Team No. 13

C.A. No. 11-1245

UNITED STATES COURT OF APPEALS
FOR THE TWELFTH CIRCUIT

STATE OF NEW UNION,

Appellant-Cross-Appellee,

v.

UNITED STATES,

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

Civ. No. 148-2011 Dated June 2, 2011

BRIEF FOR APPELLEE AND CROSS-APPELLANT UNITED STATES

TABLE OF CONTENTS

TABLE OF AUTHORITIES iii

STATEMENT OF JURISDICTION 1

STATEMENT OF THE ISSUES 1

STATEMENT OF THE CASE 2

STATEMENT OF FACTS 3

SUMMARY OF THE ARGUMENT 4

ARGUMENT 6

I. NEW UNION LACKS ARTICLE III STANDING TO PURSUE ITS CWA CLAIMS AGAINST THE UNITED STATES. 6

A. The Supreme Court's reasoning in *Massachusetts v. EPA* did not alter the "irreducible constitutional minimum of standing" as defined by *Defenders*. 7

B. New Union lacks the irreducible minimum required for Article III standing to bring suit in its sovereign capacity. 8

1. New Union fails to establish a legally protected interest in the Imhoff Aquifer. 8

2. New Union's abstract concern for the Imhoff Acquifer falls short of a concrete injury to its sovereign interests. 9

3. New Union fails to allege an imminent injury because pollution to the Imhoff Aquifer is probabilistic at best. 10

C. New Union lacks a distinguishable interest that affects a substantial segment of its population, making standing as *parens patriae* inappropriate. 11

1. States cannot sue *parens patriae* against the federal government. 12

2. New Union fails to establish the necessary elements to bring suit as *parens patriae* 13

II. THE DOD'S PROPOSED DISCHARGES INTO LAKE TEMP ARE SUBJECT TO FEDERAL JURISDICTION UNDER THE CWA 133

A. Lake Temp is subject to CWA jurisdiction because it is a navigable water. 14

1. Lake Temp has been "used in the past, or may be susceptible to use in interstate or foreign commerce." 16

a. Past navigation of Lake Temp by interstate hunters demonstrates it has been used in interstate commerce. 16

b. Lake Temp is also susceptible to future use in interstate commerce. 17

2. Lake Temp is an intrastate lake that is being used and can be used by interstate or foreign travelers for recreational or commercial purposes. 18

a. The use of Lake Temp by interstate hunters provides a sufficient basis for federal regulation. 19

b. The Supreme Court's decision in *SWANCC* is distinguishable and improperly applied to the facts at bar. 19

c. The Supreme Court's holding in *Rapanos* is limited to the EPA's jurisdiction over nonadjacent wetlands under the CWA. 21

B. The COE properly determined the discharges of munitions slurry are governed by § 404 rather than § 402 of the CWA. 21

1. The COE is authorized to determine whether the DOD's discharges are subject § 404 and not § 402 of the CWA. 22

2. The COE and EPA's regulations reasonably define "fill material" to include waste 23

3. The COE and EPA reasonably identified the DOD's munitions slurry as fill material subject to the COE's authority under § 404. 25

III. THE OMB'S EXPERTISE WAS PROPERLY EMPLOYED IN THE INTERAGENCY CONFLICT AND CANNOT BE THE SUBJECT OF NEW UNION'S COLLATERAL ATTACK. 27

A. The OMB involvement evokes a non-justiciable political question that this court should decline to answer 28

1. Article II of the Constitution textually commits the power to resolve conflicts between the EPA and COE to the Executive Branch, barring judicial review. 28

2. Judicial intervention in executive agency management violates the separation of powers and exhibits a lack of respect for coordinate branches of government. 29

B. E.O. 12,088 permits the EPA and COE to consult the OMB in order to resolve any potential conflicts. 30

C. New Union's challenge to the OMB's involvement is an impermissible collateral attack 32

CONCLUSION 35

TABLE OF AUTHORITIES

United States Supreme Court Cases

Alfred L. Snapp & Son, Inc. v. Puerto Rico, ex rel., Barez,
458 U.S. 592 (1982) 12, 13

Auer v. Robbins, 519 U.S. 452 (1997) 15, 18

Baker v. Carr, 369 U.S. 186 (1962) 6, 28, 29, 30

Barnhart v. Walton, 535 U.S. 212 (2002) 23

Chevron U.S.A., Inc. v. Natural Res. Def. Counsel, Inc.,
467 U.S. 837 (1984) ..... passim

Coeur Alaska, Inc. v. Se. Alaska Conservation Council,
129 S.Ct. 2458 (2009) ..... passim

Colorado v. New Mexico, 459 U.S. 176 (1982) 8, 9

Consumer Prod. Safety Comm'n v. GTE Sylvania, Inc., 447 U.S. 102 (1980) 22

Econ. Light & Power Co. v. United States, 256 US. 113 (1921) 17

Flast v. Cohen, 392 U.S. 83 (1968) 6, 7

Friends of the Earth, Inc. v. Laidlaw Envtl. Svcs. (TOC), Inc.,
528 U.S. 167 (2000) 6, 7, 10

Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Found., Inc.,
484 U.S. 49 (1987) 22

Hinderlider v. La Plata River & Cherry Creek Ditch Co., 304 U.S. 92 (1938) 8

Hood ex rel. Mississippi v. City of Memphis, 570 F.3d 625 (5th Cir. 2009) 9

Immigration & Naturalization Svc. v. Chadha, 462 U.S. 919 (1983) 28

Lujan v. Defenders of Wildlife, 504 U.S. 555 (1992) 7, 8, 9, 10

Massachusetts v. Envtl. Prot. Agency, 549 U.S. 497 (2007) 7, 8, 12

Massachusetts v. Mellon, 262 U.S. 447 (1923) 12

Mississippi v. City of Memphis, Tenn., Memphis Light, Gas & Water Div.,

130 S. Ct. 1317 (2010) 9

Missouri v. Illinois, 180 U.S. 208 (1901) 11

Rapanos v. United States, 547 U.S. 714 (2006) 18, 21

Sierra Club v. Morton, 405 U.S. 727 (1972) 6, 8

Solid Waste Agency of N. Cook Cty. v. U.S. Army Corps of Eng'rs, 531 U.S. 159 (2001) 18, 19, 20

The Daniel Ball, 77 U.S. (1 Wall.) 557 (1870) 16

The Montello, 87 U.S. (1 Wall.) 430 (1874) 18

United States v. Am. Trucking Ass'n, 310 U.S. 534 (1939) 32

United States v. Holt State Bank, 270 U.S. 49 (1926) 19

United States v. Mead Corp., 533 U.S. 218 (2001) 15

United States v. Munoz-Flores, 495 U.S. 385 (1990) 28

United States v. Nixon, 418 U.S. 683 (1974) 29

United States v. Riverside Bayview Homes, Inc., 474 U.S. 121 (1985) 14

Whitmore v. Arkansas, 495 U.S. 149 (1990) 10

Virginia v. Maryland, 540 U.S. 56 (2003) 9

United States Circuit Court Cases

Alaska v. Ahtna, Inc., 891 F.2d 1401 (9th Cir. 1989) 16

Connecticut v. Am. Elec. Power Co., Inc., 582 F.3d 309 (2d Cir. 2009) 11, 12

FPL Energy Maine Hydro L.L.C. v. FERC, 287 F.3d 1151 (D.C. Cir. 2002) 18

Friends of the Earth v. U.S. Navy, 841 F.2d 927 (9th Cir. 1988) 23

Friends of the Earth, Inc. v. Gaston Copper Recycling Corp., 204 F.3d 149 (4th Cir. 2000) 10

