Team No. 67

C.A. No. 11-1245

UNITED STATES COURT OF APPEALS
FOR THE TWELFTH CIRCUIT

STATE OF NEW UNION,
Appellant – Cross-Appellee,

v.

UNITED STATES,
Appellee – Cross-Appellant,

v.

STATE OF PROGRESS,
Appellee – Cross-Appellant

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

Brief for STATE OF PROGRESS, Appellee – Cross-Appellant

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JURISDICTIONAL STATEMENT

Appellant, the State of New Union, filed a complaint in the United States District Court for the District of New Union under 28 U.S.C. § 1331 (2006), and the Administrative Procedure Act (APA), 5 U.S.C. § 702 (2006), seeking review of a permit issued by the secretary of the Army, acting through the U.S. Army Corps of Engineers (COE), under authority of Section 404 of the Clean Water Act (CWA), 33 U.S.C. § 1344, to the U.S. Department of Defense (DOD) to discharge slurry of spent munitions into Lake Temp, an intermittent lake wholly within a military reservation owned by the United States in the State of Progress.

This appeal is from a Final Judgment entered by the district court on June 2, 2011, granting the State of Progress and the United States' motions for summary judgment that New Union lacks standing, that a Section 404 permit was correctly issued under the CWA, and that OMB's participation in the decision making process did not violate the CWA. The district court denied New Union's contrary motions. Jurisdiction in this court is proper pursuant to 28 U.S.C. § 1291 (2006).

STATEMENT OF THE ISSUES

I. Whether the State of New Union has standing 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.

II. Whether the Army Corps of Engineers has jurisdiction under Clean Water Act Section 404, 33 U.S.C. § 1344, to issue a permit because Lake Temp is navigable water under Clean Water Act Section 301(a), 404(a), and 502(7), 33 U.S.C. §§ 1331(a), 1334(a), 1362(7).

III. Whether the Army Corps of Engineers has jurisdiction to issue a permit under Clean Water Act Section 404, 33 U.S.C. § 1344, or the Environmental Protection Agency has jurisdiction to issue a permit under Clean Water Act Section 402, 33 U.S.C. § 1342, for the discharge of slurry into Lake Temp.

IV. Whether the decision by the Office of Management and Budget that the Army Corps of Engineers had jurisdiction to issue a permit under Clean Water Act Section 404, 33

U.S.C. § 1344, and that the Environmental Protection Agency did not have jurisdiction to issue a permit under Clean Water Act Section 402, 33 U.S.C. § 1342, for the Department of Defense to discharge slurry into Lake Temp, along with the Environmental Protection Agency's acquiescence in that decision, violated the Clean Water Act.

STATEMENT OF THE CASE

This is an appeal from a final Order of the United States District Court for the District of New Union granting the United States' motion for summary judgment and denying cross-motions for summary judgment by both the State of New Union and the State of Progress. The State of New Union sought review under 28 U.S.C. § 1331 and the Administrative Procedure Act (APA), 5 U.S.C. § 702, of a permit issued by the Secretary of the Army, acting through the United States Army Corps of Engineers (COE), under the authority of Section 404 of the Clean Water Act (CWA), 33 U.S.C. § 1344, to the United States Department of Defense (DOD). The permit allows DOD to construct a facility on the shores of Lake Temp, an intermittent lake located wholly within a military reservation owned by the United States in the State of Progress, that will discharge a slurry of pulverized spent munitions into the lake's waters. New Union contends that any permit for such dumping must be issued by the Administrator of the United States Environmental Protection Agency (EPA) pursuant to her authority to issue permits for the discharge of pollutants under CWA Section 402, 33 U.S.C. § 1342, rather than by the COE under Section 404. The State of Progress, within whose boundaries the permitted activities will take place, has intervened.

The United States filed a motion 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 because: a) Lake Temp is navigable water; and b) *Southeast Alaska Conservation Council v. Coeur Alaska, Inc.*, 557 U.S. 261 (2009), decided that a Section 404 permit is required in this situation rather than a Section 402 permit; and 3) the

participation by the Office of Management and Budget (OMB) in the decision that a Section 404 permit rather than a Section 402 permit should be issued did not violate the CWA.

New Union filed a cross-motion for summary judgment contending that 1) it has standing to appeal the permit issuance; and 2) Lake Temp is navigable water; but 3) the COE lacks jurisdiction to issue a permit under Section 404 because the materials it authorizes for discharge are primarily pollutants rather than fill material, requiring a permit from EPA under Section 402 rather than from the COE under Section 404; and 4) participation by OMB in the decisionmaking process violated the CWA.

Progress also filed a cross-motion for summary judgment asserting that: 1) New Union has 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 decisionmaking process did not violate the CWA.

STATEMENT OF THE FACTS

Lake Temp is an oblong, intermittent lake located entirely within the State of Progress. (Order at 3-4). The lake is dry approximately one out of every five years, with a maximum size during the rainy season in wet years of approximately three miles wide by nine miles long, and a much smaller footprint during the dry season. *Id.* Water accumulates in Lake Temp from a watershed in the surrounding mountains, and Lake Temp has no outflow or other connection to any other surface water. (Order at 4). A non-potable, sulfurous aquifer known as the Imhoff Aquifer is located approximately one thousand feet below Lake Temp. This aquifer follows the general shape of Lake Temp but it extends beyond the rainy-season boundaries of the lake, with ninety-five percent of its area located within the State of Progress beneath a military reservation

and five percent within the State of New Union. *Id.* One citizen of New Union, Dale Bompers, lives above the small portion of the aquifer located in that state. Neither Dale Bompers nor any other citizen of New Union or the State of Progress uses the Imhoff Aquifer for drinking water or agriculture due to its high sulfur content. *Id.*

During the intermittent periods when Lake Temp does contain water, ducks have been observed to use the water as a stopover during flight from north to south and back. *Id.* These ducks have drawn duck hunters to the area around Lake Temp in the past, in spite of warnings against entry to the lake bed posted by the Department of Defense along the Progress state highway which runs along the south side of the outermost edge of the lake bed. *Id.*

The Department of Defense wishes to use the bed of Lake Temp as a final resting place for unwanted and obsolete munitions. *Id.* Any potentially explosive liquid, semi-solid, or granular constituents of these munitions will be rendered inert through mixing with agents designed for the purpose, then further mixed with water and the pulverized solid portion of the munitions to form a slurry. *Id.* This slurry will be introduced to the lakebed as fill material and spread evenly across the lakebed. Over time this fill will have the effect of raising the elevation of the lakebed by several feet, which will raise the level of the lake during the wettest seasons by approximately six feet and increase its area by approximately two square miles. *Id.* The Army Corps of Engineers will continuously grade the lake boundaries during this fill activity to ensure runoff of water from the surrounding mountains continues to flow into Lake Temp. Once the project is complete, alluvial deposits carried from the mountain watershed will cover the fill material, returning the lake to a state similar to its condition before the project. (Order at 4-5).

STANDARD OF REVIEW

Appellate courts review a district court's grant of summary judgment *de novo*. *Johnson v. Manitowoc County*, 635 F.3d 331, 334 (7th Cir. 2011). Summary judgment is appropriate only where the movant shows that "there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). The Administrative Procedure Act governs review of agency decisions, and an agency decision should be overturned if it is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A) (2006).

The interpretation of the term "navigable water" by the United States Army Corps of Engineers and the United States Environmental Protection Agency is only entitled to deference if this court finds that the interpretation is a "reasonable" one. *Chevron U.S.A. v. NRDC*, 467 U.S. 837, 844 (1984).

SUMMARY OF THE ARGUMENT

The district court erred in holding that plaintiff, State of New Union, has no standing to sue under the CWA. The district court erred in finding that the CWA applied to Lake Temp because Lake Temp is not a "water of the United States." However, if the CWA does apply to Lake Temp, the district court was correct in holding that COE had jurisdiction to issue a § 404 permit for the addition of fill to Lake Temp, and OMB's dispute resolution between EPA and the COE did not violate the CWA.

New Union can establish standing under two different tests. First, New Union meets the standing requirements outlined by the Supreme Court in *Lujan v. Defenders of Wildlife* and later modified with respect to states as plaintiffs in *Massachusetts v. EPA*. Under these requirements, New Union has standing to sue in order to protect its sovereign interest in preserving its natural resources. Specifically, New Union has a sovereign interest in preventing COE from issuing a

permit to DOD for its facility at Lake Temp where that facility threatens to introduce pollution into the portion of the Imhoff Aquifer that lies underneath New Union. Second, New Union meets the requirements for *parens patriae* standing established in *Alfred L. Snapp & Son, Inc. v. Puerto Rico*. New Union is able to articulate an interest apart from the private interests of its citizens by pointing to the potential for pollution of the Imhoff Aquifer to adversely affect connected waters, lands, wildlife and activities. Further, New Union has an interest, as quasi-sovereign, in preserving the health and well being, both physical and economic, of its residents. Finally, a sizeable portion of New Union's population may be affected by pollution of the Imhoff Aquifer, as evidenced by the fact that New Union would likely take action itself to monitor and address any such pollution if it were in the state's control.

The CWA does not apply to Lake Temp because it is not a "water of the United States," as a result, no permits are required from either EPA or COE. Regardless of its size, Lake Temp is not navigable because it is intermittent, meaning it has no connection to navigable waters. Even though the lake is used for recreation, it is not used in connection with the actual transport of interstate commerce. Therefore the CWA does not apply to Lake Temp and no permits are required. Further, even if the CWA does apply to Lake Temp, the COE has authority to issue a § 404 permit, rather than the EPA having authority to issue a § 402 permit. The slurry contemplated in the case of Lake Temp falls under the definition of fill material because it will have the effect of changing the bottom elevation of Lake Temp. As a result, the fill material properly falls under COE §404 permitting.

