No. 11-1245

IN THE
UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE TWELFTH CIRCUIT

STATE OF NEW UNION,
Appellant and Cross-Appellee,

v.

UNITED STATES,
Appellee and Cross-Appellant.

v.

STATE OF PROGRESS,
Appellee and Cross-Appellant

Appeal from the United States District Court
for the District of New Union

BRIEF OF THE APPELLANT

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STATEMENT OF JURISDICTION

The district court had jurisdiction over this case pursuant to 28 U.S.C. § 1331 and 28 U.S.C. § 702. Jurisdiction of this court is invoked under 28 U.S.C. § 1331, as an appeal from a final decision of the United States District Court for the District of New Union. The district court entered a final judgment in this matter on September 15, 2011. Notice of appeal was timely filed in accordance with Rule 4(b) of the Federal Rules of Appellate Procedure.

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

1. Does the State of New Union have standing in its sovereign capacity as owner and regulator of the groundwater in the state or in its *parens patriae* capacity as protector of its citizens who have an interest in the groundwater in the state?
2. Under the Clean Water Act ("CWA"), is Lake Temp a "navigable water" subject to the jurisdiction of the CWA's permitting systems?
3. Under the CWA, does the United States Army Corp of Engineers ("COE") have jurisdiction to issue a permit to the Department of Defense ("DOD") under CWA section 404, 33 U.S.C. § 1344, or does the Environmental Protection Agency ("EPA") have jurisdiction to issue a permit under the CWA section 402, 33 U.S.C. § 1342, when the discharge is chemically-treated metal munitions?
4. Does the Office of Management and Budget's ("OMB") decision to instruct the EPA not to veto the CWA Section 404, 33 U.S.C. § 1344 permit violate the CWA?

STATEMENT OF THE CASE

I. Proceedings Below

This is an appeal from summary judgment entered by the United States District Court for the District of New Union on June 2, 2011. (R. at 1.) The district court granted the Secretary of the Army's motions for summary judgment on the basis that 1) New Union does not have standing to appeal the permit issuance; 2) the COE had jurisdiction to issue a permit for the discharge of fill under section 404; and 3) the participation by the OMB in the decision that a section 404 permit is valid did not violate the CWA. (R. at 5.) Following the district court's grant of summary judgment to the Secretary of the Army, both the State of New Union and the State of Progress filed motions for appeal. (R. at 1.) On September 15, 2011, the United States Court of Appeals for the Twelfth Circuit granted the appeal. (R. at 2.) The State of New Union requests that this Court reverse the decision of the district court, and find that the section 404 permit is invalid. (R. at 3.)

II. Statement Of The Facts

Surrounded by mountains, Lake Temp is a pristine landmark wholly located in the state of Progress. (R. at 4.) At its largest, the lake is twenty-seven square miles or 17,280 square acres. (R. at 3-4.) Once every five years, during the dry season, the lake evaporates. (R. at 4.) For over a hundred years the lake has welcomed thousands of travelers to its shores for boating recreation, bird watching, and duck hunting because the lake is home to international migratory ducks. (R. at 4.) A quarter of the lake's visitors are from outside the state of Progress. (R. at 4.) The lake became a part of a military reservation almost sixty years ago, but as the DOD recognizes, this did not stop generations of families from enjoying their time in rowboats and canoes on the lake. (R. at 4.) These families access the lake by way of the nearby interstate highway, walking down established trials to the fence-less lake. (R. at 4.)

The DOD's proposed plans will use Lake Temp as a dump site for a wide variety of spent, metal munitions. (R. at 4.) After building a facility along the shore of the lake, the DOD will receive the munitions, empty the explosive contents of the munitions, and treat them chemically in an attempt to ensure they are no longer explosive. (R. at 4.) The chemicals used to treat the munitions include many chemicals classified as hazardous substances in the CWA section 311. (R. at 4). After the metals are treated, they are pulverized and ground, then mixed with water to create a slurry-like material for discharge into the lake. (R. at 4.) The slurry-like material will be deposited evenly around the lake, merely raising the lakebed several feet. (R. at 4.) Water runoff into Lake Temp from the surrounding mountains will continue to flow unimpeded into the lake from the watershed, while water from the lake will not flow out, and the body of the lake will continue to exist relatively unchanged. (R. at 4.) Since the DOD has denied permission to conduct studies and collect data of the possible contamination of the aquifer, the potentially harmful effects of these pollutants into the Imhoff Aqufier are unknown. (R. at 6.)

A thousand feet under Lake Temp lay the Imhoff Aquifer, extending beyond Lake Temp and the Progress border into New Union. (R. at 4.) Five percent of the aquifer juts into New Union and New Union citizens reside above the aquifer. (R. at 4.) One of those residents is Dale Bompers, an owner and operator of a ranch located directly above the aquifer. (R. at 4.) Although the aquifer water is highly sulfuric and must be treated before agricultural use, Dale Bompers represents residents who enjoy the potential use of water from the aquifer. (R. at 4.) In order to withdraw the groundwater, New Union residents must receive a permit from New Union's Department of Natural Resources, pursuant to a New Union statute, and show the proposed withdrawal will not deplete groundwater over a period of twenty years. (R. at 6.) The

threat of toxic pollutants entering New Union has potentially decreased the value of property above the aquifer like Bompers' ranch. (R. at 6).

The COE granted a CWA section 404 permit to the DOD for the discharge of the crushed munitions into Lake Temp. (R. at 9.) The DOD prepared an Environmental Impact Statement, pursuant to the National Environmental Policy Act, on which New Union did not comment. (R. at 6.) The EPA was preparing to use its authority under the CWA to veto the section 404 permit when the OMB intervened, instructing the EPA not to veto the permit. (R. at 9.) In response, the EPA argued that the nature of the DOD's discharge was significantly different from the discharge typically associated with a traditional section 404 permit. (R. at 9.)