Headwaters, Inc. v. Talent Irrigation Dist., 243 F.3d 526 (9th Cir. 2001) 20

Iowa v. Block, 771 F.2d 347 (8th Cir. 1985) 12, 13

Kentuckians for the Commonwealth, Inc. v. Rivenburgh,
317 F.3d 425 (4th Cir. 2003) 15, 24

Meyer v. Bush, 981 F.2d 1288 (D.C. Cir. 1993) 28

Michigan v. U.S. Envtl. Prot. Agency, 581 F.3d 524 (7th Cir. 2009) 12

Mtn. States Legal Found. v. Glickman, 92 F.3d 1228 (D.C. Cir. 1996) 11

Nat'l Wildlife Fed'n v. Hanson, 859 F.2d 313 (4th Cir. 1988) 33

Natural Res. Def. Council, Inc. v. Zeller, 688 F.2d 706 (11th Cir. 1982) 30

People by Abrams v. 11 Cornwell Co., 695 F.2d 34 (2d Cir. 1982) 13

Pollock v. U.S. Dep't of Justice, 577 F.3d 736 (7th Cir. 2009) 10

Preserve Endangered Areas of Cobb's History, Inc. v. U.S. Army Corps of Eng'rs,
87 F.3d 1242 (11th Cir. 1996) 33

Pub. Interest Research Grp. of N.J., Inc. v. Magnesium Elektron, Inc.,
123 F.3d 111 (3d Cir. 1997) 10

San Francisco Baykeeper v. Cargill Salt Div., 481 F.3d 700 (9th Cir. 2007) 14

Sierra Club v. Peterson, 705 F.2d 1475 (9th Cir. 1983) 31

Sierra Club v. Thomas, 828 F.2d 783 (D.C. Cir. 1987) 34

Tenn. Valley Auth. v. EPA, 278 F.3d 1184 (11th Cir. 2002), *opinion withdrawn in part sub nom, Tenn. Valley Auth. v. Whitman*, 336 F.3d 1236 (11th Cir. 2003) 31

United States v. Moses, 496 F.3d 984 (9th Cir. 2007) 17

United States District Court Cases

Alliance To Save Mattaponi v. U.S. Army Corps of Eng'rs,
515 F. Supp. 2d 1 (D.D.C. 2007) 34

Cascade Conservation League v. M.A. Segale, Inc.,
921 F. Supp. 692 (W.D. Wash. 1996) 33

City of New York v. Exxon Corp., 744 F. Supp. 474 (S.D.N.Y. 1990) *adhered to on reconsideration*, 766 F. Supp. 177 (S.D.N.Y. 1991) 11

City of Olmstead Falls v. U.S. Envtl.Prot. Agency, 266 F. Supp. 2d 718, 722-23 (N.D. Ohio 2003) 33

Colvin v. United States, 181 F. Supp. 2d 1050 (C.D. Cal. 2001) 20

Envt'l Def. Fund v. Thomas, 627 F. Supp. 566 (D.D.C. 1986) 29

Idaho Rural Council v. Bosma, 143 F. Supp. 2d 1169, 1178 (D. Idaho 2001) 20

Johnson v. Wurthman, 227 F. Supp. 135 (D. Or. 1964) 17

United States v. Buday, 138 F. Supp. 2d 1282 (D. Mont. 2001) 20

State Court Decisions

Wilbur v. Gallagher, 462 P.2d 232 (Wash. 1969) 19

United States Constitution

U.S. Const. art. II, § 1 28
U.S. Const. art. II., § 3 30
U.S. Const. art. III ..... passim

Federal Statutory Provisions

Administrative Procedure Act, 5 U.S.C. §§ 551–559, 701–706, 1305, 3105, 3344, 4301, 5335, 5362, 7521 (2006)
§ 551(13) 34
§ 701(a)(2) 32, 33
§ 702 1
§ 704 34

28 U.S.C. § 1251 (2006) 9

28 U.S.C. § 1291 (2006) 1

28 U.S.C. § 1331 (2006) 1

Federal Water Pollution Control Act, 33 U.S.C. §§ 1251–1387 (2006)

§ 1251(a) 13
§ 1311(a) 14
§ 1342 2
§ 1342(a) 22
§ 1344 2
§ 1344(a) 21, 22, 24
§ 1344(b) 26
§ 1344(c) 32, 33, 34
§ 1361(a) 14
§ 1362(6) 24
§ 1362(7) 14
§ 1362(12) 14

Federal Rules and Regulations

33 C.F.R. pt. 323 (2011)
§ 323.2(e)(1) 23, 26
§ 323.2(e)(3) 27
§ 323.2(f) 23
§ 328.3 14
§ 328.3(a) 19
§ 328.3(a)(1) 15, 16, 17
§ 328.3(a)(3) 15, 16, 18

40 C.F.R. pt. 122 (2010)
§ 122.2 14
§ 122.2(a) 15, 16, 17
§ 122.2(c) 18
§ 122.2(c)(1) 15, 16
§ 122.3 ..... 22, 30

40 C.F.R. pt. 230 (2010) 26
§ 230.10(a) 27

40 C.F.R. pt. 231 (2010)
§ 231.1 ..... 32, 33
§ 231.3(a) 32, 33
§ 231.6 34

40 C.F.R. pt. 232 (2010)
§ 232.2 ..... 23, 25, 26, 27, 30

Exec. Order No. 12,088, 43 Fed. Reg. 47,707 (Oct. 17, 1978) ..... passim

Final Rule for Regulatory Programs of the Corps of Engineers, 51 Fed. Reg. 41,206 (Nov. 13, 1986)..... 19, 20

Final Revisions to Definitions of "Fill Material," 67 Fed. Reg. 31,129 (May 9, 2002)..... 23, 24, 26, 27

Fed. R. Civ. P. 24..... 2

Federal Administrative Materials

Constitutionality of Nuclear Regulatory Comm'n's Imposition of Civil Penalties on the Air Force, 13 Op. O.L.C. 131 (1989)..... 27, 29

Envtl. Prot. Agency & U.S. Army Corps of Eng'rs, *Draft Guidance on Identifying Waters Protected by the Clean Water Act* (April 2011), *available at* http://www.epa.gov/indian /pdf/wous_guidance_4-2011.pdf..... 15, 18, 20

Envt. Prot. Agency, Mem. of Agreement Between the Environmental Protection Agency and the Department of the Army, Aug. 11, 1992..... 30

Proposed Tax Assessment Against the United States Postal Service, 1 Op. O.L.C. 79 (1977) 29

Reply Brief for the Federal Respondents, *Coeur Alaska,* 129 S.Ct. 2458 (2009) (Nos. 07-984, 07-990), 2008 WL 5150172 24

WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 2148 (Mirriam-Webster, Inc. 2002)..... 25

STATEMENT OF JURISDICTION

The district court had subject matter jurisdiction over the claims Plaintiff, State of New Union (New Union), brought pursuant to the Administrative Procedure Act (APA), 5 U.S.C. § 702 (2006), based on general federal question jurisdiction, 28 U.S.C. § 1331 (2006). On June 2, 2010, the district court granted the United States' motion for summary judgment, dismissing the complaint for lack of subject matter jurisdiction. This Court has jurisdiction over the State of Progress's (Progress) and New Union's appeals of the district court's final decision pursuant to 28 U.S.C. § 1291 (2006).

STATEMENT OF THE ISSUES

I. Whether New Union has alleged sufficiently concrete and imminent injury to its sovereign interests to merit Article III standing, and, alternatively, whether New Union can maintain suit against the United States as *parens patriae* based solely on allegations of potential harm to a single New Union citizen.

II. Whether the COE has jurisdiction over Lake Temp as a "water of the United States," because it qualifies as a water that has been used in the past or is susceptible to future use in interstate commerce, or as an intrastate lake that can be used by interstate travelers for recreational or commercial purposes.