The District Court of New Union ruled correctly when it granted summary judgment that OMB's dispute resolution between EPA and COE did not violate the CWA. OMB did not violate the CWA when it resolved a dispute between EPA and COE because it was acting within

its constitutional power and regulatory review power under Executive Order 12088. Further, EPA's decision not to veto the COE § 404 permit is not subject to judicial review because EPA's authority to veto § 404 permits is wholly discretionary. OMB was not interpreting the CWA, OMB was simply exercising its valid dispute resolution function. OMB's participation in the dispute resolution process does not prevent the court from properly interpreting the statute using a Chevron test because the plain meaning of the statute does not allow for court interpretation.

ARGUMENT

I. THE DISTRICT COURT ERRED BY GRANTING SUMMARY JUDGMENT IN FAVOR OF THE UNITED STATES BECAUSE THE STATE OF NEW UNION SATISFIES BOTH SOVEREIGN STANDING AND PARENS PATRIAE STANDING REQUIREMENTS AND IS NOT ESTOPPED FROM BRINGING SUIT AGAINST THE FEDERAL GOVERNMENT.

The United States Constitution requires that before a federal court may decide a case, a "case" or "controversy" must exist. U.S. CONST. art. III, § 2. In addition to this constitutional requirement, certain prudential requirements established by legal precedents make up the doctrine of standing, which serves to identify those disputes that are appropriately resolved through the judicial process. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992). The doctrine of standing further determines which parties may raise claims and what rights those parties may assert.

The State of New Union may demonstrate standing in a suit brought against the federal government by asserting injuries to its sovereign or quasi-sovereign interests. *Alfred L. Snapp & Son, Inc. v. Puerto Rico*, 458 U.S. 592, 601 (1982). These interests have been interfered with if the actions of COE and DOD prevent New Union from ensuring compliance with federal law with respect to management of projects that affect state waters and have the potential to affect

the health and safety of the state's residents. *See* Alabama v. U.S. Army Corps of Engineers, 424 F.3d 1117, 1130 (11th Cir. 2005).

Once New Union has established that the actions of COE and DOD have injured its sovereign and quasi-sovereign interests, New Union may not be estopped from litigating its claims in federal court simply because it did not raise the concerns presented here during the comment period for the Lake Temp project's environmental impact statement. *City of Seabrook, Tex. v. U.S. E.P.A.*, 659 F.2d 1349, 1360-61 (5th Cir. 1981).

A. New Union has standing to sue the United States because the threat of pollution of the Imhoff Aquifer by the proposed munitions processing facility at Lake Temp implicates the state's sovereign interest in protecting its natural resources.

The irreducible constitutional minimum of standing contains three elements. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992). First, the plaintiff must have suffered an "injury in fact" – an invasion of a legally protected interest which is (a) concrete and particularized, and (b) actual or imminent, not 'conjectural' or 'hypothetical.' *Id.* Second, there must be a causal connection between the injury and the conduct complained of; that is, the injury has to be fairly traceable to the challenged action of the defendant and not the result of the independent action of some third party not before the court. *Id.* Finally, it must be likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision. *Id.*

Although *Lujan* outlined the basic standing requirements for most parties, a litigant to whom Congress has "accorded a procedural right to protect his concrete interests…can assert that right without meeting all the normal standards for redressability and immediacy." *Massachusetts v. EPA*, 549 U.S. 497, 517-18 (2007). In *Massachusetts*, the State of Massachusetts brought suit against EPA to force the agency to regulate greenhouse gases as pollutants. *Id.* at 506. The Supreme Court found that because the sovereign prerogatives to

force reductions in greenhouse gas emissions are lodged in the federal government and because Congress has given EPA responsibility for protecting Massachusetts by prescribing standards for such emissions, Massachusetts stood in a special position with respect to standing. *Id.* at 519. Further, the Court noted that Congress has recognized a procedural right for Massachusetts to challenge the rejection of its petition to EPA for a rulemaking concerning greenhouse gas emissions. *Id.* at 520. Accordingly, that procedural right and Massachusetts's stake in protecting all the air in its sovereign territory afforded the state "special solicitude" in the Court's standing analysis. *Id.* Similarly, the court in *Alabama v. U.S. Army Corps of Engineers*, 424 F.3d 1117, 1130 (11th Cir. 2005) found that a state has standing where it seeks to protect a sovereign interest like ensuring federal agency compliance with federal law governing agency management of projects involving state waters. In that case, Alabama challenged the Army Corps of Engineers' allocation of reservoir water flowing out of a lake in Georgia over concern that the Corps's failure to comply with federal law would result in damage to the natural environment and downstream economy in Alabama. *Id.* at 1120. The Eleventh Circuit determined that Alabama had standing because it possessed a sovereign federal right to protect its environment and state economy and because a decision in the state's favor could provide redress for its alleged injury. *Id.* Thus, where a state seeks to protect its sovereign interest by asserting enforcement of a federally guaranteed procedural right against the federal government, it is subject to relaxed standing requirements.

The State of New Union has standing to sue the federal government because Congress has afforded the state a procedural right to protect its concrete sovereign interest in preventing pollution of its natural resources, such as the Imhoff Aquifer. Just as the court recognized in *Massachusetts v. EPA* that the sovereign prerogatives to force greenhouse gas emissions are

vested in the federal government and that Congress has given EPA responsibility for protecting the states by prescribing standards for such emissions, here Congress has recognized the federal government's responsibility for preventing the pollution of water by, among other things, facilitating research necessary to address threats of such pollution. 33 U.S.C. § 1251(b) (2006). However, since, as the District Court noted in its order, the DOD will not grant New Union permission to install a grid of wells throughout the Imhoff Aquifer that will allow the state to monitor the movement of pollutants from the bed of Lake Temp to the aquifer, the federal government is directly interfering with the performance of research necessary for the prevention of water pollution. Therefore, like the State of Massachusetts in *Massachusetts*, here the State of New Union occupies a special position with respect to standing because the state is directly and adversely affected by the decisions of the federal government.

Additionally, just as the court in *Massachusetts* found that the State of Massachusetts was accorded a procedural right to protect its sovereign interests because the state was authorized by statute to bring suit in defense of those interests, here the State of New Union enjoys a similar procedural right. As a party whose interests under the Clean Water Act (CWA) are adversely affected by the federal government, the State of New Union is authorized to bring suit against the United States under the "citizen suit" provision of the CWA. *See* 33 U.S.C. § 1365(a)(1) (2006) and U.S. Dept. of Energy v. Ohio, 503 U.S. 607, 616 (1992) (holding that states are persons entitled to bring claims under the citizen suit provisions of the Clean Water Act). Like the state in *Massachusetts*, here New Union should be entitled to "special solicitude" with respect to standing requirements. Further, just as the court in *Alabama v. U.S. Corps of Engineers* found that the State of Alabama demonstrated sufficient injury to support standing because it was pursuing a claim in order to prevent the introduction of environmentally damaging pollutants to

its state waters, here the court should find that New Union satisfies the injury prong of the standing requirements laid down in *Massachusetts v. EPA* because it seeks to prevent the introduction of pollutants to its portion of the Imhoff Aquifer. Although the aquifer is not potable without treatment and is not currently being used by New Union or its residents, the state still has the right to keep it free of pollution in the event that it one day needs to tap the aquifer as a water source.

Finally, like the court's finding in *Massachusetts* that the State of Massachusetts satisfied the injury and redressability prongs of the court's standing doctrine because its alleged sufficient potential injuries, caused by EPA, that would be addressed if EPA was required to promulgate greenhouse gas emissions standards, here the court should find that New Union satisfies the relaxed state standing requirements for two reasons. First, New Union satisfies the injury requirement because its alleged injuries, directly caused by COE's issuance of a permit to DOD for introduction of pollutants into Lake Temp, impact New Union's sovereign interest in preserving the quality and preventing the degradation of natural resources like the Imhoff Aquifer. Under the relaxed standing requirements of *Massachusetts*, New Union need not demonstrate that such degradation has occurred or that it absolutely will in order to sue. The state needs only show that its alleged injuries are legitimate and that the defendant causes them. Second, New Union satisfies the redressability prong of standing because it can ensure that the Imhoff Aquifer will not be polluted if COE (or EPA) is prevented from issuing a permit to DOD and New Union is given the proper opportunity to study the movement of pollutants from Lake Temp to the Imhoff Aquifer before they are introduced in significant quantities by the proposed munitions processing facility. Thus, because New Union is entitled to "special solicitude" with

respect to standing and demonstrates sufficient injuries and potential for redressability if an injunction is granted here, the state has standing to sue.

B. Even if threats to New Union's sovereign interests do not establish standing, the state has standing to sue as parens patriae on behalf of its residents in order to preserve their physical and economic well-being.

