Team No. 77

UNITED STATES COURT OF APPEALS

FOR THE TWELFTH CIRCUIT

C. A. No. 11-1245

STATE OF NEW UNION,

Appellant and Cross-Appellee,

v.

UNITED STATES,

Appellee and Cross-Appellant,

v.

STATE OF PROGRESS,

Appellee and Cross-Appellant.

On Appeal from the District Court for the State of New Union

Brief of Appellee and Cross-Appellant

UNITED STATES

TABLE OF AUTHORITIES

Cases

Statutes and Constitutional Provisions

Regulations

Rules

Administrative Guidance

Executive Orders

TABLE OF CONTENTS

I. ISSUES PRESENTED FOR REVIEW

1. 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.

2. Whether the Army Corps of Engineers ("COE") has jurisdiction to issue a permit under the Clean Water Act ("CWA") section 404, 33 U.S.C. § 1344[1], 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).

3. Whether the COE has jurisdiction to issue a permit under the CWA section 404, 33 U.S.C. § 1344, or the Environmental Protection Agency ("EPA") has jurisdiction to issue a permit under the CWA section 402, 33 U.S.C. § 1342[2], for the discharge of slurry into Lake Temp.

4. 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, and that the EPA did not have jurisdiction under CWA section 402, 33 U.S.C. § 1342, to issue a permit for the Department of Defense ("DOD") to discharge slurry into Lake Temp, and whether the EPA's acquiescence in the OMB's decision violated the CWA.

II. STATEMENT OF FACTS

The following relevant facts are uncontested and presented in the Factual Background of the United States District Court for the State of New Union, Civ. No. 148-2011.

Lake Temp is an oval shaped, intermittent body of water (not continuously full) located within the boundaries of a military reservation that is located entirely in the State of Progress.[3]

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[1] Appendix B

[2] Appendix C

[3] Appendix A (Contains a map of Lake Temp)

Lake Temp became a part of the military reservation in 1952. The State of Progress shares a border with the State of New Union, the appellant and cross-appellee in this case, and Lake Temp is not far from that border. The DOD proposes to construct a facility on the shore of Lake Temp that would allow for the preparation and discharge of spent munitions into Lake Temp.

Lake Temp is up to three miles wide and nine miles long during the rainy season wet years, significantly smaller during the dry season, and completely dry approximately one out of every five years. There is a Progress state highway along the southern side of Lake Temp, bordering the military reservation and running within one hundred feet of the shore when the lake is at its highest (the "Lake Temp Highway"). Many roads that lead into New Union intersect the Lake Temp Highway. Although the DOD posted signs along the Lake Temp Highway warning of danger and indicating that entry is illegal, there are visible trails leading from the Lake Temp Highway to Lake Temp. When the lake holds water during migration seasons, ducks have used it as a stopover in their migration from the Arctic to warmer climates and back; consequently, hundreds of duck hunters have hunted at the lake over the last century. The DOD is aware that people use the lake for hunting and bird watching, yet there is no fence to prevent entry, and the DOD has taken no measures beyond the signs to restrict or discourage entry.

At its largest, Lake Temp is entirely within the State of Progress. There is no outflow from the lake, but many river ways that are navigable waters an affect commerce flow into Lake Temp. The Imhoff Aquifer is located almost one thousand feet below Lake Temp. The Imhoff Aquifer is larger than Lake Temp, even when Lake Temp is at its largest. As a result, ninety-five percent of the aquifer lies within the boundaries of the military reservation in the State of

Progress, and about five percent of the Imhoff Aquifer is located outside of the boundaries of the military reservation and within the State of New Union.

Mr. Dale Bompers owns, operates, and resides on a ranch located above the portion of the aquifer located within the State of New Union.[4] However, Mr. Bompers does not use the water from the aquifer because it is not potable or usable in agriculture without treatment, due to naturally occurring high levels of sulfur.

The facility that DOD proposes to construct will receive and prepare a wide variety of munitions waste for discharge into the lake. In this process, the DOD will empty spent munitions of liquid, semi-solid, and granular contents. Next, the DOD will mix the contents of these munitions with chemicals to assure that they are not explosive. The DOD will then grind up and pulverize the remaining solids (primarily metals). Finally, the DOD will introduce water to the solids and the treated liquid, semi-solid, and/or granular waste in order to create a slurry. The DOD will spray the treated slurry from a portable multi-port pipe. The DOD will only spray the slurry on the portions of Lake Temp that are dry. Because of the arid nature of Lake Temp's location, the slurry will dry quickly.

The DOD will move the portable pipe continually to deposit the slurry evenly throughout the lake bed. Eventually, the entire lake will be by several feet higher as a result of the slurry deposits. DOD estimates that when the project is complete, Lake Temp's elevation will be about six feet higher and the surface area will be about two square miles larger than at the present time. However, the COE does not project that Lake Temp would intrude on New Union under any of the scenarios studied for the project. The COE indicated this in its Environmental Impact Statement ("EIS"). Although this project will take several years, it is not recurring.

[4] Appendix A

The COE will continually grade the edges to the lake bed so that the runoff from the surrounding mountains will flow unimpeded onto it. Over time, alluvial deposits from precipitation falling on the mountains and flowing through tributaries into Lake Temp will cover the lake bed again, returning it to its pre-operation condition, albeit at a higher elevation.

The COE applied for a permit under CWA section 404, 33 U.S.C. § 1344. The EPA, which administers the CWA, exercised its discretion and decided not to veto this application. The OMB requested that the EPA not intervene in the grant of a section 404 permit.

III. SUMMARY OF ARGUMENT

1. The State of New Union lacks standing to initiate a suit under 5 U.S.C. § 702, which grants standing to a person suffering a legal wrong because of an agency action. New Union aims to establish standing in its sovereign capacity as owner and regulator of the groundwater in the state, and/or in its *parens patriae* capacity as protector of its citizens who have an interest in the groundwater in the state. The State of New Union has failed to show an injury in fact. New Union presented no evidence as to when, how, or if the Imhoff Aquifer will be contaminated. New Union presented no evidence that the possible contamination of the Imhoff Aquifer would result in a decrease in property value for Mr. Dale Bompers, the citizen who resides above the aquifer. Because of these deficiencies, the District Court's grant of summary judgment in favor of the United States was appropriate.

2. The COE, acting under its authority granted to it by Congress, acted within its proper jurisdiction when it issued a permit under CWA Section 404, 33 U.S.C. § 1344 for the DOD's use of Lake Temp. The COE acted within its jurisdiction because Lake Temp is navigable water, as defined under CWA. In order for the COE to have jurisdiction, the water way must be

navigable. Under the standard created in Rapanos v. United States, and the ruling of Solid Waste Agency of N. Cook County v. Army Corps of Engineers, the waters of Lake Temp are navigable water properly regulated by the CWA[5]. 547 U.S. 715 (2006); 531 U.S. 159 (2001). As a result, the lower court correctly granted summary judgment on the issue of COE jurisdiction with regards to Lake Temp.

3. Because the COE has jurisdiction over Lake Temp, the COE properly issued a permit under CWA section 404, 33 U.S.C. § 1344 for the discharge of slurry into Lake Temp. U.S. v. Riverside Bayview Homes, Inc., 474 U.S. 121 (1985). The lower court correctly granted summary judgment on the issue that the COE properly issued the permit under its CWA Section 404 discretion, which grants the COE authority over dredge and fill projects in navigable waters. 33 U.S.C. § 1344.

4. The OMB exercised its proper authority in deciding whether the COE had jurisdiction under CWA section 404, 33 U.S.C. § 1344, and that the EPA did not have jurisdiction under CWA section 402, 33 U.S.C. § 1342. The EPA's decision not to veto the section 404 permit is not subject to judicial review, but even if it were, the EPA's decision is consistent with the ruling in Coeur. Futhermore, appellant's call for judicial review of OMB's decision, claiming that the OMB acted beyond its authority, presents significant separation of powers concerns and should be rejected by this court.

IV. ARGUMENT

A. The State of New Union lacks standing because New Union has failed to show an injury in fact.

[5] *see* CWA Sections 301(a), 404(a), and 502(7), 33 U.S.C. §§ 1131(a), 1344(a), and 1362(7)

The State of New Union does not have standing to bring a suit under 5 U.S.C. § 702 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 New Union. The District Court was correct in granting summary judgment on this issue in favor of the United States.