SUMMARY OF THE ARGUMENT

There are four issues in this case. First, the State of New Union has standing to bring this suit in either its sovereign or *parens patriae* capacity. Second, Lake Temp is a "navigable water" subject to CWA jurisdiction. Third, the EPA has jurisdiction to issue a permit for the discharge of slurry into Lake Temp. Fourth, the OMB's intervention in directing the EPA not to veto the permit violated the CWA.

First, New Union has standing in its *parens patraie* capacity. New Union has a quasi-sovereign interest in regulating any pollution that enters its territory. New Union has suffered injury-in-fact because of the potential for diminished values of its citizens' property. New Union clearly meets the relaxed standing test because the CWA grants a provision for review of agency action. Second, Lake Temp is a "navigable water" subject to the jurisdiction of the CWA because it is part of interstate commerce, and it is a relatively permanent geographical body of water.

Third, the DOD's discharge, chemically-treated crushed munitions, should be subject to a section 402 permit regulated by the EPA rather than a section 404 permit because the discharge material does not fall under the EPA guideline definition of "fill material." The munitions and chemical discharge is more similar to that of a "hazardous substance" subject to section 402 permitting. The DOD's discharge is significantly distinct from the "fill material" reviewed by the United States Supreme Court in Southeast Alaska Conservation Council v. Coeur Alaska, Inc.. The effect of the discharge in Lake Temp does not require COE's advising, but rather EPA's oversight of potential adverse affects of chemicals used.

Fourth, the OMB's participation in the permitting process violated the CWA for several reasons. First, the OMB does not qualify for Chevron deference because it does not administer the CWA, therefore does not have authority to direct the EPA not to veto a permit. Second, the EPA's decision not to veto the permit is subject to judicial review under the Administrative Procedure Act because it adversely affected New Union. There is also precedent for judicial review of the EPA's failure to veto a section 404 permit. Even if the EPA's decision not to veto the section 404 permit deserves deference, the decision was arbitrary and capricious because it failed to follow the guidelines set out by Congress in the CWA. Finally, in Couer, the Court held that the CWA's permitting sections were ambiguous. Although the Court held in Coeur that the EPA's decision not to veto the section 404 permit was reasonable, the facts here significantly differ from the mining slurry in Coeur and furthermore the EPA's decision not to veto here was unreasonable.

ARGUMENT

I. NEW UNION HAS STANDING IN ITS SOVEREIGN AND *PARENS PATRIAE* CAPACITY AS NEW UNION HAS DEMONSTRATED A QUASI-SOVEREIGN INTEREST, HAS SUFFERED AN INJURY-IN-FACT, HAS A PROCEDURAL RIGHT TO JUDICIAL REVIEW OF EPA'S ACTIONS, AND IS NOT BARRED BY ESTOPPEL.

New Union has standing in its sovereign and *parens patriae* capacity to bring suit against the United States and the State of Progress. A plaintiff has standing if there is an injury-in-fact, the injury is "fairly traceable" to the defendant, and it is likely that the injury "can be redressed by a favorable court decision." Cent. Delta Water Agency v. United States, 306 F.3d 938, 946-47 (9th Cir. 2002). Whether the injury is fairly traceable or redressable is not at issue in this case. A State is not a "normal litigant" for the purposes of invoking federal jurisdiction. Massachusetts v. EPA, 549 U.S. 497, 518 (2007). First, New Union has standing in its sovereign and *parens patriae* capacity as New Union has the right to keep its territory free from pollutants. Second, New Union has standing as the threat of pollutants entering New Union has potentially diminished the property value of its citizens. Third, New Union falls under the relaxed standing standard articulated in Massachusetts v. EPA because New Union has a procedural right under the Clean Water Act to challenge the EPA's decision not to issue a section 402 permit. Finally, New Union is not estopped from bringing these claims because New Union has not engaged in any affirmative misconduct.

A. New Union has a quasi-sovereign interest in keeping its territory free from pollutants.

New Union has a quasi-sovereign interest in the environmental health of its land. A State has a quasi-sovereign interest in the health and well-being - both physical and economic – of its residents, and no specific number of residents must be affected. Id. For example, in State of Georgia v. Tennessee Copper Co., the State of Georgia sought to enjoin a Tennessee company

from discharging noxious gas into a small area within Georgia territory. State of Georgia v. Tennessee Copper Co., 206 U.S. 230, 236-7 (1907). The United States Supreme Court held the State of Georgia had standing because it had an independent interest reinforced by the interests of its citizens over all "the earth and air" within the state's power. Id. at 237. The Court emphatically emphasized that the State of Georgia has ultimate discretion in deciding, "whether its mountains shall be stripped of their forests and [whether] its inhabitants shall breathe pure air." Id. Here, like the noxious gases, which traveled into Georgia, the chemically-treated crushed munitions discharged into Lake Temp could contaminate the Imhoff Aquifer, traveling into the portion of the aquifer under the state of New Union thereby polluting its territory. Id.; (R. at 6.). Like the polluted area in Tennessee Copper Co., only a relatively small portion of New Union's land will be affected, but following the Supreme Court's holding in Tennessee Copper Co., New Union has a quasi-sovereign interest "in all the earth and air within its domain," no matter the size of the territory affected. Id.; (R. at 6.). Thus, New Union has a quasi-sovereign interest in protecting its land from pollutants.