III. Whether the COE's authority to issue a § 404 permit for the discharge of spent munitions slurry, pursuant to the dredge and fill provision of the CWA, is displaced by EPA's authority to issue a § 402 permit for the discharge of pollutants generally.

IV. Whether the OMB's involvement in the COE's decision to issue a § 404 permit and EPA's subsequent decision not to veto that permit violates the CWA, and whether either the OMB's or EPA's actions are subject to judicial review.

STATEMENT OF THE CASE

Pursuant to its statutory authority under § 404 of the Clean Water Act (CWA), 33 U.S.C. § 1344 (2006), the Secretary of the Army, acting through the U.S. Army Corps of Engineers (COE), issued a permit to the Department of Defense (DOD) to discharge a slurry of spent munitions into Lake Temp.[1] Dist Ct. Op. at 3. Prior to the issuance of the § 404 permit, the COE and the U.S. Environmental Protection Agency (EPA) consulted with the Office of Management and Budget (OMB) to determine which agency had jurisdiction to issue a permit for the discharge. A27. Based on COE and EPA briefs, and a subsequent meeting between the parties, the OMB determined that jurisdiction over the proposed discharge was proper under § 404 rather than § 402. Dist. Ct. Op. at 9 n.1.

New Union challenged the COE's authority to issue the § 404 permit, contending that the proposed discharge into Lake Temp is subject to the authority of the EPA pursuant to § 402 of the CWA, 33 U.S.C. § 1342 (2006), and that the COE's § 404 permit is invalid. Dist. Ct. Op. at 3. New Union also asserts the OMB's involvement in the permit issuance violated the CWA. *Id.* at 1. Progress successfully intervened pursuant to Fed. R. Civ. P. 24, contending Lake Temp is not within the jurisdiction of the CWA. *Id.* at 2–3. Progress otherwise joined the United States' motion for summary judgment, arguing that New Union lacked standing to bring suit, the COE had jurisdiction under § 404 of the CWA, and that the OMB's participation in the permitting

[1] References to the district court opinion are abbreviated as "Dist. Ct. Op. at __." References to official questions and answers are abbreviated as "A__."

process was valid. *Id*. at 2.

On June 2, 2011, the district court rendered its decision on cross-motions for summary judgment filed by the United States, New Union, and Progress. *Id*. at 5. The district court granted summary judgment to the United States, holding that New Union lacked Article III standing, the COE had jurisdiction under § 404 because Lake Temp is a navigable water and the slurry discharge is "fill material," and the OMB's participation was within the bounds of the CWA. *Id*. at 10–11. Both New Union and Progress filed appeals with the United States Court of Appeals for the Twelfth Circuit. *Id*. at 1.

STATEMENT OF FACTS

The COE granted the DOD an individual permit pursuant to § 404 of the CWA to discharge a slurry of decommissioned munitions onto the dry bed of Lake Temp. *Id.* at 4. The DOD proposes to build a facility on the shore of Lake Temp where it will receive and prepare a variety of spent munitions. *Id.* Pursuant to its § 404 permit, the DOD will empty the munitions and apply chemicals to the contents to ensure they are not explosive. *Id.* Any solids will be ground and pulverized, and water will be added to form a slurry that will be sprayed from a pipe onto the dry lakebed of Lake Temp. *Id.* The result will be to raise the lakebed several feet. *Id.*

Lake Temp is three miles wide, nine miles long, and completely isolated from other water bodies. *Id.* at 3–4. The lake varies in size during the dry season, and approximately one out five years is wholly dry. *Id*. at 4. Lake Temp has been utilized for more than 100 years by at least hundreds, if not thousands of duck hunters in rowboats and canoes. *Id*. Approximately one quarter of those hunters travel from out of state in order to hunt birds during their migration from the Arctic. *Id*. A public highway is approximately 100 feet from the shoreline and the DOD has not barred

entry to the lake. *Id*. Between the road and the shore there are clearly visible trails that show signs of rowboats and canoes being dragged between the highway and the lake. *Id*.

The Imhoff Aquifer lies almost a thousand feet below Lake Temp. *Id*. Though somewhat larger in area than the lake's greatest extent, the aquifer generally follows the lake's contours. *Id*. Approximately 95 percent of the aquifer lies in the State of Progress, with the remainder extending into New Union. *Id*. The record reveals minimal additional information regarding the hydrogeology of the Aquifer. In particular, nothing is known about the permeability of the lakebed or underlying alluvial sediments, the top and bottom elevations of the aquifer, or the rate or direction of groundwater flow within the aquifer. *Id.* at 6. It is known, however, that due to naturally occurring sulfur contamination, the groundwater in the Imhoff Aquifer is not potable or useable for agricultural irrigation without treatment. *Id*. at 4, 6. While New Union has a mandatory permitting system for groundwater withdrawals, *id*. at 6, it has never issued a withdrawal permit for the Imhoff Aquifer. *Id.* at 7. There is no indication that groundwater from the aquifer is used by Progress.

The Administrator of the EPA solicited the OMB to determine whether the DOD's proposed discharge required a § 402 or § 404 permit. *Id.* at 10. The OMB resolved a dispute between EPA and the COE regarding the permit, pursuant to its authority granted under Executive Order 12,088. 43 Fed. Reg. 47,707 (Oct. 17, 1978) [hereinafter E.O. 12,088]. New Union concedes that EPA made no decision to veto the § 404 permit. Dist. Ct. Op. at 10. Finally, the COE fully complied with requirements set forth in the regulations implementing § 404 when it issued the DOD's permit. A46.

SUMMARY OF THE ARGUMENT

New Union challenges the lawfully issued § 404 permit granted by the COE to the DOD, authorizing the discharge of slurry into Lake Temp. New Union does not challenge the COE's

adherence to the § 404(b) guidelines in the permit issuance process. Rather, New Union contends that a § 402 permit is required for the proposed discharge.

New Union faces its own jurisdictional complications because it lacks Article III standing to challenge the issuance of the permit in either its sovereign capacity or on behalf of its citizens as *parens patriae*. Since Lake Temp is located wholly within the State of Progress, New Union has no interest in the lake itself. Instead, New Union argues that the potential contamination of the Imhoff Aquifer is sufficient to provide it with a concrete interest that merits standing. However, in the absence of an interstate compact or equitable apportionment of the Imhoff Aquifer, New Union does not own the groundwater resources. Moreover, the aquifer is already naturally contaminated and cannot be used for potable or agricultural uses without treatment. Therefore New Union's conjectural assertion of potential contamination of the aquifer does not establish a concrete injury. New Union's claim of *parens patriae* standing also fails for several reasons. States cannot sue the federal government in this capacity. In addition, New Union does not allege injury to a distinct, quasi-sovereign interest, or harm to the general population of the state, as required for *parens patriae* standing. Instead, New Union merely brings suit in the place of a single landowner, not as a true *parens patriae*.

The COE properly exercised jurisdiction over the proposed discharge under § 404 of the CWA because Lake Temp is a navigable water, and the munitions slurry is properly characterized as "fill material." With regard to navigability, the historic use of Lake Temp in interstate commerce by "hundreds, perhaps thousands" of hunters over the past 100 years establishes jurisdiction based on traditional Supreme Court jurisprudence and the CWA. Dist. Ct. Op. at 4. Only by engrafting limitations into the legally adopted and binding agency regulations can jurisdiction over Lake Temp be denied. The past use of Lake Temp, coupled

with the lake's susceptibility to use in interstate commerce and status as a navigable-in-fact intrastate lake, thoroughly demonstrates navigability under the CWA. Not only is Lake Temp a jurisdictional water, but the COE is the proper agency to issue a permit for the DOD's proposed discharge because § 404 of the CWA applies to "fill material," including the munitions slurry.