I. The standing requirement set forth in Lujan v. Defenders of Wildlife is the appropriate standard for the present case.

The "irreducible constitutional minimum" of standing contains three elements. Lujan v. Defenders of Wildlife, 504 U.S. 555, 560 (1992). First, the plaintiff must have suffered an injury in fact. Id. This injury needs to be a concrete, particularized invasion of a legally protected interest, and the injury needs to be actual or imminent. Id. Second, there must be a causal connection between the injury and the challenged conduct of the defendant. Id. Third, it must be likely, not just speculative, that the complained of injury will be redressed by a favorable decision. Id.

In Lujan, the plaintiffs (Defenders of Wildlife, joined by other interested organizations) brought suit against Manuel Lujan (the Secretary of the Interior). Plaintiffs argued that the Endangered Species Act should extend to activities abroad that may threaten endangered species, as was originally promulgated, not just to activities within the United States and on the high seas, as the Endangered Species Act was later amended. The plaintiffs claimed an injury in that endangered species living abroad may become extinct, which would limit their ability to enjoy and study wildlife. The Supreme Court considered whether or not the Plaintiffs had standing to bring the suit in federal court.

Justice Scalia delivered the opinion of the Court, which set forth the three-part test for standing discussed above. Justice Scalia found that the plaintiffs had not demonstrated an injury

in fact, and that the hypothetical injury alleged to occur at some point in the future were not actual or imminent. Lujan, 504 U.S. 555, 566 (1992). Plaintiffs had not established that they had standing to bring the suit, and summary judgment was granted in favor of the Secretary of the Interior. Id. at 482.

In a concurring opinion, Justice Kennedy stressed the importance of a plaintiff showing an injury in fact to demonstrate standing.

> "[T]he party bringing suit must show that the action injures him in a concrete and personal way. This requirement is not just an empty formality. It preserves the vitality of the judicial process by assuring both that the parties before the court have an actual, as opposed to professed, stake in the outcome, and that the legal questions presented... will be resolved.... The requirement of concrete injury confines the Judicial Branch to its proper, limited role in the constitutional framework of Government. An independent judiciary is held to account through its open proceedings and its reasoned judgments. In this process it is essential for the public to know what persons or groups are invoking the judicial power, the reasons that they have brought suit, and whether their claims are vindicated or denied. The concrete injury requirement helps assure that there can be an answer to these questions; and, as the Court's opinion is careful to show, that is part of the constitutional design.

Lujan v. Defenders of Wildlife, 504 U.S. 555, 581 (1992). It is with this imperative and sense of responsibility that this court should consider and reject New Union's claim of injury and desire to invoke federal jurisdiction.

New Union contends that this court should apply the relaxed standing test set forth in Massachusetts v. EPA rather than the three part test set forth in Lujan. Massachusetts v. EPA, 549 U.S. 497 (2007) (5-4 decision). In Massachusetts, a group of states, local governments, and private organizations brought suit against the EPA alleging that the EPA had abdicated its responsibility under the Clean Air Act ("CAA") to regulate carbon dioxide and other greenhouse gases that contribute to global warming, and that the EPA's rejection of a petition to regulate

carbon dioxide and greenhouse gases was inconsistent with the CAA. Massachusetts at 505. The EPA argued that the Court could not address questions of statutory interpretation unless at least one petitioner had standing to invoke federal jurisdiction under Article III of the Constitution. Id.

The Supreme Court ruled in favor of the petitioners on the issue of standing, applying a relaxed standard, due to Massachusetts' status as a "quasi-sovereign state." Massachusetts at 518. The Court used this standard because states are not typically "normal litigants" for the purposes of invoking federal jurisdiction, but rather have an interest "independent of and behind the titles of its citizens." Id. at 1454.

However, the Court supplemented this analysis of Massachusetts' "quasi-sovereign" interests with a provision in the CAA that provides a procedural right to challenge the EPA's rulemaking decisions in relation to the CAA (which in this case regarded motor vehicle emissions) as arbitrary and capricious. Massachusetts at 520, citing 42 U.S.C. § 7607(b)(1), 42 U.S.C. § 7625(a)(1). Because the Court also looked to this provision of the CAA to establish petitioners' standing, and because the CAA provision was integral in the Court's decision, the Massachusetts standing requirement does not apply to the present case, which deals with the CWA.

While the relaxed standing requirement available to petitioners in Massachusetts applied partly because of a procedural right written into the CAA, petitioners were able to establish standing under the relaxed requirement because the injury (a rise in sea levels and subsequent damage to and destruction of a significant fraction of coastal property, costing well into the "hundreds and millions of dollars"), was sufficiently concrete. Massachusetts at 522-523. The petitioners in Massachusetts introduced objective and independent reports from the National

Research Council, testimony from scientists with expertise in the field of climate change, and relevant case law to establish the injury. Id. The State of New Union has introduced no such concrete evidence. Even if this court were to apply the relaxed requirement for standing used in Massachusetts, New Union would not be able to prove an injury in fact.

Because the standing requirement used in Massachusetts is does not apply to the present case, the three-part test for standing established in Lujan is the appropriate standard.

2. The State of New Union bears the burden of establishing each element set forth in Lujan v. Defenders of Wildlife, and has failed to do so.

The State of New Union bears the burden of establishing each of the three elements set forth in Lujan. Lujan, 504 U.S. 555, 561 (1992) (citing FW/PBS, Inc. v. Dallas, 493 U.S. 215, 231 (1990)). Furthermore, New Union must prove each of these elements by the presentation of specific facts. While "[a]t the pleading stage, general factual allegations of injury resulting from the defendant's conduct may suffice," general factual allegations are not sufficient in the present case, because New Union is past the pleading stage, and now challenging a grant of summary judgment. Lujan at 561 (citing Lujan v. National Wildlife Federation, 497 U.S., at 889 (1990)). In a response to a summary judgment motion, the plaintiff can "no longer rest on such 'mere allegations,' but must 'set forth' by affidavit or other evidence 'specific facts,' Fed.Rule Civ.Proc. 56(e), which for purposes of the summary judgment motion will be taken to be true." Lujan at 561 (citing Gladstone, Realtors v. Village of Bellwood, 441 U.S. 91 at 115 (1979)). Therefore, in appealing the District Court's decision on the motion for summary judgment, the State of New Union must present specific facts, not just allegations or speculative fears, in support of its claims of injury and calls for relief.

New Union aims to establish that it has standing to invoke federal jurisdiction in two distinct capacities. First, New Union argues that it has standing as the owner and regulator of the

groundwater in its state. Second, New Union argues that it has standing in its *parens patriae* capacity as protector of its citizens. Neither of these claims, however, succeeds in meeting the requirements of the standing test set forth in Lujan.

a. The State of New Union has failed to show an injury as the regulator of the groundwater within the State.

New Union's first claim to have standing is as the owner and regulator of New Union's groundwater. New Union must first establish that it has suffered an injury in fact. Lujan at 560.

New Union does have an interest in protecting its groundwater, specifically the portion of the Imhoff Aquifer that lies within the State of New Union. However, New Union's ability to show standing to challenge the issuance of a permit granted by the EPA to the DOD to fill Lake Temp requires more than a mere interest. Lujan at 563 (citing Sierra Club v. Morton, 405 U.S., at 734 (1972)).

New Union argues that the DOD's plan to discharge spent munitions in the form of a treated slurry into Lake Temp may allow contaminated water to enter the Imhoff Aquifer. The land between Lake Temp's lakebed and the Imhoff Aquifer is primarily alluvial fill, meaning that it is loose and unconsolidated, which may make it more prone to facilitate the flow of contaminated water. New Union speculates that contaminates from Lake Temp are therefore more likely to enter the Aquifer. These fears may or may not be well founded.

The court, however, cannot grant standing to New Union based on New Union's speculations or fears. New Union has presented no evidence that the waters of Lake Temp that come into contact with the slurry, or "percolates," will ever reach the aquifer. New Union has presented no evidence of the strength of the percolate if it were to reach the Imhoff Aquifer. New Union has presented no evidence to demonstrate when, or if, the percolate would even

reach the aquifer. New Union acknowledges that it has not presented any evidence whatsoever of the alleged injury.