New Union further has a quasi-sovereign interest as New Union has demonstrated a desire to regulate water quality under its own state laws. The United States Supreme Court has held that in determining whether a state has a quasi-interest, courts should examine the alleged injury. Alfred L. Snapp & Son, Inc. v. Puerto Rico, 458 U.S. 592, 607 (1982). If the injury is one that the state would address or regulate through its own lawmaking powers, then it will indicate a valid quasi-interest. Id. In Alfred L.Snapp & Son Inc., the Supreme Court held Puerto Rico had *parens patriae* standing because it had a quasi-sovereign interest in regulating unemployment. Id. Puerto Rico alleged its citizens were injured by east coast apple growers who preferred to give employment opportunities to domestic laborers rather than to a couple hundred Puerto

Rican, temporary laborers. Id. The Court held Puerto Rico had a quasi-sovereign interest because Puerto Rico addressed unemployment through its own state legislation. Id. at 609-10. Like Puerto Rico's unemployment legislation, New Union's legislation directly addresses the depletion and quality of water sources through a permit program administered by the New Union Department of Natural Resources. Id.; (R. at 6.). New Union's regulation of groundwater demonstrates a clear concern over water rights and water quality. (R. at 6.) It therefore follows that if New Union had the opportunity, it would surely regulate pollutants entering its water sources from out of state. Following the holding in Alfred L. Snapp & Son, Inc., New Union has a quasi-sovereign interest because New Union would address the water quality under its state power if it could. Id.

B. New Union has suffered an injury-in-fact due to the threat of pollution's effect on citizens' property values.

New Union has suffered an injury-in-fact due to the polluted aquifer's negative impacts on New Union citizens. To qualify as injury-in-fact, the injury must be "concrete and particularized and actual or imminent, not conjectural or hypothetical." Friends of the Earth, Inc. v. Laidlaw Envtl. Servs., 528 U.S. 167, 180 (2000). However, in environmental cases, threatened, rather than actual injury, can satisfy standing, and there is injury-in-fact if plaintiffs allege an injury to aesthetic or recreations values. Id. at 183; Friends of the Earth, Inc. v. Gaston Copper Recycling Corp., 204 F.3d 149,160 (4th Cir. 2000). For example, in Friends of the Earth Inc. v, Gaston Copper, members of an environmental group challenged the discharge of metals into a lake and alleged the "actual or threatened pollution" would diminish the value of property because of the possible presence of heavy metals. 204 F.3d at 153. The United States Court of Appeals for the Fourth Circuit, overturned the lower court's holding that there was lack of evidence to prove chemical damages to the lake, and instead held that the nature of

environmental injuries are "by nature probabilistic." Id. at 160. Plaintiffs "need not wait until the lake becomes barren and sterile or assumes an unpleasant color and smell before he can invoke the protections of the Clean Water Act." Id. Like the environmental group in Gaston Copper, the State of New Union challenges the discharge of metals into Lake Temp. Id. at 153; (R. at 5.). Like the environmental group in Gaston Copper, the "actual or threatened" pollution will diminish the value of Dale Bumpers' ranch. Id.; (R. at 6.). Following the court's holding in Gaston Copper, it is of no consequence that there is not yet concrete evidence of pollutants in the aquifer. Id.; (R. at 6.). Following the court's holding in Gaston Copper, the United States District Court of the District of New Union committed reversible error by holding New Union to a higher evidentiary standard than the United States Supreme Court has required. Id.; (R. at 6.). Dale Bompers need not wait until the water source is fully contaminated to invoke the protection of the Clean Water Act, especially considering the Department of Defense's failure to cooperate with New Union. (R. at 6.) Due to the threat of pollutants entering Dale Bompers' property, New Union has sufficiently demonstrated injury-in-fact.

C. New Union meets the relaxed standing test in Massachusetts v. EPA as the CWA grants a provision permitting review of agency action.

As New Union has a procedural right to challenge the EPA's actions under the Clean Water Act, New Union is held only to a relaxed standing text which it clearly satisfies. A relaxed standing test will apply to a litigant when a congressional statute provides a plaintiff with a right to challenge the administering agency's decision. Massachusetts v. EPA, 549 U.S. 497, 518 (2007). The relaxed standing test means that a litigant will have standing without meeting the normal standards of redressibility and immediacy. Id. Rather, a litigant in that situation needs only show "there is some possibility that the requested relief will prompt the injury-causing party to reconsider the decision that allegedly harmed the litigant." Id.

For example, in Massachusetts v. EPA, the state of Massachusetts alleged the EPA failed to comply with its responsibilities under the Clean Air Act by failing to regulate emission of greenhouse gases. Id. at 505. Massachusetts alleged this failure to regulate contributed to global warming resulting in a reduction of the State's coastal land. Id. The Clean Air Act contains a provision granting the right to challenge EPA's action and the authorization of that provision was "of critical importance to the standing inquiry." Id. at 516. Massachusetts consequently met the standing requirement even though the full effects of EPA's failure to act would not possibly accrue for hundreds of years. Id. at 518.

The Clean Water Act, like the Clean Air Act, provides for judicial review of the EPA's issuance or denial of a 402 permit. 33 U.S.C. §1369(b)(1)(F); 549 U.S. at 518. Like in Massachusetts, where the state challenged the EPA's failure to regulate greenhouse gas emissions, New Union challenges the EPA's failure to issue a section 402 permit. Id.; (R. at 5.). New Union, like Massachusetts, has a procedural right as granted in the congressional statute to challenge agency action unlawfully withheld. Id. Consequently, New Union does not have to prove redressibility and immediacy. Therefore, it is of no consequence that studies have yet to be enacted demonstrating the occurrence, timing, and severity of the contamination. (R. at 6.) Rather, New Union is only required to show the EPA might reconsider its decision concerning whether to veto the section 404 permit. As there was clearly a disagreement between the EPA and the Corps whether to veto the 404 permit, and further disagreement over whether a 402 or 404 permit should have been issued, New Union has met the sole standing requirement that there's a possibility based on the court's ruling that the OMB will reconsider. (R. at 9.) New Union has standing under the relaxed standing test because it has the procedural right to challenge the EPA's decision over which permit to issue.

