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Best Brief, Appellee-Cross-Appellant

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

Best Brief, Appellee-Cross-Appellant*

THE UNIVERSITY OF OREGON SCHOOL OF LAW
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C.A. No. 11-1245
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 Order of the United States District Court
for the District of New Union,
Civ. No. 148-2011, Dated June 2, 2011

BRIEF OF THE
RESPONDENT-APPELLEE-CROSS-APPELLANT

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

STATEMENT OF JURISDICTION

The district court had jurisdiction pursuant to 28 U.S.C. § 1331 (2006) and the Administrative Procedure Act, 5 U.S.C. § 702 (2006). On June 2, 2011 the district court granted the United States' motion for summary judgment, noting that the plaintiff has no standing. The States of New Union and Progress each filed a timely notice of appeal. The district court's order is a final decision, and this court has jurisdiction 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 the groundwater in the state or in its *parens patriae* capacity as protector of its citizens who have an interest in the groundwater in the state.

II. Whether the United States Army Corps of Engineers ("Corps") has jurisdiction to issue a permit under Clean Water Act ("CWA") § 404, 33 U.S.C. § 1344 (2006), because Lake Temp is navigable water under CWA §§ 301(a), 404(a), and 402(7), 33 U.S.C. §§ 1311(a), 1344(a), 1362(7).

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

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

STATEMENT OF THE CASE

The DOD was issued a permit by the Corps under CWA § 404 to discharge a slurry of spent munitions into Lake Temp. Situated on military property, Lake Temp is a lake located completely within the State of Progress. The lake measures three miles wide and nine miles long during years with more rain. It is smaller in dry seasons, and dries up once every five years on average. Lake Temp attracts boaters who enjoy duck hunting on the opposite side of the lake from the only road in the area. A significant portion of these hunters and boaters travel across state lines.

The State of New Union filed suit, arguing that the discharge project required a permit from EPA under CWA § 402 rather than a § 404 permit from the Corps. The State of Progress intervened in the case, and then all parties filed cross-motions for summary judgment. The district court granted the United States' motion for summary judgment on June 2, 2011, finding that New Union lacks standing to bring suit and providing an opinion on the merits of the case as well. New Union and Progress appeal this decision.

SUMMARY OF THE ARGUMENT

The district court properly granted summary judgment on the United States' motion and was correct in denying New Union's motion.

As a threshold issue, the State of New Union lacks standing to challenge the Corps' jurisdiction to issue a CWA permit. New Union has not demonstrated standing pursuant to the requirements of Article III, particularly its injury requirement. Additionally, New Union is estopped from challenging the permit, because it failed to object to DOD's EIS.

The district court properly decided that Lake Temp is subject to CWA jurisdiction because it is "within the description of water bodies that have traditionally been held to be navigable." In the alternative, the lakebed where the project will take place meets the significant nexus test and thus is subject to CWA jurisdiction. Additionally, Lake Temp satisfies the continuous surface connection test because it is a relatively permanent body of water

forming a lake. Thus, the district court's decision regarding the navigability of Lake Temp should be affirmed.

Third, the district court properly held that the Corps has authority to issue discharge permits under § 404, and both the Corps' and EPA's interpretations are consistent with this understanding of the statute. Additionally, the slurry that DOD proposes to discharge falls squarely within the definition of fill material that both agencies have promulgated. As a result, the district court was correct in holding that the permit was properly issued under § 404.

Finally, EPA's decision not to veto the permit did not violate the CWA because the statute mandated consultation with the Corps. In the alternative, the decision is not subject to judicial review because it is a discretionary agency decision not to bring an enforcement action. If the decision is subject to judicial review, it was not arbitrary or capricious.

STANDARD OF REVIEW

Questions of law are evaluated by this Court and should be reviewed *de novo*. *Theriot, Inc. v. United States*, 245 F.3d 388, 395 (5th Cir. 1998). Review of federal agency action is governed by the Administrative Procedure Act, 5 U.S.C. § 702 (2006), and can be overturned if the action:

> relied on factors which Congress has 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 is could not be ascribed to a difference in view or to the product of agency expertise.

Motor Vehicle Mfrs. Ass'n of the U.S., Inc. v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43 (1983).

ARGUMENT

I. THE DISTRICT COURT PROPERLY HELD THAT NEW UNION DOES NOT HAVE STANDING TO CONTEST THE CORPS' ISSUANCE OF A CWA PERMIT.

The State of New Union has not established Article III standing requirements to challenge the CWA § 404 permit issued by the Corps. Specifically, New Union has not suffered an injury under traditional Article III standing requirements, or under the majority's relaxed standard in *Massachusetts v. EPA*, 549 U.S. 497 (2007). Moreover, New Union should be estopped from seeking judicial review of the Corps' decision to issue a § 404 discharge permit because it failed to object to concerns in the EIS prepared by the Corps.

A . New Union does not meet Article III standing requirements.

Federal-court jurisdiction is limited to "Cases" and "Controversies." U.S. Const. art. III, § 2. Limiting federal jurisdiction to proper cases and controversies ensures that the Federal Judiciary respects "the proper . . . role of the courts in a democratic society." *Allen v. Wright*, 468 U.S. 737, 750 (1984) (quoting *Warth v. Seldin*, 422 U.S. 490, 498 (1975)) (internal quotation omitted). When a party invoking federal jurisdiction fails to demonstrate a proper case or controversy, "courts have no business deciding it, or expounding the law in the business of doing so." *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 341 (2006). Thus, the doctrine of standing serves to identify appropriate matters for judicial resolution and is a core component of the Article III case or controversy requirements. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992).

To establish standing, the Constitution requires that a plaintiff bringing a suit in federal court satisfy three elements. *Id.* at 560. First, the plaintiff must demonstrate that it has suffered an injury that is concrete and particularized and actual and imminent. *Id.* Additionally, the plaintiff must demonstrate that the injury is fairly traceable to the defendant. *Id.* Finally,

the plaintiff must demonstrate it is likely, and not merely speculative, that a favorable decision from the court would provide redress for the injury. *Id.* The State of New Union has not met this burden.[1]

B. New Union's claimed injury is neither actual nor imminent under the traditional standing test, or the relaxed standard from *Massachusetts*.

