other grounds and remanded*, 131 S.Ct. 2526 (2011).

In *Alfred L. Snapp & Son, Inc. v. Puerto Rico,* the Supreme Court held that the State must first assert "an injury to a 'quasi-sovereign' interest, an interest apart from the interests of particular private parties. 458 U.S. 592 (1982). Second, the State must allege injury to a 'substantial segment' of its population." *Id*. The doctrine of *parens patriae* originated in English common law, and was first recognized in American law in a series of United States Supreme Court cases at the beginning of the twentieth century. *See, e.g., Missouri v. Illinois & Chicago District,* 180 U.S. 208 (1901); s*ee Tennessee Copper*; *Kansas v. Colorado,* 206 U.S. 46 (1907);

New York v. New Jersey, 256 U.S. 296 (1921); *Wyoming v. Colorado*, 259 U.S. 419 (1922). Many of these cases concerned disputes regarding water and the Supreme Court consistently held that States have a right to appear as *parens patriae* regardless of the rights of individual and private users of the water. *See People of the State of California v. United States*, 180 F.2d 596, 601 (9th Cir. 1950) (collecting United States Supreme Court cases discussing *parens patriae* standing in cases involving water), *cert. denied*, 340 U.S. 826 (1950). While acknowledging that the complained of conduct may affect private citizens or privately owned land, these cases also provide the States with wide latitude to protect their natural resources because "the interests of the State are indissolubly linked with the rights of the [private] appropriators" or users. *Wyoming*, 259 U.S. at 468.

Parens patriae does not provide a cause of action, but may provide a state with standing to bring suit to protect a broader range of natural resources despite state ownership of such resources. *New Mexico v. General Elec. Co.*, 467 F.3d 1223, 1243 (10th Cir.2006). Lake Temp is not owned or regulated by the State of New Union but its citizens have an interest in its use. Lake Temp has the ability to affect the groundwater that is within the State of New Union's domain. Under the public trust doctrine, a state has a duty to use and protect lands and other natural resources for the benefit of the public because the resources are held in trust by the state for the citizens of such state. *See Illinois Central Railroad v. Illinois*, 146 U.S. 387 (1892). The public trust doctrine is not limited to surface waters and the uses that are protected are broad. *National Audubond Society v. Superior Court*, 658 P.2d 709 (Cal. 1983); *Marks v. Whitney*, 491 P.2d 374 (Cal. 1971). The public trust doctrine has been used to protect use rights for non-navigable waters. *See generally, Montana Coalition for Stream Access v. Curran*, 682 P.2d 163 (Mont. 1984).

The threatened quasi-sovereign interest of the State of New Union is the ability an effective trustee of it's the natural resources under the public trust doctrine and its ability to safeguard the health and welfare of its citizens that use Lake Temp or the Imhoff Aquifer. The State of New Union asserts that it must act in the citizens' interest as the trustee of the statewide water supply. A New Union statute regulates use of groundwater and requires a permit from the New Union Department of Natural Resources (DNR). The statute requires DNR to determine that permitted withdrawals will not deplete groundwater over a period of twenty years, which safeguards the health of the groundwater. Under the statute, no one has rights in groundwater until the DNR issues a withdrawal permit. The District Court erroneously found that the State of New Union needed its citizens to have ownership of water rights in order for it to have standing on their behalf as *parens patriae*.

The State of New Union, through its DNR statute, as trustee of this resource for the public benefit *should* have the authority and responsibility to provide careful stewardship over *all the waters* lying within its boundaries. As trustee, the State must preserve the State's waters for the trust's beneficiaries, and the State can bring suit to protect the waters over which it is trustee from contamination. *See Illinois Central Railroad,* 146 U.S. at 455–56 (1892) ; *State of Maryland, Dept. of N. Res. v. Amerada Hess Corp.,* 350 F.Supp. 1060, 1067 (D.Md.1972). As mentioned above the evidentiary standard for establishing injury-in-fact, causation, redressibility is one of "general factual allegations of injury resulting from the defendant's conduct" *Bennett v. Spear*, 520 U.S. at 168. Standing for the State of New Union can be substantiated on the basis that it is the regulator and trustee of its portion of the Imhoff Aquifer and the threat of contamination through the authority given to the DOD by the Corp interferes with the States duty to act in the citizens' interest as the trustee of the statewide water supply, regardless of Dale

Bompers use or lack of use of the groundwater. Therefore, this court should find that State of New Union satisfies the standing requirements under the common law doctrine of *parens patriae*.

II. THE EPA AND THE CORPS OF ENGINEERS HAVE JURISDICTION TO ISSUE A PERMIT UNDER THE CLEAN WATER ACT, 33 U.S.C. § 1344, BECAUSE LAKE TEMP IS A NAVIGABLE WATER UNDER SECTIONS 301(A), 404(A), AND 502(7), 33 U.S.C. §§ 1311(A), 1344(A), 1362(7).