D. New Union is not barred by equitable estoppel from bringing these claims against the United States.

New Union is not estopped from objecting to the section 404 permit. There are five elements one must prove to establish equitable estoppel:

> (1) conduct or language amounting to a representation of material facts; (2) the party to be estopped must be aware of the true facts; (3) the party to be estopped must intend the representation to be acted on or act such that the party asserting the estoppel has a right to believe it so intended; (4) the party asserting the estoppel must be unaware of the true facts; and (5) the party asserting the estoppel must detrimentally and justifiably rely on the representation. United States v. City of Toledo, 867 F. Supp. 603, 607 (N.D. Ohio 1994).

For example, in United States v. City of Toledo, the EPA alleged the City of Toledo ("City") had exceeded the effluent limitations set in their section 402 permit. Id. at 606. The City argued the exceeded discharges were permitted by a letter from the EPA's State Director and thus the EPA was estopped from bringing the claim. Id. The court rejected this argument as the EPA had not engaged in any "affirmative misconduct." Id. at 607. Equitable estoppel "is not available where the agency has simply acted in an indifferent, passive, or negligent manner." Id. The EPA's inaction was not intended to harm or injure the City, but rather was a reflection of difficult regulatory and policy issues. Id. Furthermore, courts are extremely hesitant to apply estoppel against a local government acting in its sovereign capacity. Id. Like the City in City of Toledo, New Union has not engaged in any affirmative misconduct. Id.; (R. at 6.). Rather, New Union, like the City in City of Toledo, has engaged in mere inaction. Id.; (R. at 6.). New Union's failure to comment on the Environmental Impact Statement does not reflect an intent to harm or injure the United States, but like in City of Toledo, is a reflection of complicated regulatory issues. Id.; (R. at 6.). As New Union has not affirmatively engaged in misconduct, the United States' estoppel claim is without merit.

II. LAKE TEMP IS SUBJECT TO CWA REGULATIONS AS A "WATER OF THE UNITED STATES" BECAUSE IT IS A RELATIVELY PERMANENT LAKE USED FOR INTERSTATE COMMERCE.

Lake Temp is a "water of the United States," and therefore, discharge into the lake is regulated by the CWA. A "water of the United States" is defined as a "navigable water," and a "navigable water" is a relatively permanent body of water used for interstate commerce. Rapanos v. United States, 547 U.S. 715, 732-33 (2006). Lake Temp is used for interstate commerce by interstate visitors who boat and duck hunt for recreation on the lake. (R. at 4.) The lake is relatively permanent because it is filled with water eighty percent of the time. (R. at 4.) Therefore, Lake Temp is a "navigable water" subject to the jurisdiction of the CWA.

A. Lake Temp is a "navigable water" subject to CWA jurisdiction because it is used for interstate commerce.

First, Lake Temp falls under the statute's definition of "navigable waters," subjecting it to the jurisdiction of the CWA. "Navigable waters" are "all waters which are currently used, or were used in the past, or may be susceptible to use in interstate or foreign commerce." 33 C.F.R. § 328.3(a)(1). The concept of interstate commerce is at the heart of the statute; thus, when a body of water relates to interstate commerce in any way, courts interpret the definition of 'navigable waters' broadly and apply it liberally. See United States v. Marsh, 740 F.2d 799, 801 (10th Cir. 1984) (concluding "Congress intended to assert federal jurisdiction over the nation's waters to the maximum extent permissible under the Constitution, unlimited by traditional concepts of navigability);" see also U.S. v. Earth Sciences, Inc. 599 F.2d 368, 375 (10th Cir. 1979) (reasoning Congress intended to regulate discharges into any body of water that in any way may affect interstate commerce). A report from the United States House of Representatives attached to the bill declared that the term "navigable waters" was to be interpreted with the broadest possible constitutional scope. H.R. Rep. No. 92–911, 92d Cong., 2d Sess. 131 (1972). In applying

Congress' expansive definition of navigable waters to Lake Temp, the crux of Congress' statutory protection rests on this lake's historic use by interstate visitors. (R at 4.) For example, twenty-five percent of visitors to the lake travel from out of state to use the lake. (R at 4.) Accordingly, Lake Temp has a relation to interstate commerce. As per legislative intent, legislative history, and judicial precedence, Lake Temp falls under the definition of "navigable waters," making it subject to the jurisdiction of CWA.

Second, the particular uses of Lake Temp - namely, boating and hunting on the lake by interstate travelers - is part of interstate commerce, and therefore establishes jurisdiction under the CWA. A lake is part of interstate commerce when it is visited by interstate travelers for recreational purposes; but a lake is not navigable when solely used as a migratory bird habitat. 33 C.F.R. § 328.3(a)(3)(i); Solid Waste Agency of N. Cook Cnty, 531 U.S. 159, 174 (2001). In Colvin v. United States, the district court upheld its verdict that a California lake was a 'navigable water' subject to COE jurisdiction in light of the Supreme Court's ruling in SWANCC that the COE does not have jurisdiction over lakes solely used as a stopover for migratory birds. Colvin v. United States, 181 F.Supp.2d 1050, 1055 (C.D.Cal., 2001). The district court, looking past the migratory bird use, reasoned the lake was used for interstate commerce, and was therefore a 'navigable water,' because interstate visitors used the lake for recreational purposes like duck hunting and boating. Id. The court held recreational use by interstate travelers alone established a sufficient link to interstate commerce under the statute and SWANCC. Id. Like in Colvin, Lake Temp is used for recreational purposes such as duck hunting and canoeing by out of state visitors, establishing the lake as part of interstate commerce. Id.; (R. at 4.) The fact that migratory ducks stop at Lake Temp is not an independent basis for why it is a "navigable water," but it lends further support for greater protection of the lake since migration

of the ducks enhances recreational uses such as duck hunting and bird watching. Thus, Lake Temp is part of interstate commerce since interstate travelers use it for recreational purposes.