The Supreme Court has formulated a three-part test for state parens patriae standing. Under this test, the state must (1) articulate an interest apart from the interests of particular private parties, *i.e.*, the state must be more than a nominal party (2) express a quasi-sovereign interest, and (3) allege injury to a sufficiently substantial segment of its population. *Alfred L. Snapp & Sons v. Puerto Rico*, 458 U.S. 592, 607 (1982). The Second Circuit has raised the question whether a state asserting *parens patriae* standing must satisfy *both* the *Snapp* requirements, above, *and* the three-part Article III standing test from *Lujan v. Defenders of Wildlife* (injury in fact, causal connection, and redressability), but the court did not answer that question. *See* Connecticut v. American Elec. Power Co., Inc., 582 F.3d 309, 338 (2d Cir. 2009) (state satisfied both tests in nuisance suit seeking to limit carbon dioxide emissions from fossil-fuel-fired power plants). However, since the Supreme Court in *Massachusetts v. EPA*, 549 U.S. 497, 517-520 (2007), lowered the threshold for establishing standing when the plaintiff is a state, it is unlikely that the Court intended to require a state in a *parens patriae* case to satisfy both the *Snapp* requirements and the modified *Lujan* requirements. As affected states are entitled to "special solicitude" with respect to standing, to require a plaintiff state to pass muster under two separate standing tests would be counterintuitive to the logic of the court's decision in *Massachusetts*. *Id.*

In its order, the District Court misinterprets the purpose and requirements of *parens patriae* standing. The Court notes, "New Union's *parens patriae* standing as a representative of

its citizens is exemplified by Dale Bompers, who owns, operates and resides on a ranch above the Imhoff Aquifer in New Union." (Order at 6). The doctrine of *parens patriae* allows a state to bring an action to protect its quasi-sovereign interest in the general health and well-being, both physical and economic, of its residents. *Alfred L. Snapp & Son, Inc.*, 458 U.S. at 607. The doctrine does not, however, permit a state to bring suit on behalf of its residents' private interests. *Massachusetts v. Mellon*, 262 U.S. 447, 485-486 (1923). Therefore, the District Court in this case should not have based its decision regarding New Union's standing on an examination of the effects of pollution from DOD's proposed munitions processing facility on the private interest of Mr. Bompers in the value of his land. Rather, the District Court's decision should have been based on consideration of the interest of the State of New Union, as quasi-sovereign, in protecting from pollution "all the earth and air within its domain." *State of Ga. v. Tennessee Copper Co.*, 206 U.S. 230, 237 (1907). Because a portion of the Imhoff Aquifer is located within the domain of the State of New Union, since pollution of the aquifer has the potential to pollute connected sources of groundwater and adversely affect the land above the aquifer as well as any and all life attached to it, and because devaluation of land above the Imhoff Aquifer has the potential to devalue neighboring land, this court should find that New Union has standing to sue.

1. The State of New Union is able to both establish an interest apart from the private interests of citizens like Dale Bompers and express a quasi-sovereign interest.

In order to articulate an interest apart from the interests of particular private parties, the state must be more than a nominal party. *Alfred L. Snapp & Son, Inc.*, 458 U.S. at 607. Although there is no formal, exhaustive definition of "quasi-sovereign interest," and no definitive list of qualifying interests has been articulated, certain characteristics of such interests are evident. *Id.* "A State has a quasi-sovereign interest in the health and *well-being* – both

physical and economic – of its residents in general." *Id.* "One helpful indication in determining whether an alleged injury to the health and welfare of its citizens suffices to give the State standing to sue as *parens patriae* is whether the injury is one that the State, if it could, would likely attempt to address through its sovereign lawmaking powers." *Id.*

A state has an interest independent of and behind the titles of its citizens, as quasi-sovereign, in the protection of its resources from pollution by sources beyond the state's control and when such form of pollution is threatened, the state has standing to sue as *parens patriae*. *State of Ga. v. Tennessee Copper Co.*, 206 U.S. 230, 237-38 (1907). In *Tennessee Copper*, the State of Georgia sought to protect its air from pollution being emitted by sources in neighboring Tennessee, which Georgia was unable to regulate through its own state laws. *Id.* at 236. Georgia averred that the noxious gas from Tennessee copper companies threatened injury to the health and safety of Georgia residents breathing in such fumes and damage to vegetation and animal life dependent on clean air for their continued existence. *Id.* at 238-39. The Supreme Court found that while Georgia's residents had private interests in preserving their livelihood by providing clean air for their crops and orchards, the State had an interest above and beyond the private interests of its citizens by ensuring its continued survival through preservation of the general health and well being of its residents. *Id.* at 238. In this sense, the Supreme Court also found that Georgia had a legitimate claim for injury to it in its capacity of quasi-sovereign, as it should have the last word as to the fate of its inhabitants regarding their use of the state's natural resources. *Id.* at 237. Thus, injuries to a state that are independent of injuries to the private interests of the state's residents and that affect the state in its capacity as quasi-sovereign are sufficient to satisfy the first two prongs of the *parens patriae* standing test.

The State of New Union satisfies *parens patriae* standing because its interest in preserving the general health and welfare of its citizens runs independent of and beyond the private interests of its residents in the value of their properties and because New Union has a quasi-sovereign interest in determining the fate of all water within its boundaries. Like the State of Georgia in *Tennessee Copper*, here New Union seeks to prevent pollution of the Imhoff Aquifer by DOD's proposed facility at Lake Temp, which is to be located in the State of Progress and will be outside the reach of New Union's state laws. If the facility were located in New Union, the state would likely attempt to regulate its introduction of pollutants to the Imhoff Aquifer through state environmental regulations. Further, just as air pollution in *Tennessee Copper* threatened the livelihood of Georgia residents by injuring their ability to engage in agriculture and forcing them to breathe in toxic substances, here the pollutants that will potentially be introduced to the Imhoff Aquifer can affect New Union residents by poisoning nearby waters that connect to the Imhoff Aquifer that are used for agriculture and drinking water and adversely affecting local plant and animal life if water from the aquifer finds its way up to the surface. As in *Tennessee Copper*, New Union has a quasi-sovereign interest in preventing polluted water from the Imhoff Aquifer from being introduced to its residents because without safe and healthy residents to populate it, New Union will not be able to carry on its role as a state. Therefore, New Union, like the State of Georgia in *Tennessee Copper*, should be able to have the last say when it comes to the introduction of pollutants to its waters when those pollutants have the potential to negatively impact the health and well-being of state residents in a manner that will injure the state at large.

2. The State of New Union can allege injury to a portion of its population sufficiently large enough to establish standing as *parens patriae*.

"The Court has not attempted to draw any definitive limits on the proportion of the population of the State that must be adversely affected by the challenged behavior." *Alfred L. Snapp & Son, Inc.*, 458 U.S. at 607. A state must allege more than injury to an identifiable group of individual residents, but the indirect effects of the injury must be considered as well and may help establish that the alleged injury impacts a sufficiently substantial segment of the state's population. *Id.*

Where a pollutant has the potential to be carried great distances from its original point of introduction into the environment, it has the capacity to injure a portion of a state's population sufficiently large enough to satisfy the population prong of the *parens patriae* standing test. In *State of Ga. v. Tennessee Copper Co.*, 206 U.S. 230, 238 (1907), the Supreme Court noted that when toxic acids are emitted by copper manufacturers, they mix with the air and that the mixture "if often carried by the wind great distances and over great tracts of Georgia land." *Id.* The Supreme Court found that those noxious fumes "cause and threaten damage on so considerable a scale to the forests and vegetable life, if not to health" in Georgia that the state was easily able to satisfy case standing requirements. *Id.* at 238-39. Although it was not possible to quantify the number of state residents who were or could be affected by the air pollution emitted by Tennessee copper manufacturers, the court found that introduction of pollutants to a medium like air allowed dispersal of the harmful chemicals over an area large enough for Georgia to demonstrate injury or potential injury to a sufficient portion of its population. *Id.* at 239. Thus, even where the population affected cannot be quantified, an alleged injury affects a portion of the population sufficient to support *parens patriae* standing if it is introduced to the environment in a manner that could facilitate its distribution over a large area.

The introduction of harmful pollutants to water in an aquifer can be distributed throughout and beyond the aquifer so as to reach and injure a sufficiently large enough portion of the state's population to satisfy the population prong of the test for *parens patriae* standing. Here, like the toxic air in *Tennessee Copper* that moved from its source in Tennessee over to Georgia, the water of the Imhoff Aquifer underneath New Union will be polluted by toxins moving from the bed of Lake Temp through the alluvial fill that separates the lake from the aquifer. Since water, like air, is a medium that can move rather easily from place to place via flowing currents and seepage, the pollutants introduced into the waters of the Imhoff Aquifer by pollution of Lake Temp have the capacity to travel not only throughout the aquifer, but beyond it, to connecting bodies of water. Aquifers may be connected to surrounding parts of the water table, as well as nearby bodies of surface water, so pollution of an aquifer may not remain localized. This characteristic of water to transmit pollutants throughout an area larger than that under which the Imhoff Aquifer lies gives it the potential to affect a significant portion of New Union's population. As the court in *Tennessee Copper* decided that the spreading of pollutants via air impacted a sufficiently large enough portion of the population to support standing, so too should this court find that introduction of pollutants to the Imhoff Aquifer threatens a large enough portion of the state's population to support standing under the third prong of the *Snapp* test for *parens patriae* standing.

C. New Union may challenge the permit issuance by the Corps of Engineers even though it did not raise any objections during the comment period for the environmental impact statement (EIS) associated with the permit.

In its order, the District Court noted, "DOD suggests that since New Union is now time-barred from objecting to the EIS, it is also estopped from raising issues here that could have been dealt with in the EIS." (Order at 6). The District Court later concluded, "based on these facts"

and facts related elsewhere in its order, that New Union did not have standing to sue. (Order at 7). However, the petitioner in a federal suit is not estopped from raising objections that it did not raise during the "notice and comment" period prior to an administrative agency's decision on a particular matter. *City of Seabrook, Tex. v. U.S. E.P.A.*, 659 F.2d 1349, 1360-61 (5th Cir. 1981). Several courts have held that "a party aggrieved by an agency ruling is not estopped from challenging the validity of an agency's standard that it has not objected to at the time of its promulgation." *Com. of Mass. v. Hayes*, 891 F.2d 57, 60 (1st Cir. 1982). *See* City of Seabrook, 659 F.2d at 1360-61 (holding that requiring parties to raise objections during the "notice and comment" period before raising such objections in court would require potential parties to constantly monitor agency actions and predict future changes that could affect them); Dobbs v. Train, 409 F.Supp. 432, 435 (N.D. Ga. 1975) (holding that such a rule would estop "the vast majority of potential litigants"); *Big Horn Coal Co. v. Temple*, 793 F.2d 1165 (10th Cir. 1986) (Barrett, Circuit Judge, specially concurring) (finding that any challenge to agency action timely filed should not be estopped, regardless of whether or not it was previously raised during a "notice and comment" period). Accordingly, this court should find that although New Union did not comment on or object to the contents of DOD's Environmental Impact Statement (EIS) for the proposed munitions processing facility at Lake Temp, New Union is not barred from bringing a claim based on issues contained in the EIS.