In 1972, Congress enacted the Clean Water Act to "restore and maintain the chemical, physical and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a). However, Congress also chose to "recognize, preserve, and protect the primary responsibilities of States ... to plan the development and use ... of land and water resources." *Id.* at § 1251(b); *Solid Waste Agency of N. Cook County v. U.S. Army Corps of Eng'rs*, 531 U.S. 159, 174 (2001) The power of the CWA depends upon its ability to govern "navigable waters." The CWA defines "navigable waters" as "the waters of the United States, including the territorial seas." 33 U.S.C. § 1362(7). The term "waters of the United States" has been broadly defined by the Corps to include "interstate waters," "other waters such as *intrastate lakes*, rivers, streams (including *intermittent* streams), mudflats, sandflats [and] wetlands ... the use, degradation or destruction of which could affect interstate commerce ...," as well as "tributaries" of such waters and any adjacent wetlands. *Id*.; 33 C.F.R. § 328.3(a) (emphasis added). S*ee also Rapanos*, 547 U.S. 715, 724-29 (2006). The CWA prohibits "the discharge of any pollutant by any person." 33 U.S.C. § 1311(a). The phrase "discharge of any pollutant" is defined broadly to include "any addition of any pollutant to navigable waters from any point source." 33 U.S.C. § 1362(12)(A).

In *Rapanos*, the Supreme Court examined the geographical scope of the CWA and therefore the jurisdiction of the Corps and the EPA. The Court looked at wetlands linked by a hydrological connection to "navigable waters" spanning a large distance and a wetland separated

by a berm from a drainage ditch that eventually drains into a navigable water were subject to §404 of the CWA. *Rapanos,* 547 U.S. at 722; *Carabell v. U.S. Army Corps of Engineers,* 391 F.3d 704, 705 (6th Cir. 2004) *vacated and remanded sub nom. Rapanos v. United States,* 547 U.S. 715 (2006). Justice Antonin Scalia (joined by Justice Clarence Thomas, Chief Justice John G. Roberts, and Justice Samuel A. Alito Jr.) authored the plurality opinion and argued for a plain language interpretation of the CWA. The plurality held that the CWA applies only if "the adjacent channel contains a 'wate[r] of the United States,' (i.e., a relatively permanent body of water connected to traditional interstate navigable waters)," and "that the wetland has a continuous surface connection with that water, making it difficult to determine where the 'water' ends and the 'wetland' begins." *Rapanos,* 547 U.S. at 742. Justice Scalia relied on basic canons of construction and the "natural definition" of the term "waters." *Id*. at 730-32. Justice Scalia used "commonsense understanding," and "plain language" meanings in determining what "waters of the United States" meant. *Id.* In doing so the Court narrowed the meaning the Corps attempted to give to "waters of the United States," in *Solid Waste Agency of N. Cook County v. U.S. Army Corps of Eng'rs,* or *SWANCC. Id.* Justice Kennedy authored a concurring opinion that established the "significant nexus" test which states that waters are jurisdictional only to the degree they have a significant nexus with navigable-in-fact water. This nexus is present when the waters, "alone or in combination with similarly situated lands in the region, significantly affect the chemical, physical, and biological integrity" of the navigable water. *Id.* at 780-781. A lake can be found to be navigable under the Kennedy Opinion if it satisfies the navigability in fact test along with the significant nexus test. The navigability-in-fact test was developed before the current expansive reading of the commerce clause but still remains useful in defermining the nature of water body as navigable on non-navigable under the CWA. Navigability-in-fact is

important because it helps establish the basis for Corps and the EPA's jurisdiction in this matter.

Lake Temp qualifies as navigable water because there is a strong history of its use that would make it a traditionally navigable or navigable-in-fact water body or under *Rapanos*. The *Rapanos* decision protects intermittent water bodies so long as they are relatively permanent and does not exclude seasonal or occasionally dry water bodies. *United States of America v. Moses*, 496 F.3d 984, 990 (9th Cir. 2007), reh'g en banc denied (2007) (citing *Rapanos,* 126 S. Ct. at 2221 n.5)**.** Lake Temp has been established as a part of the highway of interstate commerce for interstate hunters hunted from the shores of the lake for over one hundred years. The hunters have used boats and canoes to row or paddle across the lake to hunt from the shore opposite the highway. The District Court has correctly found that Lake Temp is similar to water bodies that have traditionally been held navigable because of use by interstate travelers, but incorrectly finds that Lake Temp is not navigable because it is an intermittent lake. The Corps did not need to argue for Lake Temps navigability based on the migratory bird rule because it satisfies the interstate commerce requirement, "the use, degradation or destruction of which could affect interstate or foreign commerce." § 328.3(a)(3). *See Solid Waste Agency of N. Cook County,* 531 U.S. at 170-174. Hunters and other citizens would be negatively impacted due to pollution of Lake Temps from the discharge of toxic slurry and thus this gives the EPA and the COE jurisdiction to regulate Lake Temp.

