C.A. No. 11-1245
Civ. No. 148-2011

IN THE UNITED STATES TWELFTH CIRCUIT COURT OF APPEALS

STATE OF NEW UNION,
Appellant and Cross-Appellee,

v.

UNITED STATES,
Appellee and Cross-Appellant,

v.

STATE OF PROGRESS,
Appellee and Cross-Appellant.

Appeal from the United States District Court for the District of New Union
United States District Judge Romulus N. Remus, Presiding

BRIEF FOR APPELLEE AND CROSS-APPELLANT, THE STATE OF PROGRESS

Questions Presented For Review

1. Whether the district court erred in deciding that New Union lacked standing to sue both in its sovereign capacity and its *parens patriae* capacity and therefore improperly granted summary judgment.

2. Whether the district court erred in granting summary judgment holding that Lake Temp is navigable; and, therefore, the Army Corps of Engineers has jurisdiction to issue permits pursuant to 33 U.S.C. §1344.

3. Whether the district court correctly determined, if Lake Temp is navigable, that the Army Corps of Engineers, not the Environmental Protection Agency, has jurisdiction to issue a permit.

4. Whether the district court correctly determined that the Environmental Protection Agency's deferment to the Office of Management and Budget's decision regarding the Corps of Engineers' jurisdiction over permitting the filling of Lake Temp violates the Clean Water Act.

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Jurisdiction

The United States Court of Appeals for the Twelfth Circuit has jurisdiction to hear this appeal pursuant to 28 U.S.C. § 1291(a) (2006).

Standard of Review

The law is well settled, a grant of summary judgment pursuant to Fed. R. Civ. P. 56(c) is reviewed *de novo*. Ass'n to Protect Hammersley, Eld, & Totten Inlets v. Taylor Res., Inc., 299 F.3d 1007, 1009 (9th Cir. 2002). If the Court determines that genuine issues of material fact exist, the court must overturn summary judgment. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986).

Statement of the Case

The State of New Union brought suit to enjoin the Army Corps of Engineers from beginning a permitted project to fill Lake Temp with slurry from munitions discharge. The State of Progress intervened in the suit because the permitted projects will take place wholly within Progress.

The Secretary of the Army and the State of New Union filed cross-motions for summary judgment. The district court granted the Secretary's motion, finding: New Union lacked standing to bring suit, Lake Temp is navigable, permits were properly granted, and the Office of Management and Budget acted properly pursuant to the Clean Water Act. New Union appeals the decision in its entirely except for the determination that Lake Temp is navigable; the State of Progress appeals the determination that New Union lacked standing to bring suit and the determination that Lake Temp is navigable; and lastly, the United States argues the district court was correct in each of its rulings.

Statement of the Facts

The Secretary of the Army, acting through the U.S. Army Corps of Engineers ("COE") and under the authority of Section 404 of the Clean Water Act ("CWA"), correctly issued a permit to the U.S. Department of Defense ("DOD") to discharge a 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.

Lake Temp is an oval-shaped body of water that is up to three miles wide and nine miles long during the rainy season in wet years. New Union v. United States, No. 148-2011, slip op. at 3-4 (D.N.U. June 2, 2011). During the dry season it is much smaller, and approximately one out of every five years the lake is wholly dry. Id. At its highest water level, the lake is currently wholly within the State of Progress. Id. Inflow comes from the runoff from adjacent mountains; there is no outflow from the lake. New Union, at 4.

During the rainy season, when the lake holds water, ducks have historically used it as a stopover on their migration from the Arctic to southern climates and back. Id. When the lake became a part of the military reservation in 1952, the DOD did not put up a fence blocking access to the lake; instead, the DOD posted signs along a highway running alongside the lake, warning that entering the lake was dangerous and that entry was illegal. New Union, at 4. These signs were posted along both sides of the highway at intervals of 100 yards, twenty-five feet from the edge of the road. Id. There are clearly visible trails leading from the highway to the lake. Id. These trails show signs of rowboats and canoes being dragged to the lake. Id. The lake serves many recreational uses; perhaps thousands, of duck hunters have used Lake Temp as a prime hunting location. Id. Approximately three-quarters of these hunters are residents of Progress, the other quarter are from out of state. Id. Though DOD acknowledges that people

continue to use the lake for hunting and bird watching, DOD has taken no additional measures to restrict public entry beyond putting up these warning signs. Id.

The Imhoff Aquifer is located one thousand feet below Lake Temp. New Union, at 4. The aquifer's water is not potable. Id. Additionally, the aquifer's water is not usable in agriculture without treatment because of high sulfur levels. Id. The aquifer follows the general contours of the lake, but is more extensive than the lake itself. Id. Approximately five percent of the aquifer is located within the State of New Union; the other 95% of the lake is located within the State of Progress, and is wholly under the boundaries of the military reservation. Id. Dale Bompers owns, operates, and resides on a ranch located above the small portion of the aquifer that is in New Union. Id.

The DOD proposed to construct a facility on the shore of Lake Temp to receive and prepare a wide variety of munitions for discharge into the lake. New Union, at 4. The DOD requested a Section 404 discharge permit for the slurry by-product of this munitions process. Id. To prepare for discharge, the content of the munitions will be mixed with chemicals to assure they are not explosive. Id. The remaining solids will be ground and pulverized. Id. Water will be added to these mixtures to form a slurry. This slurry will be sprayed from a movable, multi-port pipe. Id. The pipe will be moved continuously, so it will deposit the slurry evenly over the entire dry bed of the lake. Id. Eventually, the water level of the lake will rise by several feet. DOD estimates that when the operation is complete, the lake's top water elevation will be approximately six feet higher and its surface area will be two square miles larger than it is as the present time. Id.