New Union claims an intent to determine, with credible evidence, the gravity of the alleged injury, when New Union would suffer this injury, or whether or not it would suffer the injury at all. In order to collect this evidence, New Union would need to set up a system of monitoring wells throughout the Imhoff Aquifer, including the parts of the aquifer located on the military reservation located in the State of Progress. New Union would therefore have to obtain a permit from the DOD. To date, New Union has not applied for a permit.

New Union bears the burden of proving that it has suffered an actual injury and that the injury is not speculative. New Union has failed to do so and, therefore, has necessarily failed the three-part test set forth by the Supreme Court in Lujan and has not cleared the minimum threshold to invoke federal jurisdiction. For this reason, New Union's attempt to establish standing as the owner and regulator of the groundwater in New Union falls short.

b. The State of New Union has failed to show an injury to a citizen of New Union.

New Union also claims to have derivative standing to bring suit on behalf of it's citizens. The same standing requirement discussed in Lujan applies. New Union must demonstrate, with evidence, that the complained of action has caused an injury in fact to a citizen of the State of New Union. Lujan at 560.

New Union presents the case of Mr. Dale Bompers to demonstrate an injury suffered by a citizen. Mr. Bompers owns, operates, and resides on a ranch located above the portion of the Imhoff Aquifer located in New Union.[6] Mr. Bompers claims an injury in that the property value

[6] Appendix A

of his ranch will allegedly be diminished if the Imhoff Aquifer is contaminated by the discharge from Lake Temp.

New Union has failed to present any evidence of Mr. Bompers' alleged injury (a loss in property value). Mr. Bompers does not currently use the Imhoff Aquifer, and has no definite plans to use the aquifer in the future. If Mr. Bompers were to decide to use the water from the Imhoff Aquifer, he would first have to access the groundwater that lies one thousand feet below his ranch. The water he accessed would not be potable, and he would need to treat it in order to use it for agricultural purposes due to the water's naturally occurring high sulfur content. The current value of Mr. Bomper's property is not likely dependent on the existence of un-accessed, un-used, un-treated, un-potable groundwater. New Union has not demonstrated that Mr. Bompers has suffered any actual injury; rather, Mr. Bomper's claimed injury is purely speculative. This court should not accept an unfounded assertion that a loss in property value is actual or imminent.

Significantly, Mr. Bompers does not have present or exclusive rights to use the groundwater located below his ranch. Under New Union statutes regulating the use of groundwater, Mr. Bompers cannot withdraw groundwater from the Aquifer without a permit from the New Union Department of Natural Resources ("DNR"). Mr. Bompers would, theoretically, be given preference above other citizens of New Union if he were to apply for a permit to withdraw groundwater. However, DNR could just as easily deny Mr. Bompers' application, if appropriate.

A hallmark case of the common law of property in the United States, Pierson v. Post, holds that one cannot hold rights to fugitive resources, such as groundwater, without capture. Pierson v. Post, 3 Cai. R. 175, 177 (N.Y. 1805). Mr. Bompers speculates that he may attempt to

"capture" and utilize the resource at some point in the future, but has made no legitimate effort to do so. This fact, in addition to New Union's statutory limitations and agency regulation, demonstrate that Mr. Bompers does not currently, and may never, hold rights to the groundwater of the Imhoff Aquifer.

Because of its failure to demonstrate an actual and imminent loss in Mr. Bompers' property value, the State of New Union has not met the first requirement of the standing test set forth in Lujan, and has necessarily failed to establish derivative standing on behalf of Mr. Bompers and the citizens of New Union.

B. The COE acted within its jurisdiction because Lake Temp is navigable water as defined by the CWA.

The CWA was created "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a). To achieve this purpose, the CWA regulates "all waters of the United States." Id. In regulating "all waters of the United States," the CWA prohibits the discharge of pollutants into the waters of the United States without a CWA section 402 National Pollution Discharge Elimination System ("NPDES") permit[7] or a CWA section 404 "dredge and fill" permit[8]. The CWA, 33 U.S.C. § 1362(12), defines "discharge of a pollutant" as "an addition of any pollutant to navigable waters from any point source." If a party intends to participate in the "discharge of a pollutant," a NPDES permit is required if five elements are present: (1) a pollutant must be (2) added (3) to navigable waters (4) from (5) a point source (emphasis added). Nat'l Wildlife Fed'n v. Gorsuch, 693 F.2d 156 (D.C.

[7] 33 U.S.C. § 1342, Appendix B
[8] 33 U.S.C. § 1344, Appendix C

Cir. 1982). *See* S. Fla. Mgmt. District v. Miccosukee Tribe of Indians, 541 U.S. 95 (2004); and Nat'l Wildlife Fed'n v. Consumers Power Co., 862 F.2d 580 (6th Cir. 1988). But, in drafting the CWA, Congress granted authority to the COE through section 404 to to regulate all "dredge and fill" activities that may result in pollution discharges from a point source and that occur on CWA's jurisdictional navigable waters of the United States. 33 U.S.C. § 1344. Thus, both the COE and the EPA are responsible for supervising the permitting requirements of the CWA. Id. If the five elements required for a section 402 NPDES permit are met, and the activity consists of "dredging and filling," it will fall under the jurisdiction of the COE. Id. The EPA may not issue a section 402 NPDES permit when a section 404 dredge and fill permit is proper. Coeur Alaska, Inc. v. Southeast Alaska Conservation Council, 557 U.S. 261 (2009).

Generally, the reach of federal jurisdiction over U.S. waters as "navigable waters" is under the traditional navigable water standard, known as The Daniel Ball test[9]. 77 U.S. 557 (1870). Encompassed within the CWA definition of "navigable waters" is a broader regulatory definition of "navigable" that courts and administrative agencies have interpreted the definition to include: (1) waters used in interstate commerce, including all waters subject to the tides; (2) interstate waters; (3) interstate lakes, rivers, streams, and watersheds that are used by interstate travelers for recreation and other purposes; (4) impoundments or tributaries of interstate waters that are used for interstate commerce; or (5) wetlands adjacent to navigable waters or waters used for interstate commerce. 33 U.S.C. § 1344, 33 C.F.R. § 328.3. Numerous courts have

[9] In The Daniel Ball the Supreme Court created the common law test for navigability, a water is "navigable" under the Daniel Ball test if it is a "stream or body of water, susceptible of being made, in its natural condition, a highway for commerce, even though that trade be nothing more than the floating of lumber in rafts or logs." 77 U.S. at 560

accepted the CWA's broader definition because it fulfills the purpose of the CWA, which is to "restore and maintain the integrity of the nation's waters." Riverside Bayview, 474 U.S. at 131.

The State of Progress is disputes what qualifies as a CWA-regulated "navigable water." The State of Progress's contention is incorrect because the waters of Lake Temp, an intermittent body of water located primarily in the State of Progress[10], is in fact a navigable water because it is interstate lake used by interstate travelers for recreation and other purposes, and it also a wetland adjacent to navigable waters and waters used for interstate commerce. 33 C.F.R. § 328.3.

1. Lake Temp is a navigable water because it is a wetland with a significant nexus to an interstate, navigable, watershed. The waters of Lake Temp affect the chemical, biological or physical health of an interstate navigable water because Lake Temp assists with the flood control and the drainage of the interstate, navigable watershed.

Lake Temp is a navigable water and the regulation of the lake properly falls within the jurisdiction of the CWA. Furthermore, since the activities occurring on Lake Temp consist of the discharge of a fill material, the permitting and monitoring of the treated, spent munitions slurry deposited on Lake Temp's bed properly falls under the jurisdiction of the COE. 33 U.S.C. § 1344.

For an intermittent wetland, like Lake Temp, to be under CWA jurisdiction, it must be a wetland, as defined by the regulations. A wetland is defined as "those areas that are inundated or saturated by surface or ground water at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions. Wetlands generally include swamps, marshes, bogs, and similar areas." 33 C.F.R. § 328.3(a)(7)(b).

[10] Appendix A

What qualifies as a wetland is not an entirely settled issue by federal courts. The recent Supreme Court case, Rapanos v. United States, which resulted in a plurality decision, has left the matter still largely unsettled. 547 U.S. 715 (2006). Prior to Rapanos, the Supreme Court had ruled that the COE had a wide grant of authority and jurisdiction over wetlands adjacent to navigable waters. Riverside Bayview, 474 U.S. 121 (1985) (holding that Congress had granted the COE the authority and discretion through the CWA to regulate aquatic ecosystems, which includes wetlands adjacent to navigable waters).

