TEAM #6

C.A. No. 11-1245

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IN THE
UNITED STATES COURT OF APPEALS
FOR THE TWELFTH CIRCUIT

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STATE OF NEW UNION,
Appellant and Cross-Appellee,

V.

UNITED STATES,
Appellee and Cross-Appellant,

V.

STATE OF PROGRESS,
Appellee and Cross-Appellant.

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW UNION

BRIEF FOR APPELLEE AND CROSS-APPELLANT

QUESTIONS PRESENTED

I. WHETHER NEW UNION HAS STANDING IN ITS SOVEREIGN CAPACITY TO APPEAL THE COE'S PERMIT TO THE DOD TO DISCHARGE A SLURRY OF SPENT MUNITIONS INTO LAKE TEMP AND WHETHER ALTERNATIVELY, NEW UNION HAS STANDING IN ITS *PARENS PATRIAE* CAPACITY.

II. WHETHER THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW UNION ERRONEOUSLY DETERMINED LAKE TEMP TO BE "NAVIGABLE WATER OF THE UNITED STATES" AND THAT THE CLEAN WATER ACT APPLIES TO LAKE TEMP.

III. WHETHER THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW UNION CORRECTLY FOUND THAT THE CORPS OF ENGINEERS HAD JURISDICTION TO ISSUE A § 404 PERMIT FOR THE FILL MATERIALS THAT THE CORPS INTENDS TO DISCHARGE.

IV. WHETHER THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW UNION CORRECTLY FOUND THE DEPARTMENT OF DEFENSE'S PERMIT VALID BECAUSE THE OFFICE OF MANAGEMENT AND BUDGET'S DISPUTE RESOLUTION COMPLIED WITH THE CLEAN WATER ACT.

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The Secretary of the Army, acting through the U.S. Army Corps of Engineers (COE), issued a permit under section 404 of the Clean Water Act (CWA), 33 U.S.C. § 1344. R. at 3. The permit allowed the Department of Defense (DOD) to discharge a slurry of spent munitions into Lake Temp, an intermittent lake wholly with a federal military reservation in the State of Progress. Id. at 3. After the permit was issued, EPA expressed its desire to veto the COE's section 404 permit. Id. at 9. At that point, the Office of Management and Budget (OMB) intervened and conducted a dispute resolution between EPA and COE, pursuant to procedures for reconciling disputes within the executive branch first established by Exec. Order No. 12,088, 43 Fed. Reg. 47,707. Id. at 10. During the resolution, EPA argued to OMB that the nature of the discharge required a section 402 permit at least for treatment of the non-fill liquid and semi-solid portion of the material before discharge into navigable waters. Id. at 9. OMB directed the EPA not to veto the permit, and the EPA acquiesced in OMB's directive. Id.

The State of New Union sued the EPA, represented by the United States, in the United States District Court for the District of New Union, seeking review of the section 404 permit issued by the COE. Id. at 3. The State of Progress, within whose boundaries the permitted actions will take place, intervened in the action, seeking to uphold the issuance of the permit. Id. New Union, the United States, and the State of Progress filed motions for summary judgment. Id.

The District Court issued a decision on June 2, 2011, finding that (1) the State of New Union had no standing, (2) the "COE had jurisdiction to issue a section 404 permit for the addition of fill to Lake Temp because Lake Temp is a navigable water and slurry is a fill

material," and (3) "OMB's dispute resolution between the EPA and COE did not violate the CWA." Id. at 10-11.

Following the issuance of the Order of the District Court dated June 2, 2008, in Civ. 148-2011, the State of New Union and the State of Progress each filed a Notice of Appeal. Id. at 1. New Union argued that (1) New Union had standing to challenge the Section 404 permit, (2) the COE had no jurisdiction to issue the permit under Section 404, (3) the OMB's dispute resolution violated the CWA. Id. at 1. In its appeal, the State of Progress argued that (1) New Union does not have standing, and either (2) Lake temp is not within the jurisdiction of the CWA and the activity requires no permit under either section 402 or 404 because Lake Temp is not navigable water, or (3) the COE has jurisdiction to issue the permit under section 404 pursuant to *Coeur Alaska*; and (4) OMB's participation in the decision-making process did not violate the CWA. Id. at 1-2.

STATEMENT OF THE FACTS

Lake Temp is an oval-shaped intermittent lake that is three miles wide and nine miles long at its maximum, located primarily within the State of Progress. R. at 3-4. During the dry season, the lake is significantly smaller and it is completely dry once every five years. Id. at 4. Lake Temp has an eight-hundred square mile watershed, which is located in both Progress and New Union. Id.

The Imhoff Aquifer is located approximately one-thousand feet below Lake Temp, and it is neither potable nor usable in agriculture without treatment because of a high level of sulfur. Id. Ninety-five percent of the aquifer is located in the State of Progress, wholly within the boundaries of the military reservation. Id. Five percent of the aquifer is in New Union. Id. Above the portion of the aquifer located in New Union is a ranch, which Dale Bompers owns and operates, and on which he resides.

Individuals regularly visit the lake for boating, canoeing, duck hunting, and bird watching, among other things. When the lake holds water during the migration season, ducks use it as a stopover during their migration. Id. Duck hunters regularly visit the lake to hunt the ducks. Id. In the last one hundred years, hundreds of duck hunters have visited the lake, most of whom are from the State of Progress and some of whom are from out of state. Id.

A Progress state highway runs along the South edge of Lake Temp, at the edge of the military reservation and 100 feet from the lake when the lake is at its highest height. Id. One can see clearly visible trails leading from the road to the lake, which show signs of rowboats and canoes being dragged toward the lake. Id. When the lake became part of the military reservation in 1952, the DOD posted signs along both sides of the highway, twenty-five feet from the edge of the road, and at intervals of one hundred yards. Id. The signs warned people to stay out and

stated the entry was illegal. Id. The DOD did not install a fence and has taken no measures to restrict public access. Id. The DOD, however, knows that people use the lake for hunting and bird watching. Id.