New Union claims its injury is the potential contamination of the Imhoff Aquifer. But New Union has not offered any facts to show that it will suffer an injury that is actual or imminent. Proving an injury-in-fact requires more than showing injury to a cognizable interest. *Lujan*, 504 U.S. at 563. It also requires showing that the party seeking relief is among those actually injured. *Id*. Moreover, the injury must be "real and immediate." *Los Angeles v. Lyons*, 461 U.S. 95, 102 (1983) (internal quotation omitted).

The Supreme Court's analysis of the imminence requirement in *Lujan* offers a useful illustration for the case at bar. 504 U.S. at 563-64. The plaintiff in *Lujan*, organizations dedicated to wildlife preservation, offered affidavits from two of its members to show injury. *Id.* at 563. These members traveled to Egypt and Sri Lanka to view animals on the endangered species list. *Id.* The same members alleged they were injured by development projects that would increase the rate of those animals becoming extinct, with the result being that the members would have a more difficult time viewing the animals on return trips. *Id.* The respondents in that case were unable to show injury, though, because neither member of the wildlife organization was able to specify definitive plans to go return to Egypt or Sri Lanka. *Id.* at 563-64.

The *Lujan* court rejected the respondents' claim of injury for failing the actual or imminent test. *Id.* at 564. According to the court, professing an "inten[t] to return to the places they had

1. Nor does New Union benefit from bringing its suit under the Administrative Procedure Act, 5 U.S.C. § 702 (2006). "Congress may grant an express right of action to persons who otherwise would be barred by prudential standing rules." *Allen*, 468 U.S. at 501. Nonetheless, a federal statute cannot relieve a party bringing suit from showing the Article III requirements. *Id.*

visited . . . is simply not enough." *Id* (internal quotation omitted). A lack of concrete plans or "specification of when the some day will be do[es] not support a finding of the 'actual or imminent' injury that our cases require." *Id.* The respondents were unable to show through "specific facts" that their members would be directly affected by the actions of the appellant. *Id.* at 563.

New Union also claims that it has a special interest as an affected state, attempting to invoke the more relaxed test for standing found in *Massachusetts v. EPA*, 549 U.S. at 518-20, but it does not even meet this relaxed standard. There, the court indicated that Massachusetts was "entitled to special solicitude" in determining whether or not it met Article III standing requirements. *Id.* at 520. Massachusetts claimed injury would result from rising sea levels that would swallow the state's coastal property. *Id.* at 522-23. According to the majority that decided the case, states are not "normal litigants for the purpose of invoking federal jurisdiction." *Id.* at 518. The majority concluded that states have an independent interest in their quasi-sovereign capacity. *Id.*

Notwithstanding the fact that four of the justices dissented from the majority's view that states are subject to a relaxed standing test, the majority in *Massachusetts* relied on many more specific facts alleging injury than New Union offers in this case. For example, the petitioners in *Massachusetts* offered statements that "qualified scientific experts [had] reached a strong consensus" that global warming would cause injury by raising sea levels. *Id.* at 521 (internal quotation omitted). Additionally, the petitioners offered facts to show that sea levels had already begun to rise. *Id.* at 522.

As a result, New Union cannot show that it has suffered an injury, because it has not offered specific facts sufficient to meet the traditional Article III standing analysis or the relaxed standard from *Massachusetts*. The DOD munitions project has not started, thus New Union must rely on showing an imminent threat of injury. New Union hypothesizes that contaminated water from the munitions project will reach the Imhoff Aquifer on the bare fact that land between the aquifer and Lake Temp is primarily unconsolidated alluvial fill. Order at 5. But aside from that conclusory statement, New Union has not offered further

evidence to prove that contaminants will ever reach the portion of the aquifer below its soil. Order at 5-6.

Moreover, New Union claims that it can collect information to track the movement of pollutants with the installation of monitoring wells. *Id.* at 6. However, New Union to date has not filed an application with DOD for permission to do so. *Id.* Unlike the concrete facts of scientific consensus and rising seal levels that the petitioners in *Massachusetts* were able to offer, New Union has offered nothing more than circumstantial evidence that pollutants from the munitions project might one day reach the Imhoff Aquifer. Accordingly, New Union has not met its standing requirements requiring injury in fact.

C. Nor Does New Union have standing under a theory of *parens patriae*.

Causes of action under the *parens patriae* theory are rooted in the common-law concept of the "royal prerogative." *Snapp & Son v. Puerto Rico*, 458 U.S. 592, 600 (1982). The royal prerogative included the right or responsibility to take care of persons unable to take care of themselves. *Id.* "This prerogative of *parens patriae* is inherent in the supreme power of every State [and] is . . . often necessary to be exercised in the interests of humanity, and for the prevention of injury to those who cannot protect themselves." *Mormon Church v. United States*, 136 U.S. 1, 57 (1890).

However, the current concept of *parens patriae* standing as it has developed in American law is different from that common-law approach. *Snapp & Son*, 458 U.S. at 600. *Parens patriae* standing is separate from an allegation of injury under Article III. *See Wyoming v. Oklahoma*, 502 U.S. 437, 448-449 (1992). "[T]o maintain [a *parens patriae*] action, the State must articulate an interest apart from the interest of particular private parties, *i.e.*, the State must be more than a nominal party." *Snapp & Son*, 458 U.S. at 607. The Supreme Court in *Snapp* referred to this as a "quasi-sovereign interest[,]" one of which concerned the physical and economic well-being of its citizens. *Id.* In *Snapp*, the Supreme Court allowed a *parens patriae* action for the Commonwealth of Puerto Rico to assert federally created rights against private defendants. *Id.* at 610 n.16. In contrast,

however, "[a] State does not have standing as *parens patriae* to bring an action against the Federal Government." *Massachusetts v. Mellon*, 262 U.S. 447, 485-486 (1923). According to the Court in *Mellon*, it is not within a State's power to enforce rights against the federal government. *Id.* "In that field it is the United States, and not the State, which represents them as *parens patriae*." *Id.* at 486.