The COE's grant of authority to regulate wetlands was seemingly limited by the ruling in SWANCC. 531 U.S. 159 (2001). In SWANCC, the Supreme Court held that the COE may not deem a wetland to be navigable and declare regulatory authority solely because the wetland was visited by migratory birds. Id. at 162. The Court reasoned that granting COE federal jurisdiction had been extended too far under the "hook" of migratory birds and by the powers of the Commerce Clause[11]. Id. at 171. The Court declared that a wetland must have "a significant nexus" to a traditional navigable water for the COE to exercise jurisdiction over the wetland. Id. at 172. What qualified as a "significant nexus" was not defined by the court in SWANCC, and district and appellate courts lacked a concrete test to apply. Id.

The Supreme Court consolidated the cases of Rapanos v. United States and Carabell v. United States to address the question of what qualifes a "significant nexus." 547 U.S, at 725-30. The cases, involving the COE's jurisdiction over disputed wetlands, resulted in a plurality decision. Three judges joined Justice Scalia's opinion, which articulated a strict two-part test to determine wetlands that may be regulated; Justice Kennedy concurred with a separate opinion that called for a less stringent "significant nexus" test; and three justices joined Justice Stevens'

[11] U.S. Const. art. I, § 8, cl. 3

dissent, which called for a continued broad grant of authority to the COE to determine wetlands. 547 U.S 715.

After Rapanos, the EPA released a Memorandum (the "Memorandum"), which was intended to guide to regional EPA offices and COE districts on how to apply the mixed ruling in Rapanos in determining which wetlands qualify for federal protection under the CWA. Memorandum from Benjamin Grumbles and John Woodley, Jr.: Clean Water Act Jurisdiction (December 2008). The Memorandum instructs agencies that if the plurality test or the Justice Kennedy test is satisfied, jurisdiction is proper. Id. at 4-13. The plurality test allows jurisdiction of wetlands that abut a navigable water, i.e., "relatively permanent non-navigable tributaries of traditional navigable waters . . . [and] adjacent wetlands that have a continuous surface connection with a relatively permanent, non-navigable tributary." Id. at 6-7. The Kennedy test requires a fact intensive analysis to whether a wetland has a significant nexus to an adjacent navigable tributary. Id. 8-12. In the analysis to determine if there is a significant nexus, the "functions performed by all wetlands . . . [are analyzed] to determine if they significantly affect the chemical, physical, and biological integrity of downstream traditional navigable waters . . . . A significant nexus includes consideration of hydrologic and ecological factors [like flood control]. Id. at 8.

Even with the Memorandum's guidance, the majority of federal courts follow the Kennedy test, holding that the satisfaction of the significant nexus test is sufficient for jurisdiction and best upholds the goals of the CWA, which is to protect the nation's waters. *See* U.S. v. Cundiff, 555 F.3d 200 (6th Cir. 2009) (ruling that there is a preference for granting CWA jurisdiction to waters because Congress's intent was to expand the limits of federal jurisdiciton beyond traditionally navigable waters); U.S. v. Robison *et. al.*, 505 F.3d 1208 (11th Cir. 2007) (the Court

only applied Kennedy's standard because it allowed greater CWA jurisdiction); N. Cal. River Watch v. City of Healdsburg, 496 F. 3d 993 (9th Cir. 2007) (holding that the Kennedy opinion was the controlling rule for Rapanos); U.S. v. Gerke Excavating Inc., 464 F.3d 723 (7th Cir 2006) (applied Kennedy's standard to determine if disputed area is a wetland).

Even after Rapanos, circuit courts have granted a high deference to COE's interpretation of wetlands jurisdiction. *See* Fairbanks North Star Borough v. U.S. Army Corps of Eng'r, 543 F.3d 586 (9th Cir. 2008) (court upheld COE's determination that a wetland was under CWA's jurisdiction even though the wetland was permafrost and the wetland's affect on neighboring waters was disputed).

Of importance to the present case, courts have held that if an intermittent wetland affects and/ or controls the flooding of a navigable, interstate watershed, the intermittent wetland is properly under CWA jurisdiction. U.S. v. Lucas, 516 F.3d 316, 327 (5th Cir. 2008). The court in Lucas, held that a wetland COE jurisdiction was proper under "all three standards [physical, chemical, or biological integrity]" and when "evidence that the [sic] wetlands control flooding in the area . . . [constitutes] evidence supporting the 'significant nexus' standard" of [Justice] Kennedy's opinion." Id. In Lucas, a mobile home park developer was charged with constructing mobile homes lots and septic systems on wetlands without a CWA permit. Id. at 323. The court first considered whether the wetlands were in fact navigable, and found that Justice Kennedy's test was satisfied. Id. at 325-37. The Court reasoned that the wetlands contributed to the "flood and pollution control" of a water body, and this finding was a "sufficient . . . measure" on which to base CWA jurisdiction. Id. at 327.

In contrast, the court in Simsbury-Avon Preservation Society v. Metacon Gun Club found that a small pond bordering the perimeter of a gun shooting range was not a CWA protected

water and failed Justice Kennedy's significant nexus test. 472 F. Supp. 2d 219 (D. Conn. 2007). In Simsbury-Avon, the plaintiff presented data related to the increased lead pollution from the discarded shooting range munitions to prove whether the munitions affected the "physical, chemical, and biological integrity" of the adjacent navigable river. Id. at 230. The court found that there was insufficent evidence presented by the plaintiff that the munitions would cause increased lead pollution to the adjacent river because the plaintiffs only presented inconclusive water quality studies. Id. The court noted that, although the pond was part of the river's seasonal floodplain, the parties did not sufficiently structure their argument around the possibility that seasonal flooding could affect the integrity of the river; rather, their argument was structured around "inconclusive water sampling data." Id. The court also found no affect to groundwater from lead leaching through the soil, also due to a lack of conclusive data. Id.

Lake Temp is an intermittent body of water with no outflow, and the lake receives flows from an 800 square mile watershed of surrounding waters.[12] Lake Temp is connected to the surrounding watershed and affects the flood management and water quality of the surrounding watershed.[13] The EPA defines a "watershed" as an "area of land, a bounded hydrologic system, within which all living things are inextricably linked by their common water course.[14]" The waters of the surrounding watershed drain into Lake Temp; these waters create Lake Temp, which is relatively large, measuring three miles wide and nine miles long during the rainy season wet years, and is somewhat smaller during the dry season.[15] The EPA offers guidance in the Memorandum to determine whether waters within a watershed are under CWA navigability

[12] Appendix A
[13] Factual Background, United States District Court for the State of New Union
[14] EPA, What is a Wetland, http://water.epa.gov/type/watersheds/whatis.cfm (last visited Nov. 27, 2011)
[15] Appendix A

jurisdiction, and directs EPA personnel to consider factors, "in combination with other similarly situated waters in the watershed . . . [f]unctions of waters that might demonstrate a significant nexus include sediment trapping, nutrient recycling, pollutant trapping and filtering, retention or attenuation of flood waters, runoff storage, and provision of aquatic habitat. A hydrologic connection is not necessary to establish a significant nexus." Memorandum, Clean Water Act Jurisdiction at 8.

In considering the criteria set forth in the Memorandum and the holding in Lucas, that a wetland is navigable and satisfies the significant nexus test if it helps control flooding, Lake Temp satisfies the "significant nexus" standard of Justice Kennedy's opinion in Rapanos. Lake Temp "significantly affects the chemical, physical, and biological integrity of other . . . waters," these waters flow into Lake Temp from 800 miles of surrounding watershed. The water quality of Lake Temp does affect the waters in the surrounding watershed through "retention or attenuation of flood waters" and through "runoff storage." Because of these ecological factors, Lake Temp satisfies the "significant nexus" standard. Furthermore, high deference should be granted to the COE for its determination of "navigability" under the significant nexus test as in Fairbanks North Star. Thus, the COE acted within its jurisdiction because Lake Temp is navigable water, as defined under the CWA, and the lower court correctly granted summary judgment in favor of the United States on the issue of jurisdiction.

2. Lake Temp is used by interstate travelers for recreation and other purposes; and even though Lake Temp is a wetland that is not a navigable waters, its use, degradation, or destruction of Lake Temp could affect interstate or foreign commerce. Because of the possible affects on foreign commerce, Lake Temp is properly under CWA's jurisdiction.