Recently, the DOD proposed raising the level of the lake, which is located within the boundaries of the military reservation, with fill. DOD plans to spray the fill over the bottom of the lake using a movable multi-port pipe. Id. The pipe will deposit the slurry evenly until the entire lakebed is raised by one or two feet. Id. The fill will be composed of the liquid, semi-solid, and granular contents of spent munitions and stabilizing chemicals to assure the substance is inert. Id. The mixture will be pulverized and mixed with water to make it into a consistency nthat can be sprayed easily. Id.

After the process is complete, the lake will six feet higher and two miles larger than at the present time. Id. The DOD will continually grade the edges of the lakebed so that runoff from the watershed will flow into the lake unimpeded. Id. The lake will still collect all of the runoff because it is the lowest area in the surrounding watershed. Id. Over time, alluvial deposits from precipitation will recover the lakebed, returning the lakebed to its original composition. Id.

SUMMARY OF THE ARGUMENT

First, this Court should grant standing to New Union in its sovereign capacity because New Union has sufficiently alleged an imminent and actual harm. If the DOD proceeds with its plans, the Imhoff Aquifier will be contaminated. As part owner of the Aquifier, New Union has an interest in keeping the water free from contamination. Under the relaxed standing requirements articulated in Massachusetts v. EPA, New Union has shown that as a state, it has a special interest in protecting its territory; furthermore, New Union has brought forth sufficient evidence of a concrete and particularized injury required to establish standing. This Court should also grant standing to New Union in its *parens patriae* capacity. A state bring suits under parens patriae must allege not only harm on behalf of its citizens, but also an individualized harm to itself. Contamination of the Imahoff Aquifier threatens citizens such as Dale Bompers who have a right to use the water. The state, in turn, has a right to grant its citizens permission to use the water. If the water becomes contaminated, the State's right to the water would be taken away, as the State may no longer have the ability to allow its citizens to use the water. Thus, the harm of contamination would affect both the state individually and the citizens of New Union. Accordingly, New Union has established standing in its *parens patriae* capacity.

Second, this Court should overturn the lower court's holding that Corps of Engineers needed to obtain a permit to make the alternations that they intend to make to at Lake Temp, because Lake Temp is not a "navigable water of the United States," and is not adjacent to any "navigable water of the United States" under either the plurality holding in Rapanos, or the "nexus" test proposed in the Rapanos concurrence. Lake Temp fails to meet the definition of a navigable body of water under the Clean Water Act because it is intermittent, ephemeral and transitory, because it dries up every five years. Also, it falls outside the definition of "navigable

water" because it is isolated and entirely intrastate. Because of its location and limited local impact, Lake Temp is also not adjacent, under either Rapanos test, to any other navigable bodies of water of the United States. Accordingly, this Court should find that the COE needs no permit to proceed.

Third, to the extent that Lake Temp is a navigable water of the United States, this Court should uphold the lower court's determination that the COE has the permit-issuing authority necessary to issue a permit for the alterations they intend, specifically raising the lakebed approximately six feet, because raising the lakebed via discharge of "fill material" is the primary purpose of the discharges into Lake Temp, and Section 404 permits specifically limit the EPA from having jurisdiction over "fill material." Therefore, this Court should find that the COE can proceed with their alterations to Lake Temp.

Finally, this court should uphold the District Court's decision not to overturn the EPA's decision to permit the permit because, first, the OMB's dispute resolution between the EPA and the COE was valid under the CWA. Second, the EPA's decision to allow the permit is not subject to judicial review because EPA's authority to veto is committed to agency discretion by law. Third, if the EPA's decision is subject to judicial review, the EPA's decision not to veto the permit must be upheld because it is not arbitrary and capricious.

ARGUMENT

I. New Union has standing in its sovereign capacity and in its *parens patriae* capacity to appeal the COE's permit allowing the DOD to discharge a slurry into Lake Temp, because the slurry will likely contaminate the Imhoff Aquifer located in New Union and will injure both New Union and citizens wishing to use the Aquifier in the future.

A. New Union meets the test for state standing established in Massachusetts v. EPA because it has a special, individual interest in protecting its environment and has sufficiently established that contamination of the Imhoff Aquifier will injure New Union.

New Union has met its burden under the requirements for standing to appeal the COE's permit allowing the DOD to discharge slurry into Lake Temp. New Union has a strong interest in its sovereign capacity in the general welfare of its state, which includes an interest in keeping its portion of the Aquifier free from contamination. Because New Union has shown that the state will suffer an imminent injury if the slurry contaminates the Imhoff Aquifier, this Court should grant New Union standing to proceed in its lawsuit.

A party's standing depends on whether the plaintiff has demonstrated that it suffered an injury in fact due to a "concrete and particularized, actual or imminent invasion of a legally protected interest." Lujan v. Defenders of Wildlife, 504 U.S. 555, 555 (1992). The Supreme Court's decision in Massachusetts v. EPA, 549 U.S. 497 (2007) relaxed this requirement for states seeking standing, as "states are not normal litigants for the purposes of invoking federal jurisdiction." 549 U.S. at 518. The Supreme Court has stated that "the gist of the question of standing" is whether petitioners have "such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination." Baker v. Carr, 369 U.S. 186, 204 (1962).

New Union has a special interest in this case because the Imhoff Aquifier will be negatively affected by discharge into Lake Temp. As a state, New Union is the ultimate protector of its own territory and has a heightened responsibility to ensure the health and welfare of its land and resources. The threat of contamination to its waters poses a serious risk that New Union has a right to address. Under the relaxed standing measure for states, New Union has established its grounds for standing and therefore this Court should allow New Union to proceed with its challenge.

1. The harm to New Union through contamination of the Imhoff Aquifier by discharge into Lake Temp is imminent and actual.