The argument that a plaintiff is estopped from bringing a claim in court objecting to action by an administrative agency because the plaintiff failed to participate in the decision making process leading up to the agency's action is without merit. *Dobbs v. Train*, 409 F. Supp. 432, 434-35 (N.D. Ga. 1975) aff'd sub nom. *Dobbs v. Costle*, 559 F.2d 946 (5th Cir. 1977). In *Dobbs*, the plaintiffs objected to an EPA rulemaking that adversely affected them. *Id.* at 433.

However, EPA contended that because the plaintiffs did not participate in the rulemaking process leading to the adoption of the agency's contrary position by commenting during the appropriate period, they could not thereafter challenge such a decision in court. *Id.* at 434-35. Despite EPA's contention, the court found that such a theory of estoppel is "neither desirable, nor is it the law." *Id.* at 435. If such a rule was adopted, "the vast majority of potential litigants could not sue." *Id.* Further, "all persons would have to be on guard to insure that some agency did not promulgate some rule that might someday deny them a benefit to which they otherwise would have been entitled." *Id.* Accordingly, requiring all potential litigants to involve themselves in an agency decision before it becomes final is also impractical. *Id.* For example, the court notes that if such a rule was in place, if no one commented on or objected to a proposed agency action before it was adopted, once the decision making process was complete, the rule would be immune from attack. *Id.* The court did not find such a result favorable in any case. *Id.* Thus, plaintiffs do not have to participate in an agency's decision-making process in order to challenge an agency's final decision on a given matter.

A plaintiff's lack of commentary on the contents of a study relied on in an agency's decision-making process does not preclude the plaintiff from later objecting in court to items related to the study. Just like the plaintiffs in *Dobbs*, here the State of New Union objects to agency action on the part of DOD that adversely affects the state's interests. In response, DOD, just like the EPA in *Dobbs*, argues that New Union is estopped from bringing its claims because the state failed to raise its objections to DOD's potential pollution of the Imhoff Aquifer during the comment period for DOD's environmental impact statement for its proposed facility at Lake Temp. However, just as the court noted in *Dobbs* when it rejected the estoppel theory there, requiring a party to raise objections to agency action at the preliminary stages before action is

actually taken may require parties to act on information that is not available, thus rendering such a requirement impractical and unworkable. Such is the case here, as comment by New Union on the EIS issued by DOD for use by COE in its decision regarding the Lake Temp dredge-and-fill permit would have required New Union to possess its own independent knowledge of the potential environmental impacts of the Lake Temp facility. Since DOD acknowledges that it will not allow New Union to install monitoring wells to aid in assessing such effects, that knowledge would not have been obtainable during the comment period for the EIS. Thus, the court's conclusion in *Dobbs* that mandatory participation in the decision making process by potential litigants is contrary to the law should control here. Further, the court's decision in *Dobbs* that litigants challenging an agency's final decision need not have taken part in the agency's pre-decision affairs should apply here, where DOD seeks to estop New Union's challenge to COE's permitting decision because New Union failed to comment on a statement that was not even issued by COE. The logic of the court's decision in *Dobbs* would suggest that where a party seeking to challenge the decision of an agency – as New Union seeks to do with respect to COE's decision to issue a permit to DOD – is not required to participate in the affairs of that agency before it issues a final decision on a matter, nor is it required to participate in the affairs of another agency that might involve itself in the first agency's decision making process, such as DOD has done here by issuing an EIS for use by COE. Thus, New Union should not be estopped from challenging COE's issuance of a dredge-and-fill permit to DOD for its proposed facility at Lake Temp simply because New Union did not object to the contents of DOD's environmental impact statement regarding the Lake Temp project.

II. LAKE TEMP IS NOT A "WATER OF THE UNITED STATES" SUBJECT TO CLEAN WATER ACT REGULATION.

The State of Progress maintains that Lake Temp is not a "water of the United States." As a result, the Clean Water Act (CWA) does not apply and no permits are required from either EPA or COE. The District Court erred when it rested its decision on the contrast in characteristics between Lake Temp and water bodies held beyond the regulatory authority of the CWA in an earlier U.S. Supreme Court decision, *Solid Waste Authority of Cook County v. U.S. Army Corps of Eng'rs (SWANCC)*, 531 U.S. 159 (2001). The District Court distinguished Lake Temp from the waters at issue in *SWANCC* based on Lake Temp's larger size and historic recreational use of the lake by hunters.

While there is no question that Lake Temp has different characteristics from the bodies of water at issue in *SWANCC*, neither the size of a body of water nor recreational use is determinative in applying the Clean Water Act to an intermittent body of water like Lake Temp. Lake Temp is not a navigable water because of its intermittency. *Rapanos v. United States*, 547 U.S. 715 (2006). *SWANCC* has been interpreted by courts to apply the CWA "if the body of water is actually navigable or is adjacent to an open body of navigable water." *Rice v. Harken Exploration Co.*, 250 F.3d 264, 269 (5th Cir. 2001). Under this application of *SWANCC*, the CWA does not apply to Lake Temp. Lake Temp is not actually navigable as discussed above. Lake Temp is not adjacent to any open body of navigable water. The crux of the question of navigability is Lake Temp's use in interstate commerce which is insufficient under 33 C.F.R. Part 239. Lake Temp as described by the District Court has acted more as an obstacle to be traversed than a means of transport. Describing the influence of interstate commerce on navigability in Part 239, the regulation reads "…waterbody's capability for use by the public for the purposes of transportation of commerce which is the determinative factor…" 33 C.F.R. § 239.6(a). It cannot be reasonably said that Lake Temp is used "for the purposes of the

transportation of commerce". It is not disputed that Lake Temp has been used for duck hunting and that those hunters used watercraft to traverse the lake. What is clearly not present is a use "for the purposes of transportation of commerce" by these hunters. As a result of this lack of use "for the purposes of transportation of commerce," Lake Temp is not a "water of the United States" subject to permitting under the CWA.

The District Court did not consider whether there is a "significant nexus" between Lake Temp and navigable water as set forth in *Rapanos*. *Rapanos*, 547 U.S. at 715. This test from Justice Kennedy's concurrence in the plurality has been adopted by COE and EPA in a memorandum of agreement between EPA and COE signed in 2007. (*Rapanos* MOA at 2). This adoption has been further elaborated in a 2007 response to comments which restates the interpretation of "significant nexus" from the *Rapanos* concurrence, reciting "When, in contrast, wetlands' effects on water quality or speculative or insubstantial, they fall outside the zone fairly encompassed by the statutory term 'navigable waters.'" (*Rapanos* Comments at 1). Because the effects of Lake Temp on water quality beyond Lake Temp are insubstantial, Lake Temp is not encompassed by the term "navigable waters" and so is not subject to regulation under the Clean Water Act.

Lake Temp is beyond the scope of Clean Water Act regulatory authority based on the precedent set in the *SWANCC* and *Rapanos* decisions which bear on the statute's applicability to intermittent water bodies like Lake Temp. Regulatory action and guidance by the Corps of Engineers and the Environmental Protection Agency have also had the effect of placing Lake Temp outside the scope of the Clean Water Act by their interpretations and adoption of the law as applied by the Supreme Court in these cases.

III. IF THE CLEAN WATER ACT APPLIES TO LAKE TEMP, ARMY CORPS OF ENGINEERS HAS PERMITTING AUTHORITY UNDER SECTION 404 OF THE CLEAN WATER ACT.

The State of Progress finds the District Court's approach to its decision on the jurisdictional issue under §§ 402 and 404 of the CWA well-reasoned. COE has clear jurisdiction in cases of permitting the deposit of fill material in bodies of water which fall under CWA regulations. 33 U.S.C.A § 1344(a).

In addition to New Union's arguments against COE's permitting authority under Section 404 which the District Court found unpersuasive, New Union may argue that the "fill material" in *Couer* is not only distinguishable from the slurry intended for Lake Temp in terms of toxicity, but also that the slurry intended for Lake Temp is also totally outside the definition of "fill material" subject to COE permitting authority because the slurry that DOD intends to deposit on the Lake Temp acreage is not a "mining-related material" as exempted under the definitions governing COE permitting in 40 C.F.R. § 232.2. While the District Court correctly concluded that the statute does not recognize a distinction between fill materials based on their toxicity for permitting authority purposes, the issue of what constitutes fill material was not reached. New Union may argue, as SEACC did in *Couer,* that the COE's interpretation of the statute through its regulations is incorrect and that the conflict between EPA and COE regulations must be resolved in favor of the EPA regulations which may distinguish between toxic and non-toxic discharges. This approach to statutory interpretation was rejected by the Court in *Couer*, and deference was given to COE's definition of fill material. *Coeur Alaska, Inc. v. Southeast Alaska Conservation Council*, 129 U.S. 2458 (2009). The slurry contemplated in the case of Lake Temp will have the "effect of changing the bottom elevation" of Lake Temp and is properly under COE permitting authority as a result.

IV. THE DISTRICT COURT OF NEW UNION RULED PROPERLY WHEN IT GRANTED SUMMARY JUDGMENT THAT OMB'S DISPUTE RESOLUTION BETWEEN EPA AND THE COE DID NOT VIOLATE THE CWA.