Although Lake Temp satisfies the Rapanos "significant nexus" test, the waters of Lake Temp are properly regulated under the CWA pursuant to the Commerce Clause.[16] Lake Temp's use by recreational boaters, fishermen, and bird hunters affect interstate commerce. Because of these affects on interstate commerce, Lake Temp is a navigable body within CWA jurisdiction, and this jurisdiction is proper, because the lake is an interstate lake and watershed which is used by interstate travelers for recreation and other purposes. 33 C.F.R. § 328.3. When a water body's water quality may affect interstate commerce, as in the case of Lake Temp's water quality, a determination of CWA federal jurisdiction is proper. N.C. Shellfish Growers Assoc. and N.C. Coastal Fed. v. Holly Ridge Associates, 278 F.Supp. 2d 654, 673-75 (E.D.N.C. 2003). The grant of CWA jurisdiction requires a broad interpretation of the Commerce Clause, and the broad interpretation is required to uphold the important purpose of the CWA, which is to "preserve the nation's waters." Id.

In SWANCC, twenty-three Illinois municipalities were not permitted to construct a facility intended to dispose of non-hazardous waste because of the presence of migratory birds on ponds of the proposed facility grounds. 531 U.S. at 162. The COE claimed jurisdiction under the CWA because of the birds' affect on interstate commerce, and would not issue a CWA section 404 permit under its jurisdiction. Id. at 164-65. The COE had exercised jurisdiction under the "Migratory Bird Rule," which states COE jurisdiction extends to water bodies "[w]hich are or would be used as habitat by birds protected by Migratory Bird Treaties." 33 C.F.R. § 328.3(a)(3) (1993). The Supreme Court decided that the intent of Congress was to not grant COE jurisdiction over small, seasonal, isolated ponds, located solely in two counties within the state of Illinois, even though the ponds are the temporary home for migratory birds. Id. at

[16] U.S. Const. art. I, § 8, cl. 3

170-71. The Court reasoned that, although the holding in Riverside granted the COE additional discretion to regulate water bodies that are not traditionally navigable, the discretion exercised by the COE was too far of a jurisdictional reach. Id. The holding in SWANCC limited CWA jurisdiction over small, ephemeral isolated wetlands and, per many courts, only restricted the CWA from exercising jurisdiction solely based on the Migratory Bird Rule. *See* Baccarat Fremont Developers, LLC v. U.S. Army Corps of Eng'rs, 425 F.3d 1150 (9th Cir. 2005); and U.S. v Jones, 267 F. Supp. 2d 1349 (M.D. Ga. 2003)

In Baccarat Fremont, a land developer objected to the COE's determination that wetlands on his property was within federal jurisdiction authorized by the CWA. 425 F.3d at 1151. The developer argued that, based on the holding in SWANCC, the COE's determination regarding jurisdiction over the wetlands, was an improper exercise of CWA's jurisdiction. Id. at1152. The Baccarat Freemont court found that the wetlands in dispute were properly regulated by the COE, and held that "SWANCC did not modify Riverside Bayview Homes." Id. at 1158. The COE jurisdiction over wetlands falling within the adjacency clause . . . does not depend on the existence of a significant hydrological or ecological connection between the particular wetlands at issue and waters of the United States." Id. The court explained that SWANCC only had a narrow application, invalidating the Migratory Birds Rule, and that the COE's exercise of discretion while relying on the Commerce Clause was still proper. Id. at 1154.

Many courts have ruled similar to Baccarat and found that SWANCC did not significantly curtail the power of the COE to exercise federal jurisdiction, as granted under the Commerce Clause, and that the only residual result of SWANCC was that the Migratory Bird Rule was invalidated. *See* American Petro. Inst. v. Johnson, 541 F. Supp. 2d 165 (D.D.C. 2008), (holding that SWANCC does not establish rules for determining what waters qualify as

navigable); U.S. v. Jones, 267 F. Supp. 2d 1349, 1360 (M.D. Ga. 2003) (holding that SWANCC only dealt with the Migratory Bird Rule, and "the SWANCC decision did not dramatically alter CWA case law"); N.C. Shellfish Growers Assoc., 278 F.Supp. 2d at 671-672 (holding that "[t]he power over navigable waters also carries with it the authority to regulate non-navaigable waters when that regulation is necessary to achieve Congressional goals in protecting navigable waters").

Courts have been reluctant to disallow CWA jurisdiction under the Commerce Clause when a wetland affects interstate commerce; only the Fifth Circuit has strictly followed all of the dicta in SWANCC. In re: Needham, 354 F.3d 340 (5th Cir. 2003). In Needham the court held that SWANCC narrowed Riverside's grant of COE discretion over regulating waters of the United States. In Needham, there was a dispute regarding liability for the clean up of discharged oil into wetlands under the CWA and Oil Protection Act ("OPA"). Id. at 343. In the case, the United States Coast Guard tried to force plaintiffs James and Janell Needham into reimbursing the United States for clean-up costs imposed by the OPA. Id. at 342. James Needham had pumped oil from his facility into a drainage ditch, and the oil then spilled into a series of canals and waterways (some man-made and some natural), and then eventually into a man-made canal that flows into the Gulf of Mexico. Id. at 343. The Needham court found that, because the disputed wetlands were "adjacent" to a navigable water, and there was OPA clean up liability. Id. at 347. The court in Needham is one of the only courts that attempted to curtail COE's jurisdiction based on the dicta in SWANCC not related to the Migratory Bird Rule. Id.

Lake Temp is a wetland. The use, degradation, or destruction of Lake Temp effects (or could affect) interstate commerce. Unlike in SWANCC, and like in Baccarat Freemont, the COE is not just relying on the Migratory Birds Rule to exercise jurisdiction over Lake Temp. To

establish jurisdiction over Lake Temp the COE is using its grant of authority as provided under the Commerce Clause.[17] The people who travel into the State of Progress to use the lake for recreation affect interstate commerce, the travelers affect commerce by staying in hotels or purchasing food from restaurants; because of this, federal regulation by the CWA under the Commerce Clause is proper. *See* Heart of Atlanta Motel Inc. v. United States, 379 U.S. 241 (1964) (Supreme Court held that the federal government had the power under the Commerce Clause to regulate racially-discriminatory practices at a small hotel that served some interstate customers); Katzenback v. McClung, 79 U.S. 294 (1964) (ruling that the federal government may regulate a small restaurant under the Commerce Clause because of its potential effects on interstate commerce).

Furthermore, contrary to the State of Progress's argument, the waters of Lake Temp are not similar to the ponds in dispute in SWANCC. Lake Temp affects interstate commerce because people (not just birds) travel from out of state to use its waters, thus it is proper for this court to interpret the Commerce Clause to preserve our nation's waters. The vast majority of district courts have agreed with this interpretation, and the lower court properly granted summary judgment on the issue that the CWA and the COE have jurisdiction over Lake Temp.

C. The COE properly issued a permit under CWA Section 404, 33 U.S.C. § 1344 for the discharge of slurry into Lake Temp.

The DOD intends to discharge treated spent munitions into Lake Temp and the discharge into Lake Temp is the "discharge of [a] fill material." 33 U.S.C. § 1344 "Discharge of [a] fill material" is not defined by the statute, and "because the Clean Water Act does not define 'fill material,' nor does it suggest on its face [that there are] limitation of 'fill material' . . . [and] the

[17] U.S. Const. art. I, § 8, cl. 3

statute is silent on the issue before us, and such silence normally creates ambiguity." Kentuckians for the Commonwealth, Inc. v. Rivenburgh, 317 F.3d 425 (4th Cir. 2003). When a statute is ambiguious in defining a term, an agency, here the COE, may interpret "fill material" to mean all materials that displace water or changes the bottom elevation of water body, so long as that interpretation is not arbitrary or capricious. 33 U.S.C. § 1344; Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837 (1984). The COE properly concluded that the dispersal of treated spent munitions slurry into Lake Temp was the "discharge of [a] fill material" because it would raise the level of Lake Temp's lake bottom bed. 33 U.S.C. § 1344, Coeur Alaska, Inc. v. Se. Alaska Conservation Council, 129 S. Ct. 2458, 2474 (2009).