A litigant, whether a private party or a state, must show that the action it seeks to enjoin poses harm to the litigant that is both "concrete and particularized" and "actual and imminent." Lujan, 504 U.S. at 555. The Court stated, "when the suit is one challenging the legality of government action or inaction, the nature and extent of facts that must be averred (at the summary judgment stage) or proved (at the trial stage) in order to establish standing depends considerably upon whether the plaintiff is himself an object of the action (or forgone action) at issue." Id. at 561.

New Union has met its relaxed burden of showing that the DOD's discharge of slurry into Lake Temp poses an imminent and actual harm. New Union has evidence that the slurry will contaminate the Imhoff Aquifier, 5% of which is located in New Union, which is sufficient to establish New Union's injury. How much or when the contamination will actualize, though important questions, are not relevant to the standing inquiry when New Union has already shown that contamination of the Aquifier is an imminent threat. Standing does not require proof of the injury beyond a reasonable doubt; rather, a litigant simply must put forth evidence that an actual and imminent harm exists and that the litigant is the object of that harm. Here, New Union has

shown that because 5% of the Imhoff Aquifier is located in New Union and because the discharge of slurry into Lake Temp will contaminate the Aquifier, the discharge poses an imminent and actual threat to New Union. Accordingly, New Union has successfully established its injury from the DOD's actions.

2. New Union has a special interest in protecting the state's environment, health, and general welfare.

A state "has the last word as to whether its mountains shall be stripped of their forests and its inhabitants shall breathe pure air." Georgia v. Tennessee Copper Co., 206 U.S. 230, 237 (1907). The Supreme Court has recognized that a state has a special interest in protecting itself from environmental harm. Massachusetts v. E.P.A., 549 U.S. at 522 (stating that because Massachusetts owned a significant amount of land affected by climate change, Massachusetts "alleged a particularized injury in its capacity as a landowner."). Courts have reaffirmed that for states who have alleged a particular harm to their sovereign territory, special standing considerations may be made that would not apply to private citizens. Center for Biological Diversity vs. U.S. Dept. of Interior, 564 F.3d 466 (D.C. Cir. 2009) (distinguishing the plaintiffs in that case from the plaintiff in Massachusetts v. E.P.A, where Massachusetts was a state plaintiff with "interests in ensuring the protection of the land and air within its domain.").

New Union has not alleged some general harm from the slurry nor should its claim be reviewed as that of a private party. Here, a state has indicated actual harm to its resources from the action of another party. The harm alleged is of a special nature because of the state's interest in protecting its environment, health, and welfare. Contamination of water has been recognized for over a century as a source of great environmental concern and New Union thus has a long-restablished interest in protecting its waters from such harm.

For the reasons stated above, this Court should find that New Union has established standing in its sovereign capacity.

B. New Union has *parens patriae* standing to appeal COE's permit because New Union has a quasi-sovereign interest in preventing the imminent harm that contamination of the Aquifier poses to New Union's citizens.

1. New Union has established a quasi-sovereign interest in the health and economic welfare of its citizens.

In addition to establishing standing in its sovereign capacity, New Union has established a quasi-sovereign interest sufficient for *parens patriae* standing. The dissent in Massachusetts v. EPA explained that parens patriae standing provides an alternative, albeit a difficult one, for a state seeking to assert a right on behalf of both itself and its citizens. Massachusetss v. EPA, 549 U.S. at 538 (Roberts, J., dissenting). As a protector of its citizens, a state may bring suit on their behalf; however, the state must also establish its own interest in protecting its citizens, apart from the citizens' individual interests. Id. Stated differently, quasi-sovereign interests "consist of a set of interests that the state has in the well-being of its populace . . . A quasi-sovereign interest must be sufficiently concrete to create an actual controversy between the state and the defendant." Alfred L. Snapp & Son, Inc. v. Puerto Rico, ex rel., Barez, 458 U.S. 592, 602 (1982). The Supreme Court articulated two paths a state may follow to *parens patriae* standing:

> In order to maintain such an action, the State must articulate an interest apart from the interests of particular private parties, *i.e.*, the State must be more than a nominal party. The State must express a quasi-sovereign interest. Although the articulation of such interests is a matter for case-by-case development—neither an exhaustive formal definition nor a definitive list of qualifying interests can be presented in the abstract—certain characteristics of such interests are so far evident. These characteristics fall into two general categories. First, a State has a quasi-sovereign interest in the health and well-being—both physical and economic—of its residents in general. Second, a State has a quasi-sovereign interest in not being discriminatorily denied its rightful status within the federal system.

Id. at 607

The injury to its citizens, therefore, must rise to a level where the injury becomes not only that of its private citizens, but also an injury of the state. Georgia v. Tennessee Copper Co., 206 U.S. at 237 (describing the state's action in that case as "a suit by a State for an injury to it in its capacity of *quasi*-sovereign" and holding "[i]n that capacity the State has an interest independent of and behind the titles of its citizens, in all the earth and air within its domain."). For example, in Missouri v. Illinois, 180 U.S. 208 (1901), the Supreme Court recognized *parens patriae* standing for Missouri against Illinois for sewage discharge from Illinois that polluted parts of the Mississippi River. Id. at 241("But it must be conceded that, if the health and comfort of the inhabitants of a state are threatened, the state is the proper party to represent and defend them.").

Intertwined with an interest in the general health and well-being of its citizens is a state's interest in protecting its economic welfare. In Pennsylvania v. West Virginia, Pennsylvania sought standing to enjoin West Virginia from passing an act that would cut off the flow of natural gas from West Virginia to Pennsylvania. 43 S. Ct. 658 (1923). The Court held "[t]his is a matter of grave public concern in which the state, as the representative of the public, has an interest apart from that of the individuals affected. It is not merely a remote or ethical interest, but one which is immediate and recognized by law." A state has a right to protect not only the health and well-being of its citizens, but also the ability to sustain a vibrant economy and to offer to its citizens economic opportunity.