As part of the operation, COE will continually grade the edges of the new lakebed so that water runoff from the surrounding mountains (located primarily in Progress) will flow

unimpeded into the lake. New Union, at 4. DOD anticipates that alluvial deposits from precipitation falling on the mountains and flowing into the lake will cover the lakebed again, returning it to its pre-operation condition, though at a higher elevation. Id.

The goal of the Clean Water Act ("CWA") is to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a) (2006). To achieve this goal, the CWA generally prohibits the discharge of dredged or fill materials into waters of the United States unless authorized by a permit. 33 U.S.C. § 1311(a) (2006). Section 404 of the Clean Water Act authorizes the Secretary of the Army to issue permits for the discharge of dredged or fill material into waters of the United States when certain conditions are met. 33 U.S.C. § 1344 (2006). Section 402 of the Clean Water Act authorizes the Administrator of the Environmental Protection Agency (EPA) to "issue a permit for the discharge of any pollutant" "[e]xcept as provided in" Section 404. 33 U.S.C. § 1342(a) (2006). When it reviews a permit application, the COE must follow binding guidelines established by the COE and the EPA ("Guidelines" or "404(b) Guidelines"), which are codified at 40 C.F.R. Part 230. See 33 U.S.C. § 1344(b) (2006).

Summary of the Argument

The district court erred in determining that the State of New Union did not have standing to sue. New Union meets standing requirements in two separate ways: 1) its sovereign interests are directly affected; and 2) it has standing under the doctrine of *parens patriae*. To establish standing a party needs to show three elements: injury in fact, a connection between the injury and the conduct, and the problem is redressable. Lujan v. Defenders of Wildlife, 504 U.S. 555, 560-61 (1992). New Union will experience injury in fact because of the potential pollution of the Imhoff Aquifer, and possible loss of land though the rising waters of Lake Temp. These

injuries will be directly caused by the actions of the Army Corps of Engineers, and an injunction will end the issues before this Court. To establish *parens patriae* standing a state must show a quasi-soverign interest in the suit. Here, the State of New Union has established a quasi-sovereign interest in the health and well being of its citizens, and the loss of recreation they would suffer when Lake Temp is altered. See Mass. v. Bull Info Sys., Inc., 16 F. Supp. 2d 90, 97 (D. Mass 1998); see also Ass'n of Data Processing Serv. Orgs., Inc. v. Camp, 397 U.S. 150, 154 (1970). Because New Union can establish standing, the determination of district court should be overturned.

In order to establish federal jurisdiction over a body of water, that body of water must be "navigable." U.S. CONST. art. I, § 8, cl. 3. Lake Temp does not have outflow or inflow from, or to, another body of water; and, as such, lacks a significant nexus to a navigable body of water and is therefore not considered navigable. Rapanos v. United States, 547 U.S. 715 (2006). The district court established jurisdiction because of Lake Temp's traditional role in interstate commerce. See 33 C.F.R. § 329.6 (2011) ("it is sufficient to establish the potential for commercial use at any past, present, or future time"). Furthermore, the COE should be estopped from arguing that Lake Temp is navigable because of the Lake's role in interstate commerce because it has posted signs warning the public not to use the lake.

The district court was correct in determining the COE is the proper permitting agency under the Clean Water Act, Section 404, because the Corps grants permits for the discharge of fill material. 33 U.S.C. § 1344. Furthermore, the effect of fill material is exclusive from the types of processes that the EPA grants a permit under Section 402. Coeur Alaska, Inc. v. Se. Alaska Conservation Council, 129 S.Ct. 2458, 2472-77 (2009).

Lastly, the district court correctly determined that the Office of Management and Budget's resolution of the permitting dispute was proper. The Office of Management and Budget has the power to reconcile interagency disputes. Proclamation No. 12,088, 43 Fed. Reg. 47,707 (Oct. 13, 1978). This power has not been circumscribed by the courts or by legislation, and therefore the Office of Management and Budget's determination was proper. Furthermore, the EPA had the opportunity to veto the section 404 permit, and did not. This action is not judicially reviewable. Alliance To Save Mattaponi v. U.S. Army Corps of Engineers, 515 F. Supp. 2d 1 (D.D.C. 2007).

Argument

I. THE STATE OF NEW UNION HAS STANDING TO SUE IN ITS CAPACITY AS A SOVEREIGN STATE WHO WILL SUFFER INJURY IN FACT AND IN ITS *PARENS PATRIAE* CAPACITY

The Constitution of the United States limits the power of the courts to actions involving "cases and controversies." U.S. CONST. art. III. This Constitutional provision gives rise to the doctrine of standing. "Standing serves to identify those disputes which are appropriately resolved through the judicial process." Whitmore v. Arkansas, 495 U.S. 149, 155 (1990).

Establishing standing requires three elements: 1) injury in fact that is actual or imminent; 2) a causal connection between the injury and conduct; and, 3) that a ruling in favor of that party will "likely redress the problem." Lujan v. Defenders of Wildlife, 504 U.S. 555, 560-61 (1992). Here, New Union directly meets all three requirements to federal standing.