The issuance of a CWA section 404 permit is proper when the following circumstances are met: (1) the discharge (which constitutes any addition of any pollutant, including the placement of fill material on a lake bottom bed, from any discernible, confined, and conveyance; (2) the fill matter includes any material used for the primary purpose of replacing an aquatic area with dry land or changing the bottom elevation of a water body; (3) the discharge is made in to 'waters of the U.S.," as defined by the CWA, which extends beyond those waters meeting the traditional tests of navigability to those encompassed by the broadest possible constitutional interpretation. U.S Army Corps of Engineers, Regulatory Guidance Letter No. 08-02, Jurisdictional Determination (2008).

CWA section 404 grants the COE authority to issue a permit for the discharge of a fill material, and a fill material is defined by the COE in the CFR as: "the term fill material means material placed in waters of the United States where the material has the effect of . . . [c]hanging the bottom elevation of any portion of a water of the United States. 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 . . . . The term fill material does not include trash or garbage." 40 C.F.R. § 232.2. The slurry that the DOD intends to deposit into Lake Temp is a "fill material," as defined by the 40 C.F.R. § 232.2. A CWA section 402 permit is not permitted for the proposed activities on Lake Temp, because the item being regulated is a material that will "dramatically raise the bottom elevation of [a] lake," making it a fill material, which falls under the COE's section 404 jurisdiction. The Coeur Alaska court confirmed this interpretation and the lower court ruled appropriately on the issue.

The Coeur Alaska court confirmed that section 402 and section 404 permits are mutually exclusive, and when a project falls under the jurisdiction of a section 404 permit because it applies to a dredge and fill, a section 402 permit is not necessary. 129 S. Ct. 2458 (2009). CWA section 404(b) requires the COE to consider the environmental impacts of proposed discharges, and, in doing so, the EPA must follow the guidelines promulgated by the EPA in 40 C.F.R. § 230 (1980). 33 U.S.C. § 1344. When the COE determines that a material will cause a minimal environmental impact, like here on Lake Temp, the COE has acted properly.

In Coeur Alaska, the court held that the CWA gave authority to the COE, rather than the EPA, to issue permits for discharge of mining slurry. 129 S. Ct. at 2474. The Coeur Alaska court further ruled that CWA section 404 gives the COE the discretion to issue a permit for slurry discharge without additional regulation by EPA's Section 306 pollution discharge standards.[18] Id. at 2476. The fill material at issue in Coeur Alaska was a slurry mixture of crushed rock and water from abandoned mining tanks. Id. at 2464. The solids in the slurry mixture are called tailings, and approximately thirty percent of the mixture was tailings and the remaining seventy

[18] 33 U.S.C. § 1316(b)

percent of the mixture was water. Id. Coeur Alaska Inc., a mining company, sought its section 404 permit to deposit the tailings into a lake that was defined as navigable under the CWA. Id. It was estimated that the depositing of the tailings would raise lake bed approximately fifty feet, while increasing the lake beds size by twenty-seven acres. Id. Prior to granting a section 404 permit, the COE followed the C.F.R. guidelines, and considered other alternatives for the placement of the tailings, including depositing the tailings in an above ground pile. Id. at 2465. The COE concluded that the lake bed deposits would be the "least environmentally damaging . . . way to dispose of the tailings." Id. The Supreme Court, after hearing the Coeur Alaska ruled that the actions of the COE were proper, and a section 402 permit was not required because the pollutants which were regulated were "fill materials" as defined by the CWA. Id. at 2467. The Supreme Court found that the actions of the COE are supported by EPA Memorandum's which where the EPA's interpretation of its own regulations, thus the COE was entitled to Auer deference. Id. at 2474. *See* U.S. v Mead Corp., 533 U.S. 218 (2001) (court holidng that when an agency interprets its own regulations the agency is entitled to a lower level of deference then granted under Chevron, because Chevron is only applicable to an agency's interpretation of ambiguous enabling legislation written by Congress, instead when an agency interprets its own self written regulations, the agency is entitled to deference as explained in Auer v. Robbins, 519 U.S. 452 (1997)).

The COE has been granted the power and discretion to permit and regulated activities through section 404, but first the basic criteria of what constitutes a "fill material" must be met for COE jurisdiction to be proper. The Court in Stepniak v. United Materials, LLC, held that material must be permanent and actually change the bottom of a lake bed for it to be considered "fill material" and for the COE to have proper discretion. 03-CV-569A, 2009 WL 3077888

(W.D.N.Y. Sept. 24, 2009). The Stepniak Court rejected the plaintiffs argument that fly ash was a fill material that would raise the bottom of a irrigation ditch in order to constitute fill material. Id. Fly ash, as defined by the EPA, is " a very fine, powdery material, composed mostly of silica, nearly all particles are spherical in shape . . . [has] a consistency somewhat like talcum powder[19]." Because the fly ash did not sufficiently meet the criteria of a "fill material" and the court rejected plaintiffs motion for summary judgment alleging that the defendant was polluting a waterway without a section 404 permit. Stepniak, 03-CV-569A, 2009 WL 3077888.

In the present case, the DOD intends to apply a fill materials into Lake Temp by: (1) emptying spent munitions of liquid, semi-solid and granular contents and mixing them with chemicals to assure they are not explosive; (2) then any remaining solids, will be ground and pulverized so they become smooth; (3) water will then be introduced to the mixture to form a slurry; and (4) the slurry will be discharge evenly into Lake Temp from a pipe over the entire lake bed; and finally (5) the lake bed will be permanently raised approximatley six feet from the applications[20]. The surface area of Lake Temp will also be 2 square miles larger[21].

Prior to the application and approval of the section 404 permit, an Environmental Impact Statement ("EIS") was done in 2002 by DOD and New Union did not comment or object to the EIS. During the time period that the EIS was open for notice and comment was when Union should have objected to the DOD's project, not now. The COE complied with regulations and determined, from the EIS, that the DOD's project would result in the least environmental impact when considering the alternative projects. Like in Coeur Alaska, when the mining company's

[19] EPA, Coal Combustion Products: Fly Ash, http://www.epa.gov/osw/conserve/rrr/imr/ccps/flyash.htm (last visited Nov. 27, 2011)

[20] Appendix A

[21] Appendix A

alternative proposal was to store the slurry waste at an above ground storage site, the COE, like here, found that applying the slurry as a fill material to the bed of water body was the most environmentally sound choice.

New Union argues that the COE did not have the jurisdiction to issue a permit for the discharge of slurry into Lake Temp, and that the lower court erred in holding that the COE had jurisdiction to issue the permit. New Union seeks review of the COE's actions under 5 U.S.C. § 706 of the Administrative Procedure Act, which gives the reviewing court authority to "determine the meaning or applicability of the terms of an agency action . . [and to] hold unlawful and set aside agency action, findings, and conclusions found to be arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." I5 U.S.C. § 706(2)(A).

New Union's argument is in error because the COE has been granted the authority by the CWA, pursuant section 404, to issue permits for "[d]ishcarges of . . . fill materials," without the issuance of a section 402 permit. The acts of the DOD, in discharging treated munitions and using them as fill in Lake Temp, is the "[d]ischarge of . . . fill materials." A section 402 permit was not necessary, and this contention is supported by the holdings in Coeur Alaska. Thus, the lower court was correct in holding that the COE properly issued a section 404 permit and that a section 402 permit was not necessary for these activities. As stated by the Coeur Alaska court: "The CWA gives no indication that Congress intended to burden industry with the confusing division of permitting authority that SWANCC's contrary reading would create." Coeur Alaska 129 S. Ct. at 2460. Given the CWA's grant of the authority to the COE to decide what is a "fill material" so long as the material is not "trash or garbage," the COE showed proper discretion in deciding the deposit of treated munitions slurrt was a fill material. Furthermore, the proper time for New Union to object to this process was when the EIS was open for comment, not now.

4. The OMB exercised its proper authority in deciding whether the COE had jurisdiction under CWA section 404, 33 U.S.C. § 1344, and that the EPA did not have jurisdiction under CWA section 402, 33 U.S.C. § 1342.

The United States maintains that the Office of Management and Budget's ("OMB") actions were not improper when OMB decided that the COE had jurisdiction under section 404, to issue a dredge and fill permit, and that the EPA did not have jurisdiction under CWA section 402 to issue a permit for DOD to discharge slurry into Lake Temp. These actions are supported by the ruling in Coeur Alaska, and furthermore, EPA's acquiescence in OMB's decision did not violate the CWA, because the EPA's has discretionary authority to issue a section 402 permit and veto the section 404 permit. Therefore, the court below was correct in granting summary judgment in favor of the United States on this issue.

