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Best Brief, Appellees

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TWENTY-FOURTH ANNUAL PACE UNIVERSITY LAW SCHOOL NATIONAL ENVIRONMENTAL LAW MOOT COURT COMPETITION

Best Brief, Appellees*

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C.A. No. 11-1245 and Civ. No. 148-2011
UNITED STATES COURT OF APPEALS
FOR THE TWELFTH CIRCUIT

STATE OF NEW UNION
Petitioner-Appellant – Cross-Appellee
v.
UNITED STATES,
Respondent-Appellee – Cross-Appellant
v.
STATE OF PROGRESS
Intervenor-Appellee – Cross-Appellant

On Appeal from the United States District Court for the District of New Union

Brief for THE STATE OF PROGRESS,
Intervenor-Appellee

* This brief has been reprinted in its original format. Please note that the Table of Authorities and Table of Contents for this brief have been omitted.

JURISDICTIONAL STATEMENT

Appellant State of New Union filed a complaint in the United States District Court for the District of New Union seeking review under 28 U.S.C. § 1331 (1980) and under the Administrative Procedure Act. 5 U.S.C. § 702 (1976).

On June 2, 2011, the district court granted the United States' motion for summary judgment on the Clean Water Act counts and denied New Union's summary judgment motion. The district court's order is a final decision, and jurisdiction is proper in this court pursuant to 28 U.S.C. § 1291 (2006).

STATEMENT OF THE ISSUES

I. Whether the State of New Union has standing in its sovereign capacity as owner and regulator of groundwater within the state or in its *parens patriae* capacity as protector of its citizens who have an interest in the groundwater in the state.

II. Whether Lake Temp is a navigable water as required under the Clean Water Act sections 301(a), 404(a), and 502(7) when it is not traditionally navigable, it is isolated from any navigable-in-fact waters, and it has no substantial impact on interstate commerce.

III. If Lake Temp is a navigable water, whether the Army Corps. of Engineers has jurisdiction to issue a permit under section 404 of the Clean Water Act for the Department of Defense's discharge of slurry, a fill material, into the Lake.

IV. Whether the Office of Management and Budget's involvement with the permitting decision violated the Clean Water Act when the Director is compelled to resolve disputes at the request of the Administrator under Executive Order 12,088, and whether the ultimate permitting decision was proper under the Act.

STATEMENT OF THE CASE

This is an appeal from a final order of the District Court for the District of New Union granting the United States' motion for summary judgment and denying New Union's motion for

summary judgment. R. 10. The State of New Union petitioned the court for review of the issuance of a permit by the United States Army Corps of Engineers (COE) under section 404 of the Clean Water Act (CWA), 33 U.S.C. § 1344(a) (1987), to the United States Department of Defense (DOD) to allow for the discharge of a slurry of spent munitions into Lake Temp. R. 3. The State of Progress intervened as an interested party because the entirety of Lake Temp and a majority of the Imhoff Aquifer are located within the boundaries of Progress. *Id.*

Following discovery, the Secretary of the Army, representing the United States, filed a motion for summary judgment. R. 5. New Union and Progress both filed cross-motions for summary judgment. *Id.* The district court found that New Union did not have standing to challenge the issuance of the section 404 permit, that the COE had jurisdiction to issue a section 404 permit, and that participation by the Office of Management and Budget (OMB) in resolving the dispute between the Environmental Protection Agency (EPA) and the COE did not violate the CWA. R. 10-11.

New Union filed a Notice of Appeal challenging all three holdings of the district court. R. 1. Progress filed a Notice of Appeal challenging the district court's finding that New Union did not have standing to challenge the issuance of the section 404 permit and challenging the district court's holding that the COE had jurisdiction to issue the section 404 permit. *Id.*

STATEMENT OF THE FACTS

The COE issued a permit to the DOD pursuant to Section 404 of the CWA, 33 U.S.C. § 1344(a), (c), and (e)(1). R. 1. This permit authorized the DOD's plan to discharge non-explosive munitions in the form of slurry to the dry bed of Lake Temp, an intermittent, isolated body of water wholly within the state of Progress. R. 3-4. The EPA agreed with and participated in the COE's interpretation of the facts and grant of the permit. R. 9. The OMB, through power granted by the executive branch under Executive Order 12,088, resolved an issue between the EPA and the COE. After the resolution, the EPA made no effort to veto the COE's permit. R. 10.

The proposed process will raise the lakebed several feet, which will extend the lake's water elevation six feet and surface area by two square miles. R. 4. Currently, twenty-seven square miles is the largest the lake gets during the rainy season. R. 3-4. It is much smaller during dry years, and one out of five years it is wholly dry. R. 4. Surface water flows into the lake from a watershed of surrounding mountains located primarily in Progress. *Id.* The DOD's plan includes continually grading the lakebed edges so that this runoff will be unimpeded. *Id.* Ultimately, the runoff's alluvial deposits will re-cover the lakebed and, although at a higher elevation, it will essentially return it to its present ecological condition. R. 4-5.

Along both sides of a Progress state highway adjacent to, and about one hundred feet away from, the lake, the DOD posted no trespassing and danger signs. R. 4. Despite the signs, over the last century, it is conjectured that a yearly average of about ten hunters, a majority of whom are residents of Progress, use the lake to hunt migratory ducks. R. 4.

There is an aquifer one thousand feet below Lake Temp and five percent of it is located in New Union. R. 4. One of New Union's citizens, Dale Bompers, owns, operates, and resides on a ranch in New Union above the aquifer. R. 4, 6. Currently the aquifer is not potable or usable in agriculture without treatment due to a high level of sulfur. *Id.* A New Union statute requires citizens to acquire a permit to use the groundwater as a means of regulating withdrawals and for water conservation. R. 6. There is no evidence presented on the timing and severity of the pollution's impact on the portion of the aquifer beneath New Union. R. 5-6. Installing and operating wells could collect this data, but the DOD admits that they will not grant access for non-military purposes; thus, New Union never filed a permit with the DOD for installation. R. 6. At this point, the wells would not yield any conclusive data until after the activity is underway. R. 6.

STANDARD OF REVIEW

The district court rendered summary judgment in Defendant United States' favor. This Court reviews district court decisions

granting summary judgment *de novo*. *PCI Transp. Inc. v. Fort Worth & W. R.R. Co.*, 418 F.3d 535, 540 (5th Cir. 2005). The Administrative Procedure Act (APA) governs the review of agency decisions. 5 U.S.C. § 706(2)(A) (1966). The Act grants federal courts the authority to "hold unlawful and set aside" agency actions that are found to be "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." *Id.*

SUMMARY OF THE ARGUMENT

The State of New Union establishes standing both in its sovereign capacity as owner and regulator of groundwater within its boundaries and in its *parens patriae* capacity to protect the interests of its citizens. New Union's standing in sovereign capacity is achieved through seeking adjudication of a dispute over water rights within the State's borders. New Union's procedural right to seek judicial review through the Administrative Procedure Act (APA) subjects a state to a relaxed standing test. New Union has a reasonable fear it will suffer injury through the contamination of its groundwater—precisely the type of injury that the CWA seeks to prevent.

