Team 76

C.A. No. 11-124

UNITED STATES COURT OF APPEALS
FOR THE TWELFTH CIRCUI

STATE OF NEW UNION,
Appellant and Cross-Appellee,

v.

UNITED STATES
Appellee and Cross-Appellant

v.

STATE OF PROGRESS,
Appellee and Cross-Appellant.

Brief for the United States

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

OTHER AUTHORITIES

REGULATIONS

STANDARD OF REVIEW

A district court's grant of summary judgment is reviewed *de novo*. *Oliver v. Keller*, 289 F.3d 623, 626 (9th Cir. 2002). Summary judgment is appropriate when there is no genuine issue as to any material fact. Fed. R. Civ. P. 56.

STATEMENT OF JURISDICTION

The district court correctly held that it lacks subject matter jurisdiction over New Union's claims, because factual allegations leveled by New Union are insufficient to establish standing to sue under the Administrative Procedure Act, 5 U.S.C. § 702 (2006). The district court heard the case pursuant to 28 U.S.C. § 1331 (2006). It entered summary judgment against New Union and in favor of the United States on all claims on June 2, 2011. The district court's order granting summary judgment constitutes a final order under which this court has jurisdiction under 28 U.S.C. § 1291 (2006).

ISSUES PRESENTED

I. Whether the State of New Union has standing in its sovereign capacity as owner and regulator of the groundwater in the state or in its *parens patriae* capacity as protector of its citizens who have an interest in the groundwater in the state to challenge the permit issued by the United States Army Corps of Engineers (COE) to the Department of Defense (DOD) pursuant to the Clean Water Act (CWA) Section 404, 33 U.S.C. § 1344 (2006) to fill Lake Temp.

II. Whether the COE has jurisdiction to issue a permit under CWA Section 404, 33 U.S.C. § 1344 because Lake Temp is navigable water under CWA Sections 301(a), 404(a), and 502 (7), 33 U.S.C. §§ 1311(a), 1344 (a), 1362(7) (2006).

III. Whether the COE has jurisdiction to issue a permit under CWA Section 404, 33 U.S.C. § 1344, or the EPA has jurisdiction to issue a permit under CWA Section 402, 33 U.S.C. § 1342 (2006), for the discharge of slurry into Lake Temp.

IV. Whether the decision by the Office of Management and Budget (OMB) that the COE had jurisdiction under CWA Section 404, 33 U.S.C. § 1344 (2006), and that EPA did not have jurisdiction under CWA Section 402, 33 U.S.C. § 1342 (2006), to issue a permit for DOD to discharge slurry into Lake Temp and EPA's acquiescence in OMB's decision violated the CWA.

STATEMENT OF FACTS

Lake Temp is an oval-shaped intermittent body of water that is up to three miles wide and nine miles long during the rainy season in wet years, smaller during the dry season, and wholly dry approximately one out of five years. (R. at 4.). The lake is situated within an arid military reservation owned by the United States in the State of Progress. (R. at 3.).

The Imhoff Aquifer is located almost one thousand feet below Lake Temp. Ninety-five percent of the aquifer is located within Progress, wholly under the boundaries of the military reservation. (R. at 4.). Five percent of the aquifer is located within New Union. Id. The Imhoff Aquifer is not potable or usable in agriculture without treatment because of a high level of sulfur. Id. A rancher in New Union named Dale Bompers resides above a small portion of this aquifer. (R. at 6.).

When the lake holds water during migration seasons, ducks have historically used it as a stopover in their migration from the Arctic to southern climes and back. Numerous duck hunters have used the lake for at least the past hundred years; most have been residents of Progress but about a quarter were from out of state. A Progress state highway runs along the southern side of Lake Temp, at the edge of the military reservation and within one hundred feet of the shore when the lake is filled to its historic high. (R. at 4.).

When the lake became part of a military reservation in 1952, the DOD posted signs along both sides of the highway warning of danger and that entry was illegal. There is no fence preventing entry to the lake. There are clearly visible trails leading from the road to the lake that show signs of rowboats and canoes being dragged between the highway and the lake. DOD has taken no measures beyond the signs to restrict public entry, although DOD has knowledge that people continue to use the lake for hunting and bird watching. *Id.*

DOD proposes to construct a facility on the shore of Lake Temp to receive and prepare a wide variety of munitions for discharge into the lake. Preparation will begin by emptying munitions of liquid, semi-solid, and granular contents, and mixing the contents with chemicals to assure they are not explosive. The remaining solids, primarily metals, will be ground and pulverized. Finally, water will be introduced to both sets of waste to form a slurry, which will be sprayed from a movable multi-port pipe. *Id.*

Due to the arid nature of this location, the slurry will dry out soon after contact. The pipe will be moved continually to deposit the slurry evenly over the entire dry bed of the lake, so that eventually the entire lakebed will be raised 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 at the present time. *Id.*

The lake will remain, and over time alluvial deposits from precipitation falling on the mountains and flowing into the basin will cover the lakebed again, returning it to its pre-operation condition, albeit at a higher elevation. The COE's EIS does not project that the lake would intrude on New Union under any of the scenarios studied for the project. (R. at 4,5.).

STATEMENT OF THE CASE

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

(R. at 3.). New Union contends that the section 404 permit is invalid, and that any permit for the discharge must be issued by the Administrator of the EPA pursuant to her authority to issue permits for the discharge of pollutants under CWA Section 402, 33 U.S.C. § 1342 (2006); *Id.* Plaintiff also argued that Defendant may not proceed with the project in the absence of a permit under the Resource Conservation and Recovery Act (RCRA), 42 U.S.C. §§ 6901-7000 (2006). *Id.* The State of Progress, within whose boundaries the permitted activities will take place, intervened and was added as a Defendant. *Id.*

After discovery, the Secretary of the Army 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 Lake Temp is navigable water; and 3) the participation by OMB in the decision that a section 404 permit rather than a section 402 permit should be issued did not violate the CWA. (R. at 5.).