Third, although Lake Temp is located solely within the boundaries of New Union, the lake affects interstate commerce, and must be considered navigable. A completely intrastate body of water is considered a navigable body of water when it has an effect on interstate commerce. Utah v. Marsh, 740 F.2d 799, 803 (10th Cir. 1984). The United State Court of Appeals for the Tenth Circuit held CWA jurisdiction to reach a completely intrastate lake in Utah because of the lake's effect on interstate commerce when two percent of its annual visitors were from out of state and waters from the lake, once irrigated, were used for crops sold in the interstate market. Id. at 803-4. The court reasoned that the effect of the lake's uses, when viewed in the aggregate, would affect interstate commerce and fall under the scope of the CWA. Id. at 803. Similar to Marsh, Lake Temp has water that, once treated, could be used for sale or for crops in New Union. Id.; (R. at 4.) Further, Lake Temp has an even greater number of interstate visitors than the lake in Marsh. Id.; (R. at 4.) Lake Temp has an effect on interstate commerce and could have an even larger effect in the future if not polluted. Lake Temp is a "navigable water" because of its effect on interstate commerce.

B. Based on the United States Supreme Court's plurality decision in Rapanos v. United States, Lake Temp is "relatively permanent" and Justice Kennedy's "significant nexus" test does not apply.

Based on the description of "navigable waters" under the Rapanos plurality, Lake Temp is a "navigable water" because it is "relatively permanent." Rapanos v. United States, 547 U.S. 715, 732-33 (2006). A body of water is "relatively permanent" when it is "continuously present as opposed to ordinarily dry channels through which water occasionally or intermittently flows." Id. Applying the Rapanos plurality's general definition of "relatively permanent," the United States Court of Appeals for the Ninth Circuit held a tributary stream to be "relatively

permanent," and thus a "navigable water," when it flowed only two months a year into other rivers leading to the Pacific Ocean. United States v. Moses, 496 F.3d 984, 988 (9th Cir. 2007). The court reasoned that the fact it flowed merely two months a year did not eliminate it from national concern. Id. More permanent than the tributary stream in Moses, Lake Temp holds water approximately four out of every five years. Id.; (R. at 4.) Standing eighty percent of the time, Lake Temp's size and disappearance follow the seasons; but like Moses, the changes in water flow do not remove Lake Temp from national concern. Id. (R. at 4.) Lake Temp is "relatively permanent" under the Rapanos plurality. 547 U.S. at 733.

Since the Supreme Court's decision in Rapanos, circuits have split on the issue of "relatively permanent" waters; some require a "significant nexus" as defined in the Kennedy Test. The Kennedy Test states that waters such as "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," must have a "significant nexus" to an established navigable water in order for these other waters to be deemed a "navigable water." Id. at 724. Circuits apply the "significant nexus" test to water forms that are usually less like a geographical water feature on its own and significantly differ from Lake Temp. See United States v. Bailey, 571 F.3d 791 (8th Cir. 2009) (examining twelve acres of wetland); see also N. Cal. River Watch v. City of Healdsburg, 496 F.3d 993, (9th Cir 2007) (examining a rock pit filled with water). Rapanos' significant nexus test guides courts in deciding whether smaller and seemingly insignificant bodies of water are navigable. 547 U.S. at 724. Those cases involving wetlands and ponds significantly differ from the twenty-seven square mile area of Lake Temp. (R. at 3-4.) Lake Temp is over one hundred times larger than the fifty four acre wetlands in

Rapanos, and is directly related to interstate commerce. Id. at 720; (R. at 3-4.). Therefore, the significant nexus test does not apply to Lake Temp.

III. THE DOD'S DISCHARGE OF CHEMICALLY-TREATED METAL MUNITIONS IS SUBJECT TO ASECTION 402 PERMIT RATHER THAN A SECTION 404 PERMIT BECAUSE THE DOD DISCHARGE IS NOT THE TYPE OF "FILL MATERIAL" CONTEMPLATED BY THE COE GUIDELINES AS THE DOD DISCHARGE CONTAINS HAZARDOUS SUBSTANCES, AND THUS IS SUBTANTIALLY DISTINCT FROM THE FILL MATERIAL IN COEUR.

The DOD discharge into Lake Temp is subject to EPA regulation under section 402, and therefore the section 404 permit is invalid. The EPA and COE both administer permits, but the COE administers permits for discharge of traditional "fill material," which have the effect of significantly altering the physical body of water while the EPA administers permits for discharge of substances which could have adverse affects on the environment. 67 Fed. Reg. 31130-35. First, the discharge is not subject to section 404 regulation because the slurry is not "fill material" as defined under the COE guidelines. Second, the chemically treated, metal munitions slurry is fundamentally distinct from the industrial mining slurry in Coeur. Third, the chemical and metal make-up of the slurry falls under the hazardous substance provision empowering EPA regulation. Fourth, the effect of discharging the crushed munitions into Lake Temp does not result in the type of lakebed elevation which requires COE regulation because the potential adverse affects of the chemicals and metals on the habitat rather than largely altering the physical body of water support jurisdiction under the EPA permitting system.

A. The metal munitions discharge is not "fill material" as defined by the COE guidelines.

First, the munitions-filled discharge is not "fill material" as per the COE guidelines. The 2002 COE guidelines clarify the definition of "fill material," and provide a non-exhaustive list of several materials for interpretive guidance. 67 Fed. Reg. 31130-35.

> The final rule defines ‘‘fill material’’ as material placed in waters of the U.S. where the material has the effect of either replacing any portion of a water of the United States with dry land or changing the bottom elevation of any portion of a water. The examples of ‘‘fill material’’ identified in today’s rule include rock, sand, soil, clay, plastics, construction debris, wood chips, overburden from mining or other excavation activities, and materials used to create any structure or infrastructure in waters of the U.S. 67 Fed. Reg. 31132.