New Union establishes *parens patriae* standing because the State's interest in preserving the integrity of the groundwater within its boundaries is separate from any interests of private parties. Also, the State's interests in protecting the physical and economic well-being of their residents as well as their rightful role in the federal system are both quasi-sovereign interests. There is reasonable fear that Dale Bompers, a resident of New Union, will suffer injury because the dumping of slurry into Lake Temp could percolate into the aquifer and affect the groundwater. This potential contamination could reach a sufficient segment of the population to establish *parens patriae* standing. This is clearly an issue that New Union, if it were able to, would seek to prevent through its sovereign lawmaking ability. Furthermore, private individuals are unlikely to obtain satisfactory relief through lawsuits. These elements solidify New Union's *parens patriae* standing.

Regardless of New Union's standing, the state is unable to contest the permit because Lake Temp is not navigable as

required under 33 U.S.C. §§ 1311(a) (1995), 1344(a), and 1362(7) (2008), thus there is no need for any CWA permit. Navigability was written into the statute with a dual purpose: to focus the efforts of raising water quality on connected waters that are most likely to affect one another and to be consistent with the Constitution by limiting any extensive encroachment on state powers. Lake Temp is not navigable because it does not meet the statutory text, the case law interpretations, or the regulatory definitions. Furthermore, an extension of jurisdiction to non-navigable, isolated, intrastate waters that could potentially affect interstate commerce exceeds the CWA's statutory authority and violates the Constitution.

Given the context in which navigability appears in the CWA and the inherent constitutional limitations, the COE's attempt to extend jurisdiction to isolated waters that have a potential effect on interstate commerce is unconstitutional. The chosen statutory term, "navigable," is absent from and incompatible with all of the characteristics of Lake Temp. This leads to the conclusion that not only is the interstate commerce regulatory definition not met, it is an unconstitutional extension of the COE's jurisdiction.

If Lake Temp is within the jurisdiction of the CWA, then the DOD's discharge of slurry into the lake is properly permitted under section 404 of the Act. Section 402 provides that the Administrator may permit discharges that are not subject to Section 404 of the Act. Congress delegated authority to permit dredge and fill material discharges to the COE in Section 404. The DOD's discharge of slurry is a fill material under the regulations of both the EPA and the COE because it has the effect of changing the bottom elevation of the water. Additionally, the slurry does not fall within the exception for trash or garbage in agencies' regulations because it is not a physical obstruction that would alter the natural hydrology of the lake or cause a physical hazard or other environmental effect. Since the slurry is a fill material, the Secretary of the Army properly permitted the discharge of it into Lake Temp under Section 404 of the CWA

Because the COE legally issued the permit, the involvement of the Director of the OMB in the dispute between the agencies regarding the permitting jurisdiction did not violate the CWA. Executive Order 12,088 requires the Director to resolve disputes

between the agencies at the request of the Administrator and in accordance with any applicable laws. Even though the Administrator of the EPA was considering exercising her veto authority over the COE permit, she ultimately took no action. Decisions not to exercise enforcement authority, such as this, are presumptively not reviewable per the Supreme Court's decision in *Heckler v. Chaney*. Finally, the jurisdictional decision by the EPA and the COE should not be disturbed by this court because it was neither arbitrary nor capricious under section 706(2)(A) of the APA.

ARGUMENT

I. NEW UNION HAS STANDING TO CHALLENGE THE COE'S ISSUANCE OF THE § 404 PERMIT THROUGH ITS SOVEREIGN CAPACITY AS OWNER AND REGULATOR OF GROUNDWATER WITHIN ITS BOUNDARIES AND THROUGH ITS *PARENS PATRIAE* CAPACITY TO PROTECT ITS CITIZENS' INTERESTS.

Article III, § 2 of the United States Constitution requires the existence of a case or controversy before an issue can be presented to and ruled upon by the judicial system. U.S. Const. art. III, § 2. Standing "is an essential and unchanging part of the case-or-controversy requirement of Article III." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992). A state may achieve standing in its proprietary capacity when it suffers a direct and concrete injury, in its sovereign capacity when it requests resolution of boundary and water rights disputes, and in its *parens patriae* capacity when it attempts to protect "quasi-sovereign" interests. *Connecticut v. Cahill*, 217 F.3d 93, 97 (2d Cir. 2000). Since the State of New Union achieves standing in its sovereign capacity to adjudicate issues within its boundaries and in its *parens patriae* capacity to protect its citizens' interests, the court below erred in concluding that New Union does not have standing. Within the context of cases concerning the CWA, standing may be recognized in any "'person or persons having an

interest which is or may be adversely affected.'" *Friends of the Earth v. Gaston Copper Recycling Corp.*, 629 F.3d 387, 396 (4th Cir. 2011) (citing 33 U.S.C. § 1365(a), (g) (1987)). New Union will be adversely affected as a state because any contamination to the Imhoff Aquifer will occur in its boundaries and directly affect its citizens. Further, New Union's standing is not affected by failing to comment or object to the Environmental Impact Statement completed by the DOD because failing to raise issues during the public comment period does not prevent interested parties from judicially raising them later. *Vt. Pub. Interest Research Grp. v. U.S. Fish & Wildlife Serv.*, 247 F. Supp. 2d 495, 515-16 (D. Vt. 2002) (stating that neither the National Environmental Policy Act nor the APA requires issue exhaustion).

A. New Union has standing in its sovereign capacity as owner and regulator of a portion of the Imhoff Aquifer under the relaxed standing test used for states asserting a procedural right because there is a continuous threat of injury through contamination and the injury sought to be prevented is directly related to agency action.

Despite the DOD's ownership of Lake Temp, New Union maintains sovereign power to contest any possible harm to it and to regulate those things potentially affecting the portion of the Imhoff Aquifer within its boundaries. This case is fit for judicial review because there is a conflict between the rights of the United States under their § 404 permit and New Union's sovereign rights as owner and regulator of potentially affected groundwater. Thus, New Union achieves standing through its request for adjudication of the water rights in question. *Cahill*, 217 F.3d at 97. In *People of California v. United States*, a factually similar case, the Ninth Circuit declared that California maintained its sovereign water rights over water flowing through a parcel of land even though it was ceded to the United States for military necessity because water rights are property rights that are connected to the land. 235 F.2d 647, 656 (9th Cir. 1956). Thus, New Union has a right to the groundwater within its boundaries as owner and regulator of the land above that groundwater.