Under Section 404 of the CWA, 33 U.S.C. § 1344, the COE has jurisdiction to issue permits for fill material. Under Section 402 of the CWA, 33 U.S.C. § 1342 the EPA has jurisdiction to issue permits for the discharge of pollutants. OMB is authorized to reconcile disputes between executive branch agencies pursuant to procedures first established by Executive Order No. 12088, 43 Fed. Reg. 47,707 (Oct. 13, 1978). This portion of the brief will show that participation by OMB in EPA's decision did not make EPA's decision subject to judicial review, did not violate the CWA, and OMB's participation does not prevent the court from properly interpreting the statute using a Chevron test because the plain meaning of the statute does not allow for court interpretation.

A. EPA's decision not to veto a Section 404 permit is not subject to judicial review because EPA's authority to veto Section 404 permits is wholly discretionary.

Agency Action committed to agency discretion by law is not subject to judicial review. 5 U.S.C. §701(a)(2). An agency's decision not to prosecute or enforce is a decision generally committed to an agency's absolute discretion *See,* Cascade Conservation League v. M.A. Segale, Inc., 921 F.Supp. 692, 699 (W.D. Wash. 1996) (finding unreviewable EPA's decision not to reverse the COE's determination that Segale's activities are "normal farming"); Heckler v. Chaney*,* 470 U.S. 821, 831 (1985) (finding unreviewable the FDA's decision not to take enforcement action against the unapproved use of approved drugs for state-sponsored executions). Under *Chaney,* agency inaction is presumed to be unreviewable under the APA. *Heckler v. Chaney*, 470 U.S. at 832. This presumption may be overcome only by a showing that

the statute provides "guidelines for the agency to follow in exercising its enforcement powers." *Id*. at 833.

Under the CWA the EPA administrator may veto a § 404 permit issued by COE, but only if,

> "He determines*, after notice and opportunity for public hearings*, that the discharge of such materials into such area will have an unacceptable adverse effect on municipal water supplies, shellfish beds and fishery areas (including spawning and breeding areas), wildlife, or recreational areas. Before making such determination, the Administrator shall consult with the Secretary." 33 U.S.C. § 1344(c).

The CWA does not require the EPA to undertake any kind of investigation into § 404 permits, but if it becomes clear that there is a pollution risk, the EPA has the option to veto a § 404 permit. The § 1344(c) "veto provision" is essentially a check on the COE, to ensure that § 404 permits will not allow discharge of pollutants. There is no requirement to veto a § 404 permit unless the EPA first demonstrates that there is a pollution risk.

Here, EPA's decision not to veto the 404 permit is not subject to judicial review because it was committed to the agency's absolute discretion. In *Cascade*, the EPA exercised its discretion in not vetoing the COE's determination of what constituted "normal farming," similarly here, the EPA also exercised its discretion in not vetoing the COE's issuance of a 404 permit. The decision to veto § 404 permits is entirely up to the discretion of the EPA, and as such is unreviewable by a court of law. The fact that OMB assisted the EPA and DOE in resolving a dispute over which type of permit to issue is immaterial, because the ultimate decision of whether or not to veto the subsequent 404 permit is up to the discretion of EPA. Whatever reasons the EPA used in making its decision, including the input of another executive agency fall within this discretion. Further, this decision did not violate the CWA because the

EPA did not acquiesce to COE, the EPA made a positive decision not to veto the 404 permit issued by the COE.

Further, EPA never progressed to the point of vetoing the § 404 permit. EPA never showed the pollution risk that would lead the administrator to veto the § 404 permit. EPA also never consulted with the Secretary of the Army on any of these issues. This means not only that the EPA made none of the requisite findings to pursue a veto in the first place, but also, contrary to New Union's assertions, that EPA had not taken any affirmative steps to veto COE's § 404 permit. EPA only argued to OMB that the nature of the discharge was different from the discharge in *Coeur*, so as to warrant a § 402 permit. This argument was merely part of the EPA making their initial case to OMB about which type of permit to issue in the first place. It was not a justification for vetoing an already issued § 404 permit. Because the CWA does not require the EPA to undertake any kind of investigation into § 404 permits and EPA never demonstrated the pollution risk required by CWA to pursue a veto, the EPA has not violated any statutory mandate by opting not to use its veto power.

EPA's decision not to exercise its veto power over COE's § 404 permit is not subject to judicial review because it is wholly up to the discretion of the EPA, and OMB's dispute resolution input falls under this discretion. Further, EPA never progressed to the point of vetoing the § 404 permit because EPA did not show the requisite pollution risk, or consult with the Secretary of the Army about the § 404 permit being inappropriate, therefore there is no statutory requirement for EPA to pursue a veto.

B. OMB's participation did not violate the CWA when it resolved a dispute between EPA and COE, finding that COE had authority to issue a 404 permit.

OMB's authority over other executive agencies is established by the constitution. All the executive power of the United States is vested by the Constitution in the President, not the

administrator of the EPA or the Secretary of the Army, U.S. Const. art. II, § 1, cl. 1. The Constitution charges the President with the duty to "take care that the laws be faithfully executed." U.S. Const. art. II, § 3. This power gives the President both the duty and the power to assure that all discretionary decisions made within the executive branch, including those made by the Secretary of the Army and the Administrator of the EPA, are faithful to the constitution, treaties and laws of the nation.

OMB has no authority to use its regulatory review under Executive Order 12291 to delay promulgation of EPA regulations. *Environmental Defense Fund v. Thomas*, 627 F.Supp. 566, 571 (D.D.C. 1986). In *Thomas*, OMB contributed to EPA promulgating regulations 16 months after a congressional deadline, an unacceptable delay. *Id*. The court reasoned that OMB causing such a delay was not a valid exercise of the President's article II powers.

Here, in contrast to *Thomas*, OMB's actions were a valid and sustainable exercise of the President's Article II powers. In *Thomas*, OMB's actions were inappropriate because they were delaying the promulgation of EPA regulations. Conversely, here, the OMB was acting in its valid dispute resolution capacity under Executive Order No. 12088. New Union's comparison of the current situation to that found in *Thomas* is simply not accurate because in *Thomas* the OMB was inappropriately preventing the EPA from doing its job, while here, OMB is actually helping the EPA by resolving a dispute. While Congress did not confer authority on OMB to issue or veto permits under the CWA, the EPA is an executive office and is subject to controls of executive orders. OMB's resolution of the dispute between COE and EPA was a proper exercise of OMB's dispute resolution function and a perfectly sustainable exercise of the President's article II powers. Further, this decision did not violate the CWA because the EPA did not

acquiesce to COE, the EPA made a positive decision not to veto the 404 permit issued by the COE.

C. OMB's participation in the dispute resolution process does not prevent the court from properly interpreting the statute using a Chevron test because the plain meaning of the statute does not allow for court interpretation.

When a court reviews an agency's construction of the statute that it administers, it is confronted with two questions. First, always, is the question whether Congress has directly spoken to the precise question at issue. *Chevron, U.S.A., Inc., v. Natural Res. Def. Council*, 467 U.S. 837, 842 (1984). If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress. *Id*. at 843. Considerable weight should be accorded to an executive department's construction of a statutory scheme it is entrusted to administer. *Id*. at 844. Traditionally, courts grant EPA significant deference for its interpretations of its own regulations. *Thomas Jefferson Univ. v. Shalala*, 512 U.S. 504, 512 (1994).

Here, New Union incorrectly argues that OMB's participation prevents the court from properly interpreting the statute using a *Chevron* test. First, as discussed in section A, above, EPA's decision not to veto the §404 permit is an unreviewable discretionary decision. Even if it were reviewable, the EPA's interpretation to allow input from OMB was a reasonable one because it is an explicit delegation of authority. The CWA delegates power to interpret the CWA § 402 and § 404 permits only to the Administrator of the EPA and Secretary of the Army, respectively. However, Executive Order 12088 grants dispute resolution authority to the OMB. Because the executive order is a constitutional power of the executive branch, it too flows from the explicit delegation of authority in the CWA. The plain meaning of the statute leaves no room for interpretation and the court must give effect to the unambiguously expressed intent of

Congress. Following *Chevron*, there is no interpretation for the court to make because the court should afford considerable deference to the executive departments entrusted to administer the CWA. Therefore OMB's participation did not prevent the court from applying a *Chevron* test.

CONCLUSION

The State of New Union has standing to sue in this case because the facility proposed by DOD at Lake Temp threatens injuries to the state's sovereign and quasi-sovereign interests. Under the three-part Article III standing test laid down in *Lujan v. Defenders of Wildlife*, as modified by the Supreme Court in *Massachusetts v. EPA*, New Union satisfies the relaxed injury and redressability requirements for standing to protect its sovereign interests because the state has an interest in protecting all waters within its boundaries from pollution and because Congress has accorded New Union a procedural right to defend that interest in court when it is threatened by the actions of an agency of the federal government. Further, under the test for *parens patriae* standing laid down in *Alfred L. Snapp & Son, Inc. v. Puerto Rico*, New Union has standing to sue because a portion of the Imhoff Aquifer is located within the domain of the State of New Union, and because pollution of the aquifer has the potential to pollute connected sources of groundwater and adversely affect the land above the aquifer as well as any and all life attached to it, thus potentially impacting a significant portion of New Union's population.

Lake Temp is beyond the scope of Clean Water Act regulatory authority based on the precedent set in the *SWANCC* and *Rapanos* decisions which bear on the statute's applicability to intermittent water bodies like Lake Temp. Regulatory action and guidance by the Corps of Engineers and the Environmental Protection Agency have also had the effect of placing Lake Temp outside the scope of the Clean Water Act by their interpretations and adoption of the law as applied by the Supreme Court in these cases.

In the alternative, if Lake Temp is found to be navigable water and covered by the provisions of the Clean Water Act, then the slurry contemplated in the case of Lake Temp will have the "effect of changing the bottom elevation" of Lake Temp and is properly under COE permitting authority as a result.