The commonsense canon of *noscitur a sociis* provides that an ambiguous word is given more precise content by the neighboring words with which it is associated. United States v. Williams, 553 U.S. 285, 294 (U.S. 2008). In Williams, when the United States Supreme Court interpreted a statute banning speech which solicited, distributed, promoted, and advertised child pornography, it held the word “promotes,” a word which could have several meanings out of context, to mean “to recommend to another” because it appeared in a list of transaction-based words - “solicits, distributes, and advertises.” Id. The question was one of scope, and the Court reasoned that Congress intended the statute to criminalize speech specifically related to recommendations of child pornography, but not all general discussion regarding child pornography. Id. at 295.

The reasoning in Williams can be applied here to better understand the precise meaning of “slurry” in the CEO guidelines. Id. The word “slurry” is placed at the beginning of a list of mining-related materials, and was contemplated for the specific purpose of including overburden from industrial mining. 67 Fed. Reg. 31132. The specific mining context of “slurry” in the guidelines is like the transactional-based language in Williams, and like Williams, the language is not to be applied to all general slurry, but merely slurry created from mining materials. Id. The mining-related slurry contemplated in the guidelines is narrow, and the chemically treated, spent metal explosives in the DOD’s slurry falls outside that scope. 67 Fed. Reg. 31132. The munitions-filled discharge created by the DOD does not fit in the list of 404 “fill materials;”

therefore, the slurry should be classified under section 402, since section 402 provides for all other pollutants that are not "fill materials."

The munitions-filled discharged into Lake Temp is fundamentally distinct from traditional mining slurry, and falls outside the scope of the COE's authority. Section 402(a) forbids the EPA from issuing permits for materials classified as "fill material" because "fill material" is subject only to COE permits. Coeur Alaska, Inc. v. Se. Alaska Conservation Council, 129 S.Ct. 2458, 2467-68 (2009). For example, in Coeur the United States Supreme Court held the EPA could not have the authority to issue a section 402 permit for Coeur Alaska, a mining company dumping four and a half million tons of mining tails into a small lake, because the slurry being discharged fell under the definition of "fill material." Id. at 2463-64. The Court reasoned the slurry material in Coeur was properly classified as "fill material" because the guidelines expressly include "mining tails." 67 Fed. Reg. 31132; 129 S.Ct. at 2468. Because the mining tails in Coeur were "fill material," the COE had the sole authority over permitting their emission into the lake. 67 Fed. Reg. 31132; 129 S.Ct. at 2468. Distinct from the slurry in Coeur, the chemically-treated, metal munitions to be discharged into Lake Temp does not fall under the definition of "fill material" because it does not fit the COE guideline definition. 67 Fed. Reg. 31132; 129 S.Ct. at 2468; (R. at 4.). Since the slurry to be discharged in Lake Temp does not fall under the definition of "fill material," the COE must be denied jurisdiction and the EPA must have jurisdiction.

B. The discharge material contains hazardous substances which are solely regulated by section 402 permits.

Third, the DOD's slurry material is regulated by section 402 because it contains hazardous substances. The EPA defines hazardous substances as chemicals which may affect natural resources like wildlife and humans, and the EPA regulates the disposal of hazardous

substances by issuing section 402 permits. CWA § 311(B)(2); 40 C.F.R § 116, 117. In Manufacturing Chemists Association v. Costle, the district court recognized the EPA's authority over the production, transit, storage, and disposal of basic industrial chemicals like fertilizer by holding that the production and transit of these substances must be subject to section 402 permits. Manufacturing Chemists Association v. Costle, 455 F. Supp. 968, 971-2 (W.D. La. 1978). Like the basic chemicals in Costle, the chemicals mixed into the munitions at the DOD facility are hazardous substances under section 311. Id.; (R. at 4.). Since the chemicals in the DOD discharge may affect the health of wildlife and humans if not treated properly and are hazardous substances, the materials transported and incorporated at the Lake Temp facility must be subject to EPA regulations. (R. at 4.)

C. The effect of the DOD discharge on Lake Temp falls under the effects of those discharges regulated by the EPA.

Last, given the guidelines' emphasis on the effects-based approach, the effect of the discharge into Lake Temp does not fall under the effects which give rise to COE authority. In an effort to improve permitting consistency and to be faithful to the distinct objectives of the COE and the EPA, the guidelines provide for an objective, effects-based approach for deciding which agency has permitting authority over a discharge. 67 Fed. Reg. 31132-33. The guidelines state that discharges having the effect of replacing any portion of a water of the United States with the dry land or changing the bottom elevation of any portion of water of the United States could be regulated by the COE. 67 Fed. Reg. 31132. Giving the COE authority over discharges permanently altering the geographic figure of a body of water is consistent with the COE mission to provide public engineering services, while the EPA has authority over discharges that could affect human and environmental health. Environmental Protection Agency, http://www.epa.gov/aboutepa/whatwedo.html (last visited Nov. 28th 2011); US Army Corp of

Engineers, http://www.usace.army.mil/CRU/Pages/HistoryMissionStatement.aspx (last visited Nov. 28th 2011).

For example, the Supreme Court held the COE had jurisdiction in Coeur when the lake, fifty one feet deep, was to have its lakebed raised fifty feet during a mining company's discharge into the lake. 129 S.Ct. at 2464. During the discharge of the slurry, the COE's engineering services were needed to dam the creeks and divert the storm runoff from the distorted, shallow body of water. Id. The effect of the discharge in Coeur, namely the drastic rise of the lakebed and the technical engineering required for the discharge, necessitated that the COE be the regulating agency. Id. In contrast to Coeur, the bed of Lake Temp will only be raised several feet; there will be no dams or diversion of surface water; and the explosive, chemical nature of the slurry creates a greater risk to human and environmental health than the discharge in Coeur. Id.; (R. at 4.). Given the distinction in discharge effects between Coeur and Lake Temp, and that there is no particular need for engineering services at Lake Temp, the EPA is the proper agency to authorize the DOD's discharge into Lake Temp. Id.