Congress conferred authority in the EPA Administrator to administer the general purpose of the CWA, and the EPA Administartor may veto permits proposed by the COE, but the executive power of the United States is vested in the President by the Constitution. U.S. Const. art. I, §1, cl. 1; 33 U.S.C. §1251(d); 33 U.S.C. §1344(c). The President, through his authorized executive powers, is responsible for implementing and enforcing laws written by Congress. Additionally, with these executive powers, the President appoints the heads of independent executive federal agencies that are created by Congress, like the EPA.

The Constitution charges the President with the duty to "take care that the laws be faithfully executed." U.S. Const. art. II, §3. The Constitution gives the President both the power and the duty to assure that decisions made within the Executive branch agencies (likethe EPA or the DOD) are faithful to the Constitution, treaties, and laws written by Congress.

Accordingly, President Reagan created the OMB, through Executive Orders, as a regulatory agency with the purpose of providing Presidential oversight of the regulatory process

and to minimize conflict of regulations (*See* Executive Order 12291, 46 Fed. Reg. 13193 (Feb. 17, 1981) (to be codified 3 C.F.R. pt. 127); *See also* Executive Order 12498, 50 Fed. Reg. 1036 (Jan. 8, 1985) (revoked by Executive Order 12291, 46 Fed. Reg. at 13193)). The OMB helps ensure the President that all laws be "faithfully executed." President Clinton further expanded the OMB, and conferred authority in the Office of Information and Regulatory Affairs ("OIRA") to assist the President and Vice President in resolving conflicts between agencies. Executive Order 12866, 58 Fed. Reg. 51735 (October 4, 1993). Executive Order 12866, which established the current program for resolving disputes between independent agencies, states:

> To the extent permitted by law, disagreements or conflicts between or among agency heads or between OMB and any agency that cannot be resolved by the Administrator of OIRA shall be resolved by the President, or by the Vice President acting at the request of the President, with the relevant agency head (and, as appropriate, other interested governmental officials). Executive Order 12866, 58 Fed. Reg. at 51735.

When applying the Executive Orders to the Lake Temp dispute, it is obvious that the OMB properly resolved a dispute between the EPA and the COE regarding the which agency had authority to issue a permit for DOD discharge of spent munitions slurry. The OMB's resolution of this dispute was proper pursuant to procedures for reconciling disputes through OIRA and OMB described in Executive Order 12866. Additonaly, the OMB was carrying out its proper duties for the President, which is to ensure that laws are "faithfully executed." Thanks in part to the OMB's decision, the COE's properly issued section 404 permit was not vetoed by the EPA. Furthermore, as decided by the ruling in Coeur Alaska, when a section 404 permit is found to have been properly issued, a section 402 permit cannot be issued. Thus, the OMB was simply ensuring that all laws were "faithfully executed."

1. EPA's decision not to veto the section 404 permit is not subject to judicial review and is consistent with the ruling in Coeur.

The EPA's decision not to veto the COE section 404 permit is not subject to judicial review, because the EPA's authority to veto section section 404 permits is wholly discretionary, and "agency action . . . committed to agency discretion by law" is not subject to judicial review. 5 U.S.C. §701(a)(2). Even if the EPA's decision not to veto the COE permit were subject to judicial review, that review would be limited to whether the EPA's actions were arbitrary or capricious. 5 U.S.C. §706(2)(A). The EPA's decision not to veto the COE permit was not arbitrary or capricious, it was consistent with the Supreme Court's ruling in Coeur Alaska. The OMB, acting consistent with its duty to ensure that laws are "faithfully executed" expedited the COE permit to ensure the DOD's permit issuance and approvale was consistent with Coeur Alaska.

In Coeur Alaska, the EPA decided to not veto a COE authorized section 404 permit for the discharge of mine tailings slurry into a lake bed. Coeur Alaska, 129 S. Ct. at 2465. The Supreme Court held that the COE, not the EPA, has authority to permit this discharge of the slurry, because of the statutory framework COE was empowerd to issue permits "under a regulatory scheme [that] discloses a defined, and workable, line for determining whether the Corps or the EPA has the permit authority." Id. at 2469.

The facts in Coeur Alaska are striking similar to the facts in the Lake Temp dispute. The DOD was granted a section 404 permit by the COE to dispose of a treated slurry. The DOD's treated slurry mixture, similar to the treated slurry in Coeur Alaska, would permanently raise the bottom bed of Lake Temp. The COE properly granted the section 404 permit to the DOD, and the EPA made the ultimate decision not to veto that permit.

Therefore, although the EPA's acquiescence of OMB's decision is not subject to judicial review because it was discretionary, and it was not arbitrary and capricious. Even if the

decision were subject to judicial review, EPA's decision does not exceeds the arbitrary or capricious standard of 5 U.S.C. §706(2)(A) because the OMB was ensuring that the EPA acted consistently with Supreme Court's ruling in Coeur Alaska and did not violate any laws.

B. Appellant's assertion that OMB acted beyond its authority presents significant separation of powers concerns.

The appellant asks for this court to intrude into the internal workings of the Executive Branch of the federal government by overruling the OMB's decision. Civil suits in which the parties request the review of OMB's actions are concerning because they ask the Judicial Branch to intrude on the workings of another branch which the Judicial Branch in which the Judicial Branch is not specialized. As noted by Justice Rehnquist in Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.:

> [R]epeated and essentially head-on confrontations between life-tenured branch and the representative branches of government will not, in the long run, be beneficial to either. The public confidence essential to the former and the vitality critical to the latter may well erode if we do not exercise self restraint in the utilization of our power to negative the actions of other branches. We should be ever mindful of the contradictions that would arise if a democracy were to permit general oversight of the elected branches of government by the nonrepresentative, and in large measure insulated, judicial branch.

Valley Forge Christian College v. Americans United for Separation of Church and State, Inc. 454 U.S. 464, 474 (1982**)** (quoting United States v. Richardson, 418 U.S. 166, 188 (1974)). If this court were to overrule OMB's executive authority to resolve disputes, that decision may set a precedent allowing repeated confrontations between the Executive Branch and Judicial Branch. This is exactly the type of confrontation that the Supreme Court has cautioned against because it will damage the legitimacy of court decisions and risk the vitality of our democratic

government. Accordingly, the United States urges this court to consider the warnings of the Supreme Court in Valley Forge, and let the OMB's regulatory decision remain intact.

Furthermore, a Federal Court has limited ability to interfere with the Executive Branch's supervision of subordinates. Principles of separation of power mandate that a federal court not meddle in the internal affairs of another branch of government. Moore v. House of Representatives, 733 F.2d 946, 956 (D.C. Cir 1984). In view of separation of powers concerns, courts have properly refused to issue rulings that would result in intrusion into the workings of the Executive Branch. Id. This court need to dismiss this suit because this suit would also intrude on the workings of the Executive Branch

Thus, the OMB's participation and resolution of an inter-agency dispute did not violate the CWA, nor did it make EPA's decision subject to judicial review, and it did not render EPA's decision arbitrary or capricious. EPA's decision was consistent with internal policy, the CWA and Coeur Alaska. Appellant's argument is an unwarranted attack on the EPA's discretionary decision not to veto the COE permit. The OMB's actions in determining that the COE has jurisdiction under CWA section 404 to issue a permit to the DOD for the discharge of treated munitions slurry, and the decision that the EPA did not have jurisdiction to issue a permit under CWA section 402, was proper. The District Court was correct in granting summary judgment to the United States and this court must uphold that decision.