EPA's decision not to veto a Section 404 permit is not subject to judicial review because EPA's authority to veto Section 404 permits is wholly discretionary. There is no statutory requirement for EPA to veto the Section 404 permit because EPA has not shown the requisite environmental damages or talked to the Secretary of the Army. OMB did not violate the CWA with its resolution of the dispute between EPA and COE because OMB was serving in its valid dispute resolution capacity, not interpreting the statute. Following *Chevron*, the plain meaning of the statute leaves no room for interpretation and the court must give effect to the unambiguously expressed intent of congress.

For these reasons, we urge this court to reverse the decision of the District Court granting summary judgment on the above matters.

Respectfully Submitted,

Counsel for the State of Progress

APPENDIX

I. *Rapanos* MOA (Transcript)

MEMORANDUM FOR DIRECTOR OF CIVIL WORKS AND US EPA REGIONAL ADMINISTRATORS

Subject: U.S. Environmental Protection Agency (EPA) and U.S. Army Corps of Engineers (Corps) Coordination on Jurisdictional Determinations (JDs) under Clean Water Act (CWA) Section 404 in Light of the *SWANCC* and *Rapanos* Supreme Court Decisions

1. Purpose. The purposes of this memorandum are to promote and improve interagency cooperation, facilitate increased communication, and establish an efficient and effective process for determining Clean Water Act Section 404 jurisdiction in light of the Supreme Court decisions in *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers*, 531 U.S. 159 (2001) (SWANCC), and the consolidated cases *Rapanos v. United States*, and *Carabell v. United States*, 126 S. Ct. 2208 (2006) (jointly hereafter *Rapanos*). The procedures included in this memorandum replace the coordination procedures contained in the January 2003 EPA/Army guidance implementing the *SWANCC* decision (but leaves the remainder of that guidance unaffected) and articulate new coordination procedures for JDs affected by *Rapanos*. This memorandum does not nullify or supersede the 1990 Geographic Jurisdiction Memorandum of Agreement (MOA), including its special case provisions.

2. Current Practice. The Corps districts are currently posting all Approved JD Forms for public review on their respective websites. The EPA efficiently reviews these JD forms, as needed, to monitor consistency with regulation and policy.

3. Documentation Requirements. Under this memorandum, case-by-case evaluations are required to determine if there is a "significant nexus" to navigable waters for JDs involving the classes of waters listed in subparagraph 4.a.(2). Documentation for these JDs shall be made using the Approved JD Form developed by Corps headquarters (HQ) in consultation with EPA. The information on the jurisdictional form shall identify the rationale for asserting or not asserting jurisdiction.

4. Coordination Requirements.
a. Interagency Coordination Required. The EPA and the Corps will follow the coordination procedures in paragraph (5) for the following JDs:

(1) Determinations for intra-state, non-navigable, isolated waters potentially covered solely under 33 C.F.R. §328.3(a)(3), where jurisdiction is asserted or not asserted based on interstate commerce factors.

(2) Determinations based on a finding of a "significant nexus" with traditional navigable

waters, which are required for the following waters:

(i) non-navigable tributaries that do not typically flow year–round or have continuous flow at least seasonally (e.g., typically at least 3 months each year);

(ii) wetlands that are adjacent to such tributaries; and

(iii) wetlands that are adjacent to but that do not directly abut a relatively permanent non-navigable tributary.

b. Interagency Coordination Not Required. Interagency coordination following the procedures below is not required for JDs involving traditional navigable waters, including their adjacent wetlands, and for relatively permanent non-navigable tributaries of traditional navigable waters, including wetlands with a continuous surface connection with such relatively permanent tributaries.

5. Coordination Procedures.1,2 Effective immediately, for all waters referenced in paragraph 4.(a), agency coordination of JDs will be conducted as follows:

a. The Corps district will conduct the JD, document the basis and rationale for asserting or declining to assert jurisdiction under the CWA, and provide an electronic copy of the draft JD form to the appropriate EPA regional office. To facilitate and expedite the coordination of documents, both agencies will, to the maximum extent feasible, transmit all documents electronically. For purposes of this guidance, when documents are transmitted electronically, the date of receipt shall be the date of transmission.

b. Corps districts will provide the appropriate EPA regional office and Corps HQ with an electronic copy of every draft JD form (and supporting documentation) proposing to assert or decline jurisdiction over an intrastate, non-navigable, isolated water. The EPA regional office will in turn be responsible for ensuring that EPA HQ also receives copies of every such JD form in a timely manner. The EPA regional office will review the JD forms pursuant to the procedures in paragraphs 5.c. and 5.d. below. Draft JDs elevated to HQ under paragraph 5.d. will be reviewed by EPA and Corps HQs pursuant to the procedures outlined in paragraph 5.e. below. In addition, either Corps HQ or EPA HQ may choose to initiate a joint HQ review of a particular JD involving an intrastate, non-navigable, isolated water. Such joint HQ review must be initiated within 21 calendar days of when the district provided copies of the draft JD to the EPA Region and Corps HQ. The joint HQ review will proceed pursuant to the procedures in subparagraph e.(2)(i) or e.(2)(ii) as appropriate. If neither the Corps HQ or EPA HQ chooses to initiate a joint review within 21 calendar days, and the EPA regional office does not elevate within the timeframes identified under paragraph 5.d., the district may proceed and finalize the JD.

c. With respect to interagency coordination of other jurisdictional determinations, the EPA regional office may review the JD form to determine if it will comment on the Corps' determination. To help facilitate an efficient review of the draft JD and to expedite the review process, the EPA may ask the Corps to provide a copy of the documentation provided by the applicant and/or responsible party, where the JD is considered complex. The agencies will coordinate and attempt to resolve any JD issues at the local level within 15 calendar days after EPA's receipt of the form. EPA may notify the Corps at any time within the 15 day period that it does not intend to provide comments on a particular draft JD. Within these 15 calendar days, the EPA regional office may elect to elevate the review to their Regional Administrator (RA) and so notify the Corps district in writing.3 Such written notification shall briefly explain the rationale for EPA's position. If no notification is provided by EPA within the 15 calendar days, the Corps district may proceed and finalize the JD.

d. When the JD is elevated to the RA, the RA and the District Engineer (DE) shall have 10 calendar days from the date of EPA's notification to the Corps under paragraph 5.c. above to resolve the issue. If the issue is not resolved between the RA and DE, the RA shall, within the 10 calendar days, elevate the JD to EPA HQ and concurrently provide written notification to the DE that the JD is being elevated. Upon receipt of notification from EPA that the matter has been elevated, the DE shall immediately provide the draft JD record to Corps HQ. If no notification of elevation is provided by EPA within the 10 calendar days, or a resolution is otherwise reached, the Corps district may proceed and finalize the JD.

e. The Corps and EPA HQs will review and provide guidance on elevated draft JDs as follows:

(1) The Corps and EPA shall coordinate efficiently and appropriately to reach agreement on the JD.

(2) The Corps and EPA shall initiate discussions no later than 5 calendar days after notification of elevation under paragraph 5.d. above to determine if an interagency agreement exists on the elevated JD.

(i) If a mutual decision is reached on the assertion or declination of jurisdiction, a joint HQs level decision memo discussing the rationale of the decision will be provided to EPA and Corps field offices no later than 14 calendar days after HQ interagency discussions were initiated; or

(ii) If a mutual decision is not reached at the EPA and Corps HQs, a joint HQs level decision memo prepared by EPA explaining EPA's rationale in support of an approved JD will be provided to EPA and Corps field offices no later than 21 calendar days after interagency discussions were initiated. Copies of the joint memo will be provided to all Corps districts and to EPA Regional offices.

II. *Rapanos* Comments (Transcript)

RESPONSE TO COMMENTS
"CLEAN WATER ACT JURISDICTION FOLLOWING THE SUPREME COURT'S DECISION IN *RAPANOS* v. UNITED STATES & CARABELL v. UNITED STATES GUIDANCE" ISSUED JUNE 5, 2007

On June 5, 2007, the Environmental Protection Agency (EPA) and the U.S. Army Corps of Engineers (the Corps) issued guidance, effective immediately, regarding Clean Water Act (CWA) jurisdiction following the U.S. Supreme Court's decision in the consolidated cases *Rapanos v. United States* and *Carabell v. United States*. The agencies accepted public comments on the *Rapanos* guidance until January 20, 2008. The agencies received 66,047 public comments on the *Rapanos* Guidance (65,765 form letters, 282 non-form letters), from States, environmental and conservation organizations, regulated entities, industry associations, and the general public. EPA and the Corps have reviewed the comments and have revised the guidance in consideration of those comments and consistent with our experience implementing the guidance over the past 18 months.

The comments generally addressed four substantive issues and two procedural ones. The substantive areas were: the interpretation of the term "significant nexus;" the treatment of tributaries; the definition of "relatively permanent waters;" and the scope of "traditional navigable waters." The procedural areas were: the delay in processing jurisdictional determinations and the coordination between the two agencies on jurisdictional determinations.

The agencies also received comments from some on other important issues. One of these, the definition of adjacency, which has been an important implementation issue for the agencies, is also discussed below.

Significant Nexus

In *Rapanos*, Justice Kennedy concluded that wetlands are "waters of the United States" "if the wetlands, either alone or in combination with similarly situated lands in the region, significantly affect the chemical, physical, and biological integrity of other covered waters more readily understood as 'navigable.' When, in contrast, wetlands' effects on water quality are speculative or insubstantial, they fall outside the zone fairly encompassed by the statutory term 'navigable waters.'" The agency guidance states that the agencies will assess the flow characteristics and functions of the tributary itself, together with the functions performed by any wetlands adjacent to that tributary, to determine whether collectively they have a significant nexus with traditional navigable waters.