New Union filed a cross-motion for summary judgment 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 decision-making process violated the CWA. *Id.*

Progress also filed a cross-motion for summary judgment asserting that: 1) New Union does have standing; and either 2) Lake Temp is not within the jurisdiction of the CWA and the activity requires no permit under either section 402 or 404 because Lake Temp is not navigable water; or 3) the COE has jurisdiction to issue the permit under section 404; and 4) OMB's participation in the decision-making process did not violate the CWA. *Id.*

On June 2, 2011, the District Court granted Defendant's motion for summary judgment on the CWA counts and denied Plaintiff's motion. (R. at 1; 10.). The District Court held that: 1) Plaintiff had no standing to appeal the permit issuance; 2) the COE had jurisdiction to issue a section 404 permit for the discharge of fill into Lake Temp because Lake Temp is a navigable water and the slurry is a fill material; and 3) OMB's dispute resolution between EPA and the COE did not violate the CWA. (R. at 10,11.).

Following the District Court's order, New Union and Progress each filed a Notice of Appeal. (R. at 1.). New Union appealed the District Court's decision: 1) that New Union did not have standing to challenge the permit issued by the COE; 2) that the COE had jurisdiction to issue the permit under CWA Section 404, 33 U.S.C. § 1344; and 3) that OMB did not violate the CWA when it resolved a dispute between EPA and the COE over whether the COE had jurisdiction to issue the permit. Id. Progress took issue with the decision of the District Court that the COE had jurisdiction to issue the permit under CWA Section 404, 33 U.S.C. § 1344 (2006), because Lake Temp is not navigable water. *Id.*

This court granted review on September 15, 2011.

SUMMARY OF THE ARGUMENTS

The Court of Appeals should affirm the District Court's holding that: 1) plaintiff lacked standing to challenge the permit issued by COE; 2) COE had jurisdiction to issue a permit under CWA Section 404 because Lake Temp is navigable water and the slurry is fill material; and 3) OMB's resolution of the dispute between EPA and COE did not violate the CWA.

Since New Union cannot sufficiently establish that the discharge authorized by the COE Section 404 permit will cause injury to it or its citizens, the state does not have standing to

challenge the issuance of that permit. The summary judgment rendered on this issue by the District Court should be upheld.

Lake Temp is a navigable water under the CWA, and as such, the COE is authorized to issue permits for the discharge of fill material into Lake Temp. Lake Temp is a "relatively permanent" body of water that plays an important role in intrastate commerce. COE is entitled to make these determinations as the administrator of section 404 of the CWA. In addition, the slurry that will be discharged into Lake Temp is a "fill material," as defined by both COE and EPA. Agencies are afforded deference to interpret their own regulations, so long as the interpretation is not plainly erroneous or inconsistent with the regulation. Since the determination that the slurry is a fill material is not plainly erroneous, COE is entitled to deference in this classification.

Finally, OMB's participation in resolving the dispute between COE and EPA did not violate the CWA. OMB, as an extension of the President's executive power, has the authority to resolve such disputes between executive agencies. Although OMB resolved the dispute in favor of COE, EPA, in accordance with the CWA, had the final decision whether to veto the COE permit. Since EPA refrained from doing so, it granted its tacit approval to the permit. As a governmental agency, EPA's discretionary decision is not subject to judicial review. However, even if it were subject to judicial review, EPA's decision to allow the section 404 permit could not be considered arbitrary or capricious.

ARGUMENT

I. THE DISTRICT COURT'S GRANT OF SUMMARY JUDGMENT WAS PROPER BECAUSE THE APPELLANT LACKS STANDING TO CHALLENGE THE PERMIT ISSUED BY THE UNITED STATES ARMY CORPS OF ENGINEERS (COE) TO THE DEPARTMENT OF DEFENSE (DOD).

This Court should affirm the district court's holding that New Union lacks standing to challenge the DOD's permit. Standing is one of the controlling elements in the definition of a "case or controversy" under Article III. *Asarco, Inc. v. Kadish*, 490 U.S. 605 (1989). "In essence the question of standing is whether the litigant is entitled to have the court decide the merits of the dispute or of particular issues." *Warth v. Seldin*, 422 U.S. 490, 498 (1975). "No principle is more fundamental to the judiciary's proper role in our system of government than the constitutional limitation of federal-court jurisdiction to actual cases or controversies." *Hein v. Freedom From Religion Foundation, Inc.*, 551 U.S. 587, 598 (2007) (quoting *Raines v. Byrd*, 521 U.S. 811, 818 (1997)). "Vindicating the *public* interest…is the function of Congress and the Chief Executive." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992) (emphasis in original). To have standing, a plaintiff must establish three elements:

> (1) that it has suffered an "injury in fact" that is (a) concrete and particularized and (b) actual and imminent, not conjectural or hypothetical; (2) the injury is fairly traceable to the challenged action of the defendant; and (3) it is likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision.

Friends of Earth, Inc. v. Laidlaw Environmental Services (TOC), Inc., 528 U.S. 167, 180-81 (2000) (citing *Lujan*, at 560-61). A plaintiff cannot rest on "mere allegations" of injury to overcome summary judgment, and must instead set forth "specific facts" by affidavit or other evidence. *Lujan* at 561 (citing Fed. R. Civ. P. 56(e)).

The district court property rejected New Union's claim because New Union has produced no evidence that it or its citizens have suffered (or will suffer) any actual injury as a result of COE's permitting decision. Accordingly, New Union has not established sovereign standing as owner and protector of its groundwater, or standing in its *parens patriae* capacity as a representative for its citizens. This Court should therefore affirm the district court's grant of summary judgment.

A. NEW UNION LACKS STANDING IN ITS SOVEREIGN CAPACITY AS OWNER AND REGULATOR OF THE GROUNDWATER IN THE IMHOFF AQUIFER.

New Union has failed to allege an injury-in-fact resulting from the COE's permitting decision. In Lujan, the Supreme Court declared that "the party bringing suit must show that the action injures him in a concrete and personal way." *Lujan* at 581. Such an injury must be "actual or imminent," Id. at 561, and not "a mere possibility in the remote future." *Pierce v. Soc'y of the Sisters of the Holy Names of Jesus & Mary*, 268 U.S. 510, 536 (1925). If a plaintiff cannot demonstrate a "distinct and palpable injury," *Warth v. Seldin*, 422 U.S. 490, 501 (1975), the complaint may be dismissed without further inquiry. *See Schlesinger v. Reservists Comm. to Stop the War*, 418 U.S. 208, 227 n. 16, (1974) ("Until a judicially cognizable injury is shown no other inquiry is relevant to consideration of citizen standing.").