IV. CONCLUSION

The Districts Court's grant of summary judgment in favor of the United States on all accounts was appropriate. The District Court was correct in granting summary judgement because the State of New Union lacks standing to initiate a suit against the properly issued, CWA section 404 permit for the discharge of spent munitions slurry on the lake bed of Lake

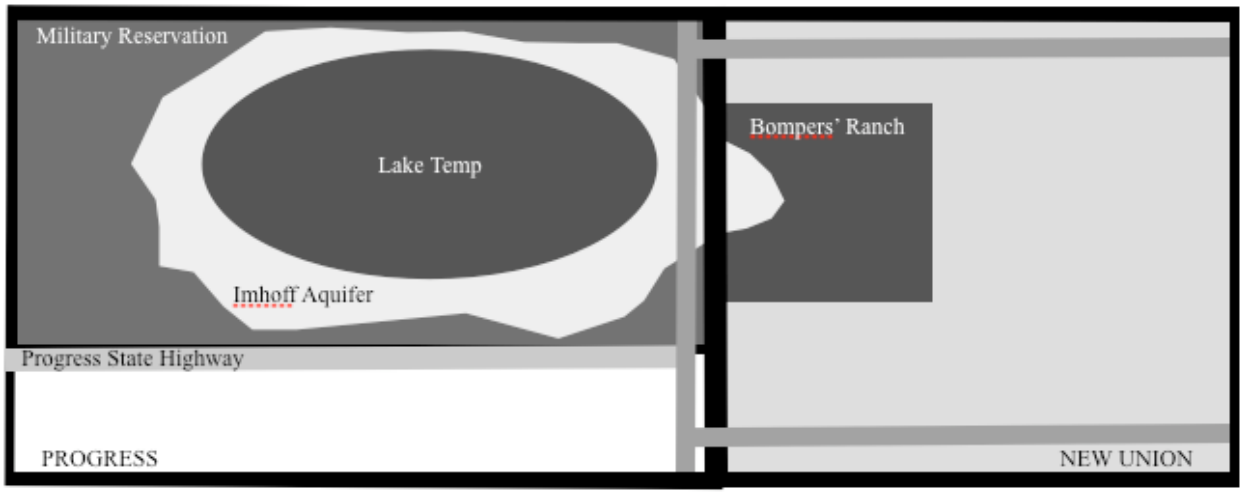
Temp. The issuance of the section 404 permit by the COE was proper because Lake Temp is navigable water, as defined by the CWA, and the discharge of the muntions slurry onto the bottom bed of Lake Temp is the discharge of a "fill material." The EPA, the COE, and the OMB all acted within their proper grant of discretion and oversight in issuing the disputed section 404 permit. As stated by the Coeur Alaska court, the CWA was writeent with "a defined, and workable, line for determining" whether a section 402 permit or a section 404 permit proper, neither the EPA or the COE should interfere with the others agencies permitting process. For that reason, the OMB acted properly under its powers granted by the Executive Orders[22].

[22] Executive Order 12291; Executive Order 12498; Executive Order 12866

VI. APPENDIX

(A) Map of Lake Temp and its Surroundings

Map of the Lake Temp, the State of Progress, the State of New Union, interstate Roads, the Imhoff Aquifer, and Mr. Dale Bomper's Ranch.



(B) 33 U.S.C.A. § 1342 [Section 402]

(a) Permits for discharge of pollutants

(1) Except as provided in sections 1328 and 1344 of this title, the Administrator may, after opportunity for public hearing issue a permit for the discharge of any pollutant, or combination of pollutants, notwithstanding section 1311(a) of this title, upon condition that such discharge will meet either

> (A) all applicable requirements under sections 1311, 1312, 1316, 1317, 1318, and 1343 of this title, or
>
> (B) prior to the taking of necessary implementing actions relating to all such requirements, such conditions as the Administrator determines are necessary to carry out the provisions of this chapter.

(2) The Administrator shall prescribe conditions for such permits to assure compliance with the requirements of paragraph (1) of this subsection, including conditions on data and information collection, reporting, and such other requirements as he deems appropriate.

(3) The permit program of the Administrator under paragraph (1) of this subsection, and permits issued thereunder, shall be subject to the same terms, conditions, and requirements as apply to a State permit program and permits issued thereunder under subsection (b) of this section.

(4) All permits for discharges into the navigable waters issued pursuant to section 407 of this title shall be deemed to be permits issued under this subchapter, and permits issued under this subchapter shall be deemed to be permits issued under section 407 of this title, and shall continue in force and effect for their term unless revoked, modified, or suspended in accordance with the provisions of this chapter.

(5) No permit for a discharge into the navigable waters shall be issued under section 407 of this title after October 18, 1972. Each application for a permit under section 407 of this title, pending on October 18, 1972, shall be deemed to be an application for a permit under this section. The Administrator shall authorize a State, which he determines has the capability of administering a permit program which will carry out the objectives of this chapter to issue permits for discharges into the navigable waters within the jurisdiction of such State. The Administrator may exercise the authority granted him by the preceding sentence only during the period which begins on October 18, 1972, and ends either on the ninetieth day after the date of the first promulgation of guidelines required by section 1314(i)(2) of this title, or the date of approval by the Administrator of a permit program for such State under subsection (b) of this section, whichever date first occurs, and no such authorization to a State shall extend beyond the last day of such period. Each such permit shall be subject to such conditions as the Administrator determines are necessary to carry out the provisions of this chapter. No such permit shall issue if the Administrator objects to such issuance.

(f) The Administrator shall promulgate regulations establishing categories of point sources which he determines shall not be subject to the requirements of subsection (d) of this section in any State with a program approved pursuant to subsection (b) of this section. The Administrator may distinguish among classes, types, and sizes within any category of point sources.

(C) 33 U.S.C.A. § 1344 [Section 404]

(a) The Secretary may issue permits, after notice and opportunity for public hearings for the discharge of dredged or fill material into the navigable waters at specified disposal sites. Not later than the fifteenth day after the date an applicant submits all the information required to complete an application for a permit under this subsection, the Secretary shall publish the notice required by this subsection.

(c) Denial or restriction of use of defined areas as disposal sites
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. Before making such determination, the Administrator shall consult with the Secretary. The Administrator shall set forth in writing and make public his findings and his reasons for making any determination under this subsection.

(e) General permits on State, regional, or nationwide basis

(1) In carrying out his functions relating to the discharge of dredged or fill material under this section, the Secretary may, after notice of opportunity for public hearing, issue general permits on a State, regional, or nationwide basis for any category of activities involving discharges of dredged or fill material if the Secretary determines that the activities in such category are similar in nature, will cause only minimal adverse environmental effects when performed separately, and will have only minimal cumulative adverse effects on the environment. Any general permit issued under this subsection shall

(A) be based on the guidelines described in subsection (b)(l) of this section, and
(B) set forth the requirements and standards which shall apply to any activity authorized by such general permit.

(2) No general permit issued under this subsection shall be for a period of more than five years after the date of its issuance and such general permit may be revoked or modified by the Secretary if, after opportunity for public hearing, the Secretary determines that the activities authorized by such general permit have an adverse impact on the environment or such activities are more appropriately authorized by individual permits.

(f) Non-prohibited discharge of dredged or fill material

(1) Except as provided in paragraph (2) of this subsection, the discharge of dredge or fill material

(A) from normal farming, silviculture, and ranching activities such as plowing, seeding, cultivating, minor drainage, harvesting for the production of food, fiber, and forest products, or upland soil and water conservation practices;

(B) for the purpose of maintenance, including emergency reconstruction of recently damaged parts, of currently serviceable structures such as dikes, dams, levees, groins, riprap, breakwaters, causeways, and bridge abutments or approaches, and transportation structures;

(C) for the purpose of construction or maintenance of farm or stock ponds or irrigation ditches, or the maintenance of drainage ditches;

(D) for the purpose of construction of temporary sedimentation basins on a construction site which does not include placement of fill material into the navigable waters;

(E) for the purpose of construction or maintenance or farm roads or forest roads, or temporary roads for moving mining equipment, where such roads are constructed and maintained, in accordance with best management practices, to assure that flow and circulation patterns and chemical and biological characteristics of the navigable waters are not impaired, that the reach of the navigable waters is not reduced, and that any adverse effect on the aquatic environment will be otherwise minimized;

(F) resulting from any activity with respect to which a State has an approved program under section 1288(b)(4) of this title which meets the requirements of subparagraphs (B) and (C) of such section, is not prohibited by or otherwise subject to regulation under this section or section 1311(a) or 1342 of this title (except for effluent standards or prohibitions under section 1317 of this title).

(2) Any discharge of dredged or fill material into the navigable waters incidental to any activity having as its purpose bringing an area of the navigable waters into a use to which it was not previously subject, where the flow or circulation of navigable waters may be impaired or the reach of such waters be reduced, shall be required to have a permit under this section.