A. New Union Has Standing as a Sovereign State That Has Suffered Injury In Fact

The Supreme Court does not currently apply a "relaxed standing test," however it does require states to meet standing tests. Mass. v. EPA, 549 U.S. 497 (2007); c.f. New Union v. United States, No. 148-2011, slip op. at 5 (D.N.U. June 2, 2011) (applying Justice Roberts' language in dissent). The district court incorrectly applies the "injury in fact" test. The court below requires the injury to be a certainty, stating:

> New Union has presented no evidence as to when the pollution will reach the edge of the aquifer beneath New Union, the strength of the pollution when it reaches that edge, or even that it will ever reach that edge.

New Union, slip op. at 5-6.

i. New Union is injured by the potential harm to the Imhoff Aquifer

"States are not normal litigants for the purposes of invoking federal jurisdiction." Mass. v. EPA, 555 U.S. at 518. Each state has an independent interest in "all the earth and air within its domain. [They have] the last word as to whether [their] mountains shall be stripped of their forests and [their] inhabitants shall breathe pure air." Georgia v. Tenn. Copper Co., 206 U.S. 230, 237 (1907). Here, the Imhoff Aquifer rests, at least partially, under the state of New Union. Because of the potential pollution to the Aquifer, New Union has shown an injury in fact and meets its initial burden under the federal standing requirements.

Second, New Union must show that there is a substantial likelihood that the actions of the United States will cause the harm. Duke Power Co. v. Car. Env. Study Gr., 438 U.S. 59, 75 n. 20 (1978). "A plaintiff need *not* prove causation with absolute scientific rigor to defeat a motion for summary judgment." Pub. Interest Research Gr. of N.J., Inc. v. Powell Duffryn Terminals Inc., 913 F.2d 64, 72 (3d Cir. 1990)(emphasis added). Here, the court below simply misapplied the requirements, holding "New Union has the burden of proving that it will be injured by the complained-of activity and it has not carried its burden." New Union, slip op. at 6. New Union cannot meet the exacting burden of the district court, nor does it need to. New Union need not show scientific certainty in order to survive summary judgment on the issue of standing.

ii. New Union is harmed by the potential loss of sovereign territory

The State of New Union will probably lose an amount of sovereign territory because of the construction project; this alone satisfies the injury in fact. The loss of land due to change in water level is projected to be approximately two square miles around the lake. New Union, slip op. at 4. This is analogous to the harm the state of Massachusetts faced in Mass. v. EPA.

Standing should not be denied simply because the scale of destruction is less. In fact, New Union's harm is substantially more concrete than the harm faced by Massachusetts. The Court below overlooked other possible injuries besides the pollution to the Imhoff Aquifer.

B. The Injuries Are Causally Connected to the United States' Actions and a Positive Determination by this Court Will Likely Redress the Problem Prong

The actions of the DOD will directly affect the future of New Union. If the DOD decides not to fill Lake Temp, the harm to the state will immediately disappear. Filling Lake Temp with slurry will not only cause the water level of the lake to rise, but will also expose the Imhoff Aquifer to artificial contaminants. The actions of the DOD directly and immediately cause harm to New Union. An injunction, obstructing the filling process, will halt the direct harm to New Union.

The United States and the court below suggest that New Union should be time barred from being able to show the harm to the Imhoff Aquifer. However, this does not address the issues of standing and injury. The harm to the Imhoff Aquifer can only be prevented by an immediate opportunity to test the aquifer.

C. New Union Has Standing in Its *Parens Patriae* Capacity Because of the Harm to its Citizens and their Recreational Interests

If a state "has standing to prosecute a lawsuit" on behalf of citizens who may be injured, it has standing in *parens patriae*. BLACK'S LAW DICTIONARY 520 (3rd pocket ed. 2006). Phrased in the alternative, "if the [s]tate is only a nominal party without a real interest of its own- then it will not have standing under the *parens patriae* doctrine." Alfred L. Snapp & Son, Inc. v. Puerto Rico, 458 U.S. 592, 600 (1982). The doctrine of *parens patriae* requires the state to identify a "quasi-sovereign interest" in the wellbeing of a state's population. Id. at 602.

The beginning of the modern *parens patriae* doctrine was first articulated by the Supreme Court in Louisiana v. Texas, 176 U.S. 1 (1900). While the doctrine of in *parens patriae* has not developed a definitive set of rules of application, the interest falls into one of two categories: "First, a State has a quasi-sovereign interest in the health and well-being-both physical and economic-of its residents in general. Second, a State has a quasi-sovereign interest in not being discriminatorily denied its rightful status within the federal system." Snapp, at 607. The *parens patriae* doctrine requires: 1) that the state have a definite interest, not just the interest of one its citizens; and, 2) that the injury affects, either directly or indirectly, a "significantly substantial" population of the state. Jack Ratliff, *Parens Patriae: An Overview*, 74 TUL. L. REV. 1847, 1853 (2000) (citing Snapp at 607).

A state has a quasi-sovereign interest in the health and well being of its citizens. Mass v. Bull Info Sys., Inc., 16 F. Supp. 2d 90, 97 (D. Mass 1998). This interest extends to potential physical harms. Id. Bompers' cattle ranch will be substantially affected by the filling of Lake Temp. Bompers land is situated in New Union, approximately a few hundred yards from the northern edge of Lake Temp. If the DOD exercises its filling project, Bompers' entire ranch will be subsumed by the rise in Lake Temp.