This requirement ensures that a party seeking judicial redress has "such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination." *Baker v. Carr*, 369 U.S. 186, 204 (1962).

1. Even If New Union Is Due "Special Solicitude" As A State, Massachusetts v. EPA Does Not Remove The Requirement That New Union Establish A Concrete Injury As A Prerequisite To Standing.

New Union has not alleged an injury-in-fact sufficient to establish standing in its sovereign capacity as a state, and concedes as much by urging this Court to adopt a version of standing analysis that is literally unprecedented. New Union mischaracterizes *Massachusetts v. EPA*, 549 U.S. 497 (2007) as establishing a "relaxed standing test" (R. at 5) that supposedly abrogates the requirement that a plaintiff suffer an injury in fact, so long as that plaintiff is a sovereign. *Cf. Lujan* at 560 (declaring that "injury in fact" is among the three elements that establish the "irreducible constitutional minimum" required for standing). Although some kind of "relaxed standing test" might be a plausible interpretation of *Massachusetts* when the majority's opinion is excerpted in a piecemeal (and sound bite worthy) fashion, the majority's opinion did not supplant *Lujan's* injury requirement. After *Massachusetts*, even a sovereign entity must suffer some *concrete* injury to sue in court. *See Summers v. Earth Island Inst.*, 555 U.S. 488, 497 (2009) ("[T]he requirement of injury in fact is a hard floor of Article III jurisdiction that cannot be removed by statute."); *See also Maryland v. Louisiana*, 451 U.S. 725, 766 (1981) (Rehnquist, J., Dissenting) (stating that the "jurisdiction [of the federal judiciary] should not be trivialized and open to run-of-the-mill claims simply because they are brought by a State.").

Indeed, the majority opinion in *Massachusetts* committed an entire section to an explanation of the Commonwealth's injury. It stated that climate change poses "serious and well recognized" harms that have been verified by "objective and independent" science. *Id.* at 521. Such harms include rising sea levels. *Id.* As applied to Massachusetts, the Court characterized the threat of climate change as a concrete injury, noting that:

> …rising sea levels have already begun to swallow Massachusetts' coastal land…the severity of that injury will only increase over the course of the next century…[costs] could run well into the hundreds of millions of dollars.

Id. Thus, the Court in *Massachusetts* identified an injury to the Commonwealth that would have likely sufficed to satisfy the traditional Article III requirements under *Lujan*.

To the extent *Massachusetts* did provide any "special solicitude" to the Commonwealth owing to its sovereign status, such "solicitude" was necessary to overcome—and limited in application to—the Court's long-standing aversion to resolving disputes better suited to the elected branches of government. Massachusetts was challenging EPA's denial of a rulemaking under the Clean Air Act. *See Massachusetts* at 520 n. 17 (2007). As explained in Lujan, standing to sue cannot be based on a procedural injury when "the impact on [plaintiff] is plainly undifferentiated and common to all members of the public." *Lujan* at 575 (internal formatting and citations omitted). Given the globally-felt effects of climate change, EPA's procedural violation in *Massachusetts* would have created an injury too generalized to establish standing absent some measure of "special solicitude." *See Ctr. for Law & Educ. v. Dep't of Educ.*, 396 F.3d 1152, 1157 (D.C. Cir. 2005) (explaining that the violation of a procedural right can form the basis for standing only "where the violation "result[s] in injury to [a]…particularized interest.").

In contrast to Massachusetts, New Union has not even alleged a *generalized* injury to its sovereign interests. Therefore no amount of "special solicitude" will transform New Union's non-injury into one sufficient to establish standing. *See Sierra Club v. Morton*, 405 U.S. 727, 738 (1972) ("[B]roadening the categories of injury that may be alleged in support of standing is a different matter from abandoning the requirement that the party seeking review must [it]self have suffered an injury.").

2. New Union Has Failed To Establish An Injury Sufficient to Confer Standing.

In the district court, New Union presented no evidence that the permitting activity will result in pollution of the portion of the Imhoff Aquifer that underlies the state. (R. at 6.). New

Union merely presented circumstantial evidence to support its highly general and speculative claim that pollutants could possibly leech into the aquifer someday in the future. (R. at 5-6.). New Union's allegations lack the specificity required under *Lujan* and Rule 56(e). *See Lujan* at 889 ("It will not do to 'presume' the missing facts because without them the affidavits would not establish the injury that they generally allege."); *See also See People for Ethical Treatment of Animals v. Dep't of Health & Human Services*, 917 F.2d 15, 17 (9th Cir. 1990) (supporting the same proposition). If New Union's general allegations are deemed sufficient to establish standing in this case, the court would be forced to engage in an abstract academic exercise in order to determine exactly which of New Union's interests are actually impaired. *Cf. Lujan* at 566 (declaring that standing is not an "ingenious academic exercise" at the summary judgment state, and requires "a factual showing of perceptible harm").

Even assuming New Union's allegations did not fail for lack of specificity, the constitutional underpinnings of Article III standing counsel against overturning the district court's grant of summary judgment. Putting it simply, New Union does not have "such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination." *Baker* at 204. The State conceded that the timing and severity of the pollutant's impact on groundwater within its boundaries—if any—is presently unknown (and unknowable without more information). (R. at 6.). *Massachusetts* involved an observable injury (i.e., rising sea levels) that was scientifically verified. *Massachusetts* at 521. In contrast, the basis for New Union's alleged injury (i.e., groundwater contamination) was not concrete enough to warrant any independent investigation from the DOE during its Environmental Impact Study. (R. at 6.).

Thus, New Union presents nothing more than an abstract injury and fails to meet the threshold for sovereign standing.