New Union's attempts a collateral attack on EPA's decision not to veto the COE-issued permit by erroneously challenging the OMB's role in resolving inter-agency conflicts under procedures established by E.O. 12,088. This issue, however, is not subject to judicial review. First, since management of the Executive Branch is constitutionally committed to the President, the OMB's role in resolving this internal executive branch dispute is a non-justiciable political question. Moreover, the OMB categorically lacks the ability to undermine the EPA Administrator's primacy in interpreting and enforcing the CWA. For these reasons, this court should dismiss New Union's challenge for lack of standing. If the court considers the merits of the case, it should defer to the COE's decision to permit the proposed discharge under § 404 and decline to consider issues related to procedures within the executive branch.

ARGUMENT

I. NEW UNION LACKS ARTICLE III STANDING TO PURSUE ITS CWA CLAIMS AGAINST THE UNITED STATES.

The case or controversy requirement of Article III of the Constitution underpins the Supreme Court's standing jurisprudence. *See Friends of the Earth, Inc. v. Laidlaw Envtl. Svcs. (TOC), Inc.*, 528 U.S. 167, 180 (2000). The essential standing question is whether New Union has a sufficient "personal stake in the outcome of the controversy," *Baker v. Carr*, 369 U.S. 186, 204 (1962) (*quoted in Sierra Club v. Morton*, 405 U.S. 727, 732 (1972), as to place the dispute "in an adversary context and in a form historically viewed as capable of judicial resolution."

Flast v. Cohen, 392 U.S. 83, 95 (1968). To meet the standing requirements under Article III, a plaintiff to show "(1) it has suffered an 'injury in fact' that is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical; (2) the injury is fairly traceable to the challenged action of the defendant; and (3) it is likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision." *Laidlaw*, 528 U.S. at 180–81 (quoting *Lujan v. Defenders of Wildlife (Defenders)*, 504 U.S. 555, 560–561 (1992)). As the plaintiff, New Union has the burden to show standing. *Id.* at 561.

New Union lacks the required personal stake to establish standing. First, New Union fails to establish a legally protected interest in the aquifer, a concrete injury to its sovereign interests, or a sufficiently imminent injury under Article III. Hence New Union lacks standing in its sovereign capacity. Second, New Union does not have authority to sue the federal government as *parens patriae* based on the potential harm to individual citizens who may be injured by the aquifer contamination.

A. The Supreme Court's reasoning in *Massachusetts v. EPA* did not alter the "irreducible constitutional minimum of standing" as defined by *Defenders*.

New Union argues that it should be given "special solicitude" based on its identity as a state in the court's standing analysis pursuant to the Supreme Court's decision in *Massachusetts v. EPA*, 549 U.S. 497, 520 (2007). This argument, however, misreads the holding of that case. In *Massachusetts*, the state was among several plaintiffs who challenged EPA's refusal to promulgate rules regulating carbon dioxide emissions from automobiles. The Supreme Court noted in dicta that it was "of considerable relevance that the party seeking review here is a sovereign State and not . . . a private individual," *id*. at 518, but the Court did not alter the "irreducible constitutional minimum of standing." *Defenders*, 504 U.S. at 560–61 (setting forth the three-part test). On the contrary, the Court ultimately found standing for Massachusetts

based upon the actual, particularized injury to the state's significant coastal property holdings being threatened by rising sea levels.[2] *Massachusetts*, 549 U.S. at 522 ("Because the Commonwealth owns a substantial portion of the state's coastal property, it has alleged a particularized injury in its capacity as a landowner."). Thus, New Union's status as a state does not alter the required showing for Article III.

B. New Union lacks the irreducible minimum required for Article III standing to bring suit in its sovereign capacity.

An injury-in-fact is "an invasion of a legally protected interest which is [ ] concrete and particularized" and "actual or imminent, not 'conjectural' or 'hypothetical.'" *Defenders*, 504 U.S. at 560. New Union has not alleged sufficient injury-in-fact to its sovereign interests to merit standing. First, New Union has not shown that it has a legally protected interest in the Imhoff Aquifer. Second, any potential injury to New Union would be abstract, not concrete. Third, any potential injury to New Union is conjectural, not imminent or certain.

1. New Union fails to establish a legally protected interest in the Imhoff Aquifer.

To establish an injury-in-fact, a plaintiff must first allege a "cognizable interest" worthy of protection. *Morton*, 405 U.S. at 734 (recognizing economic, aesthetic, and environmental well-being as cognizable interests). New Union argues that, as owner and regulator of the groundwater in the state, it has a sovereign interest in the Imhoff Aquifer that will be injured by the proposed discharge. But ownership of trans-boundary water resources, like the Imhoff Aquifer, is determined by interstate compact or equitable apportionment, not state boundaries.[3]

---

[2] To the extent that the Supreme Court afforded Massachusetts "special solicitude," this was also based on specific procedural rights established by the Clean Air Act. *Massachusetts*, 549 U.S. at 520. The Court explained that where Congress has defined a procedural right, a litigant need not meet the "normal standards for redressability and immediacy." *See Defenders*, 504 U.S. at 572 n.7.

[3] *Hinderlider v. La Plata River & Cherry Creek Ditch Co.*, 304 U.S. 92, 102 (1938); *see also Colorado v. New Mexico*, 459 U.S. 176, 183 (1982) ("Equitable apportionment is the doctrine of

The Supreme Court has indicated that the doctrine of equitable apportionment governs interstate groundwater resources. *See Mississippi v. City of Memphis, Tenn., Memphis Light, Gas & Water Div.*, 130 S. Ct. 1317 (2010) (citing *Virginia v. Maryland,* 540 U.S. 56, 74 n.9 (2003); *Colorado v. New Mexico,* 459 U.S. at 187 n.13 (1982)) (denying leave to file an original bill of complaint in a groundwater dispute based on equitable apportionment jurisprudence). Equitable apportionment of the aquifer is not within the jurisdiction of this court,[4] and there is no evidence of an interstate compact in the record. Thus, the fact that New Union's state boundaries extend over a portion of the Imhoff Aquifer is insufficient to afford New Union legal ownership in the groundwater. *See Hood ex rel. Mississippi v. City of Memphis*, 570 F.3d 625, 629–30 (5th Cir. 2009) (holding that ownership of the groundwater resources of an interstate aquifer could not be determined in the absence of an equitable apportionment or inter-state compact). Since New Union cannot establish ownership over any portion of the Imhoff Aquifer, its sovereign interests are not threatened by the DOD's munitions decommissioning activities.

2. New Union's abstract concern for the Imhoff Acquifer falls short of a concrete injury to its sovereign interests.

Even assuming *arguendo* that New Union's questionable ownership of the Imhoff Aquifer groundwater is a legitimate sovereign interest, and that the groundwater in the New Union portion of the Imhoff Aquifer will actually be contaminated by the permitted discharge, New Union still cannot show concrete injury to these interests. The requirement for a concrete injury assures "an actual, as opposed to professed, stake in the outcome," thereby satisfying Article III's "case or controversy" requirement. *Defenders*, 504 U.S. at 581 (Kennedy, J.,

---

federal common law that governs disputes between the States concerning" interstate water resources).

[4] 28 U.S.C. § 1251(a) (2006) ("The Supreme Court shall have original and *exclusive* jurisdiction of all controversies between two or more states.") (emphasis added).

concurring). Since New Union neither uses nor regulates the aquifer, and has no concrete plans to do so, any injury to these theoretical interests is in the abstract.