New Union has a quasi-sovereign interest in the loss of recreation for its citizens. Standing under the APA has been granted for interests reflecting "'aesthetic, conservational, and recreational' as well as economic values." Ass'n of Data Processing Serv. Orgs., Inc. v. Camp, 397 U.S. 150, 154 (1970). This is very similar to the quasi-sovereign interests covered by the *parens patriae* doctrine. Duck hunters and innumerable numbers of outdoor enthusiasts from New Union and the State of Progress use Lake Temp for recreation. New Union, slip op. at 4.

New Union has a sovereign interest in the heath and wellbeing of its citizens, and as such has *parens patriae* standing in this case.

II. THE ARMY CORPS OF ENGINEERS DOES NOT HAVE JURISDICTION TO ISSUE A PERMIT UNDER THE CLEAN WATER ACT BECAUSE LAKE TEMP IS NOT A NAVIGABLE BODY OF WATER.

The Army Corps of Engineers ("COE") does not have regulatory jurisdiction to dredge and fill Lake Temp under the Clean Water Act ("CWA") because Lake Temp is not a navigable body of water. Lake Temp is not navigable in fact. The COE hypocritically relies on a form of navigability that was prohibited by the Supreme Court in Solid Waste Agency of N. Cook Cnty. v. U.S. Army Corps of Engineers, 531 U.S. 159 (2001). The DOD obstructs such use in fact and, as such, it is estopped from arguing that Lake Temp caters to interstate travelers. Finally, Lake Temp lacks a significant nexus to a navigable body of water and is therefore not navigable pursuant to Rapanos v. United States, 547 U.S. 715 (2006).

A. Lake Temp is Not Navigable-In-Fact and is Not Susceptible to Commercial Use.

Lake Temp is not a navigable body of water. Navigability is the primary test for federal jurisdiction and is used as a basis for federal regulation under the Commerce Clause of the United States Constitution. U.S. CONST. art. I, § 8, cl. 3. In exercising its administrative authority, the COE is controlled by the contours of the Commerce Clause and its self-promulgated regulations. See id; see also 33 C.F.R. § 328.3(a) (2011); 33 C.F.R. § 329.5 (2011); 33 C.F.R. 329.7 (2011). Although the definition of navigable waters has expanded significantly since The Daniel Ball, 77 U.S. 557 (1870), the Supreme Court continues to utilize the traditional limits of navigability. See Rapanos, 547 U.S. at 734 (2006) (Scalia, J.)("[T]he traditional term 'navigable waters' . . . carries some of its original substance: '[I]t is one thing to give a word

limited effect and quite another to give it no effect whatever.'); 547 U.S. at 759-761 (Kennedy, J. concurring); see also Solid Waste Agency of N. Cook County, 531 U.S. 159 (2001) (hereinafter "SWANCC"). Rapanos and SWANCC acknowledge that the definition of navigability has greatly expanded, but both explicitly reject the notion that traditional tests of navigability have no application. See id.. As a result, an analysis of navigability must consider traditional limits of navigation with limited deference to COE's self-serving interpretation of its own regulations.

Traditionally, lakes that are not navigable in fact are not navigable in law. United States v. Champlin Refining Co., 156 F. 769 (10th Cir. 1946) aff'd sub nom. Oklahoma v. United States, 331 U.S. 788 (1947). Because Lake Temp is not navigable in fact, it is not navigable pursuant to the CWA. See id. In order to establish navigability pursuant to Section 329.6, "it is sufficient to establish the potential for commercial use at any past, present, or future time." 33 C.F.R. § 329.6 (2011). The temporal standard set by Section 329 is broad; if a lake has been previously been for interstate commerce or has the potential to be used for interstate commerce, it is navigable pursuant to Section 329.6. See United States v. Appalachian Elec. Power Co. 311 U.S. 377, 406 & n. 19 (1940); Minnehaha Creek Watershed Dist. v. Hoffman, 449 F.Supp. 876 (D.Minn.1978).

Similarly, commercial activities are construed liberally pursuant to both Section 329 and the CWA. See Atlanta Sch. of Kayaking, Inc. v. Douglasville- Douglas County Water & Sewer Auth., 981 F. Supp. 1469 (N.D. Ga. 1997) (holding that use by kayakers established current commercial use); Utah v. Marsh, 740 F.2d 799 (10th Cir. 1984)(finding that recreational use of intrastate lake by interstate travelers was a significant factor in finding navigability); but see George v. Beavark, Inc., 402 F.2d 977 (8th Cir. 1968) (Mere pleasure fishing does not constitute a stream navigable in fact when it has always been susceptible for use only for this purpose);

Taylor Fishing Club v. Hammett 88 S.W.2d 127 (Tex. Civ. App. 1935)(holding that a lake which was only valuable for fishing was not navigable).

Many federal courts continue to uphold the broad interpretations applied by the COE and EPA. See generally, United States v. Riverside Bayview Homes, Inc., 474 U.S. 121 (1985); United States v. TGR Corp., 171 F.3d 762 (2d Cir. 1999); United States v. Pozsgai, 999 F.2d 719 (3d Cir. 1993). Indeed, the district court found that seasonal presence of interstate bird hunters was sufficient to find Lake Temp navigable-in-fact. New Union, slip op. at 7. The court erred in this determination because the COE and Department of Defense obstruct this particular use and because this particular finding of commercial use has been explicitly prohibited by the United States Supreme Court in SWANCC.

i. The only commercial use established by the lower court was strictly prohibited by the United States Supreme Court in SWANCC