B. NEW UNION'S *PARENS PATRIAE* CAPACITY AS PROTECTOR OF ITS CITIZENS DOES NOT PROVIDE AN ALTERNATE BASIS FOR STANDING.

Even if this case is construed as a *parens patriae* action rather than one asserting New Union's sovereign interests, it should not be allowed to proceed. "[A] State asserting quasi-sovereign interests as *parens patriae* must still show that its citizens satisfy Article III." *Massachusetts* at 539 (Roberts, C.J., dissenting). Though a *parens patriae* suit can go forward when only a small number of individuals has been injured, *Alfred L. Snapp & Son, Inc. v. Puerto Rico, ex rel., Barez*, 458 U.S. 592, 599 (1982) (holding that Puerto Rico was entitled to sue as *parens patriae* despite injury to a small number of its people), no case has ever relaxed the doctrine of *parens patriae* so far as to allow a sovereign entity to assert such a suit when no citizens at all have been injured. New Union points to Dale Bompers to demonstrate how it seeks to use *parens patriae* on behalf of its citizens. Because Mr. Bompers has not suffered an injury sufficient to establish standing for himself, New Union's alternate standing theory must fail.

In an attempt to give life to its lifeless *parens patriae* claim, New Union asserts that its claim as a representative for its citizens is exemplified by Dale Bompers. (R. at 6.). However, Mr. Bompers himself will not suffer (and has not suffered) any injury resulting from the permit. The claim that Mr. Bompers will suffer due to a reduction in property values resulting from contamination to the aquifer is so probabilistic and attenuated that one must wonder if it is intended to insult this Court's intelligence. Property values have not fallen as a result of the permitting decision, and the unsupported claim that values will fall in the future is not sufficient to establish standing. Although loss in property values would constitute an injury, Mr. Bompers has failed to produce any evidence that the value of his property has fallen (R. at 6.). Moreover, Mr. Bompers has no certain plans to put his ranch up for sale, and so any decrease in the property value due to contamination of the aquifer will not harm him economically. Without concrete plans to sell, any possible drop in valuation is an insufficient "some day"

injury. Lujan at 564 (stating that "some day" intentions, absent a description of concrete plans, "do not support a finding of the "'actual or imminent' injury that standing cases require").

Even if it were possible for Mr. Bompers to somehow establish a bona-fide, objective reduction in value without putting the ranch up for sale, it would be impossible to establish that the valuation change was a result of the permitting activity as opposed to the numerous other factors that can affect real estate values. *See Lujan* at 561 (noting that an injury must be "fairly traceable" to the challenged government conduct). To be sure, the water under Bompers' ranch is already unusable for agricultural uses and cannot be drunk due to high levels of sulfur. (R. at 6.). New Union's assumption that additional contamination in the aquifer would somehow precipitate a perceptible drop in value of Mr. Bompers' ranch runs counter to common sense.

Beyond property values, New Union implies—without stating directly— that Mr. Bompers' use of the groundwater in the Imhoff Aquifer will be somehow impaired by the permit. This argument must fail to establish an injury because citizens of New Union are prohibited from drawing water out of the Imhoff Aquifer due to its high sulfur content. As there are no permit applications asking for waiver of the prohibition, and because New Union has not indicated a willingness to repeal the its groundwater statute, use of the water in the aquifer will not be affected by the permitting decision even if the permitted activity leeches contaminants into the same. Thus, New Union cannot rely on a remote possibility that property values willfall—affecting a single citizen—to establish *parens patriae* standing.

II. LAKE TEMP IS A NAVIGABLE WATER OF THE UNITED STATES UNDER THE CLEAN WATER ACT.

The COE has jurisdiction to issue a permit under CWA Section 404 because Lake Temp is a navigable water under CWA Sections 301(a), 404(a) and 502(7). The COE is authorized to issue permits for "the discharge of dredged or fill material into the navigable waters," 33 U.S.C. § 1344(a) (2006). "Navigable waters" are defined by the CWA as "the waters of the United States, including the territorial seas." 33 U.S.C. § 1362(7) (2006). The COE has defined "waters of the United States" in its regulations to include, in relevant part, "intrastate lakes . . . the use,

degradation or destruction of which could affect interstate or foreign commerce." 33 C.F.R. § 328.3(a). This definition is entitled deference because it does not conflict with congressional intent nor is it an impermissible construction of the statute. *See Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843 (1984). Lake Temp is an intrastate lake that has a substantially connection to interstate commerce. It is therefore a navigable water under the COE's reasonable interpretation of the CWA.

A. THE COE'S DEFINITION OF "WATERS OF THE UNITED STATES" IS ENTITLED TO CHEVRON DEFERENCE.

The COE's definition of "waters of the United States" in 33 C.F.R. § 328.2(a) is entitled to deference under *Chevron*. *See Chevron*, 467 U.S. at 842-43. A court reviewing an agency decision must first look to "whether Congress has directly spoken to the precise question at issue." *Id.* If congressional intent is clear, the court "must give effect to the unambiguously expressed intent of Congress." *Id.* If, however, "the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute." *Id.*

The CWA does not define further define "the waters of the United States," and neither the legislative history nor the underlying policies of statutory grants of authority "provides unambiguous guidance for the Corps" to define the term. *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 132 (1985). Therefore, this court must defer to the COE's interpretation of the term if it is "based on a permissible construction of the statute." *See Chevron*, 467 U.S. at 843.

The inclusion of lakes in the definition of "waters of the United States" is a permissible interpretation of the statute. *See Rapanos v. United States*, 547 U.S. 715, 739 (2006) (plurality opinion)("[O]n its only plausible interpretation, the phrase 'the waters of the United States'

includes only those relatively permanent, standing or continuously flowing bodies of water 'forming geographic features' [such as] . . . 'lakes.'"). The plurality in *Rapanos* relied on the definition of "waters" in Webster's Second to contrast isolated, ephemeral wetlands with discrete bodies of water. *Id.* at 732-34. It held that the COE's assumption of CWA jurisdiction over such wetlands constituted an impermissible construction of the CWA because, unlike lakes, the wetlands did not meet the formal definition of "waters." *Id.* at 739.

A permissible construction of the CWA must include only "relatively permanent" bodies of water. *See id.* at 732. The *Rapanos* plurality inferred relative permanence from the traditional definition of waters, which includes bodies of water that "connote continuously present, fixed bodies of water, as opposed to ordinarily dry channels through which water occasionally or intermittently flows." *Id.* at 733.

Agency interpretations are not, however, permissible if they exceed constitutional limits on the power that Congress may delegate to the agency. *See, e.g., Solid Waste Agency of N. Cook County v. U.S. Army Corps of Eng'rs*, 531 U.S. 159, 173 (2001) (hereinafter *SWANCC*). Congress is permitted to regulate and delegate regulatory authority over navigable waters under its commerce power. This jurisdiction is not limited only to waters that are navigable in-fact, *see, e.g.*, *SWANCC*, *Riverside Bayview*, but also extends to non-navigable, intrastate waters that affect interstate commerce. *See, e.g., United States v. Byrd*, 609 F.2d 1204, 1210 (7th Cir. 1979).