In *Lujan v. Defenders of Wildlife*, the United States Supreme Court set out the minimum requirements needed to achieve standing by an owner of affected property. *Lujan*, 504 U.S. at 560-61. The plaintiff must show a "concrete and particularized" injury-in-fact that is "actual or imminent." *Id*. at 560. The injury must be caused by the actions of the defendant and it must be likely that a favorable decision will remedy the asserted injury. *Id*. at 560-61. However, when asserting a guaranteed procedural right, a state may achieve standing through a lesser showing.

1. New Union meets the requirements of the relaxed standing test used for states asserting a special interest in a procedural right guaranteed to them by the APA.

Congress authorized, through the APA, a procedural right in any party to seek judicial review of any agency decision or action that adversely affects that party. 5 U.S.C. § 702 (1976). This procedural right to judicial review allows New Union to obtain standing without strictly adhering to the usual redressability and immediacy standards. *Connecticut v. Am. Elec. Power Co.*, 582 F.3d 309, 337 (2d Cir. 2009) (quoting *Lujan*, 504 U.S. at 572).

The requirements for states afforded a procedural right to achieve standing were loosened further by the Supreme Court in *Massachusetts v. EPA*, which held that a "litigant has standing if there is some possibility that the requested relief will prompt the injury-causing party to reconsider the decisions that allegedly harmed the litigant." 549 U.S. 497, 518 (2007). New Union's requested relief for the issuance of a section 402 permit instead of the issued section 404 permit will certainly cause the COE and the EPA to reconsider its decision that led to the fear of contamination of groundwater.

2. The reasonable fear of contamination to New Union's groundwater through surface pollution is an established injury-in-fact.

A demonstration of environmental harm is not necessary to establish an injury-in-fact. *Gaston,* 629 F.3d at 394 (citing *Friends of the Earth v. Laidlaw Envtl. Servs.*, 528 U.S. 167

(2000)). All that is required is an assertion of a *reasonable* fear and a concern that the injury-producing party's actions *may* affect the use and enjoyment of the plaintiff's land. *Id.* Fear that the further contamination of the aquifer would lead to a decreased utility of the groundwater, as it may no longer be usable even after chemical treatment, is reasonable, and therefore deserving of judicial review.

Contamination of an aquifer by percolation of pollutants through the ground is a recognized injury, making the fear of this contamination reasonable. *Miller v. Cudahy Co.*, 592 F. Supp 976 (D. Kan. 1984). In *Cudahy*, the plaintiffs presented results provided from monitoring wells that demonstrated the contamination of the groundwater. *Id.* at 984. While monitoring wells have not been installed in Lake Temp or the aquifer to determine the level of contamination, in *Cudahy* the court determined that the impact from some of the pollutants seeping down into the groundwater through surface spills was sufficient to cause a reasonable fear and concern. *Id.* This shows that it is reasonable to believe that pollutants introduced to the ecosystem at the surface of the ground can eventually filter down to groundwater causing injury through contamination.

It is not necessary to prove the chemical content of the affected water or to even prove that there was "other negative change in the ecosystem of the water" to establish an injury-in-fact. *Gaston,* 629 F.3d at 394. The Fourth Circuit further elaborated that actual harm is unnecessary to establish standing and found that a plaintiff must show only that "a direct nexus existed between the plaintiffs and the 'area of environmental impairment.'" *Id.* at 395. The direct nexus in this case exists between New Union's ownership of the groundwater within its boundaries and the threat of contamination of that water by the United States.

The district court recognized, and the DOD does not dispute, that if New Union attempted to obtain a permit to install monitoring wells in Lake Temp, the DOD would not have granted access to complete installation. Even if the wells were installed immediately, conclusive results from the wells would not be available until after the dumping of the fill material began. Regardless of the lack of data, New Union does not need to prove

the strength or timing of when the pollutants will begin to affect the integrity of the water. Many times, "requiring a plaintiff to demonstrate actual environmental harm in order to obtain standing would . . . compel the plaintiff to prove more to show standing than she would have to prove to succeed on the merits." *Ecological Rights Found. v. Pac. Lumber Co.*, 230 F.3d 1141, 1151 (9th Cir. 2000).

3. New Union's complaint is directly related to agency action and is the type of injury which § 404 was enacted to prevent.

Additionally, to establish standing through its sovereign capacity, New Union's complaint must be related to the agency's action under the statute and the injury must fall within the zone of interests protected by that statute. *Ky. Riverkeeper, Inc. v. Midkiff*, 2011 WL 2789086, 14 (E.D. Ky. July 14, 2011) (citing *Ctr. for Biological Diversity v. Lueckel*, 417 F.3d 532 (6th Cir. 2005)). The decision by the COE to issue a section 404 permit undeniably qualifies as "agency action" under this requirement and the fear of aquifer pollution through the discharge of fill material into Lake Temp assuredly falls under the general interests of the CWA to "restore and maintain [the] chemical, physical and biological integrity of the nation's waters," 33 U.S.C. § 1251(a) (1987), and also under the specific interests sought to be protected by a section 404 permit relating to fill material.

B. New Union has standing to challenge the permit through its *parens patriae* capacity because there is reasonable fear that Dale Bompers, a New Union resident, is under a continuous threat of injury through the devaluation of his property.

In order for a state to bring suit in its *parens patriae* capacity, a state must first "articulate an interest apart from the interests of particular private parties." *Snapp v. P. R. ex rel. Barez*, 458 U.S. 592, 607 (1982). The state must also demonstrate a quasi-sovereign interest in either the physical and economic well-being of its residents or in its rights and role within the federal system. *Id.* Then, the state must claim injury to "a

sufficiently substantial segment of its population." *Id.* Finally, the state must show that the individuals who are claiming injury could not be sufficiently redressed through a private lawsuit. *Connecticut v. Am. Elec. Power Co.*, 582 F.3d 309 (2d Cir. 2009) (quoting *People by Abrams v. 11 Cornwell Co.*, 695 F.2d 34 (2d Cir. 1982)). New Union asserts a reasonable fear of injury to both quasi-sovereign interests and interests separate from involved private parties. Also, the involved private parties will not be able to obtain sufficient redressability through lawsuits.

1. New Union has a quasi-sovereign interest in protecting the economic well-being of its citizens as well as interests in preserving the integrity of its natural resources and its sovereignty, both of which are separate from the interests of the affected private individuals.