III. ACTIONS WITHIN THE SCOPE OF THE CLEAN WATER ACT SHOULD BE ANALYZED WITH STEADFAST CONSIDERATION OF THE EXPRESS CONGRESSIONAL INTENT TO UPHOLD COMPREHENSIVE ENVIRONMENTAL PROTECTIONISM AND PRESERVATION.

The Clean Water Act was passed in October of 1972 in a concerted effort by the 92nd Congress to "restore and maintain the chemical, physical and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a) (2011). Congress sought to achieve a number of lofty goals with

respect to preservation and environmental consciousness, including the eventual elimination of pollutant discharge. § 1251(a)(1). The legislation also expressed the intent to prohibit toxic discharge, provide financial assistance, encourage research to develop necessary technologies and expeditiously create essential control programs. § 1251(a). The significance of these objectives has been continuously magnified and upheld by judiciary bodies across the United States.

The CWA has been held to supersede previously recognized common law causes of action, and interpreted as the "establishment of an all-encompassing program of water pollution and regulation…supervised by an expert administrative agency." *See City of Milwaukee v. Illinois and Michigan*, 451 U.S. 304 (1981) (emphasizing the comprehensive nature that Congress intended the legislation to sustain), *see also Quivira Mining Co. v. U.S.E.P.A.*, 765 F.2d 126, 129 (1985) (noting recognized Congressional intent for the CWA to cover, as much as possible, all waters of the United States). In this vein, "the guiding star is the intent of Congress to improve and preserve the quality of the nation's waters and all issues must be viewed in light of such intent." *Kennecott Copper Corp. v. E.P.A.*, 612 F.2d 1232 (10th Cir. 1979). The CWA charges the Environmental Protection Agency with regulating to the "*fullest extent possible* those sources emitting pollution into rivers, streams and lakes." *U. S. v. Earth Sciences, Inc.*, 599 F.2d 368, 373 (10th Cir. 1979) (emphasis added). Complete and total elimination of pollutant discharge into the Nation's waters has been recognized as the ultimate objective of the Clean Water Act on numerous occasions. *See Reynolds Metals Co. v. U.S.E.P.A.*, 760 F.2d 549, 558 (4th Cir. 1985) (noting congressional insistence to eliminate water pollution); *see also Weyerhauser Co. v. Costle*, 590 F.2d 1011, 1025 (D.C. Cir. 1978) (recognizing congressional intent to rely on EPA ingenuity to achieve the lofty objective of complete pollutant discharge

elimination); *see also Am. Paper Inst. v. Train*, 543 F.2d 328, 333 (D.C. Cir. 1976) (recognizing the goal of complete elimination as applied to the EPA comprehensive scheme of water pollution regulation).

As noted, courts at all levels of the federal judiciary have continuously recognized the necessity to consider the express objective of Congress to preserve the waters of the United States. Any analysis undertaken with respect to the CWA must be employed with this purpose in mind, and accordingly, these objectives must be given significant weight.

IV. THE CORPS OF ENGINEERS DOES NOT HAVE JURISDICTION TO ISSUE A SECTION 404 PERMIT TO THE DEPARTMENT OF DEFENSE, BECAUSE THE DISCHARGE BY THE DEPARTMENT OF DEFENSE DOES NOT FIT WITHIN THE DEFINITION OF "FILL MATERIAL" AND THE CORPS ABUSED ITS DISCRETION IN DECIDING SO, IN VIOLATION OF THE APA, 5 U.S.C. §706(2) (A).

When reviewing a particular agency action challenged under §706(2) of the APA, "the court is first required to decide whether the agency acted within the scope of its authority." *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 415 (1971). In determining whether the agency acted within the scope of its authority, the court must first inquire as to whether "the intent of Congress is clear" as to "the precise question at issue." *Chevron U.S.A. Inc. v. Naturual Resources Defense Council, Inc.*, 467 U.S. 837, 842 (1984). If Congress's intent is clear, "that is the end of the matter" *Id*. However, "if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute." *Id*. at 843. This analytical approach applies not only when a statute or regulation is directly challenged but also when a particular agency action is challenged, as is the case here. *See Kentuckians for Commonwealth Inc. v. Rivenburgh*, 317 F.3d 425, 439 (2003).