Jurisdiction over non-navigable, intrastate waters is permissible where the activities involving the water body "substantially affect" interstate commerce." *Cf. SWANCC*, 531 U.S. at 173 (citing *United States v. Lopez*, 514 U.S. 549, 559 (1995)). The regulation at issue in *SWANCC* was the COE's interpretation that it had jurisdiction over wetlands used by migratory birds because the birds are targeted by the hunting industry in different states. *Id.* The Court held

that the connection between the wetlands and commerce was too attenuated to support the COE's interpretation that Congress had delegated it jurisdiction. *Id.* It stated that the COE cannot exercise jurisdiction where the connection between the water body and interstate commerce is speculative. *Id.*

The COE's definition of "waters of the United States" at issue here, "intrastate lakes . . . the use, degradation or destruction of which could affect interstate or foreign commerce[,]" is a permissible construction of the CWA under *Rapanos* and *SWANCC*. The plurality in *Rapanos* explicitly included "lakes" in its definition of "waters of the United States." *SWANCC* acknowledged that intrastate bodies of water may fall within the scope of the CWA. The holding in that case narrowed the acceptable application of the COE's regulation to exclude cases where the connection between the water body and interstate commerce is too speculative. *SWANCC*, 531 U.S. at 173; *see also United States v. Wilson*, 133 F.3d 251, 257 (4th Cir. 1997) (COE may not base jurisdiction over intrastate waters on premise that the use, degradation, or destruction of such waters *could* have a substantial effect on interstate commerce, but must base jurisdiction on the premise that those activities *would* have a substantial effect on interstate commerce). Therefore, the COE's regulation is not invalid, but must simply be read in compliance with *Lopez*. Following *Rapanos* and *SWANCC*, a water body qualifies as a "water of the United States" under 33 C.F.R. § 328.3(a)(3) if it is a "relatively permanent body of water" and has a "significant effect" on interstate commerce."

B. LAKE TEMP IS A RELATIVELY PERMANENT BODY OF WATER UNDER *RAPANOS*.

Lake Temp is a relatively permanent body of water under *Rapanos*, and thus satisfies the "intrastate lake" requirement of the COE definition. The COE's jurisdiction is limited to "those relatively permanent, standing or continuously flowing bodies of water forming geographic

features that are described in ordinary parlance as streams, oceans, rivers, and *lakes*." *Rapanos*, 547 U.S. at 739 (quotations omitted)(emphasis added). Lake Temp is both a lake, and relatively permanent.

A lake is defined as a "large body of water contained in a depression of the earth's surface, and supplied from the drainage of a more or less extended area." **Webster's Revised Unabridged Dictionary**, 825 (1913). Although there is no commonly-accepted definition of how large a water body must be to be a "lake," the state of Michigan excludes any water body that "has a surface area of less than 5 acres" from its definition of inland lakes. Mich. Comp. L. 324.30101(i); *cf. SWANCC*, 531 U.S. at 163, 171-72 (treating water bodies "of varying size (from under one-tenth of an acre to several acres) and depth (from several inches to several feet)" as "isolated ponds.").

Water bodies must be "relatively permanent" to qualify as "waters of the United States" under *Rapanos*. 547 U.S. at 732. However, "relatively permanent" "do[es] not necessarily exclude streams, rivers, or *lakes that might dry up in extraordinary circumstances*, such as drought[, or] . . . seasonal rivers, which contain continuous flow during some months of the year but no flow during dry months . . . ." *Id.* at 733 n.5 (emphasis added). Courts after *Rapanos* have found that water bodies containing water for just two months out of the year constitute "relatively permanent" bodies of water. *See United States v. Moses*, 496 F.3d 984, 985, 991 (9th Cir. 2007).

Lake Temp meets the definitions of both a lake and relatively permanent body of water. Lake Temp would easily meet the definition of "lake" under the Michigan statute. It is significantly larger than five acres and drains an "extended area" of several hundred square miles. The lake is also orders of magnitude greater in size than the "isolated ponds" in

SWANCC; Lake Temp covers up to 13,600 acres compared to "several acres" by the ponds in *SWANCC*.

Lake Temp is also "relatively permanent." Like the "lakes that might dry up in extraordinary circumstances" noted in *Rapanos*, Lake Temp only dries up in extraordinarily dry periods. The lake has standing water for a much greater proportion of time than the stream in *Moses*, which was deemed to be "relatively permanent." Because Lake Temp is both relatively permanent and a water body under *Rapanos*, it meets the threshold criterion ("intrastate lake") of 33 C.F.R. § 328.3(a)(3).

B. THE USE, DEGRADATION, OR DESTRUCTION OF LAKE TEMP WOULD AFFECT INTERSTATE COMMERCE.

Lake Temp has a significant nexus with interstate commerce, such that the use, degradation, or destruction of it would affect interstate commerce. Because Congress may authorize regulation of "intrastate activities that 'substantially affect' interstate commerce," *SWANCC* 531 U.S. at 173, the COE has jurisdiction over intrastate waters that have a significant impact on interstate commerce. *Cf. id.* (rejecting that wetland use by migratory birds substantially affects interstate commerce, thereby invalidating the COE's Migratory Bird Rule).

Numerous circuits have concluded that "Congress intended 'waters of the United States' to reach to the full extent permissible under the Constitution." *United States v. Lambert*, 695 F.2d 536, 538 (11th Cir. 1983); *see also Byrd*, 609 F.2d at 1209; *Leslie Salt Co. v. Forehlke*, 578 F.2d 742, 754-55 (9th Cir. 1978); *United States v. Ashland Oil & Transp. Co.*, 504 F.2d 1317, 1324-25 (6th Cir. 1974). This extent is limited to activities that "substantially affect" interstate commerce. *Lopez*, 514 U.S. at 559. The Supreme Court has upheld regulation of a variety of intrastate activities as substantially affecting interstate commerce, including intrastate mining, *Hodel v. Va. Surface Mining and Reclamation Ass'n, Inc.*, 452 U.S. 264 (1981), intrastate

extortionate credit transactions, *Perez v. United States*, 402 U.S. 146 (1971), consumption of homegrown wheat, *Wickard v. Filburn*, 317 U.S. 111 (1942), and, of particular relevance to this case, hotels catering to interstate guests, *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241 (1964), and illegal marijuana production, *Gonzales v. Raich*, 545 U.S. 1 (2005).