Comments:

Environmental and conservation communities commented that the guidance interprets the term significant nexus too narrowly. They commented that under the Kennedy standard the agencies have the ability to continue to protect wetlands when they collectively affect water quality and to apply that protection to similar waterbodies. The regulated community commented that significant nexus is interpreted too broadly in the guidance. These commenters argued that there needs to be actual data showing impacts to integrity of traditional navigable waters (TNWs) to establish a significant nexus. States commented that they were concerned about the analytical and data burden of making significant nexus determinations consistent with the guidance. Arid states were especially concerned that a narrow interpretation leaves many important streams unregulated and thus unprotected.

Response:

The agencies have made no changes to the guidance with respect to significant nexus findings. The agencies struck a careful balance when interpreting Justice Kennedy's opinion. The positions articulated by commenters were among those considered by the agencies when developing the guidance, and the agencies have decided to maintain their interpretation of the term significant nexus for purposes of determining when a water is a "water of the United States."

Treatment of Tributaries

The guidance interprets Justice Kennedy's standard to apply to tributaries as well as wetlands. The guidance also clarifies that a tributary includes natural, man-altered, or man-made water bodies that carry flow directly or indirectly into a traditional navigable water. In addition, for the purposes of the guidance, a tributary is the entire reach of the stream that is of the same order (i.e., from the point of confluence, where two lower order streams meet to form the tributary, downstream to the point where such tributary enters a higher order stream). Under the guidance, the flow characteristics of a particular tributary will be evaluated at the farthest downstream limit of such tributary (i.e., the point the tributary enters a higher order stream).

Comments:

The environmental community commented that *Rapanos* did not address the scope of CWA jurisdiction for tributaries, and they should be jurisdictional categorically. The conservation community commented that tributaries should be jurisdictional categorically, or, alternatively, any tributary with an ordinary high water mark should be presumed to have a significant nexus. The regulated community commented that tributaries are subject to *Rapanos*. States expressed concern about the loss of jurisdiction over tributaries generally. Arid states in particular expressed concerned about ephemeral, intermittent and headwater streams that are critical resources in their states.

A smaller number of commenters addressed the stream reach concept in the guidance. The general consensus among the regulated community was that the concept is overly broad in its interpretation and application when determining jurisdiction, and many suggested that the concept be abandoned. The environmental community commented that the concept limits jurisdiction and is not in keeping with Justice Kennedy's intent. Other commenters recommended the concept be more scientifically or ecologically based and that it should take into account a broader watershed approach. A few commenters opposed the guidance to assess flow at the farthest downstream limit. Some commented thought that this was simply not feasible, while others suggested that this was not the most appropriate approach to assessing an entire stream, suggesting that the stream flow be assessed where it is most representative of the entire stream.

Response:

The agencies have made no changes to the guidance with respect to utilizing Justice Kennedy's standard to determine the jurisdiction of tributaries. The agencies struck a careful balance when interpreting Justice Kennedy's opinion. The positions articulated by commenters were among those considered by the agencies when developing the guidance, and the agencies have decided to maintain their interpretation of the scope of Justice Kennedy's standard for purposes of determining when a tributary is a "water of the United States."

The agencies have made some changes with respect to assessing flow in tributaries for purposes of determining whether a tributary is relatively permanent. Footnote 24 of the guidance now clarifies that where data indicates the flow regime at the downstream limit is not representative of the tributary (e.g., where data indicates the tributary is relatively permanent at its downstream limit but not for the majority of its length, or vice versa), the flow regime that best characterizes the tributary should be used.

Definition of Relatively Permanent Waters

For purposes of implementing Justice Scalia's standard, the guidance interprets relatively permanent waters (RPWs) as "waters that typically (e.g., except due to drought) flow year-round or waters that have a continuous flow at least seasonally (e.g., typically three months)."

Comments:

The environmental community commented favorably on the agencies' approach to determining RPWs. The regulated community commented that RPWs should be limited to perennial streams or those that flow at least 290 days. The conservation community commented that the guidance's approach to RPWs could inappropriately eliminate jurisdiction over some intermittent streams. They further commented that physical indicators, rather than timing of flow, should be used to meet the plurality test.

Response:

The agencies have made no changes to the guidance with respect to their approach to determining RPWs. The agencies struck a careful balance when interpreting Justice Scalia's opinion. The positions articulated by commenters were among those considered by the agencies when developing the guidance, and the agencies have decided to maintain their interpretation of the term relatively permanent for purposes of determining when a water is a "water of the United States." However, the agencies have provided additional technical guidance in footnote 24 on how to assess flow in a tributary to determine whether it is an RPW.

Traditional Navigable Waters

The agencies stated in the guidance that they considered section (a)(1) of their regulations defining "waters of the United States" to constitute the "traditional navigable waters" (TNWs) for purposes of Clean Water Act jurisdiction (see footnote 20 of the guidance and Appendix D of the field instructional manual).

Comments:

Environmental and conservation communities commented that TNWs should be interpreted as broadly as possible. The regulated community commented that TNWs are no broader than Section 10 waters under the Rivers and Harbors Act of 1899 (RHA).

Response:

The agencies have made some changes to the guidance to clarify the scope of "traditional navigable waters" for purposes of CWA jurisdiction. The agencies have edited footnote 20 of the guidance to make even more explicit that they consider Section 10 waters to be a subset of TNWs. In addition, changes to footnote 20 provide more guidance to the field on how to determine if a water is a TNW, including how to determine if it is susceptible for use in commercial navigation, including commercial water-borne recreation.

Processing Delay

To ensure that decisions are made on sound science and a defensible record, the guidance instructs Corps districts and EPA regions to document jurisdictional determinations (JDs) in a manner consistent with the standards laid out by the opinion. Specifically, the guidance indicates the "record shall, to the maximum extent practicable, explain the rationale for the determination, disclose the data and information relied upon, and, if applicable, explain what data or information received greater or lesser weight, and what professional judgment or assumptions were used in reaching the determination." The agencies issued a number of documents, in conjunction with the *Rapanos* guidance, to assist field staff to make accurate and appropriately documented JD decisions. These documents included a field instructional manual, a JD form, and a MOU establishing an

interagency coordination process with specific deadlines.

Comments:

All commenter groups expressed concern regarding delay in finalizing official JDs (i.e., "approved JDs"), and implications of that delay for permitting decisions and timing of associated projects. Many identified as a source of delay the extent of data and analysis required to finalize an approved JD. A number of commenters from the regulated community, state departments of transportation, and the conservation community recommended that the agencies provide an opportunity to "opt into" jurisdiction, allowing project proponents willing to have all aquatic resource impacts evaluated and mitigated to move to the permitting process rather than awaiting an approved JD.

Response:

On June 26, 2008, the Corps of Engineers issued Regulatory Guidance Letter (RGL) 08-02, clarifying that project proponents may request a preliminary JD, which is based on an "effective presumption of CWA/RHA jurisdiction over all of the wetlands and other water bodies at the site." (See RGL 08-02, paragraph 9a.) Consequently, a preliminary JD allows the Corps to proceed to the permitting process rather than waiting for an approved JD. RGL 08-02 indicates that, with such preliminary JDs, there is no legally binding determination of CWA jurisdiction over the particular water body or wetlands in question, but only a presumption of jurisdiction to facilitate permitting. For all cases where approved JDs are used, the agencies continue to believe that well-documented approved JDs are necessary to ensure that decisions are made based on sound science and a defensible record, and so the agencies have not modified documentation requirements for approved JDs in the guidance.

Coordination Process

Concurrent with issuance of the *Rapanos* guidance, the agencies established a coordination process for draft approved JDs involving a significant nexus or section (a)(3) of the regulatory definition of "waters of the United States." The June 2007 coordination process provided specific timeframes for interagency review, and a process for field staff to elevate specific JDs to EPA and Corps headquarters for resolution if necessary. While the coordination procedures for (a)(3)-related JDs were to continue indefinitely unless the agencies agreed to modifications, coordination of significant nexus-related JDs was to end after six months unless the agencies agreed to continue.

Comments:

Several commenters from state environmental agencies, environmental nonprofits, and the general public emphasized the importance of JD coordination for

consistent and accurate JDs. Some commenters from the regulated community and state departments of transportation indicated that the interagency coordination process caused delays and recommended that coordination with EPA be ended altogether.

Response:

On January 28, 2008, the Corps indicated that for significant nexus-related JDs, the coordination process was being changed to provide a shorter timeframe than was established when the guidance was originally issued. Under the new coordination process for significant nexus-related JDs, the EPA Region has 15 days to review the draft JD, discuss any questions or concerns with the Corps District, and "special case" the JD if they feel it is necessary after those discussions. Coordination of (a)(3)-related draft JDs remained unchanged. As a result, the Corps continues to provide EPA with all draft JDs involving significant nexus or (a)(3) waters. This does not apply to preliminary JDs, since these are only used in cases where a project sponsor agrees to a presumption of CWA/RHA jurisdiction over all waters on the project site.

Adjacency

The guidance states that the agencies will continue to assert jurisdiction over wetlands "adjacent" to traditional navigable waters as defined in the agencies' regulations. Under EPA and Corps regulations and as used in this guidance, "adjacent" means "bordering, contiguous, or neighboring." Finding a continuous surface connection is not required to establish adjacency under this definition. The *Rapanos* decision does not affect the scope of jurisdiction over wetlands that are adjacent to traditional navigable waters because at least five justices agreed that such wetlands are "waters of the United States."

Comments:

Some in the regulated community commented that the automatic regulation of nearby wetlands based solely on their adjacency to a traditional navigable water is inappropriate. These commenters also requested that the definition of "adjacent" be clarified and the regulations be revised.

Response:

Under the revised guidance, the agencies continue to assert jurisdiction over wetlands that are adjacent to traditional navigable waters as that term is defined in the agencies regulations.. The agencies disagree with commenters and conclude that at least five justices agreed that such wetlands are "waters of the United States." The agencies agree that the guidance should provide some further clarification of the term "adjacent" and have revised the guidance to identify, consistent with the regulations and agency practice, the three criteria the agencies use to determine whether a wetland is adjacent.