In *Laidlaw,* the plaintiffs alleged that the defendant's discharges in violation of its permit limits caused them legal injury despite no evidence of actual harm to the aquatic environment. 528 U.S. at 183–84. This was because "[t]he relevant showing for purposes of Article III standing . . . is not injury to the environment but injury to the plaintiff." *Id*. at 181. The Supreme Court found standing based on the plaintiffs' "reasonable concerns about the effects of those discharges [which] directly affected [their] recreational, aesthetic, and economic interests." *Id*. at 183–84. In contrast, New Union lacks a concrete interest because none of its citizens use the Imhoff Aquifer; hence any concern is unreasonable. *Compare Pollock v. U.S. Dep't of Justice,* 577 F.3d 736, 742 (7th Cir. 2009) (denying standing under *Laidlaw* because the individual did not use the areas potentially affected by pollution) *with Friends of the Earth, Inc. v. Gaston Copper Recycling Corp*., 204 F.3d 149, 155–61 (4th Cir. 2000) (affirming standing based on a concrete impairment of the landowner's recreational and aesthetic use of the lake). Mere knowledge that pollution is present in a body of water is not a concrete injury. *Pub. Interest Research Grp. of N.J., Inc. v. Magnesium Elektron, Inc.*, 123 F.3d 111, 120 (3d Cir. 1997).

3. New Union fails to allege an imminent injury because pollution to the Imhoff Aquifer is probabilistic at best.

New Union's injury must be "actual or imminent, not conjectural or hypothetical." *Defenders*, 504 U.S. at 560. The purpose of the imminence requirement "is to ensure that the alleged injury is not too speculative for Article III purposes—that the injury is '*certainly* impending.'" *Id.* at 564 n.2 (quoting *Whitmore v. Arkansas*, 495 U.S. 149, 155 (1990)). New Union does not allege actual harm has yet occurred, but avers potential contamination of the Imhoff Aquifer based solely on the circumstantial link between the general contours of the

aquifer and the above-ground lake. This is insufficient without hydrogeologic data or evidence that pollutants discharged on the lakebed could pose an imminent threat to the aquifer.

First, the record lacks any hydrogeologic data to support New Union's assumption that the lake contributes water to the aquifer.[5] Second, New Union makes no showing of the solubility of the contaminants in question. As the Southern District of New York recognized, "[i]f a material is not soluble, it cannot get into the ground water [and] migrate . . . ." *City of New York v. Exxon Corp.*, 744 F. Supp. 474, 488 (S.D.N.Y. 1990) *adhered to on reconsideration*, 766 F. Supp. 177 (S.D.N.Y. 1991). Third, given the 1000 feet of sediments between the lakebed and the top of the aquifer, any dissolved contaminants may filter out through natural physical, chemical or biological processes before reaching the aquifer. Finally, due to natural contamination, the aquifer is already unfit for use without treatment.[6] Dist. Ct. Op. at 6. Thus, New Union's claim of standing fails because there is no certainty that *any* injury will *ever* occur.

C. New Union lacks a distinguishable interest that affects a substantial segment of its population, making standing as *parens patriae* inappropriate.

While states traditionally have standing as *parens patriae* to litigate on behalf of the health and well-being of their citizens, *Missouri v. Illinois*, 180 U.S. 208, 241 (1901), the specific facts in this case do not support New Union's standing as *parens patriae*. To establish *parens patriae* standing, "[a] state: (1) 'must articulate an interest apart from the interests of particular private parties, *i.e.*, the State must be more than a nominal party'; (2) 'must express a quasi-

[5] While New Union argues that the DOD will not grant access to the military reservation to install monitoring wells needed to collect additional hydrogeologic data, New Union has never filed an application with the DOD to permit the installation of such wells. Dist. Ct. Op. at 6.

[6] New Union is unable to evidence any increased risk of contamination of the aquifer because the aquifer is already contaminated. Dist. Ct. Op. at 6. *See Mtn. States Legal Found. v. Glickman*, 92 F.3d 1228, 1234 (D.C. Cir. 1996) (describing "the customary rejection of 'speculative' causal links" as not "ruling out all probabilistic injuries" and holding an incremental increase in risk of wildfire was sufficient for injury).

sovereign interest'; and (3) must have 'alleged injury to a sufficiently substantial segment of its population.'" *Connecticut v. Am. Elec. Power Co., Inc.*, 582 F.3d 309, 335–336 (2d Cir. 2009) (overruled on other grounds) (quoting *Alfred L. Snapp & Son, Inc. v. Puerto Rico, ex rel., Barez (Snapp)*, 458 U.S. 592, 607 (1982)). Further, Supreme Court precedent is clear that states cannot sue the federal government as *parens patriae*. Even if the parties were proper, New Union's interest in the Imhoff Aquifer is indistinguishable from the interests of private landowners and any potential contamination of the Imhoff Aquifer threatens only a small, identifiable population. Finally, problems of concreteness and imminence similarly preclude the state's assertion of *parens patriae* standing, as they did in the state's sovereign interest claim.

1. States cannot sue *parens patriae* against the federal government.

New Union does not have authority to sue the federal government on behalf of its citizens. The Supreme Court has held that states have no duty or power to enforce their citizens' "rights in respect of their relations with the federal government." *Massachusetts v. Mellon*, 262 U.S. 447, 485–86 (1923). Instead, it is "the United States, and not the state, which represents them as *parens patriae*." *Id.* at 486. The overwhelming weight of precedent since *Mellon* supports the conclusion that states are generally precluded from suing the federal government as *parens patriae*.[7] *See Snapp*, 458 U.S. at 610 n.16; *Michigan v. U.S. Envtl. Prot. Agency*, 581 F.3d 524, 529 (7th Cir. 2009); *Iowa v. Block*, 771 F.2d 347, 355 (8th Cir. 1985) (denying *parens patriae* standing because this "would intrude on the sovereignty of the federal government and

[7] *Massachusetts v. EPA* does not change this presumption because that case did not involve *parens patriae* litigation, but a direct suit on behalf of the State, alleging injury to its sovereign and proprietary interests. 549 U.S. at 522. Distinguishing that case from *Mellon*, the Court noted that Massachusetts did not dispute the application of the Clean Air Act to its citizens, but instead sought "to assert *its* rights under the Act." *Id*. at 520 n. 17 (emphasis added). Thus, the Court acknowledged that Massachusetts was not suing on behalf of its citizens, but to protect its own sovereign and proprietary interests.

ignore important considerations of our federalist system").

2. New Union fails to establish the necessary elements to bring suit as *parens patriae*.

New Union must establish a distinct interest for which "individuals could not obtain complete relief through a private suit." *People by Abrams v. 11 Cornwell Co.*, 695 F.2d 34, 40 (2d Cir. 1982) (overruled on other grounds). Since Dale Bompers could file a citizen suit under the APA to challenge the permit in question, potential redress for any injuries exists independent of the *parens patriae* doctrine. The infirmity in New Union's attempt to establish a distinct interest is two-fold. First, by grounding its claim on a potential harm to Dale Bompers, New Union is not alleging a distinct claim over a state right. Second, the only injury New Union could claim is with regard to its groundwater interests, which have not been sufficiently established as discussed in Section B.

Parens patriae litigation is reserved for situations where the general populace of a state is affected by the challenged action. *Snapp*, 458 U.S. at 607 (explaining "more must be alleged than injury to an identifiable group of individual residents"). Where the general populace is affected, the state has an overarching quasi-sovereign interest that supersedes the affected individuals. In this case, only a small portion of the Imhoff Aquifer underlies New Union, and the record only indicates a single potentially affected landowner with property overlying the New Union portion of the aquifer, Dale Bompers. Dist. Ct. Op. at 6. Thus, New Union has not alleged the type of widespread harm for which *parens patriae* litigation is properly reserved. Instead, the state is simply a nominal party seeking to assert the interests of a single citizen.