New Union seeks to enforce the rights of the rancher Dale Bompers, who claims the value of his ranch will be diminished if the aquifer is contaminated. Order at 6. As stated above, though, New Union cannot bring a *parens patriae* action against the government. Even if New Union were able to bring a *parens patriae* action against the federal government, it would still be unable to demonstrate that Dale Bompers has suffered an injury. His property lies over the Imhoff Aquifer, but he does not draw water from there and has no definite plans to use it in the future. *Id.* It is hard to see exactly how Dale Bompers suffers any actual or imminent injury at all. Furthermore, New Union has not alleged facts that allege the aquifer is currently being used or will be by residents of the state. The water in the aquifer is not potable or able to be used for agricultural purposes. It follows, then, that New Union is unable to meet standing requirements under a theory of *parens patriae*.

D. New Union's failure to object to issues that should have been raised in the EIS process estopps it from seeking judicial review of the Corps' decision to issue § 404 permit.

Allowing New Union to proceed with this suit without raising objections to the EIS circumvents the procedures set out in NEPA, 42 U.S.C. §§ 4321-4370H, for resolving objections to the proposed munitions project. Facing an analogous situation, the Supreme Court stated in *Department of Transportation v. Public Citizen*, 541 U.S. 752, 764 (2004), "[p]ersons challenging an agency's compliance with NEPA must structure their participation so that it . . . alerts the agency to the [parties'] positions and contentions." Doing so allows an agency to "give the issue meaningful consideration." *Id.*

The underlying policy of this rule is to prevent courts from substituting their "judgment for that of the agency on matters where the agency has not had an opportunity to make a factual record or apply its expertise." *New Mexico Environmental Imp. Div. v. Thomas*, 789 F.2d 825, 835 (10th Cir. 1986). Considerations of governmental efficiency necessitates that courts respect agency decisions "unless the administrative body not only has erred but has erred against objection made at the time appropriate under its practice." *United States v. L.A. Tucker Truck Lines, Inc.*, 344 U.S. 33, 37 (1952). But *see City of Seabrook, Tex. v. United States EPA*, 659 F.2d 1349, 1360-61 (5th Cir.1981) (holding that plaintiffs are not required to comment or participate before challenging agency action).[2]

Here, the Corps followed standard NEPA procedures and followed public notice requirements throughout the EIS process. Order at 6. Moreover, all relevant information concerning Lake Temp and the Imhoff Aquifer at issue in the district court order was included in the EIS. *Id.* Despite those efforts, the State of New Union failed to make any objection to the EIS. *Id.* As a result, considerations of fairness and respect for the Corps' decision to issue the permit require that New Union's claims against it be estopped.

II. THE DISTRICT COURT PROPERLY DECIDED THAT LAKE TEMP IS SUBJECT TO CWA JURISDICTION.

The CWA provides the Corps jurisdiction to issue permits for the discharge of dredge or fill material into navigable waters. CWA § 404(a), 33 U.S.C. § 1344. The term navigable waters is defined as "waters of the United States." CWA § 502(7), 33 U.S.C. § 1362(7). The Supreme Court issued a fractured opinion in

2. *City of Seabrook* held that potential litigants generally should not be estopped based on failure to object during a notice and comment period. *Id.* at 1360-61. However, that rule presupposes that objecting during the notice and comment period preserves a right to contest an agency action. *Big Horn Coal Co. v. Temple*, 793 F.2d 1165, 1170 (1986) (Barrett, J., specially concurring). The concurrence instead reasoned that a litigant should be estopped from objecting to an agency action unless the litigant can demonstrate it is constitutionally infirm or in excess of statutory authority. *Id.* Neither of those exceptions are the case here.

Rapanos v. United States, 547 U.S. 715 (2006), that guides the interpretation of the term "waters of the United States." An opinion authored by Justice Scalia for a four-vote plurality established a "continuous surface connection" test. *Id*. at 730-39. A concurrence by Justice Kennedy established a "significant nexus" test. *Id*. at 779-84 (Kennedy, J., concurring). The four dissenting Justices argued for jurisdiction under either of two tests, and in other instances as well. *Id*. at 787-810 (Stevens, J., dissenting).

The holding of the district court, and the correct application of the CWA to Lake Temp, is not based on either of the *Rapanos* tests, but a definition of navigable waters that all the Supreme Court Justices agree on. Thus, this Court need not reach a decision on the *Rapanos* split to resolve this case.

A. The district court correctly held that Lake Temp is "within the description of water bodies that have traditionally been held to be navigable."

The entire Supreme Court agrees that the term "navigable waters" encompasses something more than traditionally "navigable-in-fact" waters, thus Lake Temp is properly classified as a navigable-in-fact water. *Id.* at 731 (plurality opinion); *id.* at 767 (Kennedy, J., concurring); *id.* at 792 (Stevens, J., dissenting); *Solid Waste Agency of N. Cook County v. United States Army Corps Of Eng'rs*, 531 U.S. 159, 167 (2001); *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 133 (1985); *United States v. Robison*, 505 F.3d 1208, 1216 (11th Cir. 2007). The traditional definition established in *The Daniel Ball*, 77 U.S. 557, 563 (1870), is that waters must be used or susceptible of use, in their ordinary condition, as a highway for commerce in the customary modes of trade and travel. The waters do not need to be open to navigation "at all seasons of the year, or at all stages of the water." *Economy Light & Power Co. v. United States*, 256 U.S. 113, 122 (1921). In *Utah v. United States*, 403 U.S. 9, 11 (1971), the Supreme Court held that the Great Salt Lake was navigable in fact because "nine boats [were] used from time to time to haul cattle and sheep from the mainland to" an island. Despite the fact that the Great Salt Lake was not a part of an interstate or

international commercial highway, "[t]he lake was used as highway and that is the gist of the federal test." *Id.*

Similarly, the district court found that Lake Temp is a part of a highway of interstate commerce used by out-of-state hunters who boat and paddle canoes on the lake. Lake Temp meets *The Daniel Ball* test because "for over one hundred years" the lake has been used, in its ordinary condition, as a highway for boaters traveling from out of state to hunt birds on a shore with no road access. Order at 7. It is not significant that Lake Temp shrinks in dry years because waters do not need to be navigable "at all season of the year" to be navigable in fact. *Econ. Light & Power*, 256 U.S. at 122.