New Union provides Dale Bompers as one example of the overall injury to its citizens that would occur if the Imhoff Aquifier becomes contaminated; however, Mr. Bompers is not the only citizen who stands to be affected. The exact effects from contamination of the Aquifier are admittedly not determined, but enough is known about contamination from pollutants that reasonable minds would agree that contamination of a state's waters poses a threat to the health

and well-being of its inhabitants. New Union has an interest in ensuring its citizens are surrounded by clean, non-toxic waters and as such, New Union has sufficiently established a concrete interest allowing *parens patriae* standing.

New Union has a separate interest in protecting its citizen's rights to obtain water from the Aquifier. Whether the water must be treated before use is irrelevant to the inquiry — all that matters is that the state has made the water available to its citizens if they choose to use it. Although Mr. Bompers has not and may never actually use the Aquifier, his right to use it, established by New Union, currently exists for him to assert. If the Aquifier becomes contaminated, that right would dissolve for Mr. Bompers and any similarly situated citizens; in turn, the state's ability to grant that right would diminish.

Because New Union has an interest in providing its citizens the right to access water from the Aquifier and because contamination to the Aquifier threatens that right, New Union has sufficiently established standing in its parens patriae capacity.

2. New Union has established a quasi-sovereign interest asserting its rights within the federal system.

The second principle underlying parens patriae is a state's interest in defending its rights created within the federal system. Alfred L. Snapp & Son, Inc. v. Puerto Rico, 458 U.S. at 607. ("State and residents are not excluded from the benefits that are to flow from participation in the federal system.").

Here, New Union has created a system by which it permits its residents to use water from the Imhoff Aquifier. New Union has a right to allow its residents the benefits of its resources. Accordingly, New Union has an interest in protecting that right. Contamination of the Imhoff Aquifier would likely prevent New Union from further allowing its residents to use the Aquifier water, a result that would deny New Union its right to use its land and resources as it chooses.

Under the theory of *parens patriae* therefore, New Union has an interest in protecting its land and resources granted to it through the federal system.

New Union has met its burden under the relaxed test for standing articulated under Massachusetts v. EPA. The DOD's discharge of slurry into Lake Temp poses a threat of contamination of the Imhoff Aquifier, 5% of which is located in New Union. As a sovereign state, New Union has a special interest in the health, environment, and welfare of its land. Furthermore, in its *parens patriae* capacity, New Union has successfully established that the injury to its citizens by contamination of the Imhoff Aquifier would also create an independent injury to New Union. Accordingly, New Union has also successfully shown that it may establish standing under a theory of *parens patriae*.

II. The COE should be able to proceed because Lake Temp is not protected by the CWA, because Lake Temp is not a navigable water of the United States, and has no "significant nexus" nor "continuous surface connection" to navigable waters.

A. Lake Temp is not a navigable water of the United States because it is (1) intermittent, ephemeral, or transitory, and it is (2) nonnavigable, intrastate, and isolated.

This Court should find that the Clean Water Act (CWA) does not regulate discharges into Lake Temp because Lake Temp falls outside the definition of "navigable waters of the United States," and is not adjacent to any navigable waters. The Clean Water Act grants jurisdiction to the federal government to regulate discharges into all "navigable waters" "of the United States." 33 U.S.C § 1344(a); 33 U.S.C § 1362(7). The Supreme Court, when interpreting the CWA's definition of "navigable waters," noted that the definition is "broader than the traditional understanding of that term." Rapanos v. United States, 547 U.S. 715, 731(2006) (interpreting Solid Waste Agency of N. Cook County v. U.S. Army Corps of Engineers, 531 U.S. 159 (2001)); United States v. Riverside Bayview Homes, 474 U.S. 121 (1985)). In a 4-1-4 split

decision, the plurality in Rapanos determined that if a body of water was not, in itself, a navigable water, and was not "adjacent" to a navigable water, the CWA did not have jurisdiction over it. Rapanos, 547 at 717. Under the plurality's reasoning, a body of water must maintain a "continuous surface connection" to another body of water that is, in its own right, a navigable water of the United States. In the alternative, Justice Kennedy, in a concurring opinion, agreed with the holding but held instead that a broader "significant nexus" with a navigable water of the United States was all that a body of water needed to be considered "adjacent" to a navigable body of water for the purposes of the CWA. Id. at 759.

1. Lake Temp is "transitory,""intermittent," or "ephemeral" because it dries up once every five years.

The CWA does not cover Lake Temp, because Lake Temp is an intermittent, transitory, and ephemeral body of water. The Supreme Court found in Rapanos that the "waters of the United States" "does not include channels through which water flows intermittently or ephemerally." Rapanos, 547 U.S. at 716 (holding that the [COE]'s expansive interpretation of the phrase "waters of the United States" is impermissible). Indeed, the Supreme Court specifically pointed out that "[i]solated ponds are not "waters of the United States" in their own right. Id. at 717, 733 ("Even the least substantial of the definition's terms, namely, "streams," connotes a continuous flow of water in a permanent channel-especially when used in company with other terms such as "rivers," "lakes," and "oceans"). The Court noted that the terms for navigable waters did not include "transitory puddles or ephemeral flows of water." Id. at 733.[1]

Lake Temp is excluded from the definition of "navigable waters." Lake Temp shrinks during the dry season. R. at 4. Indeed, all parties agree that Lake Temp disappears completely

[1] Several of the Circuits have followed the Rapanos plurality on this issue. See Rice v. Harken Exploration Co., 250 F.3d 264 (5th Cir. 2001); Natural Resources Defense Council v. Kempthorne, 525 F. Supp. 2d 115 (D.C. Circ. 2007).

"one out of five years." Id. The CWA was not intended to cover these types of isolated bodies of water. See 33 U.S.C. § 1251(a) (providing that the CWA was established to "restore and maintain the . . . integrity of the Nation's waters") (emphasis added). Therefore, this Court should find that Lake Temp is a "transitory," "intermittent," or "ephemeral" body of water, and not a navigable water of the United States.