Because the primary finding of navigability of Lake Temp was through the interstate travel of hunters, the district court contravenes the holding of SWANCC. In SWANCC, the COE attempted to establish regulatory jurisdiction over abandoned sand and gravel pits that had evolved into permanent and seasonal ponds. 531 U.S. at 163. The ponds in question were frequented by approximately 121 different species of migratory birds. Id. at 164. In an attempt to establish Section 404 jurisdiction, the COE deferred to its "Migratory Bird Rule." Id. (citing Final Rule for Regulatory Programs of the Corps of Engineers, 51 Fed. Reg. 41, 206-01 (Nov. 13, 1986)). The Migratory Bird Rule granted Section 404 jurisdiction to waters:

> a. Which are or would be used as habitat by birds protected by Migratory Bird Treaties; or
> b. Which are or would be used as habitat by other migratory birds which cross state lines;

51 Fed. Reg. 41, 206-01. The Supreme Court found that the Migratory Bird Rule contravened Congress' intended scope for the CWA and the underlying purpose of federal regulation. SWANCC, 531 U.S. at 172. While the majority opinion implied that there may be valid commercial and recreational interests tied to the presence of migratory bird; the Migratory Bird Rule "was a far cry . . . from the 'navigable waters' and 'waters of the United States' to which the [CWA] by its terms extends." See id. at 173.

Here, the district court's determination of navigability rests solely on the transient presence of interstate, migratory ducks:

> When the lake holds water during migration seasons, ducks have historically used it as a stopover in their migration . . . . Hundreds, perhaps thousands of duck hunters also used it over at least the last one hundred years; most have been residents of Progress . . . .

New Union, slip op. at 4. It appears that the district court bases the finding of jurisdiction on the presence of the migratory ducks, and conceals this determination by reference to corresponding presence of interstate duck hunters. The court cannot base a finding of navigability on the presence of migratory ducks. See SWANCC, 531 U.S. at 174-175.

Additionally, while the Supreme Court noted the recreational activities associated with duck hunting, the court held it "would have to evaluate the precise object or activity that, in the aggregate, substantially affects interstate commerce." See SWANCC, 531 U.S. at 174-75. This clearly indicates that the while the Supreme Court is willing to make a finding of commercial use through the presence of hunters, it requires more than just a showing of the duck hunters presence. The court needs enough evidence to consider the aggregate, substantive impact on interstate commerce. See id. Here, the record is silent in regard to the effects of interstate hunters. Because the lower court's reliance on the presence of interstate hunters contravenes SWANCC, Lake Temp cannot be considered navigable-in-fact.

ii. The Army Corps of Engineers should be estopped from arguing the existence of other modes of navigability because they prohibit access to Lake Temp.

The COE is estopped from arguing the existence of interstate commerce based on the presence of hunters or other forms of commercial use. The doctrine of equitable estoppel precludes a litigant from asserting a claim or defense that might otherwise be available to them against another party who has detrimentally altered their position in reliance on the former's misrepresentation or failure to disclose some material fact. United States v. Georgia-Pacific Co., 421 F.2d 92, 96 (9th Cir. 1970). While the Supreme Court has historically been reluctant to apply estoppel to the government, see Federal Crop Ins. Corp. v. Merrill, 332 U.S. 380 (1947), the Supreme Court has applied estoppel to federal agencies. See Kaiser Aetna v. U. S., 444 U.S. 164 (1979).

In Kaiser, the Court provided partial adjustment for reliance on official advice. Id. Kaiser leased 6,000 acres of land for a housing development. The land included a lake of several acres. In 1961, Kaiser approached the COE and informed the agency of its plans to develop the pond. The COE assured Kaiser that it was not required to obtain permits and consented to all Kaiser's proposals. Kaiser went ahead with its plans. Ten years later, the COE informed Kaiser that authorization was necessary for future construction. The COE also stated that the public would have access to the marina, under section 10 of the Rivers and Harbors Appropriation Act of 1899, because the pond had become a "navigable water" of the United States. Id. at 168-73.

The Supreme Court granted Kaiser partial relief due to its reliance on the representations of the COE. Although the Court held that the "consent of individual officers representing the United States cannot 'estop' the United States," the holding effectively applies principles of estoppel. See Kaiser, 444 U.S. at 180. Here, the COE has posted no trespassing signs on and around Lake Temp. The COE has made factual assertions about the accessibility of Lake Temp

and, indirectly, its corresponding navigability. Both State of Progress and New Union may have utilized the lake for commercial purposes but for the COE's representations.

Because State of Progress and New Union have relied on these representations, the COE is estopped by perpetual representation of fact from arguing that Lake Temp is susceptible to alternative commercial uses. See Kaiser, 444 U.S. at 178-80.

B. Lake Temp Lacks a Significant Nexus to a Navigable Body of Water and is Therefore Not Navigable Pursuant to *Rapanos v. United States*.

Lake Temp is not a navigable body of water because it lacks a significant nexus to a preexisting, navigable body. Rapanos, 47 U.S. 715 (2006). Under Rapanos, a body of water can only be navigable pursuant to the CWA if it possesses a significant nexus to waters that are or were navigable in fact. See id at 759-61 (J. Kennedy, concurring). Justice Kennedy suggests that this is the controlling rule of the case, and it has subsequently been applied in several circuits. See United States v. Robison et al., 505 F.3d 1208 (11th Cir. 2007)); N. California River Watch v. City of Healdsburg, 496 F.3d 993 (9th Cir. Aug. 6, 2007) . Here, Lake Temp is not connected to, nor adjacent to, a navigable-in-fact body of water. As a result, it cannot be considered navigable pursuant to the standard set forth by Justice Kennedy in Rapanos. See Rapanos, 47 U.S. 715 (2006).