Moreover, Lake Temp is more closely connected to interstate commerce than the Great Salt Lake in *Utah v. United States*. In *Utah*, the lake was not "a navigable highway in the customary sense of the word" because no commercial operator ran a shipping, ferry, or barge operation. 403 U.S. at 11. Similarly, Lake Temp is not used to ship commercial goods in interstate commerce. Yet, because a few boats used from time to time to haul *intrastate* livestock over a lake satisfies *The Daniel Ball* test, so too does Lake Temp's long history of use by *interstate* hunters. Thus, Lake Temp meets the traditional definition of a navigable-in-fact water.

B. The lakebed, where the Corps' project will take place, is subject to CWA jurisdiction.

CWA jurisdiction extends to Lake Temp's ordinary high water mark, and thus includes dry sections of the lakebed. The CWA provides that the federal government can substitute state for federal jurisdiction over "navigable waters . . . other than those waters which are . . . susceptible to use in their natural condition or by reasonable improvement as a means to transport interstate or foreign commerce *shoreward to their ordinary high water mark*." CWA § 404(g)(1), 33 U.S.C. § 1344(g)(1) (emphasis added). By denying state jurisdiction over navigable waters "shoreward to their ordinary high water mark," Congress intended to retain federal CWA jurisdiction over the area between the shore and high water mark of waters susceptible to use in interstate commerce. *See Rapanos*, 547 U.S. at 731

(Plurality opinion interpreting CWA jurisdiction over navigable waters based upon this subsection of the act); *id.* at 768 (Kennedy, J., concurring) (interpreting CWA jurisdiction over navigable waters based on this clause). Because Congress inserted a provision retaining federal jurisdiction over these areas, it follows that Congress intended these areas to be a part of federal CWA jurisdiction in the first place.

The CWA grants federal jurisdiction to navigable waters below their ordinary high water mark. A lakebed is defined as the "bottom of a lake." *New Oxford American Dictionary* 948 (Erin McKean ed., 2d ed., 2005). The bottom is below the high water mark, and the proposed activity will take place on the lakebed of Lake Temp. Order at 4. Thus, the proposed activity on the lakebed is subject to CWA jurisdiction.

C. In the alternative, if the Court finds that the lake is navigable in fact and the dry portions of the lakebed are not a part of the lake, then the dry portions of the lakebed meet the significant nexus test.

If the court finds that Lake Temp is navigable under *The Daniel Ball* test, but that the dry portions of the lakebed are not a part of the lake, then the dry portions are subject to CWA jurisdiction as adjacent wetlands under the significant nexus test. Here again, the Court may come to this decision without reaching the issue of which interpretation of *Rapanos* to embrace. Two Circuit Court interpretations of the *Rapanos* decision exist: the Seventh and Eleventh Circuits concluded that the significant nexus test alone creates CWA jurisdiction, while the First and Eighth Circuits concluded that either creates CWA jurisdiction. *United States v. Gerke Excavating, Inc.*, 464 F.3d 723, 724–25 (7th Cir. 2006); *United States v. Robison*, 505 F.3d 1208, 1221–22 (11th Cir. 2007); *United States v. Johnson*, 467 F.3d 56, 62–64 (1st Cir. 2006); *United States v. Bailey*, 571 F.3d 791, 799 (8th Cir. 2009). No part in this case asserts, and no circuit court has held that the plurality test alone creates jurisdiction. Thus, this court may conclude that CWA jurisdiction exists under the significant nexus test without deciding if the plurality's continuous surface connection test is also applicable. *See Precon*

Dev. Corp. v. U.S. Army Corps of Eng'rs, 633 F.3d 278, 288 (4th Cir. 2011); *Northern Cal. River Watch v. Wilcox*, 633 F.3d 766, 781 (9th Cir. 2011) (allowing CWA jurisdiction under the significant nexus test while reserving judgment on CWA jurisdiction under the continuous surface connection test).

A wetland meets the "significant nexus" test if, "either alone or in combination with similarly situated lands in the region, [it] significantly affect[s] the chemical, physical, and biological integrity of other covered waters more readily understood as 'navigable.'" *Rapanos*, 547 U.S. at 780 (Kennedy, J., concurring). Addressing a Corps standard that provides for jurisdiction over wetlands adjacent to navigable waters, Justice Kennedy recognized that "the Corps's conclusive standard for jurisdiction rests upon a reasonable inference of ecologic interconnection, and the assertion of jurisdiction for those wetlands is sustainable under the Act by showing adjacency alone." *Id.* Later, he again reiterated that "[w]hen the Corps seeks to regulate wetlands adjacent to navigable-in-fact waters, it may rely on adjacency to establish its jurisdiction." *Id.* at 782.

No party disputes that the area to be sprayed is directly next to, or adjacent to, Lake Temp. Thus, if the Court finds that Lake Temp is a navigable water, then it follows that the adjacent lakebed is within the jurisdiction of the CWA because the adjacent area meets the significant nexus test.

D. In the alternative, if the Court finds that the lake is not navigable in fact, than either of the *Rapanos* tests may be used to establish jurisdiction.

In the alternative, the United States asserts that under *Rapanos*, either Justice Kennedy's significant nexus test or the plurality's continuous surface connection test can be used to establish jurisdiction under the CWA. This interpretation is supported by Justice Stevens in his dissent: "Given that all four Justices who have joined this [dissent] would uphold the Corps' jurisdiction in [all] cases in which either the plurality's or Justice Kennedy's test is satisfied—on remand each of the judgments should be reinstated if either of those tests is met." *Id.* at 810 (Stevens, J., dissenting) (footnotes omitted). The circuit courts that held otherwise rest their reasoning on *United States v.*

Marks, 430 U.S. 188, 193 (1977), where the Supreme Court held that "[w]hen a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds" (citations omitted) (internal quotation omitted). In the Seventh and Eleventh Circuits' analysis, the significant nexus test is the "narrowest grounds" for restricting federal jurisdiction. *Gerke*, 464 F.3d at 724-25; *Robison*, 505 F.3d at 1221-22.