2. Lake Temp is nonnavigable, isolated, and intrastate because there is no outflow from it.

The Supreme Court unequivocally stated that "nonnavigable, isolated, intrastate waters . . . were not included as waters of the United States." Rapanos, 547 U.S. at 726, 126. (interpreting its own holding in SWANCC, 531 U.S. 159 (2001)). In SWANCC, under very similar facts to the case at bar, the Court found that the COE's authority did not extend to the waters in question. Solid Waste Agency of N. Cook County v. U.S. Army Corps of Engineers, 531 U.S. 159, 162 (2001) (holding that "an abandoned sand and gravel pit" that occasionally filled with water did not qualify as a "water of the United States").

Under the Supreme Court's dictates in Rapanos and SWANCC, this Court should find that because Lake Temp is "entirely intrastate; located within a basin with no outlets, and flowing nowhere," R. at 7, Lake Temp is not a navigable water of the United States. See City of Shareacres, et al. v. Waterworth, 420 F.3d 440, 446 n.2 (5th Cir. 2005) (finding that the CWA does not cover "isolated, intrastate waters"). The purpose of the CWA is to prevent impacts on the larger waters of the United States; if a body of water is sufficiently isolated, then it will not fall within the jurisdiction of the CWA. See 33 U.S.C. § 1251(a) (providing that the CWA was established to "restore and maintain the . . . integrity of the Nation's waters"). Further, this Court should follow the reasoning of the Third, Fifth, and Ninth Circuits, holding that bodies of water that are entirely intrastate do not fall under the CWA. See John v. United States, 247 F.3d 1032

(9th Cir. 2001); United States v. Donovan, 10-4295, 2011 WL 5120605 (3d Cir. Oct. 31, 2011). This Court should find that Lake Temp is an intermittent and intrastate body of water, falling outside the definition of "navigable waters of the United States," and therefore outside the CWA.

B. Both the "continuous surface connection" test of the Rapanos plurality and the "significant nexus" test of the Rapanos concurrence exclude Lake Temp from adjacency to navigable waters of the United States.

1. The "continuous surface connection" test excludes Lake Temp because it is entirely contained within the State of Progress, with no output.

This Court should find that Lake Temp has no "continuous surface connection" to a navigable water of the United States. The plurality opinion in Rapanos held that a nonnavigable body of water must have a "continuous surface connection" to a "relatively permanent" water of the United States in order to be deemed "adjacent" for purposes of the CWA. Rapanos, 547 U.S. at 717. This connection must be more substantial than a "remote hydrologic connection." Id. at 742. It must, rather, be a connection that makes it "difficult to determine" where one body of water ends and the other begins. Id. If there is not such connection, then there are no concerns about the impact on the waters of the United States generally. See N. California River Watch v. City of Healdsburg, 496 F.3d 993, 1001-02 (9th Cir. 2007) (finding that no permit is required to "discharge pollutants into a self-contained body of water that has no connection to a water of the United States").

Here, there is no continuous surface connection—as noted above, Lake Temp is entirely intrastate, with no output whatsoever. All parties agree that no continuous surface connection from Lake Temp to another, relatively permanent body of water work (despite the existence of the subsurface aquifer). Therefore, this Court should apply the "continuous surface connection" and find that Lake Temp is not "adjacent" to any navigable water of the United States.

2. The "significant nexus" test also excludes Lake Temp from adjacency to navigable waters of the United States because Lake Temp has no effect on the chemical, physical, and biological integrity of the waters of the United States.

The "significant nexus" test of Justice Kennedy in the Rapanos concurrence gives a broader reading to the jurisdiction of the CWA, but still does not encompass bodies of water like Lake Temp, and therefore should exclude it from the CWA's coverage. In his concurrence, Justice Kennedy noted that under the Supreme Court's earlier interpretations under the CWA, "a water or wetland must possess a 'significant nexus' to waters that are or were navigable in fact or that could reasonably be so made." Rapanos, 547 U.S. at 759 (J. Kennedy, concurring). Giving some further guidance on this issue, Kennedy noted that the body of water in question needed to serve as an "integral part of the aquatic environment" in order to have this "significant nexus." Id. at 779 (referencing Riverside Bayview, 474 U.S. at 135). Finally, a body of water has a significant nexus if it can "significantly affect the chemical, physical, and biological integrity of other covered waters more readily understood as 'navigable.'" Id. at 780 (referring to Congress' intent in enacting the CWA). However, if there is no significant nexus, the concerns about discharges are avoided. See N. California River Watch v. City of Healdsburg, 496 F.3d 993, 1001-02 (9th Cir. 2007) (finding that no permit is required to "discharge pollutants into a self-contained body of water that has no connection to a water of the United States").

Here, the facts in the record do not support that the COE's actions would effect Lake Temp's ability to act as an "integral part of the aquatic environment." The COE spray slurry over the dry parts of the lakebed, allowing it dry out before it ever contacts the water. R. at 4. The lake's elevation will be raised about six feet, and it will be two miles larger. Id. After this operation, the lake will return to its "pre-operation condition." Id. at 5. Therefore, the

"chemical, physical, and biological integrity" of any waters which Lake Temp has a significant nexus to will not be affected, and the CWA permits the COE's proposed alterations.

III. In the alternative, to the extent to which Lake Temp falls under the CWA, the COE has authority to issue a permit for that activity under § 404, 33 U.S.C. § 1344 because the material to be discharged is fill material, and the toxicity of the material is therefore irrelevant.

A. The COE has the authority to issue a permit under § 404_of the CWA because the material to be discharged will have the effect of raising Lake Temp's lakebed.