II. THE DOD'S PROPOSED DISCHARGES INTO LAKE TEMP ARE SUBJECT TO FEDERAL JURISDICTION UNDER THE CWA.

The CWA was enacted to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a) (2006); CWA § 101(a). To reach this

goal the CWA explicitly prohibits the "discharge of any pollutant by any person," "[e]xcept as in compliance" with a permit issued under §§ 402 or 404. 33 U.S.C. § 1311(a) (2006); CWA § 301(a). The Act further defines "discharge of a pollutant" as "any addition of any pollutant to navigable waters." *Id.* § 1362(12) (2006); CWA § 502(12). Because the DOD plans to discharge munitions slurry, fill material, from a point source into Lake Temp, a navigable water, DOD properly sought a § 404 permit from the COE.

A. Lake Temp is subject to CWA jurisdiction because it is a navigable water.

The CWA establishes a broad definition of "navigable waters" as "the waters of the United States, including territorial seas." 33 U.S.C. § 1362(7) (2006); CWA § 502(7). The Supreme Court categorized this as a decision by Congress to "define the waters covered by the Act broadly," in order to meet the "systemic . . . goal of maintaining and improving water quality." *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 133 (1985). To effectuate this goal, Congress authorized EPA and the COE to promulgate regulations. *See* 33 U.S.C. § 1361(a) (2006); CWA § 501(a) (authorizing EPA to "prescribe such regulations as are necessary to carry out his functions under this chapter"); *see also San Francisco Baykeeper v. Cargill Salt Div.*, 481 F.3d 700, 704 (9th Cir. 2007) (explaining that "[b]y not further defining [navigable waters,] Congress implicitly delegated . . . authority to the EPA and the Corps").

While the broad definition of "navigable waters" under § 502(7) of the CWA establishes a starting point for the agencies, the lack of specificity and manageable standards serve as an implicit delegation of authority. *Id.* at 704. The EPA's and the COE's definitions of "navigable waters" are nearly identical, and deserve strong deference under the *Chevron* doctrine. *See* 40 C.F.R. § 122.2 (2010) (EPA definition); 33 C.F.R. § 328.3 (2010) (COE definition); *Chevron U.S.A., Inc. v. Natural Res. Def. Counsel, Inc.*, 467 U.S. 837, 843–44 (1984) (finding that where

Congress explicitly leaves a gap in a statute, there is an express delegation of authority to the agency to "elucidate a specific provision of the statute by regulation"); *United States v. Mead Corp*., 533 U.S. 218, 229 (2001) ("express congressional authorizations" from "notice-and-comment rulemaking or formal adjudication" are afforded *Chevron* deference). Because the agencies' regulatory definitions are not "procedurally defective, arbitrary or capricious in substance, or manifestly contrary to the statute," they are binding as a matter of law. *Mead Corp.*, 533 U.S. at 227.

The EPA and the COE have sought to further define the scope and meaning of their regulations in the *Draft Guidance on Identifying Waters Protected by the Clean Water Act* (April 2011), *available at* http://www.epa.gov/indian/pdf/wous_guidance_4-2011.pdf [hereinafter *Draft Guidance*]. The *Draft Guidance*'s interpretation of these regulations should be upheld because it is not "plainly erroneous." *Auer v. Robbins*, 519 U.S. 452, 461 (1997) (explaining that an agency's "interpretation of its own regulations" is reviewed by the court "highly deferential[ly]" and is "controlling unless plainly erroneous or inconsistent with the regulation"); *see also Kentuckians for the Commonwealth, Inc. v. Rivenburgh*, 317 F.3d 425, 439 (4th Cir. 2003) (courts reviewing an agency's interpretation of its own regulation do "not have much leeway" to invalidate the rule). Lake Temp was properly categorized as a navigable water under the agencies' formally adopted regulations and their interpretation of those regulations.

Lake Temp falls squarely within the EPA and the COE's exclusive list of jurisdictional waters, making Lake Temp subject to the CWA. First, it is a water that has been "used in the past" and is "susceptible to use in interstate commerce." 40 C.F.R § 122.2(a); 33 C.F.R. § 328.3(a)(1). Second, Lake Temp also qualifies as a navigable water because it is an "intrastate lake" which is and can be "used by interstate and foreign travelers for recreational purposes." 40

C.F.R. § 122.2(c)(1); 33 C.F.R. § 328.3(a)(3). Thus, this court should uphold the COE's jurisdictional determination.

1. Lake Temp has been "used in the past, or may be susceptible to use in interstate or foreign commerce."

The COE correctly determined that Lake Temp "has been part of the highway of interstate commerce for interstate hunters" and that the lake qualifies as a navigable water both because of past use of the lake and its susceptibility to future use in interstate commerce. Dist. Ct. Op. at 7; 40 C.F.R. § 122.2(a); 33 C.F.R. § 328.3(a)(1). The Supreme Court, in the seminal case *The Daniel Ball*, established the traditional basis for determining navigability. 77 U.S. (1 Wall.) 557, 563 (1870) (noting waters "are navigable in fact when they are used, or are susceptible of being used . . . as highways for commerce").

a. Past navigation of Lake Temp by interstate hunters demonstrates it has been used in interstate commerce.

The past hunting activities on Lake Temp by interstate travelers demonstrate Lake Temp has been used as a highway for commerce. In *Alaska v. Ahtna, Inc.*, the Ninth Circuit held that the use of an Alaskan river for commercial recreational boating was sufficient to evidence the water's capacity to carry waterborne commerce and was thus navigable in fact. 891 F.2d 1401, 1403 (9th Cir. 1989). The court reasoned that the past use, including 16 to 24-foot fiberglass and aluminum watercraft commonly used by hunters, demonstrated that the river in question had the capacity to support navigation. *Id*. at 1405. Lake Temp, at nine miles long and three miles wide, is large enough to support watercraft commonly used by hunters just as the body of water in *Ahtna*. Dist. Ct. Op. at 4. The district court relied on the use of Lake Temp by "perhaps thousands of duck hunters … for the last 100 years . . . about a quarter of which were from out of state." *Id*. Further, there are "clearly visible trails leading from the road to the lake" that show

signs of "rowboats and canoes being dragged." *Id*. These clearly visible trails evidence that boats have and continue to navigate Lake Temp.

While at times the lake is not navigable because it is "wholly dry approximately one out of five years," the seasonal variations in water level should not impact this court's navigability determination. The Supreme Court explained that navigability may exist irrespective of "occasional natural obstructions or portages" or seasonal interruptions in use. *Econ. Light & Power Co. v. United States*, 256 US. 113, 121–22 (1921) (noting navigability does not require "the navigation be open at all seasons of the year, or at all stages of the water"); *United States v. Moses*, 496 F.3d 984, 988–89 (9th Cir. 2007) (concluding that although portions of a creek were intermittently dry, this was insufficient in isolation to counter the determination that the creek was navigable). Furthermore, the lake's presence within the military reservation after 1952 has no bearing on the validity of the district court's navigability determination. *See Johnson v. Wurthman*, 227 F. Supp. 135, 137 (D. Or. 1964) (explaining that it is of "no importance that the United States owned the land surrounding the lake … in deciding whether the lake should be considered" navigable under the Commerce Clause). The use of Lake Temp by interstate hunters over the past 100 years shows that the waterway is navigable as defined by traditional Supreme Court jurisprudence and the relevant CWA regulations.

b. Lake Temp is also susceptible to future use in interstate commerce.