New Union's interest in preserving the integrity of its groundwater and its sovereign power to regulate waters within its boundaries are both separate from those of the involved private parties, thus New Union satisfies the threshold requirement for *parens patriae* standing. These separate interests are also quasi-sovereign because New Union has an interest in maintaining its role as a state power and also as protector of the economic well-being of its residents and the natural resources within the state's boundaries. A state's protection of the economic well-being of its residents by preventing the devaluation of their property is a "classic example[] of a state's quasi-sovereign interest." *Am. Elec. Power*, 582 F.3d at 338. Currently, water from the Imhoff Aquifer can only be used for agricultural purposes if chemically treated beforehand. Fear that further water contamination will leave the aquifer unfit for use even after treatment is reasonable. While it is true that Bompers does not have rights in the groundwater until he obtains a withdrawal permit, his fear of the elimination of its utility makes obtaining a permit useless and creates a sufficient concern for Bompers' economic well-being. New Union also has a legitimate quasi-sovereign interest in protecting its natural resources. *Id.* at 334-35 (recognizing protecting natural

resources as a legitimate quasi-sovereign interest since the turn of the last century).

2. The aquifer's contamination is an injury likely to be prevented by New Union's lawmaking power that both directly and indirectly reaches a sufficient segment of the population.

There is no bright line rule that specifies an amount or proportion of the population that must be negatively affected in order for a state to maintain *parens patriae* standing. *La. ex rel Caldwell v. Allstate Ins. Co.*, 536 F.3d 418, 426 (5th Cir. 2008) (evaluating both direct and indirect effects in determining the sufficiency of injury). Courts have consistently held that a good indicator of whether or not an injury is sufficient to support *parens patriae* standing is "whether the injury is one that the State, if it could, would likely attempt to address through its sovereign lawmaking powers." *Snapp*, 458 U.S. at 607. The contamination of groundwater within a state's borders is certainly a problem that a state would likely seek to rectify through its legislature. The willingness and likelihood of attempting to address this issue through state legislation is illustrated by the fact that New Union has gone through the process of bringing a lawsuit.

Here, Bompers and future owners of his land and other land above the aquifer in New Union establish sufficient injury through fear of aquifer contamination from the discharge of slurry into Lake Temp that could render it unusable even after treatment and diminish the value of the property. *See P.R. ex rel. Quiros v. Bramkamp*, 654 F.2d 212 (2d Cir. 1981) (including the impact on future victims in its consideration of whether a substantial segment of the population was injured).

3. New Union citizens cannot obtain satisfactory relief through private lawsuits.

Bompers and future owners of his land and other lands above the aquifer would be unlikely to achieve satisfactory relief through a private lawsuit because without a withdrawal permit, Bompers currently lacks rights in the groundwater. The state of

Connecticut in *Connecticut v. Am. Elec. Power Co.* was able to achieve standing partly because the court recognized that it would be "doubtful that individual plaintiffs filing a private suit could achieve complete relief." 582 F.3d at 338.

Further, some courts do not require proof of an inability to obtain relief through private suit. *Bramkamp*, 654 F.2d at 217 (stating "a state seeking to proceed as *parens patriae* need not demonstrate the inability of private persons to obtain relief if *parens patriae* standing is otherwise indicated."). The ability of a private citizen to obtain relief through a lawsuit may make *parens patriae* standing less compelling, but this factor should not be dispositive of *parens patriae* standing. *Id.* Moreover, the right of a state to defend the interests of its current and future citizens affected by the activities in question should not be left to the possibility of one individual obtaining private relief. *Id.*

II. LAKE TEMP IS NOT NAVIGABLE UNDER ANY EXISTING STANDARD AND THE INTERSTATE REGULATORY EXTENSION IS NEITHER SATISFIED NOR CONSTITUTIONALLY VALID.

Despite having standing, the discharge of slurry into Lake Temp does not fall within the jurisdiction of the CWA because the lake is not navigable under 33 U.S.C. §§ 1311(a), 1344(a) or 1362(7). Since Lake Temp is not subject to the jurisdiction of the CWA, the court below erred in granting the United States' motion for summary judgment.

Congress enacted the CWA to raise the nation's overall water quality level to a fishable and swimmable level by regulating pollution discharges into surface waters, but the Act did not set out to regulate *all* water quality. 33 U.S.C. § 1251(a)(1), (2), & (3) (1987). One jurisdictional limit is the requirement that the regulated waters must be "navigable," and Lake Temp satisfies neither the plain language definition of "navigable waters" under the CWA as "waters of the United States," 33 U.S.C. § 1362(7) (2008), nor the requirement that non-navigable waters maintain a significant nexus to traditionally navigable waters in order to be subject to the CWA. *See Rapanos v. United States*, 547 U.S. 715, 759 (2006) (plurality opinion) (Kennedy, J., concurring);

Solid Waste Agency of N. Cook Cnty. v. U.S. Army Corps of Eng'rs (*SWANCC*), 531 U.S. 159, 168 (2001).

The statutory text of the CWA does not extend jurisdiction to non-navigable waters, so the administrative agencies attempted to push the agency's jurisdiction "to the outer limits of Congress's commerce power." *Rapanos,* 547 U.S. at 724. They attempted to obtain jurisdiction over non-navigable waters by extending the original regulatory definition from including waters "capable of use by the public for purposes of transportation or commerce," 33 CFR § 209.260(e)(1) (1974), to include *all* intrastate wetlands that "could affect interstate or foreign commerce," 33 C.F.R. § 328.3(a)(3) (1999). This expansion does not warrant *Chevron* deference because it surpasses the agencies' authority granted by Congress and exceeds the bounds of constitutional authority. *See Chevron, U.S.A., Inc. v. N.R.D.C., Inc.*, 467 U.S. 837 (1984) (explaining that reasonable administrative interpretations are normally entitled deference); *but see SWANCC*, 531 U.S. at 172 (declining to extend *Chevron* deference where the administrative interpretation exceeds its constitutional grant of authority).

Even if the revised regulatory interpretation under *Rapanos* is valid, Lake Temp does meet this proposed definition because it does not play a substantial role in interstate commerce. This Court should find that Lake Temp is not a navigable water because the lake does not meet the statutory, case law, or regulatory definition for navigable waters and also because the attempted regulatory extension should be invalidated as an unconstitutional federal intrusion into areas of state control.

A. Lake Temp, as an intermittent body of water with no outlets, does not meet the statutory or case law definitions of navigable waters.

Lake Temp, a non-navigable body of water with no surface connection to any traditionally navigable waters, does not meet the statutory definition or case law interpretations. The CWA defines "navigable waters" as "waters of the United States." 33 U.S.C. § 1362(7) (2008). The Supreme Court noted in *Riverside Bayview* that while it may be acceptable to forego "traditional tests of navigability" and include non-navigable waters connected to traditionally navigable waters, the CWA does not support

completely abandoning "navigability" altogether. *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 133-34 (1985) (noting that the concerns and goals of Congress indicate an intent to regulate wetlands "inseparably bound up with the 'waters' of the United States"). The connection to navigable waters is necessary because non-navigable, intrastate waters that do not substantially affect the waters of the United States are not within the purview of regulation by the federal government. These isolated, intrastate waters were not included in the original statutory definition because intermittent waters, unconnected to traditionally navigable waters, play no substantial role in restoring and maintaining the integrity of the nation's waters.