The COE has sole authority to issue permits for "fill" material, and therefore the CWA allows the COE's proposed alterations to Lake Temp. § 404(a) of the CWA gives the COE the authority to "issue permits . . . for the discharge of dredged or fill material." Coeur Alaska, Inc. v. Se. Alaska Conservation Council,129 S. Ct. 2458, 2468 (2009) (citing CWA § 404, 33 U.S.C. § 1344(a)); see also CWA § 402(a) (providing that the EPA has permit-issuing authority for all discharge of pollutants "except as provided in . . . [CWA § 404]"). If a material has the effect of "[c]hanging the bottom elevation, it is "fill" material. 40 C.F.R. § 232.2. "Fill" includes "slurry, or tailings or similar mining-related materials." Id. In fact, § 404 (a) puts all fill material "without qualification" under the authority of the COE. Coeur Alaska, 129 S. Ct. at 2469. As long as the materials being discharged fall "within the regulation's definition of 'fill,'"[2] the COE has authority. Id. at 2468. Therefore, the question this Court must resolve simple: does the material the COE wishes to discharge fit within the definition of fill? The CWA provides some examples of fill, including, but not limited to: "Rock, sand, soil, clay, plastics, construction debris, wood chips, overburden from mining or other excavation activities, and materials used to

[2] "(2) Examples of such fill material include, but are not limited to: 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 the waters of the United States. (3) The term fill material does not include trash or garbage." 40 C.F.R. § 232.2

create any structure or infrastructure in the waters of the United States," while excluding "trash or garbage." 40 C.F.R. § 232.2. Under § 1344 of the CWA, the COE retains authority for issuing permits "for the discharge of dredged or fill material into the navigable waters."33 U.S.C.A. § 1344; see also Save Our Cmty. v. U.S. E.P.A., 971 F.2d 1155, 1162 n. 14 (5th Cir. 1992) (holding that the COE has authority for issuing permits for all fill material, while the EPA "is responsible for issuing permits for all other discharges") (emphasis added). One of the factors that must be considered in determining whether the material to be discharged is fill is the discharger has as a "principle purpose . . . to raise the bottom elevation" of a water of the United States. Water Pollution Control; Memorandum of Agreement on Solid Waste, 51 FR 8871-01. The discharge here will raise the bed of Lake Temp—therefore, the slurry is fill material.

B. The toxicity of the fill material to be discharged is irrelevant because that is not a relevant consideration under § 404.

While the lower court notes here notes that the materials being discharged into Lake Temp include "hazardous substances," R. at 3, nowhere does § 404 prohibit the discharge of such substances as long as they are being used as fill material. See also Kentuckians for Commonwealth Inc. v. Rivenburgh, 317 F.3d 425, 448 (4th Cir. 2003) (vacating and remanding a lower court's holding that "'fill material' as used in § 404 of the Clean Water Act is limited to mean 'material deposited for some beneficial primary purpose"). In fact, allowing the COE to issue a § 404 permit here does not fly in the face of the policy behind the CWA, because if the pollutants are not discharged into any waters of the United States, there is in effect, zero discharge of the pollutants, which is the goal of the statute. See CWA Section 101(a)(1), 33 U.S.C. § 1251(a)(1). As all parties have conceded, Lake Temp has no output, so the pollutants could not have any "downstream" effects. All parties agree that the material will have a primary purpose of elevating the lakebed. R. at 4. Therefore, because the material being discharged is

"fill material" it properly falls to the COE as the permit-issuing authority to issue the permit to proceed with the alterations to Lake Temp.

This Court should find that the COE has the authority to proceed with the proposed alterations to Lake Temp. First, because Lake Temp falls outside the CWA's aegis, because it is not in its own right a navigable water of the United States. It is transitory, ephemeral, and intermittent in nature, because it dries up once every five years, and the CWA does not cover such bodies of water. Also, Lake Temp is isolated and completely intrastate, with no out-flow whatsoever—again, the CWA does not cover such bodies of water. Second, Lake Temp is not adjacent to any bodies of water that are, in their own right, waters of the United States, because under either the plurality's "continuous surface connection" test or Justice Kennedy's "significant nexus" test from Rapanos, Lake Temp fails to meet the requirements for adjacency. Finally, even if Lake Temp falls within the definition of a navigable water of the United States, the COE has the ability to proceed because the material that the COE intends to discharge into Lake Temp will have the effect of raising the lakebed, which puts the discharged material under the definition of "fill material." "Fill material" is entirely within the COE's jurisdiction to regulate, and therefore the COE can issue a permit for the alterations if it so chooses. Therefore, this Court should find that the COE has the authority to proceed with the proposed alterations to Lake Temp.

IV. The United States District Court for the District of New Union correctly found the DOD's Section 404 permit valid because the OMB's dispute resolution complied with the Clean Water Act and the EPA's decision to uphold the permit is unreviewable.

Subject to certain exceptions, agency actions are presumptively subject to judicial review. First, agency actions are unreviewable when "statutes preclude judicial review." 5 U.S.C. §

701(a). Second, judicial review is precluded when "is committed to agency discretion by law." 5 U.S.C. § 701(a)(2). In addition, an agency action must be "final" in order to be reviewed. Whitman v. American Trucking Ass'n, 531 U.S. 479 (2001). If review is permitted, courts review agency action using an "arbitrary and capricious" standard. See 5 U.S.C. § 702(2)(A).

This court should uphold the District Court's decision to uphold the EPA's decision to permit the Section 404 permit because, first, the OMB's dispute resolution between the EPA and the COE was valid under the CWA. Second, the EPA's decision to allow the permit is not subject to judicial review because EPA's authority to veto is committed to agency discretion by law. Third, if the EPA's decision is subject to judicial review, the EPA's decision not to veto the permit must be upheld because it is not arbitrary and capricious.

A. The Section 404 permit is valid because OMB's dispute resolution between the EPA and COE was proper under the CWA.

1. The CWA's text, structure, objective, and the nature of the available remedies indicate that Congress provided for OMB's participation.

The OMB reviewed the EPA's decision not to veto, and their review was proper under the CWA. Section 701(a)(1) of the APA recognizes the possibility that, in limited circumstances, statutes can rebut the presumption of reviewability by precluding review. *See* 5 U.S.C. § 701(a)(1). Courts have construed this provision narrowly because the presumption of reviewability is "strong" and imposes a "heavy burden" on rebutters. Therefore, rebutters must demonstrate "persuasive reasons to believe that [precluding review] was the purpose of Congress." Bowen v. Michigan Academy of Family Physicians, 476 U.S. 667 (1986).