Following the dissent's instruction will yield a result that most closely follows what would happen if the Supreme decided each case before it. If the waters at issue meet the significant nexus test, then the four members of the dissent in *Rapanos* and Justice Kennedy would vote to uphold jurisdiction under the CWA. If the waters at issue meet the continuous surface connection test, then the four members of the dissent and the four members of the plurality in *Rapanos* would vote to uphold jurisdiction. The Supreme Court, voting on each test individually, would allow CWA jurisdiction under either test, thus this Circuit should follow the First and Eighth Circuits in adopting the *Rapanos* dissent's instruction and allow CWA jurisdiction under either test.

The Seventh and Eleventh Circuits' reasoning is not compelling because it is difficult, if not impossible, to determine which test upholds jurisdiction on a narrower ground. *Bailey*, 571 F.3d at 798 ("Because there is little overlap between the plurality's and Justice Kennedy's opinions, it is difficult to determine which holding is the narrowest."). Narrower grounds can be characterized as a test that restricts federal jurisdiction in a subset of the situations under which the other test restricts federal jurisdiction. *See Johnson*, 467 F.3d at 63.

The "narrower grounds" rationale is not applicable here because one test in *Rapanos* is not a subset of the other. There are certain waters, for example, a small creek with a continuous surface connection to a large navigable water, that would be subject to CWA jurisdiction under the continuous surface connection test, but possibly not under the significant nexus test. On the other hand, a large area of wetlands upstream from a traditionally navigable body of water likely has a significant

nexus with that body of water. Yet if the wetlands do not contain a surface connection to the body of water, CWA jurisdiction will not attach under the plurality's test. Accordingly, the one test cannot be viewed as "narrower grounds" than the other because neither is a subset of the other. The term narrowest grounds "as used in *Marks* does not translate easily to [*Rapanos*]. The cases in which Justice Kennedy would limit federal jurisdiction are not a subset of the cases in which the plurality would limit jurisdiction." *Id.* at 64.[3] Accordingly, *Marks* is not an appropriate standard to decide CWA jurisdiction in the wake of *Rapanos*.

If the Court finds that the lake is not navigable in fact, then following Justice Sevens' instruction either of the *Rapanos* tests may be used to establish CWA jurisdiction. Following *Marks* is not compelling because it is difficult, if not impossible, to determine which test upholds jurisdiction on narrower grounds. Following the dissent's instruction will yield a result that mirrors what would happen if the Supreme adjudicated each fact pattern that emerges.

E. Lake Temp is a relatively permanent body of water and thus meets the *Rapanos* plurality's test.

The plurality's test:

> requires two findings: first, that the . . . channel contains a 'wate[r] of the United States,' (*i.e.,* a relatively permanent body of water connected to traditional interstate navigable waters); and second, that the wetland has a continuous surface connection with that water, making it difficult to determine where the 'water' ends and the 'wetland' begins.

Rapanos, 547 U.S. at 742. Lake Temp meets the first part of the plurality's test, and the second part of this test is not applicable to Lake Temp because it is a lake and not wetlands.

The first part of the plurality's test requires that the lake be a "relatively permanent, standing . . . body of water forming [a] geographic feature[] described in ordinary parlance as [a] lake." *Id*. at 732. "At bare minimum, [this includes] the ordinary

3. The *Johnson* Court additionally cited confusion regarding what exactly the term "narrowest grounds" means. 467 F.3d at 63.

presence of water." *Id.* at 734. The outer bounds of the plurality's test is set out in footnote 5 of the Court's decision: "[C]hannels containing permanent flow are plainly within the definition, and [intermittent or ephemeral streams] whose flow is [c]oming and going at intervals[, b]roken, fitful, or existing only, or no longer than, a day; diurnal[,] short-lived, are not." *Id.* at 733 n.5 (citations and internal quotation marks omitted).

Lake Temp meets all the elements of this test. The lake is an established feature of the area, having been used by boaters for over one hundred years, and thus is "relatively permanent." Additionally, no party disputes Lake Temp's status as a lake; its name and depiction on maps lends credibility to this view. Accordingly, the lake is a geographic feature described in ordinary parlance as a lake. The lake is only dry approximately one out of every five years, thus Lake Temp ordinarily includes the presence of water. Finally, Lake Temp falls within the outer bounds of the test as described in footnote 5 of the Court's decision because it is normally flowing and dries out only, on average, twice a decade.

In conclusion, the district court properly decided that Lake Temp is subject to CWA jurisdiction because it is "within the description of water bodies that have traditionally been held to be navigable." In the alternative, dry portions of the lakebed meet the significant nexus test. Either of these conclusions can be made without deciding which interpretation of *Rapanos* to adopt. If this Court decides to address the *Rapanos* split, it should hold that either test creates jurisdiction under the CWA. Additionally, Lake Temp satisfies the plurality's continuous surface connection test because it is a relatively permanent body of water forming a lake. The District Court decision regarding the navigability of Lake Temp should be affirmed.

III. THE LOWER COURT CORRECTLY DECIDED THAT THE CORPS PROPERLY ISSUED A CWA § 404 PERMIT.

Under the CWA, only the Corps has authority to issue discharge permits under § 404, and both the Corps' and EPA's interpretations are consistent with this understanding of the statute. Moreover, the slurry that DOD proposes to discharge

falls squarely within the definition of fill material that both agencies have promulgated. As a result, the district court was correct in holding that the permit was properly issued under § 404.

A. When the Corps has authority to issue a CWA § 404 discharge permit, EPA does not have concurrent authority to issue a CWA § 402 discharge permit.

"The [Clean Water] Act is best understood to provide that if the Corps has authority to issue a permit for a discharge under § 404, then . . . EPA lacks authority to do so under [section] 402." *Coeur Alaska, Inc. v. Se. Alaska Conservation Council*, 129 S. Ct. 2458, 2467 (2009). The CWA grants both the Corps and EPA regulatory authority under a dual-permitting scheme. 33 U.S.C. §§ 1342(a)(1), 1344(a). The Corps has authority to grant permits for discharges of "fill material," and EPA has authority to grant permits for discharges of pollutants. *Id.* Specifically, EPA may issue permits for the discharge of any pollutant, "[e]xcept as provided in section . . . 1344." *Id.* As a result, Congress carved out an explicit exception to EPA's otherwise broad permitting authority under CWA § 402.