The *Rapanos* decision held that "navigable waters" must be "relatively permanent, standing or flowing bodies of water." *Rapanos,* 547 U.S. at 732. The Court did explain that the connection to navigable waters did not exclude those bodies of water that dry up in extraordinary circumstances or traditionally navigable streams or rivers that dry up seasonally. *Id.* at 733 n.5. This logically includes waters that would otherwise be navigable but experience either an "extraordinary circumstance" or a seasonal dry period. Lake Temp does routinely run completely dry, but, unlike the rivers and streams exemplified in the exception, it is neither traditionally navigable nor connected to a traditionally navigable water.

Lake Temp further fails the *Rapanos* concurrence definition because the lake has no "significant nexus" to any navigable water. *Id.* at 759 (plurality opinion) (Kennedy, J., concurring) (citing *SWANCC*, 531 U.S. at 167). The close *Rapanos* decision leads some lower courts to apply both the plurality and the concurrence tests. *United States v. Bailey*, 571 F.3d 791, 799 (8th Cir. 2009); *United States v. Johnson*, 467 F.3d 56, 60 (1st Cir. 2006); *see Marks v. United States*, 430 U.S. 188, 193 (1977) (explaining that "[w]hen a fragmented Court decides a case . . . the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds."); *Johnson v. Bd. of Regents of the Univ. of Ga.*, 263 F.3d 1234, 1247 (11th Cir. 2001) (noting that the narrowest grounds usually mean the "less far-reaching common ground"). The *Rapanos* standards announced in the plurality and the

concurrence are quite different, and thus the controlling law is unclear. Regardless, Lake Temp is an intermittent, isolated lake, which does not meet either definition or a combination of the two. Therefore, there is no jurisdiction under the CWA over discharges into Lake Temp.

B. Even if the regulatory definition was an acceptable extension, Lake Temp does not qualify because it does not affect interstate commerce.

Courts cannot read "navigable" out of the Act completely by allowing the replacement of the statute's definition with an interpretation so far removed from navigability that it allows jurisdiction over isolated, intrastate, temporary bodies of water like Lake Temp. The interstate commerce regulatory extension was intended and previously applied only for regulation of waters "inseparably bound" to navigable waters. *See SWANCC*, 531 U.S. at 167-68; *see also United States v. Appalachian Elec. Power Co.*, 311 U.S. 377, 408-10 (1940) (explaining that jurisdiction does not include every water from which one molecule might eventually find its way into a navigable water). In *SWANCC,* the Court clarified that jurisdiction under the CWA regulatory power was not necessarily broad. *SWANCC*, 531 U.S. at 168 (noting the use of the term "navigable" demonstrated the authority Congress envisioned when it enacted the CWA and mandating that courts construe this to require some kind of link to traditionally navigable waters). The Supreme Court essentially recognized that there has never been, and should never be, federal jurisdiction over a water like Lake Temp that was neither navigable nor connected to a navigable water.

The COE and New Union argue that Lake Temp is part of the highway of interstate commerce for interstate hunters. This argument is rooted in the power of Congress to regulate under the Commerce Clause. U.S. Const. art. I, § 8, cl. 3. The Supreme Court limited this power to three areas: (1) channels of interstate commerce, (2) instrumentalities of interstate commerce or persons and things in interstate commerce, and (3) activities that have a substantial effect on interstate commerce. *Lopez v. United States*, 514 U.S. 549, 558-59 (1995). Since Lake Temp is not navigable, it cannot be classified as a channel of interstate

commerce or be used as an instrumentality of interstate commerce. The only area in which Lake Temp might be regulated would be an activity that substantially affects interstate commerce, but to meet this the impact must be substantial. *Id.* at 559 (concluding that "the proper test requires an analysis of whether the regulated activity 'substantially affects' interstate commerce").

Here, even if there is an effect, it is too minimal to meet this requirement. Even if hundreds of hunters over the past hundred years used the lake, of which there is no concrete proof, that is only an average of a few hunters a year. Moreover, the few hunters who allegedly use the lake are not legally permitted to do so because the lake is on private military property, and there are numerous "no trespassing" signs around the perimeter. Regardless of the presence or absence of the hunters, New Union has not offered any evidence that the hunters have any effect on interstate commerce, much less a substantial one. Because the hunters' use of the lake is not only unsubstantiated, but also insufficient to establish a significant effect on interstate commerce, Lake Temp, isolated and unconnected from any navigable water, does not meet the COE's regulatory extension.

C. The COE's interpretation is unconstitutional because it exceeds the authority delegated to it by Congress.

Even if there were a valid argument that the use of Lake Temp affects interstate commerce, this extension would intrude upon Progress' sovereignty. *United States v. Morrison,* 529 U.S. 598, 556-57 (2000). The regulatory power granted to the COE over navigable waters is always balanced against states' police power. *See SWANCC*, 531 U.S. at 172-73. Congress did not intend to circumvent the states' control in land and water management, 33 U.S.C. § 1251(b) (1987), but even without this clear congressional intent, courts are still required to read statutes to evade constitutional problems. *SWANCC*, 531 U.S. at 173. Progress is entitled to preserve their police power and maintain their established rights to intrastate waters within their boundaries. Federal agencies should cooperate with states in an effort to prevent, reduce, and eliminate pollution in concert

with programs for managing water resources. 33 U.S.C.A. § 1251(g) (1987).

The commerce power is closely tied to the congressional purpose of the CWA to prevent any interference with the water's ability to be used in flow and stream of commerce. *Appalachian Elec. Power Co.*, 311 U.S. at 405-07. Isolated waters like Lake Temp do not affect the flow or stream of commerce. *Id.* at 406. Extending jurisdiction to waters not physically connected to navigable waters goes beyond the authority delegated to the agencies by Congress. It grants the COE substantial power over a much larger range of land and water than was intended by the CWA statute and would raise significant constitutional concerns by altering the federal-state balance. Therefore, the Court should find this extension invalid because it violates both the Constitution's delegation of state powers and the congressional intent of the act.

Lake Temp is a larger lake than the waters at issue in *SWANCC*, but the size of a water body does not automatically grant jurisdiction. Even though the waters in *SWANCC* and Lake Temp are not the same size, the two are analogous because they both involve isolated wetlands with no connection to navigable waters.

SWANCC and this case are completely reconciled when the *SWANCC* holding is viewed in light of the Court's reasoning. The Court reiterated that the Commerce Clause, though broad, is not unlimited. *SWANCC,* 531 U.S. at 173 (citing *Morrison*, 529 U.S. 598; *Lopez*, 514 U.S. 549). The crux of the holding was not the size or use of the lake, but rather the constitutional issue of maintaining the States' traditional and primary power over land and water use. *SWANCC*, 531 U.S. at 174. *SWANCC* was not decided strictly on the facts, but rather it was a decision restricting an overly extensive regulatory definition that pushed the bounds of the CWA jurisdiction too far.