Lake Temp's physical characteristics and past use support a finding that it is susceptible to future use and provide an independent basis to determine the lake is jurisdictional under the CWA. 40 C.F.R. § 122.2(a); 33 C.F.R. § 328.3(a)(1). Boats and canoes used by interstate hunters provide valid evidence of a body of water's susceptibility to interstate commerce. In *The Montello*, the Supreme Court clarified that navigability determinations are not dependent on "the

mode by which commerce is … conducted." 87 U.S. (1 Wall.) 430, 442 (1874); *see also FPL Energy Maine Hydro L.L.C. v. FERC*, 287 F.3d 1151, 1157 (D.C. Cir. 2002) (upholding a navigability determination based on three experimental canoe trips). Under the *Draft Guidance*, a water is susceptible to use in interstate commerce if it can be used for "commercial navigation, including commercial waterborne recreation." *Draft Guidance* at 6. The "likelihood of future commercial navigation, including commercial waterborne recreation" may be evidenced by "current boating or canoe trips for recreation or other purposes." *Id*. This court should afford *Auer* deference to the agencies' interpretation of their regulation. 519 U.S. at 461. As a matter of law, the existence of recreational boating and canoe trips on a water body is sufficient proof of navigability. Lake Temp, located 100 feet from a publicly accessible road, has been consistnely navigated by interstate hunters in rowboats and canoes for the past 100 years. Dist. Ct. Op. at 4. This is sufficient to establish navigability.

2. Lake Temp is an intrastate lake that is being used and can be used by interstate or foreign travelers for recreational or commercial purposes.

An intrastate lake is jurisdictional under the CWA if it is used by interstate or foreign travelers for recreational or other purposes. 40 C.F.R. § 122.2(c); 33 C.F.R. § 328.3(a)(3). Lake Temp falls within the regulations because the lake is presently used by interstate travelers for recreational purposes. The applicability of the regulations is not affected by the Supreme Court's decision in *Solid Waste Agency of Northern Cook County v. United States Army Corps of Engineers (SWANCC)*, 531 U.S. 159 (2001), which only invalidated jurisdictional determinations based on the Migratory Bird Rule. The Supreme Court's ruling in *Rapanos v. United States*, 547 U.S. 714, 738 (2006) (plurality opinion), likewise does not affect this analysis because it was limited to jurisdictional decisions regarding nonadjacent wetlands, not navigable-in-fact waters.

a. The use of Lake Temp by interstate hunters provides a sufficient basis for federal regulation.

It is well documented that Lake Temp is used recreationally by interstate duck hunters, Dist. Ct. Op. at 4, and thus under the plain meaning of the regulation, Lake Temp is jurisdictional. A waterway that is entirely within the boundaries of single state is not subject to a different standard for determining navigability. *United States v. Holt State Bank*, 270 U.S. 49, 56 (1926). In *Holt State Bank*, the Supreme Court found that a wholly intrastate lake was navigable despite the fact that navigation, trade, and travel in the area were limited. *Id*. at 57. The lake was navigable notwithstanding difficulties in travel and limited evidence of use on the lake. *Id*. Although Progress contends intermittent bodies of water are not navigable, that contention has no basis in law and directly conflicts with the agencies' properly enacted regulations. Dist. Ct. Op. at 7. A court may not upset regulations properly enacted through formal notice-and-comment unless they are unreasonable. *Chevron*, 467 U.S. at 843–44. Furthermore, the consistent use of Lake Temp by interstate hunters is the essential factor for navigability, regardless of variations in the lake's water level or permanency. *See Wilbur v. Gallagher*, 462 P.2d 232, 233, 238 (Wash. 1969) (noting that Lake Chelan's navigability is not impacted by fluctuations in water level).

b. The Supreme Court's decision in *SWANCC* is distinguishable and improperly applied to the facts at bar.

Progress's contention that the Supreme Court's decision in *SWANCC* is controlling extends the Court's holding and improperly interprets the agencies' regulations on navigability. In *SWANCC*, the Court held that isolated gravel pits were not within the CWA's definition of "navigable waters" because they were "neither navigable-in-fact" nor adjacent to open waters. 531 U.S. at 168. The actual holding from *SWANCC* is limited solely to invalidating the "Migratory Bird Rule" under 33 C.F.R. § 328.3(a). Final Rule for Regulatory Programs of the

Corps of Engineers, 51 Fed. Reg. 41,206, 41,217 (Nov. 13, 1986); *Headwaters, Inc. v. Talent Irrigation Dist*., 243 F.3d 526, 533 (9th Cir. 2001) (citing *SWANCC* for the proposition that jurisdiction cannot be based on the patterns of migratory birds, but not upsetting jurisdictional determinations for lakes and intermittent streams). After the *SWANCC* decision, intrastate lakes, such as Lake Temp, cannot be subject to jurisdiction based solely on the migratory patterns of birds. *Draft Guidance* at 20 (finding the *SWANCC* "decision … addressed *only* the presence of migratory birds as a basis for asserting jurisdiction" (emphasis added)). However, jurisdiction in this case is not asserted based upon the mere presence of waterfowl, but rather upon the demonstrated use of Lake Temp by interstate hunters.

Likewise, in *Colvin v. United States*, the plaintiff was alleged to have illegally discharged pollutants into the Salton Sea without a permit under the Clean Water Act. 181 F. Supp. 2d 1050, 1055 (C.D. Cal. 2001). The Salton Sea, an intrastate lake, was a popular destination for out-of-state tourists who "ski, fish, [and] *hunt ducks*." *Id*. at 1055, n.6 (emphasis added). The court in *Colvin* ultimately held the intrastate was navigable. *Id*. Similarly, the court in *Idaho Rural Council v. Bosma* rejected the *SWANCC* decision as controlling the jurisdiction over an intrastate lake. 143 F. Supp. 2d 1169, 1178 (D. Idaho 2001) (clarifying that the Supreme Court was "unwilling[] to read the term 'navigable' entirely out of the CWA"). The holding of *SWANCC* was simply that the COE's reliance on the Migratory Bird Rule was not reasonable. *SWANCC*, 531 U.S. at 161; *United States v. Buday*, 138 F. Supp. 2d 1282, 1288 (D. Mont. 2001) (noting that after *SWANCC* federal courts still have jurisdiction over traditional navigable waters, interstate waters, and navigable-in-fact waters).

/// /// ///

c. The Supreme Court's holding in *Rapanos* is limited to the EPA's jurisdiction over nonadjacent wetlands under the CWA.

In *Rapanos*, the Supreme Court addressed whether an isolated (nonadjacent) wetland could properly be considered a navigable water under the CWA. 547 U.S. at 738. Progress attempts to expand the meaning of *Rapanos* to bar jurisdiction over "intermittent bodies of water." Dist. Ct. Op. at 7. The language selectively quoted by Progress is taken out of context. The plurality opinion merely sought to limit jurisdiction over "transitory puddles or ephemeral flows of water," within which "intermittent channels" would qualify. *Rapanos*, 547 U.S. at 738. This dicta regarding "intermittent channels" has no bearing on the jurisdiction over intrastate lakes. *Id*. at 733. The inapplicability of *Rapanos* is buttressed by the fact that the plurality conceded a jurisdictional water need not be entirely permanent by qualifying the word permanent with "*relatively*." *Id*. at 738 (emphasis added). Where the "intermittent" language may be saliently applied is only with regard to an adjacency analysis for a non-navigable wetland, not a navigable-in-fact intrastate lake. Lake Temp is not an insubstantial pond; it is a large, *relatively* permanent lake that has been frequented by interstate hunters for the past 100 years. Dist. Ct. Op. at 3–4, 7. The analysis from *Rapanos* is off point and should bear no weight in this case.

B. The COE properly determined the discharges of munitions slurry are governed by § 404 rather than § 402 of the CWA.

The second issue regarding this court's subject matter jurisdiction under the CWA is whether the DOD's proposed discharge of spent munitions slurry should be subject to § 404 rather than § 402 of the CWA. Although discharges of pollutants are generally subject to § 402 under EPA's authority, § 404(a) governs specific pollutants further identified as "dredged or fill material." 33 U.S.C. § 1344(a). The text and context of the CWA clarify that the COE is the proper authority to determine which discharges are subject to § 404. Because the CWA does not define the term "fill material," this court should defer to the COE and EPA's joint regulatory

definition that reasonably defines "fill material" to include waste. *See Chevron*, 467 U.S. at 843–44 (deferring to an authorized agency's permissible construction of a silent or ambiguous statute). Finally, because the DOD's munitions slurry fits the agencies' regulatory definition, it is properly subject to § 404.