When interpreting an individual statute, specific language controls over more general language. *See, e.g., Nat'l Cable & Telecomms. Ass'n. v. Gulf Power Co.*, 534 U.S. 327, 335 (2002); *MacEvoy v. United States*, 322 U.S. 103, 107 (1944). The plain text of the statute prohibits EPA from issuing permits for actions properly under the jurisdiction of the Corps pursuant to CWA § 404, regardless of whether a "fill material" can also be classified as a pollutant.

B. The Corps' authority to issue permits for discharges of fill material is consistent with both agencies' interpretation of the CWA.

If the Court finds the plain language of the CWA to be ambiguous, then the court should look to the agencies' interpretation of the statute to resolve the ambiguity. *See, e.g., Rapanos*, 547 U.S. at 758 ("Agencies delegated rulemaking authority under a statute such as the Clean Water Act are

afforded generous leeway in interpreting the statute they are entrusted to administer.") (Roberts, C.J., concurring) (citing *Chevron U.S.A. Inc., v. Natural Res. Def. Council*, 467 U.S. 837, 842-45 (1984)). As a result, decisions of the agencies charged with administering the CWA are entitled to deference.

Throughout the history of the CWA, the Corps and EPA have issued rulemakings and other pronouncements demonstrating a joint understanding that the Corps—and not EPA—has authority to issue permits for "discharges of fill material." Soon after the CWA was enacted in 1972, EPA issued a regulation that states "[d]redged or fill material discharged into navigable waters" does "not require an NPDES permit." 40 C.F.R. § 125.4(d) (1973). Today's regulations are similar. 40 C.F.R. § 122.3 (2011) (Section 402 permits are not required for "[d]ischarges of . . . fill material into waters of the United States which are regulated under section 404 of CWA."). Both agencies also stated in 1986 that discharges meeting the definition of "fill material" are regulated under § 404, even if they also have to meet the criteria of a § 402 discharge. 51 Fed. Reg. 8871 (March 14, 1986). Finally, both agencies stated in the preamble to the 2002 fill rule that effluent guidelines promulgated under §§ 304 and 306 applied to § 402 permits and that "EPA has never sought to regulate fill material under effluent guidelines." 67 Fed. Reg. 31,129, 31,135 (May 9, 2002).

Both the Corps and EPA provided explanations for this division of authority. According to both expert agencies charged with implementing the CWA, the permitting regime under § 404 is fundamentally different by design. 65 Fed. Reg. 21,292, 21,293 (April 20, 2000). First, § 404 was written by Congress specifically to regulate dredged material and fill material. *Id.* Additionally, "fill material" is different from the broad category of pollutants regulated under § 402 "because the principal environmental concern [of fill permits] is the loss of the water body itself." *Id.* Additionally, Congress intended for § 404 to be the "vehicle for regulating materials whose effects include the physical conversion of waters to non-waters or other physical alterations of aquatic habitat[.]" *Id.*

EPA is not shut out of the Corps decision to issue a permit under § 404. Section 404 directs the Corps to specify each

disposal site for discharge permits through guidelines developed by EPA. 33 U.S.C. § 1344(b)(1). These guidelines, codified in 40 C.F.R. § 230 (2011), ensure that "fill materials" are not discharged without the applicant demonstrating that a limited impact on the aquatic ecosystem. 40 C.F.R. § 230.1(c). For example, the guidelines direct the Corps to review practicable alternatives to the proposed discharge, meaning no discharge at all or "discharging into an alternative aquatic site with potentially less damaging consequences[.]" *Id*. § 230.5(c).

Furthermore, Congress provided EPA a significant check on the Corps § 404 permitting authority. Section 404(c) of the CWA provides the EPA with the authority to "deny or restrict the use of any defined area for specification . . . as a disposal site[.]" This provision is known as the EPA veto. *Coeur*, 129 S. Ct. at 2465. The guidelines and veto provision show that the Corps is required to apply EPA guidelines when deciding to issue a § 404 permit, but the decision to issue a § 404 permit remains the responsibility of the Corps.

Notwithstanding the EPA guidelines and veto option, the underlying conclusion of the rulemakings and agency pronouncements mentioned above is that "discharges of fill material" are exclusively regulated by the Corps under § 404.

C. The Corps has authority to issue the permit under § 404, because the proposed discharge falls squarely within the definition of "fill material."

Section 404 of the CWA grants the Corps exclusive authority to issue permits for discharges of dredged or "fill material." CWA § 404, 33 U.S.C. § 1344(a) (2006); *Coeur*, 129 S. Ct. at 2467-69. Congress did not provide a definition in the CWA for "fill material." However, the agencies have promulgated a rule to bridge the gap left by Congress, which defines "fill material" as "material placed in waters of the United States where the material has the effect of (i) Replacing any portion of a water of the United States with dry land; or (ii) Changing the bottom elevation of any portion of a water of the United States." 33 C.F.R. § 323.2(e)(1) (2011) (Corps definition); 40 C.F.R. § 232.2 (2011) (EPA definition). Both agencies also provide a non-exhaustive list of activities that qualify as a "discharge of fill

material." 33 C.F.R. § 323.2(f) (2011); 40 C.F.R. § 232.2 (2011). These joint regulations explicitly state that a "discharge of fill material" includes "placement of overburden, slurry, or tailings or similar mining-related materials[.]" *Id.* The decision for this Court, then, is to decide whether or not the agencies have constructed a rule that is consistent with the CWA.

1. The agencies' definition of fill material is controlling because it is a permissible construction of the statute.

An agency interpretation is controlling unless plainly erroneous or inconsistent with the statute. *Auer v. Robbins*, 519 U.S. 452, 461 (1997). "When a court reviews an agency's construction of the statute which it administers, it is confronted with two questions." *Chevron*, 467 U.S. at 843. It first looks at whether or not Congress has spoken directly to the question at issue, and if Congress has provided a clear answer, then that is the end of review, for both the agency and the court must follow Congressional intent. *Id.* If Congress has not spoken directly to the question at issue, then the court must determine whether or not the agency's rulemaking is a permissible construction of the statute. *Id.*

Congress can delegate regulatory authority implicitly or explicitly. *Id.* at 843-44. If the statutory gap is explicit, then courts must defer to the agency interpretation "unless they are arbitrary, capricious or manifestly contrary to the statute. *Id*. at 844. On the other hand, if the delegation of authority is implicit, then courts should defer to agency interpretations that are reasonable constructions of the statute. *Id*. Here, the agencies' interpretation of the term "fill material" is made pursuant to an implicit delegation.