When interpreting an agency regulation, a court should defer to the agency's interpretation of the regulation "unless it is plainly erroneous or inconsistent with the regulation." *Auer v. Robbins*, 519 U.S. 452, 461(1997). However, "deference is warranted only when the language of the regulation is ambiguous." *Christensen v. Harris County*, 529 U.S. 576, 588 (2000). If the language of the regulation is clear, then "to defer to the agency's position would be to permit the agency, under the guise of interpreting a regulation, to create a *de facto* new regulation." *Id.*

If it is determined that the language of the regulation is unambiguous a reviewing court must determine whether the agency's action is consistent with the regulation." *Kentuckians for Commonwealth Inc,* 317 F.3d at 439. The reviewing court, in undertaking this determination, does not have much leeway, because the agency's interpretation is "controlling unless plainly erroneous or inconsistent with the regulation." *Auer*, 519 U.S.at 117.

Under §404 of the CWA "fill material" is not defined. The statute is silent on the definition of "fill material," thus giving rise to ambiguity, particularly when a broad definition of "fill material" is employed. *Kentuckians for Commonwealth Inc*, 317 F.3d at 443. It is evident that Congress has not clearly spoken to or defined the meaning of "fill material" and thus the courts are left to determine whether the Corps' regulation is based on a permissible construction of §404 within the contours of the CWA. If the court is satisfied that the Corps' regulation is based on a permissible construction of §404, the court then must determine whether the Corps interpretation of the regulation is plainly erroneous or inconsistent with the regulation when issuing a §404 permit.

A. <u>The Corps revised interpretation of "fill material" is an unreasonable interpretation of §404 and thus is an impermissible construction of §404.</u>

The definition of "fill material" under §404 has undergone a number of changes. These changes have dramatically departed from the Corps' previous definition of fill material, and are unreasonable, unsupported by reasoned analysis, and have undermined the CWA's overarching goal of pollution reduction.

Although, the court in *Chevron* has stated, "the fact that the agency has from time to time changed its interpretation…does not… lead us to conclude that no deference should be accorded the agency's interpretation of the statute." *Chevron U.S.A., Inc*., 467 U.S. at 863. However, the court in later cases indicated that judicial deference is less compelling with respect to agency positions that are inconsistent with previously held views. *Pauley v. BethEnergy Mines, Inc.*, 501 U.S. 680, 698 (1991); *INS v. Cardoza-Fonseca*, 480 U.S. 421, 446 n.30 (1987). The Court in *Good Samaritan Hospital v. Shalala,* furthered this line of judicial deference to inconsistent interpretations, however the Court still deferred to the altered agency interpretation because the altered interpretation closely aligned with "the design of the statute as a whole and … its object and policy." 508 U.S. 402, 418(1993). In the present case the opposite can be found, the altered interpretation does not closely aligned with the design of the CWA or its object and policy. The court should therefore give less deference to the Corps interpretation of §404 and find that such an interpretation was unreasonable and is an impermissible construction of §404 under the CWA.

Before the joint resolution of 2002, the Corps had a differing regulatory definition for what constituted "fill material." The Corps' defined the term as "any material used for the primary purpose of replacing an aquatic area with dry land or of changing the bottom elevation of a water body. The term does not include any pollutant discharged into the water primarily to dispose of waste, as that activity is regulated under §402 of the CWA." 42 Fed. Reg. 37, 130 (July 19, 1977). The Corps definition centered on evaluating what the *primary purpose* of the

discharge would be, specifically excluding from the definition material that was discharged primarily to dispose of waste. *See Id.* After the joint resolution of 2002, the Corp substantial changed its definition and adopted the EPA's definition. Under this definition , "fill material means 'any pollutant' which replaces portions of the 'waters of the United States' with dry land or which changes the bottom elevation of a water body for any purpose. 40 C.F.R. §232.2. This definition utilized and *effect based test* for determining what constituted fill material.

The joint definition of fill material fails to follow the object and policy of the CWA. By classifying waste disposal as fill material, the agencies have failed to effectuate the CWA's core purpose, which was pollution reduction. For Congress "the use of any river, lake, stream or ocean as a waste treatment system, is unacceptable." S.Rep. No. 92-414, p. 7 (1971), *reprinted in* 1971 U.S.C.C.A.N. 3668, 3674.

Congress intended the definition of fill material to provide the dividing line between §404 and §402 programs. *See* 65 Fed. Reg. 21,292,21,293 (Apr. 20, 2000). Thus a change in the scope of what constitutes fill material changes whether some activities are subject to a §404 permit of a §402 permit. *See Id*. Previously, "Fill material" under the 404 program was not to encroach upon pollutants that could potentially be covered by §402's National Pollutant Discharge Elimination System ("NPDES") program, but rather constituted an exception. *E.g.* 42 Fed. Reg. 37,122,37,130 (July 19, 1977). The NPDES program explicitly limited the scope of the §404 permitting authority. *See* 65 Fed. Reg.21, 292, 21, 300 (Apr. 20, 2000). Now, however, fill material defines the extent of the NPDES program. *See* 67 Fed. Reg. 31,129, 31,134 (May 9, 2002). Therefore, the joint resolution definition improperly allows certain waste traditional regulated under the NPDES program to be discharged as "fill material." Implementation of the joint rule removed important language from the Corps's prior definition of "fill material." The

Corps previous definition was very important because it protected United States waters from pure waste material being disposed of as "fill material."