IV. PARTICIPATION BY THE OMB IN THE DECISION-MAKING PROCESS VIOLATED THE CWA BECAUSE THE EPA ADMINSTERS THE STATUTE AND ITS DECISION NOT TO VETO THE PERMIT WAS ARBITRARY AND CAPRICIOUS, THE OMB DOES NOT HAVE THE AUTHORITY TO INSTRUCT THE EPA NOT TO VETO PERMITS, THE EPA'S DECISION NOT TO VETO THE PERMIT IS SUBJECT TO JUDICIAL REVIEW, AND THE CWA IS AMBIGUOUS SO THE EPA'S DECISION IS NOT REQUIRED BY THE HOLDING IN COEUR.

The OMB did not have the authority to instruct the EPA not to veto the section 404 permit. Deference is given to an agency that administers a statute. Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 844 (1984). First, the OMB's decision to instruct the EPA not to veto the section 404 permit does not qualify for Chevron deference because it does not administer the CWA. Second, the EPA's decision not to veto the permit is subject to

judicial review under the Administrative Procedure Act because it adversely affected New Union and because the court has reviewed the EPA's decision not to veto section 404 permits in the past. Even if the EPA's decision not to veto the section 404 permit deserves deference, the decision was arbitrary and capricious because it failed to follow the permitting guidelines set out by Congress in the CWA. Finally, the EPA was not required to veto the permit, since the Court in Coeur determined that the CWA's permitting guidelines were ambiguous and since Lake Temp is distinguishable from the lake in Coeur.

A. The OMB does not administer the CWA nor does it have the authority to instruct the EPA not to veto a section 404 permit.

First, the OMB had no authority to instruct the EPA not to veto the section 404 permit. An agency's interpretation is given considerable weight when that particular agency is entrusted to administer the statute. Id. When the meaning or reach of a statute involves reconciling conflicting policies, and especially when those interpretations depend upon more than ordinary knowledge of the subject, deference is given to the administrative interpretation. Id. A more "specific responsibility for administering the law is needed to trigger Chevron deference." Crandon v. United States, 494 U.S. 152, 177 (Scalia, J., concurring). The EPA administers the CWA generally and alone decides whether to veto section 404 permits. 33 U.S.C. § 1251(d), 1344(c).

For example, in Aeronautical Repair Station Association v. Federal Aviation Administration, the D.C. Circuit Court of Appeals refused to defer to the Federal Aviation Administration's (FAA) interpretation of the Regulatory Flexibility Act. Aeronautical Repair Station Association v. Federal Aviation Administration, 494 F.3d 161, 176 (D.C.C. 2007). The court reasoned that the FAA did not administer the statute so its interpretation of the statute did not deserve deference. Id. Here, like the FAA, the OMB is not charged by Congress with

administering the CWA and does not deserve deference in instructing the EPA not to veto section 404 permits based on the OMB's interpretation of the statute. Id.; (R. at 9.). The EPA administers the CWA generally and issues and denies section 404 permits specifically. 33 U.S.C. § 1344(d). If any agency shares authority with the EPA to administer the CWA, it is the COE, which has some authority over Section 404 permits. 33 U.S.C. § 1344(d). However, the OMB does not have authority to administer the CWA. Because the OMB does not administer the CWA, deference should not be granted to its decision to instruct the EPA not to veto the proposed section 404 permit.

In addition to the OMB's lack of authority to administer the CWA, the OMB would only be authorized to review the EPA's decision to veto if Congress' statutory goals would be furthered by OMB's review. See Dole v. United Steelworkers of America, 494 U.S. 26, 38 (1990). In Dole v. United Steelworkers of America, the United States Supreme Court held the OMB's review of the Department of Labor's (DOL) regulations did not further the goals of the statute set out by Congress. Id. Without any legislative purpose to have the OMB screen proposed regulations, the Court held Congress did not intend to authorize OMB's review of regulations. Id. Like the Act in Dole, in which Congress did not intend to give OMB the authority to review regulations promulgated by the DOL, the CWA does not authorize the OMB to review the EPA's decision to veto section 404 permits, and allowing so would not further the statute's goals of environmental protection. Id.; 33 U.S.C. § 1344(c). Because the EPA administers the CWA and because the OMB was not authorized to review the EPA's permitting decisions regarding the CWA, the OMB's participation in resolving the dispute between the EPA and the COE concerning the granting of the DOD's section 404 permit violated the CWA.

B. The EPA's decision not to veto the section 404 permit is subject to judicial review under the Administrative Procedure Act and prior case law.

Second, the EPA's decision not to veto the 404 permit is subject to judicial review. Under the Administrative Procedure Act, "a person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute is entitled to judicial review thereof." 5 U.S.C. § 702. The EPA's decision not to veto a section 404 permit is based on the agency's interpretation of the CWA, and the United States Court of Appeals for the D.C. Circuit has previously reviewed the EPA's decision not to veto a permit. See Alliance to Save the Mattapone v. US Army Corps of Engineers, 606 F. Supp. 2d 121, 141 (D.D.C. 2009). Even though the EPA administers the CWA, its interpretation is subject to judicial review under the Chevron test, which states that where Congress has failed to directly speak to a specific issue, an agency's construction is permissible and not subject to judicial review unless it is arbitrary, capricious, or manifestly contrary to the statute. Chevron, 467 U.S. at 842. When a court reviews an agency's construction of the statute which it administers, it must first determine whether Congress has directly spoken to the precise question. Id. If Congress has not directly spoken to the issue and the statute is silent or ambiguous, the question for the court to review is whether the agency's answer is based on a permissible construction of the statute. Id. at 843. If Congress has explicitly left a gap for the agency to fill, the agency's interpretation is given controlling weight unless it is arbitrary, capricious, or manifestly contrary to the statute. Id. at 843-44.