It follows that Congress need not be regulating interstate commerce directly, but may regulate any even "local activities in both the States of origin and destination, which might have a substantial and harmful effect upon that commerce." *Heart of Atlanta Motel*, 379 U.S. at 258. The Court in *Heart of Atlanta Motel* held that "[t]he action of the Congress in the adoption of [a law] as applied here to a motel which concededly serves interstate travelers is within the power granted it by the Commerce Clause of the Constitution." 379 U.S. at 261.

This logic extends to the CWA, which directly regulates activities affecting water quality. Degraded water quality can in turn have a "substantial and harmful effect" upon interstate commerce, such as recreational use by out-of-state residents. *See, e.g., Byrd*, 609 F.2d at 1210. The court in *Byrd* noted that out-of-state visitors to intrastate lakes value "the purity of their water for swimming, or the abundance of fish and other wildlife inhabiting them or the surrounding wetland and land areas." *Id.* Since the objective of the CWA is the "[r]estoration and maintenance of chemical, physical and biological integrity" of such waters, 33 U.S.C. 1251(a) (2006), the court held that application of the act to intrastate waters was a constitutional regulation of local activity that could substantially affect interstate commerce. *Id.*

The *SWANCC* decision did not abrogate *Byrd*. While SWANCC limited the COE's intrastate waters rule, the holding was narrow, invalidating only the Migratory Bird Rule. *SWANCC*, 531 U.S. at 174; *see also United States v. Interstate General Co.*, 152 F. Supp. 2d

843, 847 (D. Md. 2001). "[I]t would be improper for this Court to extend the SWANCC Court's ruling any farther than they clearly intended." *Interstate General*, 152 F. Supp. 2d at 847.

It is also irrelevant whether the interstate commerce that is affected is illegal. See Raich, 545 U.S. at 19 n.29. The *Raich* Court held that the difference in whether Congress is regulating a lawful or unlawful market "is of no constitutional import." *Id.* Congress' interstate commerce power extends also to unlawful markets. *Id.*

This case in no way involves application of the Migratory Bird Rule under 33 C.F.R. 328.3(a)(3). Therefore, the holding in *SWANCC* is not controlling here. Instead, this case involves the appropriate application of the COE's rule that it has jurisdiction over an intrastate lake, the degradation of which will have a substantial effect on interstate commerce. As in *Byrd*, Lake Temp is frequently visited and used by out-of-state residents for hunting and boating. Those users come to Lake Temp for its "biological integrity," namely its role as duck habitat. Any degradation of Lake Temp could make it unsuitable for ducks, which would eliminate the attraction for out-of-state users. The loss of this tourism would have a substantial effect on interstate commerce.

Even if the hunters are technically trespassing on Lake Temp, their tourism still creates an interstate market. As in *Raich*, the illegality of the activity does not remove it from the scope of Congress' commerce power, which was delegated in part to the COE in the CWA. Therefore, the COE's jurisdiction over Lake Temp is proper because the use, degradation, or destruction of Lake Temp would have a substantial effect on interstate commerce, and the district court's ruling on this issue should be affirmed.

III. THE COE HAS JURISDICTION UNDER SECTION 404 TO ISSUE A PERMIT FOR DISCHARGING FILL MATERIAL INTO LAKE TEMP.

The COE properly asserted its jurisdiction under CWA § 404 to issue a permit for the discharge of fill material into Lake Temp. The CWA makes it unlawful to discharge a slurry of munitions into a navigable water "[e]xcept as in compliance" with the Act. 33 U.S.C. § 1311. However, section 404 gives the COE authority to issue permits for the discharge of "fill material" into navigable waters. 33 U.S.C. § 1344(a) (2006). So long as the COE issues a fill permit under its lawful jurisdiction, no EPA permit is required. *See Coeur Alaska, Inc. v. Southeast Alaska Conservation Council*, 129 S. Ct. 2458, 2467, __ U.S. __ (2009). The COE has jurisdiction to issue a permit if the material at issue properly falls within the definition of "fill material." 33 U.S.C. § 1344(a) (2006); *Coeur Alaska*, 129 S. Ct. at 2469. The CWA contains no requirement that navigable waters be treated differently based on their function under Section 101, 402, or 404, nor does it prohibit the COE from issuing a permit to the Army.

The munitions slurry reasonably falls within the COE's definition of fill material and nothing else in the CWA prohibits the COE's issuance of the fill permit in this case. Therefore, this Court must affirm the District Court's decision that the COE's § 404 permit is proper here.

A. THE MUNITIONS SLURRY IS FILL MATERIAL.

The COE reasonably and properly interpreted that the munitions slurry falls within the definition of fill material in the CWA. The CWA does not define "fill material" but the COE and EPA have defined the term in their regulations:

> (1) Except as specified in paragraph (3) of this definition, the term fill material means material placed in waters of the United States where the material has the effect of:
>
> (i) Replacing any portion of a water of the United States with dry land; or
>
> (ii) Changing the bottom elevation of any portion of a water of the United States.

(2) Examples of such fill material include, but are not limited to: rock, sand, soil, clay, plastics, construction debris, wood chips, overburden from mining or other excavation activities, and materials used to create any structure or infrastructure in the waters of the United States.

(3) The term fill material does not include trash or garbage.

40 C.F.R. § 232.2. These regulations are a reasonable interpretation of the agencies' statutory authority under the CWA. *See Coeur Alaska*, 129 S. Ct. at 2469-70.

In applying the regulations, agencies are afforded deference in their interpretation of the regulations, so long as the interpretation is not plainly erroneous or inconsistent with the regulations. *Auer v. Robbins*, 519 U.S. 452, 461 (1997); *see also Coeur Alaska*, 129 S. Ct. at 2473. The Court in *Coeur* ruled that the COE was entitled *Auer* deference in its application of the fill material regulations to discharge of crushed rock slurry. 129 S. Ct. at 2473. The Court found that since the application of the regulations was not inconsistent with the CWA, existing agency practice, or the language of the regulations, the COE's interpretation was not plainly erroneous or inconsistent with the regulations. *Id.* at 2473-76.