Under the joint definition, the Corps is now left with discretion to interpret the term "fill" broadly and to authorize waste discharges, so long as the effect of the discharge is to convert waters of the U.S. to dry or change the bottom elevation, irrespective of the impact on water quality. Thus "a discharge of a pollutant, otherwise prohibited by firm statutory command, becomes lawful if it contains sufficient solid matter to raise the bottom of a water body…. Whole categories of regulated industries can thereby gain immunity from a variety of pollution-control standards… Providing an escape hatch for polluters whose discharges contain solid matter… is particularly perverse. *Couer Alaska, Inc. v. Southeast Alaska Conservation Council*, 557 U.S. 261 (2009) (J. Ginsberg dissenting opinion). The present state of fill material is vulnerable. Companies can apply to the Corps to try and discharge chemicals that should be regulated by the EPA, as is the issue in the present case. Entities that would normally fall under the permitting program of §402 may be now strategically thinking of ways to qualify their discharge for less stringent 404 permits from the Corps. The current state of fill material permitting is treading on a very slippery slope and is undermining the vary purpose Congress enacted the CWA.

Therefore, this court should find that the joint definition is unreasonable and impermissible in light of the purpose of the CWA. The court should given less judicial deference to the agency due to the inconsistency of which the agencies have interpreted §404 and find that the altered interpretation of this section is unreasonable because it does not closely aligned with the object and policy of the CWA. Further the court should be aware that the joint definition of fill material threatens to return the nation to the days when polluters deliberately used U.S. waters as private dumping ground.

B. The Corps' decision to authorize a permit for the discharge of toxic slurry in to Lake Temp by the Department of Defense is contrary to its implementing regulations, and therefore an abuse of discretion, in violation of the APA, 5 U.S.C. §706(2) (A).

If the court finds that the Corps interpretation of §404 is reasonable and supported by reasoned analysis, the court should next look to whether the Corps issuance of a §404 permit to DOD in the present case is an unlawful interpretation of the fill regulation. This court should examine the Corps decision to grant DOD a §404 permit to discharge toxic slurry under an abuse of discretion standard. An abuse of discretion is shown if the party establishes that the agency decision under review was made without rational explanation, inexplicably departed from established authorities, or rested on an impermissible basis. *Li Cheung v. Esperdy,* 377 F.2d 819,820 (2d Cir. 1967).

Further, an agency abuses its discretion when it fails to follow its own regulations. *See Carter v. Sullivan,* 909 F.2d 1201, 1202 (8th Cir. 1990). An agency's interpretation of its regulations, however, is accorded substantial deference and is controlling "unless it is plainly erroneous or inconsistent with the regulation." *Bowles v. Seminole Rock Co.,* 325 U.S. 410, 414 (1945).

Under the regulation at issue, the definition of "fill material" is defined as any material that has the effect of replacing any portion of a water of the United States with dry land, or changing the bottom elevation of any portion of a water of the United States. 33 C.F.R. §323.2. It goes on to give examples of fill material which include: "rock, sand, soil, clay, plastics, construction debris, wood chips, overburden from mining or other excavation activities." *Id.* The agencies further modified the "placement of coal mining overburden" to read "placement of overburden, slurry, or tailing or similar mining-related materials." 67 Fed. Reg. 31,135. The

reason for such a modification was to clarify that any mining-related material that has the effect of fill when discharged will be regulated as "fill material." *Id.* The agencies believed that the additional mining related example would address the confusion reflected in the comments. *Id.*

These examples were meant to be illustrative and to clarify the rule. 67 Fed. Reg. 31,132. The agencies believed these materials are similar to "traditional fill" material used for purposes of creating land for development. *Id.* at 31,133. Although these example are not be viewed as an exclusive list of materials to be defined as "fill", the agencies were made aware that the rule was not meant to open up waters of the U.S. to be filled for any waste disposal purpose. *Id.* Further, the agencies recognized "that some discharges (such as suspended or settleable solids) can have the associated effect, over time, of raising the bottom elevation of water due to settling of waterborne pollutants, [the agencies] do not consider such pollutants to be 'fill material', and nothing in today's rule changes that view." *Id.* at 31,135.