In summation, Lake Temp is not navigable because the district court's reliance on SWANCC is in error. The COE is precluded from asserting that Lake Temp is susceptible to other commercial uses and thus navigable due to its perpetual representation of fact. Furthermore, the court must find that Lake Temp is not navigable pursuant to the standards advanced in Rapanos.

III. IF LAKE TEMP IS NAVIGABLE PURSUANT TO THE CWA, THE COE POSSESSES PERMITTING AUTHORITY PURSUANT TO SECTION 404 AND THE EPA LACKS JURISDICTION UNDER SECTION 402.

If Lake Temp is navigable, the COE possesses permitting authority pursuant to Section 404 of the CWA and a Section 402 permit is inappropriate. See Coeur Alaska, Inc. v. Se. Alaska Conservation Council 129 S.Ct. 2458 (2009). Because the DOD is dealing directly with fill material and because the proposed physical alterations to Lake Temp fall specifically within the processes identified by Section 404, Section 402 permitting is unnecessary. See id. Furthermore, the procedural safeguards provided by Section 402 permitting appear appropriate given the diverse, multi-state and multi-agency interests.

A. The District Court Correctly Applied *Coeur Alaska* In Holding The Corps of Engineers Has Exclusive Jurisdiction to Grant a Permit, Because the Department of Defense Project Will Alter The Bottom of Lake Temp.

Section 404 is appropriate because the DOD is using "fill material." 33 U.S.C. § 1344 (the COE may issue permits "for the discharge of dredged or *fill material* into . . . navigable waters.")(emphasis added). Pursuant to the current effects based test utilized by the COE and recognized by the EPA, material that alters the elevation of a lake is considered "fill material." 33 C.F.R. § 323.2(e) (2011). The Supreme Court indicated that this effect is regulated under Section 404 and was mutually exclusive from the Section 402 permitting process. Coeur Alaska, at 2472-77 (2009). Here, the primary effect of the DOD's slurry discharge will be to alter the bottom of Lake Temp. New Union, slip op. at 4. The surface waters of Lake Temp will rise as a result. Id. Because Coeur Alaska indicates that fill material that raises or alters the bottom of a lake requires a Section 404 permit, the jurisdictional finding was appropriate. See Coeur Alaska, 129 S.Ct. 2458.

Additionally, the material identified by Coeur Alaska and regulated pursuant to Section 404 is analogous to the unique material being regulated here. In Coeur Alaska, the slurry material at issue was a pollutant as well as a fill material. 129 S.Ct. at 2468. In finding that the slurry at issue was akin to fill material, the Supreme Court deferred to the regulatory conclusions of both the EPA and the COE:

> [T]he law authorizes the environmental agencies to classify material as the one or the other, so long as they act within the bounds of relevant regulations, and provided that the classification, considered in terms of the purposes of the statutes and relevant regulations, is reasonable.

Id. at 2477. The Court deemphasized the distinction between pollutant and fill material and, rather, underlined the regulatory safeguards within cross-agency regulation. See id at 2477-2479 (J. Breyer, concurring); see also Auer v. Robbins, et al., 519 U.S. 452, 461 (1997)(holding that a federal agency receives deference when interpreting its own regulatory scheme). Here, the district court upholds the substantive determinations of both federal agencies and appropriately finds the slurry to be fill material.

B. Deference to the Agencies' Joint-Regulatory Structure Provides Additional Protections in Furtherance of the CWA

The CWA provides a joint-regulatory structure that enhances the substantive protections afforded Lake Temp. See 33 U.S.C. § 1344. The risk of a conflict of interest is eliminated by inherent safeguards within the permitting process. See id. For example, while the COE exercises primary permitting power for dredging and filling, the EPA retains authority to veto *any* dredging and filling project:

> The Administrator is authorized to prohibit the specification (including the withdrawal of specification) of any defined area as a disposal site, and he is authorized to deny or restrict the use of any defined area for specification (including the withdrawal of specification) as a disposal site, whenever he determines, after notice and opportunity for public hearings, that the discharge of such materials into such area will have an unacceptable adverse effect on

> municipal water supplies, shellfish beds and fishery areas (including spawning and breeding areas), wildlife, or recreational areas.

33 U.S.C. § 1344(c) (2006). Additionally, the EPA's vetoing power extends beyond the traditional contours of the CWA; the EPA may exercise veto power based on innumerable factors. See Alameda Water & Sanitation Dist. v. Reilley, 930 F.Supp. 486 (D. Colo. 1996)(EPA did not exceed its authority under CWA in vetoing decision of COE to issue permit for water storage project, despite claim that veto was improperly based upon *recreational* and fishing conditions not related to water quality changes, and assertion that CWA was concerned only with water quality)(emphasis added); James City Cnty., Va. v. E.P.A., 12 F.3d 1330 (4th Cir. 1993) (EPA's veto of permit to construct dam could be based solely on environmental harms). The EPA's broad veto power creates objective oversight of the Section 404 permitting process, but retains efficiency by allowing the COE to regulate directly. Here, the district court cites public, private and environmental interests that may be directly impacted by the COE's project. Some of these factors are outside the scope of traditional CWA considerations. The veto power permits EPA to consider these extraneous factors when overseeing COE's permitting process. See 33 U.S.C. § 1344(c). The more significant implication is that if the fill material discharges a quantifiable level of pollutant, the EPA may veto the filling process. See id. While Coeur Alaska implies that direct application of 33 U.S.C. § 1314 (b) (2006) ("Section 304") pollutant standards to filling projects is prohibited, the veto power inherent in Section 404 gives EPA substantial regulatory discretion. See Coeur Alaska, 129 S.Ct. at 2468; 33 U.S.C. § 1344(c). Because the Section 404 provides inter-agency, procedural safeguards for filling Lake Temp, it is the only appropriate permit provision. See 33 U.S.C. § 1344.