Likewise, including the munitions slurry in this case as "fill material" is not plainly erroneous or inconsistent with the regulations. The slurry here has all the characteristics of fill material as defined by the COE's regulations and approved of by the *Coeur Alaska* Court. It is a "material [that] has the effect of . . . [c]hanging the bottom elevation of [a] portion of a water of the United States." 40 C.F.R. § 232.2. The discharge is a slurry of similar character to that permitted in *Coeur Alaska*. In addition, the munitions slurry meets the standards of the five factors on which the *Coeur Alaska* Court relied in determining that the COE's interpretation was permissible. *See* 129 S. Ct. at 2473-74. The Court looked to whether 1) the application is limited

to closed bodies of water, 2) the discharger is not attempting to evade EPA's performance standard, 3) the application preserves the ACE's expertise in determining whether the discharge is in the public interest, 4) the discharge does not release toxic pollutants into a navigable water, and 5) the application avoids a two-permit system. *Id.*

Here, the application is limited to Lake Temp, which is a closed body of water with no outflow. The Army is not attempting to evade EPA's performance standard because the proposed discharge's filling effect is not merely "incidental." *Cf. id.* ("[W]hen a discharge has only an 'incidental filling effect,' the EPA's performance standard continues to govern that discharge."). The COE properly exercised its expertise in determining that permitting the slurry discharge is in the public interest. There is no indication that the munitions contain toxic pollutants that will be released into Lake Temp, much less beyond the shores of the lake. Finally, this application results in a reasonable single-permit system for the Army, avoiding duplicative review by the EPA.

Further, it is irrelevant whether the material in this case may also be defined as a "pollutant" under the Act. *See Coeur Alaska*, 129 S. Ct. at 2464 (Although crushed rock is defined as a "pollutant" in the CWA, the COE properly considered it to also be "fill material"). The COE's regulations provide examples of many materials as fill that could also be considered pollutants under the CWA, such as plastics, construction debris, overburden from mining activities, and materials used to create any structure or infrastructure in the waters of the United States. 40 C.F.R. § 232.2. The *Coeur Alaska* Court found that the inclusion of "crushed rock" in the CWA's definition of pollutant did not preclude it from also being considered "fill material." See 129 S. Ct. at 2464, 2468.

The inclusion of munitions in the definition of "pollutant" in the CWA similarly does not preclude the material from being considered fill material by the COE. *See* 33 U.S.C. § 1362(6). Because the COE's application of its regulations to the munitions slurry is not inconsistent with the CWA or *Coeur Alaska*, it is not an impermissible interpretation and is therefore lawful.

B. SECTION 101 DOES NOT DISTINGUISH NAVIGABLE WATERS BASED ON THEIR FUNCTION.

Lake Temp's function with regard to the discharge is irrelevant for determining the COE's jurisdiction to issue a discharge permit. Nothing in the CWA conditions the COE's jurisdiction on whether discharge of fill is more environmentally desirable than alternative actions. The COE may consider the relative environmental impact in deciding whether to issue the permit, see 33 U.S.C. § 1344(c), but that consideration is subsequent to acquiring jurisdiction.

The COE's jurisdiction also does not depend on whether the lake serves the purpose of "treating" effluent before water flows from the lake. The purpose of the COE's § 404 jurisdiction is to regulate discharge of fill material "which, unlike traditional water pollutants, are solids that do not readily wash downstream." *Rapanos*, 547 U.S. at 723. A 402 permit may be required if polluted wastewater flows from the lake, *see Coeur Alaska*, 129 S. Ct. at 2465-66, but that type of discharge is not at issue in this case. Therefore, Appellants' attempt to distinguish this case from *Coeur Alaska* on the treatment characteristics of the lake is inapposite.

C. THE COE HAS JURISDICTION TO ISSUE PERMITS TO THE ARMY.

The COE has jurisdiction to issue CWA permits to the Army. It is irrelevant that the Corps is a subsidiary of the permittee. Nothing in the CWA requires that permits be issued by independent agencies.

Further, the theory of the "unitary executive" renders Appellants' arguments impossible. That theory asserts that different agencies are not independent entities, but part of one "unitary"

executive branch. *See generally Morrison v. Olson*, 487 U.S. 654, 697-734 (1988) (Scalia, J., dissenting). Every federal agency is thus intimately connected with every other federal agency. Under appellants' "conflict of interest" theory, all entities within the unitary executive would have a conflict of interest. It would follow that no agency in the executive could issue a CWA permit to any other agency. This is obviously an impermissible reading of the CWA. Appellants' assertion that the COE may not issue a CWA permit to the Army thus fails.

IV. OMB HAD THE AUTHORITY TO DECIDE THAT COE HAD JURISDICTION UNDER CWA TO ISSUE A PERMIT FOR DOD TO DISCHARGE SLURRY INTO LAKE TEMP.

OMB's participation in resolving the dispute between EPA and COE did not violate the CWA. Executive Order 12,088, Fed. Reg. 47,707 (Oct. 13, 1978), stipulates that, "[t]he Director of the Office of Management and Budget shall consider unresolved conflicts at the request of the Administrator," in regards to federal compliance with pollution control standards. In this case, the question of which agency's "Administrator" had the proper authority to issue a permit for the filling of Lake Temp was a central matter of the dispute between EPA and COE. The task of determining whether the slurry at issue was a "pollutant," in which case a permit from EPA's administrator would be required, 33 U.S.C. § 1342, or if the slurry was "fill," in which case COE's administrator, the Secretary of the Army, would have authority, 33 U.S.C. § 1344, was properly handled by OMB, which heard both party's arguments before issuing its directive that COE had the authority to issue the permit to DOD.