III. IF THE COURT FINDS THAT LAKE TEMP IS A NAVIGABLE WATER WITHIN THE JURISDICTION OF THE CWA, THEN THE § 404 PERMIT WAS PROPERLY ISSUED BY THE COE BECAUSE THE DOD'S SLURRY DISCHARGE

WAS CORRECTLY CLASSIFIED AS FILL MATERIAL.

If this Court finds that Lake Temp is a navigable water within the jurisdiction of the CWA, then any discharge of a pollutant into the lake by the DOD must be authorized. 33 U.S.C. § 1342(a) (2008). The DOD's plan to spray the munitions slurry into the dry area of the lakebed is aptly classified as a pollutant discharge. 33 U.S.C. § 1362(6) (2008) (including in the definition "munitions"). As such, the slurry must be authorized by permit either under section 402 or 404 of the CWA. 33 U.S.C. § 1311 (1995). Section 402(a) provides that the Administrator may issue a permit for the discharge of any pollutant into waters of the United States. 33 U.S.C. § 1342 (2008). Section 404, however, provides that the COE, acting through the Secretary of the Army, "may issue permits for the discharge of dredged or fill material into the navigable waters at specified disposal sites." 33 U.S.C. § 1344(a) (1987). The COE properly issued a section 404 permit for the DOD's discharge of munitions slurry into the lakebed of Lake Temp because the munitions slurry is fill material under the CWA and corresponding regulations.

A. The discharge of slurry is a discharge of "fill material" under the CWA because it meets the regulatory definition set forth by both the EPA and the COE.

The slurry will replace a portion of Lake Temp's dry lakebed and change the lake's elevation, thus it is fill material and was properly permitted by the COE under section 404 of the CWA. 40 C.F.R. 232.2 (2008); 33 C.F.R. 323.2 (2008). In *Coeur Ala. Inc. v. Se. Ala. Conservation Council*, the Supreme Court held that the CWA gave authority to the COE, not the EPA, to issue a permit for the discharge of mining waste that was slurry. 129 S. Ct. 2458, 2468 (2009).

In *Coeur*, the COE issued a permit to Coeur Alaska, Inc. for the discharge of mining waste into a lake in its efforts to reopen a gold mine. *Id.* at 2463. The mining waste at issue consisted of a mixture of water and crushed rock that was left behind in the tanks after the froth flotation process. *Id.* at 2464. Rather than

construct a "tailings pond" in which to dispose of this slurry, Coeur wished to use a nearby lake to dispose of the slurry and planned to deposit four and a half million tons of solid slurry. *Id.* The effect of this discharge would raise the lakebed fifty feet and almost triple the surface area of the lake. *Id.*

This slurry was correctly classified as fill material under the agencies' joint regulatory definitions that "fill material" is "material [that] has the effect of [c]hanging the bottom elevation of water." 40 C.F.R. § 232.2 (2008); 33 C.F.R. § 323.2 (2008). Discharges of fill material are properly permitted by the COE under 33 U.S.C. § 1344(a). The Court also found that the issuance of the discharge permit for fill material was appropriate because the permit complied with the environmental factors and considerations set forth in the EPA's section 404(b)(1) guidelines. 40 C.F.R. § 230 (2008). The COE concluded that the reclamation of the lake would result in an increase in wetlands/vegetated shallows with a high value for wildlife habitat, despite the fact that the immediate effect would be to destroy the lake's small population of fish. *Coeur*, 129 S. Ct. at 2465. The EPA did not exercise its veto authority despite the fact that, in their opinion, the slurry discharge into the lake was not the preferable means of disposal. *Id.* This determination not to veto the permit was further evidence of its appropriateness. *Id.*

In this case, the DOD's proposed project will receive and prepare munitions for discharge into the lake as a non-explosive slurry. The slurry will be distributed evenly over the entire lakebed, and the distribution will raise the lake elevation approximately six feet. The surface area of the lake will increase by approximately two square miles. Over time, alluvial deposits from runoff from the surrounding watershed will cover the lakebed and return it to its pre-operation condition.

The slurry is properly classified as a fill material because its placement into Lake Temp will change the lake's elevation level. 40 C.F.R. § 232.2 (2008). Like *Coeur*, the EPA decided not to invoke its power to veto the COE's section 404 permit, and implicit in the EPA's determination is the conclusion that the COE's issuance of a section 404 permit is proper because the discharge classification complies with the EPA's section 404(b)(1) guidelines.

Fill material is not defined in the CWA, thus the respective regulatory interpretations by the Administrator and Secretary of the Army concerning fill material warrant deference. *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410, 413-14 (1945). The Court considers the ultimate criterion for determining construction of an administrative regulation to be the administrative agency's interpretation, which becomes the "controlling weight unless it is plainly erroneous or inconsistent with the regulation." *Id.* The agencies determined that the slurry that the DOD wishes to discharge should be categorized as fill material under their regulations. 40 C.F.R. § 232.2 (2008); 33 C.F.R. § 323.2 (2008). Under *Seminole Rock*, this interpretation is controlling because it is not plainly erroneous or inconsistent with the regulations, which are identical. 325 U.S. at 414. The slurry will have the effect of changing the bottom elevation of the lake, as written in the definition, and is properly classified as a discharge of fill material. 40 C.F.R. § 232.2 (2008); 33 C.F.R. § 323.2 (2008).

B. The slurry is not trash or garbage under 33 C.F.R. 323.3(e).

The agencies' regulations provide an exception to fill material that may be permitted under section 404 of the CWA. 40 C.F.R. 232.2 (2008). Section 232.2 provides that "the term fill material does not include trash or garbage." *Id.* This exception came about as a result of a joint rulemaking proceeding in 2002 by the COE and the EPA revising the CWA's regulatory definitions. 67 Fed. Reg. 31,129-34 (June 10, 2002) (to be codified at 40 C.F.R. pt. 232; 33 C.F.R. pt. 323). This final rule sought to amend the agencies' regulations so that they would both have the same definition of fill material. *Id.* at 31,129. This rule does exclude discharges of trash or garbage from permitting under section 404, even if those discharges had the effect of raising the bottom elevation of a water of the United States. *Id.* at 31,134.