C. The Ammunitions Filling Process is Best Overseen by the Corps of Engineers According to the Balancing Test Utilized Under Section 404.

The Section 404 permitting process involves a careful ad hoc balancing test performed by the COE. 33 C.F.R. § 320.4(a)(1) (2011). The process considers a plethora of environmental and economic factors in both the public and private sector. See id. The balancing test employed by the COE is different from the technology-based standards that govern the Section 402 permitting scheme. Compare 33 U.S.C. § 1342 (2006) (utilizing an effluent based limitations standard), with 33 C.F.R. § 320.4(a)(1) (expanding permitting considerations to economic impacts). The filling of Lake Temp will be done by a military agency and will involve costs to both public and private entities. See New Union. Because the COE balancing test provides the most expansive consideration and evaluation of these types of factors, a Section 404 permit is both appropriate and efficient.

IV. OMB'S ACTIONS TO RESOLVE A DISPUTE BETWEEN THE EPA AND COE WAS PROPER, AND THE COURT BELOW CORRECTLY GRANTED SUMMARY JUDGMENT.

A. The Office of Management and Budget is given the power to resolve disputes between executive agencies.

Executive power in the United States is vested by the Constitution in the President of the United States. U.S. CONST. art. I, § 1, cl. 1. The President is charged with the duty to "take Care that the Laws be faithfully executed." U.S. CONST. art. II, § 3. This power and these duties are not vested in the Administrator of the EPA or the Secretary of the Army. It is the President's duty to ensure that all discretionary decisions made within the executive branch, whether by the Administrator of the EPA or the Secretary of the Army, are faithful to the Constitution and laws of this country. This duty necessarily includes the authority to resolve legal and policy disputes that may between agencies.

To ensure this duty was met, an Executive order was issued, creating procedures to follow when disputes arise between executive branch agencies. The State of Progress admits that OMB resolved a dispute between the EPA and the COE about the permitting process, yet this resolution was pursuant to procedures for reconciling disputes within the executive branch. Executive Order Number 12088 gives OMB the power to reconcile disputes between executive branch agencies. Proclamation No. 12,088, 43 Fed. Reg. 47,707 (Oct. 13, 1978)). Specifically, the Executive Order allows:

> 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.
> 1-702. 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.

Id.

In 1981, an additional executive order was issued which established the regulatory review structure that exists today. Executive Order 12,291, issued by President Reagan, requires executive agencies to submit all proposed rules and final regulations to OMB for prepublication review. Proclamation No. 12,291, 46 Fed. Reg. 13,193 (Feb. 19, 1981); 3 C.F.R. § 127 (1982) (reprinted as a note in 5 U.S.C. § 601 (1982)). Additionally, certain rules submitted to the OMB must be accompanied by regulatory impact analysis, which are detailed cost-benefit analysis. Subsequent Presidential administrations have sustained OMB's power to review executive agency decisions. See Proclamation No. 12,866, 58 Fed. Reg. 51,735 (Oct. 4, 1993)(issued by

President Clinton, revoking Reagan's Executive Order 12291, but retaining some main concepts, and retaining the cost-benefit review); Proclamation No. 13,422, 72 Fed. Reg. 2763 (Jan. 23, 2007)(issued by President G.W. Bush, amending the Clinton order to add a requirement that agency actions must be justified by demonstrating a specific market failure); Proclamation No. 13,563, 76 Fed. Reg. 3821 (Jan. 21, 2011)(issued by President Obama, generally following others, with reliance on OMB's Office of Information and Regulatory Affairs to review only the most significant agency rulemaking actions).

Limitations have been placed on OMB's ability to delay promulgation of environmental regulations. See Def. Fund v. Thomas, 627 F. Supp. 566, 570 (D.D.C. 1986) (finding that the OMB could not use its regulatory review power to delay promulgation of regulation, until substantive changes are made, beyond the date of a statutory deadline). Yet, the courts have never limited OMB's ability to resolve disputes between executive agencies. Therefore, the OMB's resolution of a dispute between the EPA and COE about CWA permitting for fill materials was appropriate.

B. Because EPA's Authority to Veto Section 404 Permits is Discretionary, EPA's Decision Not to Veto May not be Judicially Reviewed.

COE issued a permit to the Department of Defense (DOD) pursuant to the Clean Water Act, Section 404, 33 U.S.C. § 1344, to fill Lake Temp. Section 404(c) gives the Administrator of the EPA authority to deny or restrict the use of certain areas as a disposal site for fill materials if the administrator determines, after notice and 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 . . . wildlife, or recreational areas.". 33 U.S.C. 1344(c). If the Administrator decides to deny the Secretary's approval of a Section 404 permit, the Administrator "shall set forth in writing and make public his findings and his reasons for making

any determination under this subsection." Id. While the EPA has the authority to veto issuance of Section 404 permits by COE, the Administrator of the EPA is not required to veto these permits. See Alliance to Save the Mattaponi v. U.S. Army Corps of Engineers, 606 F. Supp. 2d 121, 126 (D.D.C. 2009) appeal dismissed, 09-5201, 2009 WL 2251896 (D.C. Cir. 2009) (finding that EPA has the authority to veto Section 404 permits issued by COE).