"[O]nly upon a showing of 'clear and convincing evidence' of a contrary legislative intent should the courts restrict access to judicial review." Abbott Labs., 387 U.S. at 141. There is a 'clear and convincing' showing of contrary legislative intent "whenever the congressional

intent to preclude judicial review is 'fairly discernible in the statutory scheme.'" Block v. Community Nutrition Institute, 467 U.S. 340, 351 (U.S. 1984) (quoting Data Processing Service v. Camp, 397 U.S. 150, 157). When evaluating Congressional intent, the relevant factors are the statute's text, its structure, its objective, the nature of the statutory remedies, and the type of agency action involved. See Dalton v. Spector, 511 U.S. 462 (1994) (finding preclusion inferred from statements in legislative history, though court relied more on lack of finality than preclusion); Morris v. Gressette, 432 U.S. 491 (1977) (finding review precluded when legislative history indicated that Congress intended the remedy to be expeditious and judicial review would unnecessarily extent the procedures).

The text and structure of the CWA also indicates that review by OMB was proper because the OMB is responsible for resolving disputes between the EPA and the COE. The EPA and the COE are both responsible for wetland protection under section 404 of the CWA. 33 U.S.C. § 1344 ("Section 404"). The COE is responsible for issuing permits for the discharge of fill material. See Conservation Counsel v. Coeur Alaska, Inc., 129 S. Ct. 2458, 2468 (2009) (citing 33 U.S.C. § 1344(a)). After a permit is issued, the EPA Administrator has the ability to veto the permit, but the Administrator must "consult with the Secretary" of the COE before vetoing a permit. 33 U.S.C. § 1344(c). The Act leaves the Executive Branch the responsibility of determining what the Administrator and Secretary's consultation should entail. The act, therefore, gives the Executive Branch the responsibility of designing an appropriate consultation method.

OMB's review is also proper because a primary goal is implementing the Act's provisions in an expeditious manner. Specifically, a Congressional goal of the CWA was for "programs for the control of nonpoint sources of pollution [to] be developed and implemented in

an expeditious manner." 33 U.S.C. § 1251(a)(7). To meet this goal, the Act is to be administered by the EPA Administrator, "except as otherwise expressly provided in" the Act. 33 U.S.C. 1251(d). With respect to section 404, two agencies share responsibility for implementation, and therefore, the agencies or the executive branch are responsible for determining the proper method of implementation.

OMB review was also appropriate because the nature of the action, the issuance of a permit requiring the approval of two agencies, necessarily requires an arbitration process. The EPA and COE will inevitably disagree about when a permit should be vetoed, and therefore, the Executive Branch had to design an arbitration process so that the agencies are able to implement the CWA in an "expeditious mann.er." Based on the CWA's text, structure, goals, and the nature of the agency action, the OMB's dispute resolution between the EPA and the COE did not violate the CWA.

2. OMB's dispute resolution was proper because the President is responsible for determining how to resolve disputes within the executive branch.

The OMB's dispute resolution is proper because it is required by the separation of powers set forth in the Constitution. The Constitution mandates that the President, not the Administrator of EPA, has the duty to "take care that the laws be faithfully executed." U.S. CONST. art. II, § 3. This power necessarily involves the ability to resolve disputes between executive agencies. The President took steps to resolve disputes between the Administrator and COE by enacting Executive Order number 12,088. 43 Fed. Reg. 47,707 (Oct. 13, 1978). The EPA shares responsibility with other executive agencies for implementing numerous environmental statues, including the CWA. *See* 43 Fed. Reg. 47,707. To resolve disputes between agencies, the President passed the Order requiring the Administrator to "make every effort to resolve conflicts... between Executive agencies," and if the conflict cannot be resolved, to "request the

Director of the [OMB] to resolve the conflict." 43 Fed. Reg. 47,708. As a result, OMB's participation was compatible with a valid exercise of the President's Article II powers.

B. Judicial review of the EPA's decision to allow the Section 404 permit is prohibited.

1. Judicial review is prohibited because deciding whether to veto is committed to agency discretion by law.

Judicial review of the EPA's decision to uphold the permit is improper because the decision is committed to the EPA's discretion. Section 701(a)(2) of the APA precludes judicial review "to the extent that agency action is committed to agency discretion by law." Review is precluded under section 701(a)(2) when there are practical considerations that demonstrate a "general unsuitability for judicial review of agency decisions to refuse enforcement." Heckler v. Cheney, 470 U.S. 821, 831 (1985). There is a general unsuitability for judicial review when an agency does not act to enforce and the agency has not exercised its power in any way. Id. at 832; see AAPC v. FCC, 422 F.3d 751 (D.C. Cir. 2006) (finding that an agency's denial of reconsideration of a license is committed to agency discretion by law). Review is unsuitable under these circumstances because a court has no "focus" for judicial review because it cannot know what the agency would have done. Heckler, 470 U.S. at 832. EPA's decision not to veto the permit is unreviewable because it is a decision to refuse enforcement, which provides no locus for judicial review. As the Administrator took no action, the court would have no locus to examine. See Didrickson v. U.S. Department of Interior, 922 F.2d 1332 (9th Cir. 1992) (finding that an agency's decision not to appeal in litigation is committed to their discretion). As a result, judicial review of the Administrator's decision not to veto the permit is improper.