Section 404(c) of the CWA grants the administrator of the EPA the authority "to prohibit the specification (including the withdrawal of specification) of any defined area as a disposal site" – essentially a "veto" power. Although § 404(c) states that, "[b]efore making such determination, the Administrator shall consult with the Secretary [of the Army]," final authority regarding the CWA ultimately rests with EPA. Therefore, although OMB determined that the

slurry was a "fill material" and not a "pollutant," and thus fell under 33 U.S.C. § 1344, EPA had the final opportunity to veto this directive. By choosing not to veto, EPA granted tacit approval to OMB's directive and remained in compliance with the stipulations of the CWA. OMB, by merely fulfilling its obligation to resolve disputes between executive agencies as set forth in Executive Order 12,088, at no time prevented EPA or COE from acting in accordance with the CWA.

A. OMB'S ROLE IN RESOLVING THE DISPUTE WAS A VALID EXERCISE OF EXECUTIVE POWER.

OMB, situated within the Executive Office of the President, acted in accordance with the CWA when it resolved the dispute between EPA and the COE. Upon the reorganization of the Bureau of the Budget into the OMB, "all functions vested by law . . . in the Bureau of the Budget" were "transferred to the President of the United States." 31 U.S.C. § 501. Since all executive power in the United States is vested in the office of the President of the United States, U.S. Const. art. II, § 1, cl. 1, this necessarily means that the President's power, and by extension the power of OMB acting upon an Executive Order, supersedes that of all executive administrators, including the administrator of the EPA and the Secretary of the Army. Resolving disputes between agencies such as these is a duty that must fall to the President and those invested with the power of the President's office.

Plaintiff argues that OMB's decision allowing COE to issue a permit for the discharge of the slurry into Lake Temp, and EPA's decision to acquiesce to that directive, are both "incompatible with the will of Congress and . . . [un]sustainable as a valid exercise of the President's Article II powers." *Envtl. Def. Fund v. Thomas*, 627 F. Supp. 566, 570 (D.D.C. 1986). That case, however, involved OMB using its power of regulatory review "to delay promulgation of EPA regulations . . . beyond the date of a statutory deadline." Id. at 571. In this

case, there was no improper action on the part of OMB. OMB merely acted according to its duty under Executive Order 12,088 and did not obstruct the exercise of EPA's power. Plaintiff's argument that *Envtl. Def. Fund* applies must fail. Lawfully resolving a dispute between two executive agencies is not equivalent to unlawfully obstructing the legitimate exercise of an agency's power.

B. EPA ULTIMATELY DECIDED NOT TO VETO COE PERMIT.

EPA, not OMB, made the final decision regarding the COE permit by opting not to veto that permit. Although OMB has the power to resolve disputes between agencies, the CWA clearly grants the administrator of the EPA the ultimate authority over all permits issued under section 404 of the CWA. 33 U.S.C. § 1344(c) (2006). Although OMB determined that COE could issue the permit under section 404, it did not preclude EPA from exercising its legitimate power to veto that permit.

Since EPA did have the opportunity to make the decision not to veto the COE permit, plaintiff's argument that the Court is unable to properly interpret the statute using a *Chevron* test must fail. *See Chevron, U.S.A., Inc. v. Natural Res. Def. Council*, 467 U.S. 837 (1984). First, as COE is the administrator of section 404 of the CWA, as it has the authority to issue permits under that section. *See* 33 U.S.C. § 1344(e)(1) (2006). As stated previously, when "the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute." *Chevron* at 843. Since there is ambiguity regarding whether a section 402 or 404 permit should be issued, the Court should defer to the construction of the statute proposed by the administrator. Whether the Court looks to COE, the administrator of section 404, or EPA, the administrator of the CWA as a whole, does not matter in this case. COE clearly has indicated that it believes a section 404

permit is proper. EPA, which had the power to veto the COE permit, chose not to do so. By declining to use this power, EPA tacitly made the decision that a section 404 permit was proper.

C. EPA GRANTED BROAD DISCRETION WHEN TASKED WITH PROMULGATING REGULATIONS.

Since the *Chevron* test is satisfied either way, plaintiff's argument amounts to nothing more than a collateral attack on EPA's decision not to veto the COE permit. This same tactic was employed previously by the Natural Resources Defense Council (NRDC). In a claim filed in 1992, the NRDC argued that OMB had unlawfully influenced EPA's decision to not list recycled oil as hazardous waste. *Natural Res. Def. Council v. U.S. E.P.A.*, 36 ERC 1078 (D.D.C. 1992). The District Court recognized that by alleging OMB had "unduly influenced" the EPA, the NRDC "really [sought] to challenge the substance of the final determination and the process by which it was reached." *Id.* The case was eventually brought to the U.S. Court of Appeals, D.C. Circuit. At that point, the charges regarding OMB were dropped and the NRDC attacked only whether EPA could properly decline to list recycled oil as a hazardous waste. *Natural Res. Def. Council, Inc. v. U.S. E.P.A.*, 25 F.3d 1063, 1065 (D.C. 1994). The court granted EPA broad discretion in determining which items would be regulated and which would not. *Id.* at 1069. It follows that EPA should be entitled to discretion when determining whether to veto a section 404 permit, and that making claims that OMB improperly interfered distracts from the real issues of the case.

D. EPA'S DECISION IS NOT SUBJECT TO JUDICIAL REVIEW AND IS NOT ARBITRARY OR CAPRICIOUS.

Section 404 of the CWA grants EPA broad discretion in regards to when it will use its veto power over COE-issued permits. 33 U.S.C. § 1344(c). When the decision of an executive agency is wholly discretionary, U.S. law holds that "agency action . . . committed to agency discretion by law" is not subject to judicial review. 5 U.S.C. § 701(a)(2) (2006).

Even if EPA's decision not to veto the COE permit was subject to judicial review, review would be limited to whether the decision was "arbitrary" or "capricious" under 5 U.S.C. § 706(2)(A) (2006). EPA's decision not to veto the COE permit was neither arbitrary nor capricious because it was either required by or consistent with the Court's ruling in *Coeur*. As stated previously, *Coeur* held that the discharge of slurry into a lake, elevating and changing the bottom configuration of the lake, was the discharge of fill material requiring a section 404 permit. *Coeur Alaska*, 129 S. Ct at 2469. EPA's decision that the depositing the slurry, which in this case will also be alter the bottom of the lake, requires a section 404 permit is consistent with *Coeur* and this could not be considered arbitrary or capricious.

CONCLUSION

For the reasons set forth above, the United States respectfully requests that this Court affirm the judgment of the district court.

Respectfully,

Counsel for the United States