An important distinction must be drawn, however, between discharges of trash or garbage and those of waste material—the latter being acceptable to permit under section 404, provided that they comply with the section 404(b)(1) guidelines. *Id.* at 31,133. The agencies found that due to the similarity of some discharges

of waste to "traditional" fill, a categorical exclusion of all discharges of waste would be overly broad. *Id.* Examples given of trash or garbage in the rule include debris, junk cars, used tires, and appliances. *Id.* at 31,134. The agencies found that the discharge of trash or garbage often creates "physical obstructions that alter the natural hydrology of waters and may cause physical hazards as well as other environmental effects." *Id.* Conversely, the COE's regulations were amended to add the words "placement of fill material for construction or maintenance of any liner, berm, or other infrastructure associated with solid waste landfills; placement of overburden, slurry, or tailings or similar mining-related materials" in the portion dealing with examples of discharges of fill material. 67 Fed. Reg. 31,141 (June 10, 2002) (to be codified at 40 C.F.R. pt. 232; 33 C.F.R. pt. 323).

The discharge at issue here is slurry, which is listed as permissible in the COE's regulations regarding discharges of fill material. 33 C.F.R. 323.2(f) (2008). The DOD's discharge of slurry, while a discharge of waste under the Act, is *not* a discharge of trash or garbage. In excluding trash or garbage from section 404, the agencies were concerned with larger items than the slurry that might impede the hydrology of a body of water or cause a physical hazard. 67 Fed. Reg. at 31,134. The ground munitions mixed into a slurry do not present such concerns. The mixture will be sprayed evenly over the lakebed, which will not affect hydrology or create any physical hazards. Thus, the slurry is a permissible fill material under both the COE's and EPA's regulations. 33 C.F.R. 323.2 (2008); 40 C.F.R. 232.2 (2008).

C. Under *Coeur*, the EPA may not require a § 402 permit if the COE has the authority to issue a § 404 permit.

In *Coeur*, the Supreme Court held that by specifying in section 402 that "[e]xcept as provided in . . . [§404,]" the EPA "may . . . issue permit[s] for the discharge of any pollutant," Congress forbid the EPA to issue permits for the discharge of fill material falling under the section 404 authority of the COE. *Coeur*, 129 S. Ct. at 2463.

The EPA still regulates the discharge of fill material to a certain extent through the promulgation of regulations issued pursuant to section 404(b)(1), which govern the environmental standards with which the discharge must comply. 33 U.S.C. § 1344(e)(1) (1987). Additionally, the Administrator has the authority to veto a section 404 permit, after notice and comment, if she determines that the discharge "will have an unacceptable adverse effect on municipal water supplies, shellfish beds and fishery areas . . . , wildlife, or recreational areas."

While the COE is not free to regulate discharges of fill material without the oversight of the EPA, Congress provided that section 402 permits are permissible as long as a section 404 permit is not required. Because the slurry at issue in the instant case is a fill material subject to a section 404 permit, it cannot also be subject to a section 402 permit from the EPA.

IV. THE OMB'S INVOLVEMENT IN THE PERMITTING DECISION DID NOT VIOLATE THE CWA.

Congress delegated authority to the COE and the EPA to administer the CWA, 33 U.S.C. § 1251(b) (1987), and because the permitting jurisdiction of the two does not overlap, disputes sometimes arise regarding whether a discharge is subject to a section 402 or a 404 permit. Executive Order 12,088 (EO 12,088) was signed in recognition of such disputes in an effort to ensure compliance with applicable pollution control standards. Exec. Order No. 12,088, 43 Fed. Reg. 47,707 (Oct. 17, 1978).

A. Executive Order 12088 requires the Director of Management and Budget to resolve disputes between Executive agencies at the Administrator's request and in compliance with any applicable pollution control standard.

EO 12,088 compels each Executive agency to "cooperate with the Administrator . . . and State, interstate, and local agencies in the prevention, control, and abatement of environmental pollution." 43 Fed. Reg. at 47,707-08. Section 1-602 of that Order provides that it is the Administrator's duty to resolve conflicts

between Executive agencies regarding the applicability of pollution control standards, such as permitting under the CWA. 43 Fed. Reg. at 47,708. Additionally, Section 1-603 requires the Director to seek the Administrator's technological judgment and determination with the regard to the applicability of statutes and regulations. 43 Fed. Reg. at 47,708. In this case, the applicable laws are the provisions of the CWA and the corresponding or relevant regulations. Finally, Section 1-605 stresses that "nothing in [the] Order, nor any action or inaction under [the] Order, shall be construed to revise or modify any applicable pollution control standard." 43 Fed. Reg. at 47,709.

In addition to the guidance of the Administrator, the Director's resolution of the dispute between the COE and the EPA must comport with not only the provisions of the CWA, but also any other applicable pollution control standard. 43 Fed. Reg. 47,709. The Director of the OMB is not allowed to resolve disputes in a way that would conflict with or have the effect of revising or modifying any applicable pollution control standard. *Id.* The OMB's involvement in the resolution of disputes between the EPA and other executive agencies is limited to the extent provided for in the Executive Order.

In *Environmental Defense Fund v. Thomas*, it was alleged that the OMB overstepped the authority granted to it by Executive Order 12,291 and unlawfully interfered with the EPA's promulgation of regulations. 627 F. Supp. 566, 567 (D.C. Cir. 1986). That Executive Order requires that executive agencies submit all proposed and final rules to the OMB for review prior to their publication. *Id.* The Order also provides that the OMB must conclude its review within certain specified time periods unless it notifies the agency of an extension, and the Order limits that extension by authorizing it only to the extent to which existing law permits. *Id.* at 568. The regulations at issue were permitting standards under the Resource Conservation and Recovery Act. *Id.* at 567. The statutory deadline for such regulations was no later than March 1, 1985. *Id.* The OMB disagreed with the EPA about the regulations, and refused to clear the regulations, extending their review far past the statutory deadline. *Id.* at 568. The court ultimately found that the OMB did not have the authority to use its regulatory review

power under the Order to delay the promulgation of the regulations beyond the deadline in the statute. *Id*. at 571. The court declined to issue injunctive relief against the OMB and noted that doing so in that situation was "an unwarranted intrusion into discretionary executive consultations." *Id.*

The record does not describe the instant situation in great detail, but mentions that the Director of Management and Budget did get involved in resolving whether or not a section 404 permit was proper for the DOD's discharge into Lake Temp. It can be inferred from the Director's involvement that the Administrator requested his assistance with the permitting decision since the Administrator considered vetoing the COE's section 404 permit. Additionally, it can be assumed that the resolution was reached through the assistance of the Administrator's technological guidance and determination of the applicable statutes and regulations.

Any involvement by the OMB in dispute resolution is limited by the constraints provided in EO 12,088, specifically that such resolution must comply with any applicable pollution control standards, such as the permitting provisions of the CWA and their corresponding regulations and guidelines. 43 Fed. Reg. at 47,709. As indicated by the title of the Order, Federal Compliance With Pollution Control Standards, the purpose of the Order was to ensure that executive agencies worked together to achieve federal compliance with these standards. In resolving the dispute between the EPA and the COE, the Director was carrying out a Presidential Order to "take care that the Laws be faithfully executed." U.S. Const. art. II, § 3. The COE properly issued the section 404 permit because the slurry is a "fill material" under 40 C.F.R. 232.2 and 33 C.F.R. 323.2. Because the permit was properly issued, the OMB's resolution of the dispute between the agencies did not violate the CWA.