Looking to the present case, the DOD wishes to discharge "slurry" of liquids, semi-solids, granular contents, chemicals, and metals into Lake Temp through a permit issued by the Corps. Although the DOD is labeling this mixture as "slurry", the Corps view that this label is consistent with the slurry listed as an example in the regulation is an abuse of its discretion. The slurry at issue contains no substances listed as examples of fill material and further it contains no substances that mining overburden would contain. (e.g. rock, sand, and earth). In essence this "slurry" is being disposed of not to have the effect of fill but as the disposal of waste. Although the agencies have determined that just because a material is disposed of for the purpose of waste disposal, it does not justify excluding it categorically from the definition of fill. *Id. at* 31,133. However, the reason for such a determination by the agencies is because some waste (e.g. mining overburden) consists of material such as soil, rock and earth that is similar to "traditional" fill

material used for the purposes of creating fast land for development. *Id.* The "slurry" at issue here has no similarities to "traditional fill" material. If the Corps were to allow interpret the discharge of such "slurry" it would open the door for numerous other industrial discharges.

The District Court in the present case relies on *Couer Alaska* in its ruling that the slurry at issue fit within the definition of "fill material." However, the Court in *Couer Alaska* did not directly address if "slurry" was to be interpreted broadly to mean any mixture labeled as such. *See* 557 U.S. 261(2009). The parties conceded that the mining slurry present in that case met the definition of fill material. *Id* at 2468. The court agree that the parties concession on this point was appropriate because the mining slurry fell within the central understanding of the term "fill", as shown by the examples given by the regulation. *Id.* Even though Southeast Alaska Conservation Council argued in its brief that Couer's interpretation of the regulatory scheme permits the discharge of other solids that are restricted, "for example, 'feces and uneaten food,' 'liter,' and waste produced in 'battery manufacturing.'" *Id.* (quoting Brief for Respondents Se. Alaska Conservation Council, at 44-45). The court failed to address this slippery slope argument because it concluded that those extreme instances were not presented to it at that time. *Id.* However, the court in the present case is faced with such an extreme instance of toxic discharge, and therefore should address the issue of whether the Corps interpretation of the DOD's "slurry" is permissible under the regulation.

Ultimately this court should find that the Corps issuance of a §404 permit was an abuse of discretion, because the Corps failed to follow its own regulation. This court should not afford the Corps substantial deference in issuing such a permit, because the Corps deference in this situation was inconsistent with the regulation and the interpretation of that regulation agreed upon by both the EPA and the Corps.

V. THE DECISION OF THE ENVIRONMENTAL PROTECTION AGENCY NOT TO VETO THE §404 PERMIT ISSUED BY THE ARMY CORPS OF ENGINEERS IS SUBJECT TO JUDICIAL REVIEW.

The Corps asserts that the alleged inaction of the EPA in not vetoing the §404 permit issued by the Corps is exempt from judicial review because the authority to do so is wholly discretionary. Though this premise may be true in certain instances, it is not applicable here.

In 2007, the Mattaponi Indian tribe and a number of environmental organizations brought suit against the Corps and the EPA for alleged violations of the CWA. *See Alliance To Save The Mattaponi v. U.S. Army Corps of Engineers*, 515 F.Supp.2d 1 (D.D.C. 2007). The suit dealt directly with a §404 permit issued by the Corps to construct a 1526-acre reservoir and the failure of the EPA to veto that permit. *Id*. The District Court refused to recognize a cause of action under the citizen suit provision of the CWA, but subsequently made an important distinction with respect to agency inaction. *Id*.

Initially, the Court recognized that 5 U.S.C. § 706(a)(2) bars judicial review of agency action when precluded either statutorily or when "agency action is committed to agency discretion by law." However, it also noted that this exception serves to bar suit when the statute is "drawn in such broad terms that in a given case there is no law to apply," which leaves the Court with "no meaningful standard against which to judge the agency's exercise of discretion." *Alliance To Save The Mattaponi*, 515 F.Supp.2d at 7-8 (citing *Citizens to Preserve Overton Park*, 401 U.S. at 410 (1971) and *Heckler v. Chaney*, 470 U.S. 821 (1985)). However, §404 of the CWA provides such a standard in specifying that the EPA may veto a permit "whenever it determines that the discharge will have an unacceptable adverse affect." *Alliance To Save The Mattaponi*, 515 F.Supp. at 8 (quoting the Clean Water Act, 33 U.S.C. § 1344(c)). In recognizing that the *Chaney* opinion has been construed narrowly, the Court found that the EPA's failure to

veto a §404 permit is an instance in which "agency inaction is final action having the same impact as agency action." *Id* at 8 (citing appropriate circumstances for APA review of inaction from *Sierra Club v. Thomas*, 828 F.2d 783 (D.C. Cir.1987)).