III. Excerpt from 40 C.F.R. § 232.2

Discharge of fill material.

(1) The term discharge of fill material means the addition of fill material into waters of the United States. The term generally includes, without limitation, the following activities: Placement of fill that is necessary for the construction of any structure or infrastructure in a water of the United States; the building of any structure, infrastructure, or impoundment requiring rock, sand, dirt, or other material for its construction; site-development fills for recreational, industrial, commercial, residential, or other uses; causeways or road fills; dams and dikes; artificial islands; property protection and/or reclamation devices such as riprap, groins, seawalls, breakwaters, and revetments; beach nourishment; levees; fill for structures such as sewage treatment facilities, intake and outfall pipes associated with power plants and subaqueous utility lines; placement of fill material for construction or maintenance of any liner, berm, or other infrastructure associated with solid waste landfills; placement of overburden, slurry, or tailings or similar mining-related materials;" after the words "utility lines; and artificial reefs.

IV. U.S. Constitution Excerpts

U.S. Const. Art. II § 1, cl. 1
Section 1, Clause 1. Executive Power, Term

Section 1. The executive Power shall be vested in a President of the United States of America. He shall hold his Office during the Term of four Years, and, together with the Vice President, chosen for the same Term, be elected, as follows:

U.S. Const. Art. II § 3
Section 3. Messages; Convene and Adjourn Congress; Receive Ambassadors; Execute Laws; Commission Officers

Section 3. He shall from time to time give to the Congress Information of the State of the Union, and recommend to their Consideration such Measures as he shall judge necessary and expedient; he may, on extraordinary Occasions, convene both Houses, or either of them, and in Case of Disagreement between them, with Respect to the Time of Adjournment, he may adjourn them to such Time as he shall think proper; he shall receive Ambassadors and other public Ministers; he shall take Care that the Laws be faithfully executed, and shall Commission all the Officers of the United States.

U.S. Const. Art. III § 2
Section 2. Judicial Power, Jurisdiction, and Trial by Jury

Section 2. The judicial power shall extend to all cases, in law and equity, arising under this Constitution, the laws of the United States, and treaties made, or which shall be made, under their authority;--to all cases affecting ambassadors, other public ministers and consuls;--to all cases of admiralty and maritime jurisdiction;--to controversies to which the United States shall be a party;--to controversies between two or more states;--between a state and citizens of another state;--between citizens of different states;--between citizens of the same state claiming lands under grants of different states, and between a state, or the citizens thereof, and foreign states, citizens or subjects.

In all cases affecting ambassadors, other public ministers and consuls, and those in which a state shall be party, the Supreme Court shall have original jurisdiction. In all the other cases before mentioned, the Supreme Court shall have appellate jurisdiction, both as to law and fact, with such exceptions, and under such regulations as the Congress shall make.

The trial of all crimes, except in cases of impeachment, shall be by jury; and such trial shall be held in the state where the said crimes shall have been committed; but when not committed within any state, the trial shall be at such place or places as the Congress may by law have directed.

V. Executive Order

Exec. Order No. 12088, 43 FR 47707
Executive Order 12088

Federal Compliance With Pollution Control Standards

October 13, 1978

By the authority vested in me as President by the Constitution and statutes of the United States of America, including Section 22 of the Toxic Substances Control Act (15 U.S.C. 2621), Section 313 of the Federal Water Pollution Control Act, as amended (33 U.S.C. 1323), Section 1447 of the Public Health Service Act, as amended by the Safe Drinking Water Act (42 U.S.C. 300j-6), Section 118 of the Clean Air Act, as amended (42 U.S.C. 7418(b)), Section 4 of the Noise Control Act of 1972 (42 U.S.C. 4903), Section 6001 of the Solid Waste Disposal Act, as amended (42 U.S.C. 6961), and Section 301 of Title 3 of the United States Code, and to ensure Federal compliance with applicable pollution control standards, it is hereby ordered as follows:

1-1. ***Applicability of Pollution Control Standards.***
1-101. The head of each Executive agency is responsible for ensuring that all necessary actions are taken for the prevention, control, and abatement of environmental pollution with respect to Federal facilities and activities under the control of the agency.

1-102. The head of each Executive agency is responsible for compliance with applicable pollution control standards, including those established pursuant to, but not limited to, the following: (a) Toxic Substances Control Act (15 U.S.C. 2601 *et seq.*).

(b) Federal Water Pollution Control Act, as amended (33 U.S.C. 1251 *et seq.*).

(c) Public Health Service Act, as amended by the Safe Drinking Water Act (42 U.S.C. 300f *et seq.*).

(d) Clean Air Act, as amended (42 U.S.C. 7401 *et seq.*).

(e) Noise Control Act of 1972 (42 U.S.C. 4901 *et seq.*).

(f) Solid Waste Disposal Act, as amended (42 U.S.C. 6901 *et seq.*).

(g) Radiation guidance pursuant to Section 274(h) of the Atomic Energy Act of 1954, as amended (42 U.S.C. 2021(h); see also, the Radiation Protection Guidance to Federal Agencies for Diagnostic X Rays approved by the President on January 26, 1978 and published at page 4377 of the FEDERAL REGISTER on February 1, 1978).

(h) Marine Protection, Research, and Sanctuaries Act of 1972, as amended (33 U.S.C. 1401, 1402, 1411-1421, 1441-1444 and 16 U.S.C. 1431-1434).

(i) Federal Insecticide, Fungicide, and Rodenticide Act, as amended (7 U.S.C. 136 *et seq.*).

1-103. 'Applicable pollution control standards' means the same substantive, procedural, and other requirements that would apply to a private person.

1-2. ***Agency Coordination*****.**
1-201. Each Executive agency shall cooperate with the Administrator of the Environmental Protection Agency, hereinafter referred to as the Administrator, and State, interstate, and local agencies in the prevention, control, and abatement of environmental pollution.

1-202. Each Executive agency shall consult with the Administrator and with State, interstate, and local agencies concerning the best techniques and methods available for the prevention, control, and abatement of environmental pollution.

1-3. ***Technical Advice and Oversight.***
1-301. The Administrator shall provide technical advice and assistance to Executive agencies in order to ensure their cost effective and timely compliance with applicable pollution control standards.

1-302. The administrator shall conduct such reviews and inspections as may be necessary to monitor compliance with applicable pollution control standards by Federal facilities and activities.

1-4. ***Pollution Control Plan*****.**
1-401. Each Executive agency shall submit to the Director of the Office of Management and Budget, through the Administrator, an annual plan for the control of environmental pollution. The plan shall provide for any necessary improvement in the design, construction, management, operation, and maintenance of Federal facilities and activities, and shall include annual cost estimates. The Administrator shall establish guidelines for developing such plans.

1-402. In preparing its plan, each Executive agency shall ensure that the plan provides for compliance with all applicable pollution control standards.

1-403. The plan shall be submitted in accordance with any other instructions that the Director of the Office of Management and Budget may issue.

1-5. ***Funding*****.**
1-501. The head of each Executive agency shall ensure that sufficient funds for compliance with applicable pollution control standards are requested in the agency budget.

1-502. The head of each Executive agency shall ensure that funds appropriated and apportioned for the prevention, control and abatement of environmental pollution are not used for any other purpose unless permitted by law and specifically approved by the Office of Management and Budget.

1-6. ***Compliance With Pollution Controls*****.**
1-601. Whenever the Administrator or the appropriate State, interstate, or local agency notifies an Executive agency that it is in violation of an applicable pollution control standard (see Section 1-102 of this Order), the Executive agency shall promptly consult with the notifying agency and provide for its approval a plan to achieve and maintain compliance with the applicable pollution control standard. This plan shall include an implementation schedule for coming into compliance as soon as practicable.

1-602. The Administrator shall make every effort to resolve conflicts regarding such violation

between Executive agencies and, on request of any party, such conflicts between an Executive agency and a State, interstate, or a local agency. If the Administrator cannot resolve a conflict, the Administrator shall request the Director of the Office of Management and Budget to resolve the conflict.

1-603. The Director of the Office of Management and Budget shall consider unresolved conflicts at the request of the Administrator. The Director shall seek the Administrator's technological judgment and determination with regard to the applicability of statutes and regulations.

1-604. These conflict resolution procedures are in addition to, not in lieu of, other procedures, including sanctions, for the enforcement of applicable pollution control standards.

1-605. Except as expressly provided by a Presidential exemption under this Order, nothing in this Order, nor any action or inaction under this Order, shall be construed to revise or modify any applicable pollution control standard.

1-7. ***Limitation on Exemptions.***
1-701. Exemptions from applicable pollution control standards may only be granted under statutes cited in Section 1-102(a) through 1-102(f) if the President makes the required appropriate statutory determination: that such exemption is necessary (a) in the interest of national security, or (b) in the paramount interest of the United States.

1-702. The heard of an Executive agency may, from time to time, recommend to the President through the Director of the Office of Management and Budget, that an activity of facility, or uses thereof, be exempt from an applicable pollution control standard.

1-703. The Administrator shall advise the President, through the Director of the Office of Management and Budget, whether he agrees or disagrees with a recommendation for exemption and his reasons therefor.

1-704. The Director of the Office of Management and Budget must advise the President within sixty days of receipt of the Administrator's views.

1-8. ***General Provisions.***
1-801. The head of each Executive agency that is responsible for the construction or operation of Federal facilities outside the United States shall ensure that such construction or operation complies with the environmental pollution control standards of general applicability in the host country or jurisdiction.

1-802. Executive Order No. 11752 of December 17, 1973, is revoked.

JIMMY CARTER
THE WHITE HOUSE,*October 13, 1978*.