As a result, the current definition of "fill material" promulgated by the Corps and EPA is a reasonable interpretation that is consistent with the CWA. In 2002, the Corps and EPA jointly undertook an effort to redefine the definition of "fill material." 67 Fed. Reg. 31,129 (May 9, 2002). Before 1977, both agencies defined "fill material" as "any pollutant used to create fill in the traditional sense of replacing an aquatic area with dry land or of changing the bottom elevation of a water body for any

purpose." *Id.* at 31,131. Then, in 1977, the Corps modified the definition by adding a "primary purpose test," which excluded discharges primarily intended to dispose of waste. *Id.* EPA, on the other hand, defined "fill material" as any pollutant that replaces a water of the United States with dry land or changes its elevation for any purpose, retaining the effects-based definition. *Id.*

The agencies explained that the effects-based approach was selected over the "primary purpose" approach because of the difficulty of making subjective determinations regarding the purpose of potential discharges. 65 Fed. Reg. at 21,294 (April 20, 2000). The agencies reasoned that adopting an effects-based test would provide for more objective decisions on whether to issue § 404 permits, as well as more consistent results. *Id.* at 21,294-95. Accordingly, the effects-based definition that the agencies have in place today is a reasonable interpretation of term "fill material."

2. The proposed discharge meets the test set out by the Supreme Court in *Coeur Alaska, Inc.*

Moreover, New Union's attempt to distinguish the discharge of fill material in this case from the discharge of fill material described in *Coeur* falls flat. There, the defendant-mine operator received a § 404 permit to discharge slurry from a mining operation into a treatment lake. *Coeur*, 129 S. Ct. at 2463-64. Ruling for the defendant, though, the Supreme Court explained that the mining slurry at issue "falls well within the central understanding of the term 'fill'" and noted that the plaintiff had even conceded that point. *Id.* at 2468. The plaintiff raised a concern that this "interpretation of the statute will lead to [section] 404 permits authorizing the discharges of solids [e.g., litter and battery manufacturing waste,] that are now restricted by EPA standards." *Id.*

The Court responded that those "extreme instances" were not in front of the court and hinted at a potential exception to the effects-based definition of "fill" by stating that, "the dispositive question for future cases would be whether the solid at issue . . . came within the regulation's definition of "fill." *Id.* The proposed discharge by DOD is not one of those instances.

The munitions slurry in this case is not the same category as the mining slurry from *Coeur*, however the slurry is still well within the definition of "fill material." Later in the *Coeur* opinion, the Court deferred to EPA's conclusion that CWA § 306(e) performance standards did not apply to permits issued under § 404. *Id.* at 2473. Relying on an internal EPA opinion, the Court noted that "the instant cases do not present a process or plan designed to manipulate the outer boundaries of the definition of 'fill material' by labeling minute quantities of EPA-regulated solids as fill." *Id.* Nor does DOD's proposed discharge of munitions slurry. The record establishes that the munitions project will have the effect of changing the bottom elevation of Lake Temp. The project will raise the entire lakebed by an estimated six feet, resulting in a two square mile increase in the surface area of the lake. Order at 4. As a result, DOD cannot be accused of proposing a discharge plan that intends to manipulate the outer boundaries of what constitutes "fill material."

3. The legislative history and an earlier congressional statute regulating fill material also support the conclusion that the proposed munitions discharge falls within the definition of fill material.

New Union suggests that, because some of the materials in the munitions slurry are toxic pollutants, DOD's proposed discharge is different from the fill discharged in *Coeur*. Order at 8. But the legislative history shows that Congress intended for discharges of "fill material" to be regulated by the Corps under section 404, regardless of whether the fill material contained toxic substances or not. In a Senate Report discussing the 1977 amendments to the Clean Water Act of 1977, Congress stated:

> Section 404 of the Federal Water Pollution Control Act Amendments of 1972 required a permit program to control the adverse effects caused by point source discharges of dredged or fill material into the navigable waters including: (1) the destruction and degradation of aquatic resources that results from replacing water with dredged material or fill material; and (2) the contamination of water resources with dredged or fill

> material that contains toxic substances. The committee amendment is designed to reaffirm this intent[.]

S. Rep. No. 95-370, at 74 (1977). Based on this report, Congress foresaw the possibility that discharges of fill material could contain toxic substances or destroy aquatic resources.

Furthermore, the Corps' authority set out in the Rivers and Harbors Act (RHA), the statutory predecessor to the CWA, is also analogous to the current regulatory regime. Under the RHA, the Corps has authority to regulate discharges of fill. 33 U.S.C. § 403 (2006). The Fourth Circuit held that RHA § 10 was "sufficiently broad to prohibit the discharge of any fill material, including waste, that would 'alter or modify the course, location, condition, or capacity' of designated navigable waters." *Kentuckians for the Commonwealth v. Rivenburgh*, 317 F.3d 425, 442 (2003) (citations omitted). The court rejected a definition of "fill material" limited only to "material deposited for some beneficial primary purpose." *Id.* It follows then, that, regardless of the presence of toxic pollutants in DOD's proposed slurry, the discharge falls within the definition of "fill material," because it has the effect of changing the bottom elevation of Lake Temp.

IV. THE DISTRICT COURT CORRECTLY DECIDED THAT EPA'S DECISION DID NOT VIOLATE THE CWA.

The district court properly upheld EPA's decision not to veto the Corps permit. The EPA, Corps, and Office of Management and Budget (OMB) acted appropriately under the CWA's veto provision. CWA's § 404(c), 33 U.S.C. § 1344(c) (2006).

A. EPA properly consulted with the Corps under CWA § 404(c).

EPA's decision not to veto the permit was taken pursuant to CWA § 404(c), which reads: "Before [a veto] determination, the [EPA] Administrator shall consult with the Secretary [of the Army]." *Id.* This provision is an explicit statutory mandate for EPA to work with the Corps in evaluating the situation before making a veto determination. OMB facilitated the consultation process between EPA and the Corps. OMB's participation in this

process supported the consultation effort between EPA and the Corps. Thus, because the consultation process is sanctioned by the CWA, EPA's participation in the consultation process was proper.