The facts in the present case are entirely analogous. The DOD was issued a § 404 permit by the Corps, based on an interpretation of the "slurry" material to be discharged. As noted above, § 1344(c) provides that the EPA can veto such a permit "whenever it determines that the discharge will have an unacceptable adverse affect." Consequently, any court engaging in the process of judicial review is provided with a specific standard by which it may interpret EPA action or lack thereof. The necessary analysis undertaken in determining the nature of the discharge as either fill material or pollution provides another measuring stick by which the judiciary may evaluate the decision of the EPA. Furthermore, as *Alliance To Save The Mattaponi* recognized in the realm of § 404 permits, the absence of action by the EPA has the same effect as final, affirmative action. Therefore, the decision of the EPA is subject to judicial review.

VI. THE OFFICE OF MANAGEMENT AND BUDGET VIOLATED THE CLEAN WATER ACT IN DIRECTING THE ENVIRONMENTAL PROTECTION AGENCY NOT TO VETO THE SECTION 404 PERMIT ISSUED TO THE DEPARTMENT OF DEFENSE BY THE ARMY CORPS OF ENGINEERS.

Except as otherwise expressly provided, the EPA has the sole authority to administer the CWA. 33 U.S.C. § 1251(d) (2011). As Administrator of the CWA, the EPA is allowed to issue permits for the discharge of pollutants, after an opportunity for public hearing is given. § 1342(a)(1). This authorization to issue §402 pollutant discharge permits is conditioned upon compliance with the requirements of §§1311, 1312, 1316, 1317, 1318, and 1343. § 1342(a)(1). The EPA is also responsible for the prescription of requirements for compliance under this section of the CWA. § 1342(a)(2).

More specifically, the authority to veto fill material discharge permits proposed by the Corps under 33 U.S.C. § 1344(c) falls directly within the scope of the administrative role of the EPA. No authority, express or implied, is conferred upon the OMB to issue or veto permits under 33 U.S.C. § 1342 or § 1344. The determination as to which permit is appropriate for a particular discharge is therefore left to the EPA, not the Secretary of the Corps. *Administrative Authority to Construe §404 of the FWPCA*, 43 Op. Att'y Gen. 197 (1979).

The Corps argues that the EPA shall *request* that the OMB intervene if it cannot resolve a conflict of pollution control between executive agencies. Exec. Order No. 12,088, 43 Fed. Reg. 47,707 (Oct. 13, 1978)(emphasis added). However, the Director of the OMB is to seek the technical judgment of the EPA, as well as its determinations regarding statutory and regulatory applicability. *Id*. The Executive Order also emphasizes that the duties of the EPA as Administrator include consultation "concerning the best techniques and methods available for the prevention, control, and abatement of environmental pollution" and "providing technical advice and assistance to Executive agencies in order to ensure their cost effective and timely compliance with applicable pollution control standards." *Id*. Lastly, dispute resolution by the OMB is to be considered "in addition to, not in lieu of, other procedures, including sanctions, for the enforcement of applicable pollution control standards." *Id*.

There is no evidence in the record to suggest that the EPA made any request of the OMB to resolve this particular dispute. Admittedly, the Executive Order on which the Corps relies is clear that the OMB may fulfill this role if there is a dispute between agencies. However, the language of the Order states very specifically that the OMB is to rely on the expertise of the EPA in resolving such a conflict. The EPA was given the broad power to administer the CWA because of its expertise in the requisite areas applicable to the statute. "Any interpretation of this

chapter that operates to deny the EPA the power to set nationally effective effluent standards would be a clear refusal to follow the intent of the Congress and a gross misinterpretation of this chapter itself." *American Frozen Food Institute v. Train*, 539 F.2d 107 (D.C. Cir. 1976).

By instructing the EPA not to veto the § 404 permit issued by the Corps, the OMB doggedly refused to utilize this expertise and usurped the authority of the EPA to administer the CWA. This constituted an absolute disregard of the express purposes and objectives of the CWA by the OMB, and thus an inaccurate determination of the nature of the discharge in question.

A. The unlawful participation of the Office of Management and Budget in the administration of the Clean Water Act precludes proper statutory interpretation by the judiciary.

In deciding the propriety of the §404 permit issued by the Army Corps of Engineers, the Office of Management and Budget precluded a proper Chevron analysis as to whether the applied construction of the enabling statute was indeed permissible.

Agency actions made reviewable by statute and final agency actions for which there is no other adequate remedy in a court are subject to judicial review. 5 U.S.C. § 704 (2011). To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. § 706. The reviewing court shall hold unlawful and set aside agency action, findings, and conclusions, found to be arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law. § 706(2)(A).