Every year, the COE processes approximately 60,000 permit actions. Clean Water Act Section 404(c) "Veto Authority," United States Environmental Protection Agency, *available at* http://water.epa.gov/type/wetlands/outreach/upload/404c.pdf (citing Corps permit data 1988-2010, U.S. Army Corps of Engineers Headquarters, Regulatory Branch). However, Administrators of the EPA have only used the Section 404(c) authority rarely, issuing only thirteen final veto actions since 1972. Id. These final veto actions have spanned a broad geographic area, and have been implemented only when "unacceptable adverse impacts to a variety of aquatic resources" were found. Id. With only thirteen final veto actions issued since 1972, it is clear that the Administrator's veto power is discretionary, not mandatory.

The Administrative Procedure Act ("APA") contains an exemption to judicial review for cases in which an agency action was committed to discretion. These agency actions, made under discretion, are not subject to judicial review. 5 U.S.C. § 701(a)(2) (2006). A report prepared by COE concerning operation of flood control project constructed by Corps was not judicially reviewable. Taylor Bay Protective Ass'n v. E.P.A., 884 F.2d 1073 (8th Cir. 1989). Additionally, a decision by Army Corps of Engineers not to issue permit for private boat dock was a discretional decision pursuant to the APA. Gardner v. U.S. Army Corps of Engineers, 504 F. Supp. 2d 396 (E.D. Ark. 2007). When the EPA decided not to issue a Notice of Deficiency, a discretional action, the court of appeals was unable to review this decision. Ohio Pub. Interest

Research Group, Inc. v. Whitman, 386 F.3d 792 (6th Cir. 2004); see also Pub. Citizen, Inc. v. E.P.A., 343 F.3d 449 (5th Cir. 2003) (EPA's discretional decision not to issue a Notice of Deficiency, despite alleged deficiencies in a state program, was not subject to judicial review).

However, courts have held that even though the APA exception to judicial review exists for cases in which agency action was committed by agency discretion, certain APA claims against the EPA can be made. Mattaponi, 515 F.Supp.2d 1 (D.D.C. 2007) (finding that EPA's failure to veto a permit issued by COE for construction of a reservoir was judicially reviewable because the CWA provision authorizing EPA to veto permits whenever unacceptable adverse effects would occur created a standard against which a judge could measure EPA's decision not to veto permit).

C. If Judicially Reviewable, EPA's Decision Not to Veto the Corps of Engineers Permit is Presumed to be Valid and Was Not an Arbitrary or Capricious Decision.

If this Court finds that the EPA's decision not to veto the COE permit is judicially reviewable, the EPA's decision is presumed valid unless its decision was arbitrary and capricious. Actions by an executive agency, including inactions where an agency chooses not to veto a permit, are presumed to be valid. See Ethyl Corp. v. EPA, 541 F.2d 1, 34 (D.C.Cir.1976) (citing Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402, 415 (1971)). As long as an agency considered relevant factors and articulated a rational connection between the facts and the choice it made, its decision will be upheld. See Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 42-43 (1983); Marsh v. Or. Natural Res. Council, 490 U.S. 360, 378 (1989)(holding that agency action will not be reversed absent a clear error of judgment).

The standard of review for agency actions is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law." 5 U.S.C. § 706(2) (2006). An agency decision is

arbitrary and capricious if the agency has relied on factors that it should not have considered, entirely failed to consider an important aspect of the problem, offered an explanation of its decision that is different than the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise. Statefarm, 463 U.S. at 29; see also James City Cnty, Va. v. E.P.A., 12 F.3d 1330 (4th Cir. 1993)(finding that EPA's actions for permitting dredged or fill material is reviewable under arbitrary and capricious standard, not a "substantial evidence" test).

Where the EPA failed to veto a permit issued by the COE to a city to build a reservoir, the court determined that the EPA acted arbitrarily and capriciously because it considered factors outside of the scope of its statutory authority. Mattaponi, 606 F. Supp. 2d 121; see also Natural Res. Def. Council, Inc. v E.P.A., 966 F.2d 1292 (9th Cir. 1992) (finding that certain decisions by the EPA in creating the CWA storm water discharge rules were arbitrary and capricious where the EPA failed to include deadlines for permit approval and where the EPA rule excluded certain types of sites from application of the rule).

In the present case, the EPA's decision not to veto COE's issuance of a Section 404 permit was not arbitrary or capricious. Section 404 allows for both the EPA and the COE to issue permits for fill materials into waters. Whereas in other cases courts have found that the EPA's actions were arbitrary and capricious, these actions were being judged solely on the actions of the EPA. In this case, the EPA was specifically given discretion to decide whether or not it vetoes COE permits. The EPA is not required to make its own determination to issue the permit or not, rather it is given discretion to veto determinations made by the COE. The EPA did not consider factors outside of the scope of its statutory authority; rather, it made the discretionary decision not to veto COE's permitting decision.

Conclusion

For the foregoing reasons, Appellee and Cross-Appellant The State of Progress, requests that this Court reverse the decision of the court below, granting summary judgment in favor of the United States regarding whether the State of New Union has standing to bring suit, and the lower court's determination that Lake Temp is navigable. Furthermore, the State of Progress requests the Court uphold the determination that the COE is the correct permitting agency, and the OMB had authority to determine COE authority over the permitting.