The D.C. Circuit has determined the Section 404 permit portion of the CWA is ambiguous and subject to agency interpretation. Alliance, 606 F. Supp. 2d at 141. For example, in Alliance to Save the Mattapone v. U.S. Army Corps of Engineers, the D.C. Circuit held the EPA's decision not to veto a section 404 permit was arbitrary and capricious because the agency

relied on factors which Congress had not intended for the agency to rely upon. Id. In Alliance, the court reasoned that a section 404 permit may not be issued where it "will cause or contribute to significant degradation of the waters of the United States," which includes significantly adverse effects on the "life stages of aquatic life and other wildlife dependent on aquatic ecosystems" and "loss of fish and wildlife habitat." Id. at 124. The statute authorized the Administrator to veto a permit "whenever he determines…that [it] will have an unacceptable adverse effect" and although the Administrator deserved some discretion, that discretion was "not a roving license to ignore the statutory text." Id. at 140; 33 U.S.C. § 1344(c) (140). The court in Alliance held that the EPA's decision not to veto the permit was not based on the determination that the permit would not likely have unacceptable adverse effects, but rather it was based on an entire range of other reasons completely divorced from the statutory text of the CWA. 606 F. Supp. at 140. Because the EPA relied on factors upon which Congress has not intended the agency rely, the decision not to veto was arbitrary and capricious. Id. at 141.

Here, like the EPA in Alliance, which made the decision not to veto the section 404 permit based on factors outside the scope of the CWA, the EPA decided not veto the permit for Lake Temp because the OMB instructed the EPA not to exercise its veto power. Id. at 140; (R. at 9.). The EPA did not make its decision based on whether the permit for Lake Temp would have unacceptable adverse effects. (R. at 9.) Like the court in Alliance, which held the EPA's decision not to veto the permit was arbitrary and capricious because the decision was based on factors outside the statute, the court here should not only review the EPA's decision but determine it was arbitrary and capricious because the decision was based on the OMB's instruction and not factors in the statute. Id. at 141; (R. at 9.).

Although the EPA's decision not to veto the permit was arbitrary and capricious, the EPA does not even necessarily deserve Chevron deference because it shares authority to administer the CWA with the COE. Where agencies share administrative power over a statute, no agency's interpretation deserves deference. Rapaport v. US Dep't of the Treasury, 59 F.3d 212, 220 (D.C.C. 1995). For example, in Rapaport v. United States Dep't of the Treasury, the United States Court of Appeals for the D.C. Circuit refused to defer to the Office of Thrift Supervision's interpretation of a statute because the agency shared responsibility for the administration of the statute with other agencies. Id. Because the EPA and the COE share authority to administer section 404 permits under the CWA, the court should review its decision not to veto the permit without applying Chevron deference to either agency's interpretation. 33 U.S.C. § 1251(d), 1344(d). The EPA's decision not to veto the permit based on the OMB's direction is subject to judicial review, should be reviewed without deference, and was an arbitrary and capricious decision even if Chevron deference is applied.

C. The Court in Coeur held the CWA to be ambiguous and the EPA's decision not to veto the section 404 permit for Lake Temp was unreasonable.

Finally, the EPA's decision not to veto the section 404 permit was not required by the Supreme Court's decision in Coeur. Only a judicial precedent holding that the statute unambiguously forecloses the agency's interpretation, and therefore contains no gap for the agency to fill, displaces a conflicting agency construction. National Cable & Telecommunications Ass'n v. Brand X Internet Services, 545 U.S. 967, 982-83 (2005). In Coeur, the Court determined the CWA's section 404 was ambiguous but the EPA's decision not to veto the permit in that situation was reasonable. 129 S.Ct. at 2469. In National Cable & Telecommunications Association v. Brand X Internet Services, the United States Supreme Court reviewed the Federal Communications Commission's (FCC) interpretation of the

Communications Act even though a previous case had involved an interpretation of the same statute. 545 U.S. at 982. The United State Court of Appeals for the Ninth Circuit declined to review the FCC's interpretation because the conflicting construction of the Act it had adopted in another case foreclosed the Commission's interpretation. Id.; see AT&T Corp. v. Portland, 345 F.3d 871, 1127-32 (9th Cir. 2000). The Supreme Court reasoned that a court's opinion as to the best reading of an ambiguous statute is not authoritative and the agency's decision to construe a statute differently does not mean that the court's holding was legally wrong. Id. at 983.

Even though the court in Coeur held the EPA's decision not to veto the 404 permit was reasonable, the court here is not precluded from determining the EPA's decision not to veto the 404 permit was unreasonable. 129 S.Ct. at 2470. Because the court in Coeur held the CWA to be ambiguous regarding 404 permits, like the ambiguous Communications Act in National Cable, the court here is free to review the EPA's interpretation and is not required to find the EPA's interpretation to be reasonable based on the holding in Coeur. Coeur, 129 S.Ct. at 2469; National Cable, 545 U.S. 982. Additionally, because the facts of Lake Temp have already been distinguished from the facts in Coeur, the court should consider the differences between the lakes in deciding that EPA's decision not to veto the permit for Lake Temp was, in fact, a permissible construction of the CWA. Because the CWA is ambiguous and requires the court to determine whether the agency's interpretation is reasonable, the decision in Coeur does not require this Court to determine the EPA's decision not to veto the section 404 permit to be reasonable.

CONCLUSION

For the foregoing reasons, the Appellant and Cross-Appellee, the State of New Union, respectfully requests that this Court reverse the district court's grant of summary judgment.

Respectfully submitted,

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Team Number 55