When the Court engages in judicial review of an agency construction of the enabling statute that it has administered, it considers two questions. *Chevron, U.S.A., Inc. v. Natural Resources Defense Council*, 467 U.S. 837, 842 (1984). The initial determination is whether Congress has spoken directly to the issue at question, or if the statute is ambiguous in nature. *Id*

at 842-43. However, ambiguity in the legislation indicates that "Congress has explicitly left a gap for the agency to fill." *Id* at 843-44. In the absence of clear congressional intent, the Court shall inquire as to whether the agency took action based upon a permissible or reasonable construction of the statute. *Id* at 843. If the construction is found to be permissible or reasonable, then the agency interpretation is entitled to judicial deference. *Id* at 844.

The dispute in the present case necessarily revolves around the interpretation of the nature of the pollutant discharge that the DOD is releasing into Lake Temp. The "slurry" material in question does not fall specifically enough within the scope of either § 404 or § 402 permit jurisdiction that the COE and EPA can come to an agreed resolution absent statutory construction. Having been said, this ambiguity represents a gap in the enabling statute that Congress clearly intended the Administrator to fill. The sole authority to administer the CWA was delegated to the EPA because of its relevant experience and expertise in matters of this nature. *See* § 1251(d), *see also Weyerhauser*, 590 F.2d at 1025 (acknowledging the uncertain state of knowledge concerning the creation, effects, and control of water pollution, and the need to rely on EPA expertise).

Applying a proper *Chevron* analysis to this dispute would inevitably reveal the above-noted ambiguity in the CWA. In directing the EPA not to veto the §404 permit issued by the COE, the OMB deprived the EPA of its necessary role as Administrator of the CWA. Any judicial body undertaking this analysis would thus be unable to determine whether the EPA engaged in a permissible construction of the statute, because the EPA was usurped by the OMB in its delegated role to construe the statute. Had the EPA been allowed to do so, absent intervention of the OMB, it would have reached a construction based upon its inherent expertise

in the field of water pollution. This would consequently allow any judiciary to review the propriety of that interpretation under the appropriate § 706 standard.

B. The Environmental Protection Agency violated the Clean Water Act by complying with the Office of Management and Budget instruction not to veto the Section 404 permit issued by the Army Corps of Engineers.

As already established, the EPA has the sole authority to administer the CWA. 33 U.S.C. § 1251(d) (2011). As Administrator of the CWA, the EPA may issue § 402 permits for the discharge of pollutants, as long as such permits comply with the requirements of §§1311, 1312, 1316, 1317, 1318, and 1343. § 1342(a)(1). The EPA is also responsible for the prescription of requirements for compliance under this section of the CWA. § 1342(a)(2). This administrative role also extends to include the authority to veto fill material discharge permits proposed by the Corps of Engineers under 33 U.S.C. § 1344(c).

As already argued the "slurry" material in this dispute should be qualified as a pollutant rather than fill material. Such a distinction places the authority to issue a discharge permit solely within the jurisdiction of the EPA. In acquiescing to the direction of the OMB, the EPA disregarded this necessary interpretation and failed to fulfill its required responsibility to administer the CWA. Furthermore, it considered factors outside the scope of its statutory authority, rendering its decision not to veto the § 404 permit as an arbitrary and capricious action.

EPA action has been held to be arbitrary and capricious if it fails to consider whether a § 404 permit would have unacceptable adverse environmental effects. *See Alliance To Save The Mattaponi*, 515 F.Supp.2d at 140. In that particular case, the EPA based its decision not to veto a § 404 permit on "a whole range of other reasons completely divorced from the statutory text," including the likely diversion of resources and impending threat of litigation. *Id* at 140. While

the Court conceded that the EPA need not engage in notice and comment procedures to make a determination regarding adverse effects, it held that the agency must base the decision on the unacceptable effects standard. *Id* at 141.

In the present case, the EPA relied solely on the recommendation of the OMB in failing to veto the § 404 permit issued to the DOD. The decision was based entirely on this recommendation, and was not based in any manner on the potentially devastating environmental effects of this discharge. As a result, the Court must find that this decision by the EPA was in fact arbitrary and capricious action, and consequently a violation of the CWA.

CONCLUSION

For the foregoing reasons this Court should find that (1) the State of New Union has standing to file suit under the Clean Water Act, 28 U.S.C. § 1331, and the Administrative Procedure Act, 5 U.S.C. § 702; (2) The EPA and the Corps has jurisdiction to issue permits under the CWA because Lake Temp is a navigable water under 33 U.S.C. § 1362(7); (3) The Corps does not have jurisdiction to issue a §404 permit the intended because the discharge by the DOD does not fit within the definition of "fill material"; (4)the EPA has the sole authority to administer the CWA; and (5)the OMB should defer to the EPA in regard to statutory application. The Court should reverse the District Court Order dated June 2, 2011 in Civ. No. 148-2011, and remand this matter to be adjudicated by the District Court consistent with this Court's decision.

Respectfully submitted,

COUNSEL FOR THE

STATE OF NEW UNION