2. Judicial review of the EPA's decision not to veto the Section 404 permit is precluded because the EPA's decision to veto was not a final action

Judicial review of the EPA Administrator's decision to uphold the permit is improper because the decision is not final. Only "final" agency action is reviewable. 5 U.S.C. § 704. For an agency action to be final, "the action must mark the consummation of the agency's decision making process." Bennett v. Spear, 520 U.S. 154, 177-78 (1997); see Chicago & S. Air Lines v. Waterman S. S. Corp., 333 U.S. 103, 112, 68 S. Ct. 431, 437, 92 L. Ed. 568 (1948) (finding no final action when the Board's action only took effect after the President approved the action). Further, "the action must be one by which rights or obligations have been determined, or from which legal consequences will flow." Bennett, 520 U.S. at 178; see Dalton v. Specter, 511 U.S. 462, 462 (1994) (finding no final action when the action had "no direct consequences" on the litigant's rights).

The EPA's decision is not final. First, the Administrator's decision pursuant to the OMB dispute resolution does not "mark the consummation of the agency's decisionmaking process" because the Administrator may still disregard the decision from the OMB dispute resolution and veto the permit. Further, the Administrator's decision not to veto the permit has no effect on the DOD's legal rights: the DOD's rights are the same before the EPA's action and after the EPA's action. As a result, the EPA's decision is not final, and thus, the decision is not reviewable.

C. Even if the EPA's decision is subjected to judicial review, the Section 404 Permit is valid because EPA's decision not to veto the permit was not arbitrary and capricious as it is consistent with precedent and supported by the facts.

If the Court finds review appropriate, the Section 404 permit still survives because it is consistent with previous Supreme Court precedent and is supported by the factual record. When reviewing the factual sufficiency of an informal proceeding such as permitting decisions, courts only overturn agency actions that are "arbitrary and capricious." See 5 U.S.C. § 706(2)(A). To

determine whether an agency acted in a manner that was arbitrary and capricious, the court examines the factual adequacy of their order. See Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402, 416 (1971). In reviewing the factual sufficiency, the court requires the agency to explain and justify their decision against a standard of reasonableness. Association of Data Processing Service Organizations v. Board of Governors, 745 F.2d 677, 684 (D.C. Cir. 1984).

To assess reasonableness, "the court must consider whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment." Citizens to Preserve Overton Park, 401 U.S. at 416. Whether the Administrator made a clear error in judgment, the Court should examine the record that the Administrator "had before him when he acted," not solely "the record of closed-record proceedings" in court. Data Processing, 745 F.2d at 684. While this inquiry must "be searching and careful, the ultimate standard of review is a narrow one. The court is not empowered to substitute its judgment for that of the agency." Citizens to Preserve Overton Park, 401 U.S. at 416.

The EPA's decision not to veto the permit is not arbitrary and capricious because that decision was required to comply with the Supreme Court's decision in *Southeast Alaska* Conservation Counsel v. Coeur Alaska, Inc., 129 S. Ct. 2458. In Coeur, the court held that the discharge of slurry into a lake, elevating and changing the bottom configuration of the lake, was the discharge of fill material requiring a § 404 permit. Id. at 2464. The COE had issued a § 404 permit, but the EPA disagreed with the Corps' permit and believed that a § 402 permit was required because "in its view, placing tailings in the lake was not the environmentally preferable means of disposing of them." Id. at 2465. Although the EPA had authority under § 404(c) to veto the permit, it had not done so. Id. Pursuant to this decision, the EPA issued a § 402 permit

for "not for the discharge from the mine into the lake but for the discharge from the lake into a downstream creek." Id.

In this case, as in Coeur, EPA believed a § 402 permit was required to discharge fill material into a lake. EPA, however, failed to veto the COE's § 404 permit in both cases. Thus, the EPA deferred to the COE's determination that a § 404 permit was appropriate. EPA's decision to issue a separate § 402 permit in Coeur is irrelevant because this decision is wholly separate from the decision to veto COE's § 404 permit. See Coeur, 129 S. Ct. at 2465.

Further, EPA's decision is not arbitrary and capricious because it is fully supported by the factual record. As described above, a § 404 permit is appropriate for discharging slurry into Lake Temp because a § 404 permit is required for the discharge of fill material. Coeur, 129 S. Ct. at 2474. Fill material is anything that "has the effect of... [c]hanging the bottom elevation" of a lake. 40 C.F.R. § 232.2 (failing to take the toxicity of pollutants into account when defining fill). Here, DOD's slurry will change the elevation of the bottom of the lake, and therefore, it is fill material. As a result, the EPA's decision not to veto the § 404 permit is not arbitrary and capricious because it is fully supported by the factual record.

Finally, deference to the EPA's interpretation of the law justifies upholding the Section 404 permit. Agencies are entitled to deference when the agencies' experience and authority in an area make its decisions "a body of experience and informed judgment to which courts and litigants may properly resort for guidance." Skidmore v. Swift & Co., 323 U.S. 134, 140 (U.S. 1944)(noting that the amount of deference given to "a judgment in a particular case will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements"). The Administator thoroughly considered whether to veto the section 404 permit when engaged in dispute resolution with OMB, and the

Administator's decision to uphold the permit is consistent with the Administrator's previous decision in Coeur. As the EPA Administrator has experience determining when to veto a permit, their decision not to veto the COE's section 404 permit is entitled to deference.

Judicial review of OMB's involvement offers no protection here. OMB's dispute resolution was proper under the CWA. Further, the EPA's decision not to veto the Section 404 permit is unreviewable. Finally, because the EPA's decision was not arbitrary and capricious, any challenge to the permit necessarily fails. Accordingly, this Court should affirm the decision of the United States District Court for the District of New Union and uphold the Section 404 permit.

CONCLUSION

On the basis of the arguments presented above, the Appellee and Cross-Appelllant respectfully request that this Court affirm in part and overturn in part the judgment of the Twelfth Circuit. Specifically, Appellee and Cross-Appellant respectfully request this Court:

A. Find that New Union does have standing;

B. Find that Lake Temp is not a "navigable water of the United States";

C. Find that the COE has the jurisdiction to issue a permit under CWA Section 404;

D. Find that OMB's action were not improper.

Respectfully submitted,

State of Progress,

By their attorneys

/s/Team #6