B. The EPA's decision not to veto the permit is presumptively not reviewable under *Heckler v. Chaney*.

In addition to the OMB's resolution of the dispute being necessary and proper, the EPA's ultimate decision to not exercise their veto authority pursuant to 33 U.S.C. § 1344(c) is

presumptively not reviewable under the APA. *Heckler v. Chaney*, 470 U.S. 821, 831 (1985). In *Chaney*, the plaintiffs were prison inmates on death row who had petitioned the Food and Drug Administration (FDA) for the enforcement of the Food, Drug, and Cosmetic Act (FDCA). *Id.* at 823. The plaintiffs argued that the drugs to be used in their lethal injections had not been approved under the FDCA, and therefore violated the Act. *Id.* The FDA denied their petition and the plaintiffs sought review of that denial. *Id.* On appeal, the Supreme Court found that the determination not to exercise enforcement authority was presumed to not be reviewable. *Id.* at 831. The Court found that decisions not to take enforcement actions were generally unsuitable for judicial review for a number of reasons, such as the balancing of a number of factors particularly within its expertise and the similarity to prosecutorial discretion available to the Executive Branch. *Id.* at 831-32. The Court noted:

> the agency must not only assess whether a violation has occurred, but whether agency resources are best spent on this violation or another, . . . whether the particular enforcement action requested best fits the agency's overall policies, and, indeed, whether the agency has enough resources to undertake any action at all. An agency generally cannot act against each technical violation of the statute it is charged with enforcing. The agency is far better equipped than the courts to deal with the many variables involved in the proper ordering of its priorities.

Id. This presumption may be rebutted where the substantive statute provides guidelines for the agency to follow in its exercise of enforcement authority. *Id.* at 832-33. Congress can use these guidelines to limit the agency's discretion in administering the statute. *Id.* at 834.

The EPA's decision not to exercise its veto authority is analogous to the FDA's decision in *Chaney* not to exercise its enforcement authority under the FDCA. Here, the decision of whether or not the EPA would veto the COE's section 404 permit was a wholly discretionary action and presumptively not reviewable under the Supreme Court's decision in *Chaney* or 5 U.S.C. § 701(a)(2) (2011). The EPA's decision not to veto the permit is generally unsuitable for review because such a decision involves the balancing of factors particularly within the purview

of the Administrator. The Administrator must determine whether a veto would best fit the EPA's overall policies. Because section 404 discharges are still subject to EPA regulations, the Administrator may determine that the discharge can be properly regulated under a section 404 permit. Additionally, the presumption is not rebutted in this instance because, like *Chaney*, there is no law to apply. Congress did not limit the Administrator's discretion by providing guidelines in the CWA by which the Administrator must make a determination of whether or not to veto a section 404 permit. Because there is no law to apply in reviewing the Administrator's decision not to veto the permit, the presumption has not been rebutted and the decision is not subject to judicial review.

C. The jurisdictional decision by the EPA and the COE regarding the DOD's permit was neither arbitrary nor capricious under 5 U.S.C. § 706(2)(A).

Even if the Administrator's decision not to exercise her veto authority were subject to judicial review, that review would be limited to the arbitrary or capricious standard in section 706(2)(A) of the APA. *Russo Dev. Corp. v. Thomas*, 735 F. Supp. 631, 635 (D.C. N.J. 1989). The Supreme Court, in *Nat'l Ass'n of Home Builders v. Defenders of Wildlife*, found that arbitrary and capricious review is deferential to the agency. 551 U.S. 644, 657 (2007). An agency's decision will not be overturned unless the agency relies on "factors which Congress had not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise." *Id.* at 2529-30 (quoting *Motor Vehicle Mfrs. Ass'n. of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.,* 463 U.S. 29, 43 (1983)). The court of appeals found that the EPA's decision in *Home Builders* was arbitrary and capricious because the agency relied on inconsistent findings regarding the applicability of section 7 of the Endangered Species Act. *Id.* at 2529. In reversing the lower court, the Supreme Court found that the inconsistency to which the court was referring was an instance in which the agency simply changed its mind. *Id.* at 2530. The

Court explained further that, as long as proper procedures were followed, the agency was allowed to change its position regarding the applicability and requirements of section 7. *Id.* "[T]he fact that a preliminary determination by a[n] . . . agency representative is later overruled . . . within the agency does not render the decision-making process arbitrary and capricious." *Id.*

Similarly, the Administrator's ultimate decision not to veto the COE's section 404 permit was not arbitrary or capricious simply because the Administrator had considered vetoing the permit at one point in time. In fact, the Administrator was compelled to not exercise her veto power because the section 404 permit was required by the Supreme Court's decision in *Coeur*. The DOD's discharge into Lake Temp was of fill material, as the slurry would have the effect of raising the bottom elevation of the lakebed. Section 402 of the CWA provides that the Administrator may only issue permits for discharges into navigable waters if section 404 does *not* apply. 33 U.S.C. § 1342 (2008) (emphasis added). The *Coeur* decision reaffirmed this sentiment, by determining that the jurisdictional basis for permits did not overlap, thus, if a discharge is subject to a section 404 permit, it cannot also be subject to a section 402 permit. *Coeur*, 129 S. Ct. at 2468. Additionally, nothing in the record suggests that the Administrator made a finding that the discharge of slurry into Lake Temp would have an adverse effect on municipal water supplies, shellfish beds, fishery areas, wildlife, or recreational areas. Because there has been no finding of adverse impact from the Administrator, the EPA could not legally veto the section 404 permit. 33 U.S.C. § 1344(c) (1987). Thus the EPA's decision not to veto survives this Court's review because it is proper under the applicable statutes, regulations, and cases.

CONCLUSION

The State of New Union has standing in both its sovereign capacity as owner of water rights within its boundaries and its *parens patriae* capacity to protect its citizens. However, because Lake Temp is not navigable, the CWA is not triggered and regardless of New Union's standing, the State has no ability to contest the permit.

Alternatively, if the CWA does apply, the current section 404 permit is applicable and proper because the DOD's slurry discharge is a fill material and the OMB's involvement was both legal and proper.

For the foregoing reasons, the State of Progress respectfully asks this Court to reverse the decision of the district court denying New Union's standing claim, reverse the finding of navigability and determine that Lake Temp is not under the CWA's jurisdiction or, in the alternative, affirm the District Court's determination that the section 404 permit was proper and the OMB's involvement did not violate the CWA.