B. In the alternative, EPA's decision not to veto the permit is not subject to judicial review.

In the alternative, EPA's decision not veto the permit is a wholly discretionary action and not subject to judicial review. The Administrative Procedures Act exempts from judicial review an "agency action [that] is committed to agency discretion by law." 5 U.S.C § 701(a)(2). "[A]n agency's decision not to take enforcement action should be presumed immune from judicial review under § 701(a)(2)." *Heckler v. Chaney*, 470 U.S. 821, 832 (1985). EPA's decision not to veto the permit was a decision not to take enforcement action. Thus, the EPA's decision not to veto the permit is presumed immune from judicial review and should be upheld. As the district court aptly noted: "The participation by OMB in EPA's decision did not violate the CWA, [and] did not make EPA's decision subject to judicial review[.]" Order at 10.

C. Even if EPA's decision was subject to judicial review, the decision not to veto the permit was not arbitrary or capricious.

In the alternative, EPA's decision not to veto the permit should be upheld under the Administrative Procedure Act's deferential arbitrary and capricious standard. EPA's decision under CWA § 404(c) should only be found unlawful if "agency action, findings, and conclusions" are "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2) (2006). EPA's decision was not arbitrary or capricious because it is consistent with existing case law, including *Coeur*, and a reasonable exercise of the President's constitutional Article II powers. Accordingly, this Court should hold that EPA's actions were legal under the Administrative Procedures Act.

1. EPA's actions were consistent with the

Supreme Court's ruling in *Coeur*.

EPA's actions were not arbitrary or capricious because they were consistent with the Supreme Court's ruling in *Coeur*. In *Coeur*, the Court held that the Corps has exclusive jurisdiction to issue permits for fill materials under CWA § 404. *Coeur*, 129 S. Ct. at 2468. EPA does not have authority to issue permits that involve fill materials, but EPA may, in its discretion, veto a permit issued by the Corps if inconsistent with conservation priorities identified in the statute. Accordingly, EPA's discretionary decision not a veto a Corps permit is consistent with the limited authority that the Supreme Court found was given to EPA in *Coeur*.

2. OMB's involvement in the EPA-Corps consultation is not arbitrary or capricious.

EPA's decision not to veto the permit was taken pursuant to CWA § 404(c), which reads: "Before [a veto] determination, the [EPA] Administrator shall consult with the Secretary [of the Army]." 33 U.S.C. § 1344(c) (2006). This provision is a mandate for EPA to work with the Corps in evaluating the situation before making a veto determination. The consultation process between EPA and the Corps was facilitated by OMB. OMB's participation in this process supported the consultation effort between EPA and the Corps. The Executive Branch's use of a third-party agency to aid statutorily-mandated consultation is neither arbitrary, capricious, nor an abuse of discretion. Thus, because the consultation process is sanctioned by the CWA and OMB's participation in the consultation process was a proper way to support EPA's consultation reasonability, EPA's decision not to veto the permit was appropriate.

3. The President is empowered by the Constitution to decide how to arbitrate disputes between executive branch agencies.

EPA's decision not to veto the permit was not arbitrary or capricious because the executive power of the United States is vested in the President. U.S. Const. art. I, § 1, cl. 1. The President is charged with duty to "take Care that the Laws be

faithfully executed." *Id*. art. II, § 3. This clause gives the president the power to make decisions on any discretionary issue reaching the executive branch, including conflicts between laws and agencies. Thus, the Constitution gives the President the power to resolve disputes between federal agencies in whatever way she sees fit, including delegating the responsibility to a third agency such as OMB.

In conclusion, EPA's decision not to veto the permit did not violate the CWA because the statute mandated the consultation, or in the alternative, the decision is not subject to judicial review, or the decision was not arbitrary or capricious.

CONCLUSION

For the foregoing reasons, the judgment of the district court should be affirmed.

The district court property held that New Union does not have standing to contest the corps' issuance of a CWA § 404 permit. New Union lacks traditional Article III standing. New Union's claimed injury is neither actual nor imminent under the traditional standing test, or the relaxed standard from Massachusetts. Nor does New Union have standing under a theory of *parens patriae*. New Union's failure to object to issues that should have been raised in the EIS process estopps it from seeking judicial review of the Corps' decision to issue a § 404 permit.

The district court properly decided that Lake Temp is subject to CWA jurisdiction. The district court correctly held that Lake Temp is "within the description of water bodies that have traditionally been held to be navigable." The lakebed, where the Corps' project will take place, is subject to CWA jurisdiction.

In the alternative, if the Court finds that the lake is navigable in fact and the dry portions of the lakebed are not a part of the lake, then the dry portions of the lakebed meet the significant nexus test. In the alternative, if the Court finds that the lake is not navigable in fact, then either of the *Rapanos* tests may be used to establish jurisdiction. Lake Temp is a relatively permanent body of water and thus meets the *Rapanos* plurality's test.

The lower court correctly decided that the Corps properly issued a CWA § 404 permit. When the Corps has authority to issue a CWA § 404 discharge permit, EPA does not have concurrent authority to issue a CWA § 402 discharge permit. The Corps' authority to issue permits for discharges of fill material is consistent with both agencies' interpretation of the CWA.

The Corps has authority to issue the permit under § 404, because the proposed discharge falls squarely within the definition of "fill material." The agencies' definition of fill material is controlling because it is a permissible construction of the statute. The proposed discharge meets the test set out by the Supreme Court in *Coeur*. The legislative history and an earlier congressional statute regulating fill material also supports the conclusion that the proposed munitions discharge falls within the definition of fill material.

The district court correctly decided that EPA's decision did not violate the CWA. EPA properly consulted with the Corps under CWA § 404(c). In the alternative, EPA's decision not to veto the permit is not subject to judicial review.

Even if EPA's decision were subject to judicial review, the decision not to veto the permit was not arbitrary or capricious. EPA's actions were consistent with the Supreme Court's ruling in Coeur. OMB's involvement in the EPA-Corps consultation is not arbitrary or capricious. The President is empowered by the Constitution to decide how to arbitrate disputes between executive branch agencies.