1. The COE is authorized to determine whether the DOD's discharges are subject § 404 and not § 402 of the CWA.

The text and structure of the CWA make clear that the COE properly determined the proposed discharge is subject to § 404 rather than § 402. *See Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Found., Inc.*, 484 U.S. 49, 56 (1987) ("It is well settled that 'the starting point for interpreting a statute is the language of the statute itself'") (quoting *Consumer Prod. Safety Comm'n v. GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980)). EPA has the power to "issue a permit for the discharge of any pollutant," "*[e]xcept as provided in sections [318 and 404]*." 33 U.S.C. § 1342(a) (emphasis added). Under § 404(a) of the CWA, the COE has the power to "issue permits . . . for the discharge of . . . fill material." 33 U.S.C. § 1344(a). The express terms of §§ 402 and 404 make clear that the relevant question is whether the material to be discharged is fill material. If so, the authority to issue a permit is vested in the COE and not EPA. EPA's regulations reflect the COE's ultimate authority. 40 C.F.R. § 122.3 (2010) (providing that "[d]ischarges of dredged or fill material into waters of the United States which are regulated under section 404" "do not require [§ 402] permits").

The Supreme Court has likewise found the permit schemes under §§ 402 and 404 are exclusive, and that EPA's authority is limited by the extent of the COE's authority under § 404. *Coeur Alaska, Inc. v. Se. Alaska Conservation Council*, 129 S.Ct. 2458, 2468 (2009) (explaining "[t]he question whether the EPA is the proper agency to regulate the slurry discharge thus depends on whether the [COE] has authority to do so."). New Union attempts to distinguish

Coeur Alaska based on the identity of the parties. New Union asserts that the COE's authority to issue § 404 permits ought to be diminished based solely on the identity of the DOD as the permittee, claiming a conflict of interest exists when the COE issues a permit to its parent agency. Dist. Ct. Op. at 8. Yet Congress expressly delegated the authority to issue § 404 permits to the COE without limitation, and it is not for the courts to decide otherwise. *See Chevron*, 467 U.S. at 842–43 ("If the intent of Congress is clear, that is the end of the matter" because "the court . . . must give effect to the unambiguously expressed intent of Congress"). It is common for agencies to issue permits to themselves or an entity in the same department. *See, e.g.*, *Friends of the Earth v. U.S. Navy*, 841 F.2d 927, 929 (9th Cir. 1988) (explaining the Navy had obtained the required § 404 permit from the COE to dredge a harbor). Because the DOD's permit application is subject to the same requirements as any other permit, there is no conflict of interest and the COE properly executed its authority in issuing a § 404 permit.

2. The COE and EPA's regulations reasonably define "fill material" to include waste.

Because the CWA does not define the term "fill material," the agencies are implicitly tasked with adopting definitions consistent with the statutory framework of the CWA. *See Barnhart v. Walton*, 535 U.S. 212, 218 (2002) ("such silence, after all, normally creates ambiguity"). The agencies have jointly defined "fill material" as material that "has the effect of . . . [r]eplacing any portion of a water of the United States with dry land; or . . . [c]hanging the bottom elevation of any portion of a water of the United States." 40 C.F.R. § 232.2; 33 C.F.R. § 323.2(e)(1). The phrase "discharge of fill material" is defined by regulation as "the addition of fill material into waters of the United States" and specifically includes the "placement of . . . slurry." 40 C.F.R. § 232.2; 33 C.F.R. § 323.2(f). The COE and EPA did not include an express exclusion for waste because Congress contemplated this material would be encompassed by

§ 404. Final Revisions to Definitions of "Fill Material," 67 Fed. Reg. 31,129, 31,133 (May 9, 2002) ("Simply because a material is disposed of for purposes of waste disposal does not, in our view, justify excluding it categorically from the definition of fill").

The joint regulation defining fill material as including waste is reasonable because it is consistent with the statute. First, the statute as a whole expressly contemplates permitting the discharge of waste material.[8] Second, the agencies have explained that they adopted the same definition to provide an objective test that would minimize potential confusion and uncertainty as to the applicability of the permitting programs, while remaining consistent with the text of the CWA. Final Revisions to Definitions of "Fill Material," 67 Fed. Reg. at 31,133. Hence the definition harmonizes the statute. The COE and EPA "have consistently expressed the view that all discharges of fill material—including discharges containing constituent substances subject to EPA effluent limitation guidelines—are subject to regulation under Section 404" and not § 402. Reply Brief for the Federal Respondents Supporting Petitioners at 12, Coeur Alaska Inc. v. Se. Alaska Conservation Council, 129 S.Ct. 2458 (2009) (Nos. 07-984, 07-990), 2008 WL 5150172.

The agencies deserve *Chevron* deference for their reasonable interpretation that all discharges of fill material, including discharges containing waste, are subject to regulation under § 404. Deference is appropriate here, where "Congress has not directly addressed the precise question at issue" through the statutory text. *Chevron*, 467 U.S. at 843; *see also Kentuckians for the Commonwealth Inc.*, 317 F.3d at 444 (noting, in analyzing the agencies' previous definition of "fill material," "Congress has not clearly spoken on the meaning of 'fill material' and, in particular, has not clearly defined 'fill material to be material deposited for some beneficial

[8] *See* 33 U.S.C. § 1362(6) (2006) (defining the term "pollutant" to mean "*solid waste, . . .* chemical *wastes . . .*") (emphasis added); *see also* 33 U.S.C. § 1344(a) (2006) (referring to "*disposal sites*" for the discharge of dredged or fill material into waters of the United States) (emphasis added).

primary purpose.'"). Where "the statute is silent or ambiguous," the question is "whether the agency's answer is based on a permissible construction of the statute." *Chevron*, 467 U.S. at 842–43. Because the COE and EPA reasonably interpret fill material to include waste, this court should defer to that interpretation.

3. The COE and EPA reasonably identified the DOD's munitions slurry as fill material subject to the COE's authority under § 404.

Because the discharge will have the effect of raising the bottom elevation of a water of the United States, Dist. Ct. Op. at 4, the COE properly identified the munitions slurry as "fill material" subject to a § 404 permit. The Supreme Court's holding in *Coeur Alaska* supports finding the discharge of munitions slurry to be "fill material" subject to § 404 rather than § 402. The slurry in *Coeur Alaska* was expected to raise the lakebed and increase the acreage of the lake. 129 S.Ct. at 2464. In our case, the proposed discharges are expected to raise the elevation of Lake Temp several feet, and increase its acreage by two square miles. Dist. Ct. Op. at 4. There is no triggering threshold in the regulation regarding the change in elevation required before a substance is considered "fill material," and thus the increase of several feet in this case is sufficient to classify the munitions slurry as fill.

Like the slurry in *Coeur Alaska*, which the regulations expressly identify as "discharge of fill material," the munitions slurry at issue here fits the agencies' example in the text of the regulations defining "fill." *See* 129 S.Ct. at 2468 ("slurry falls well within the central understanding of the term 'fill'"); *see also* 40 C.F.R. 232.2 (fill material "includes, *without limitation* . . . placement of . . . slurry") (emphasis added). The CWA does not define "slurry," but the ordinary dictionary meaning is a "watery mixture or suspension of insoluble matter." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 2148 (Mirriam-Webster, Inc. 2002). The spent munitions slurry described under our facts meets this definition. Also, the DOD's process

for creating the slurry is similar to that in *Coeur Alaska*.[9] Like the isolated lake in *Coeur Alaska* that did not threaten the integrity of neighboring waters, 129 S.Ct. at 2464, Lake Temp is isolated and thus prevents the discharge of any pollutants into other navigable waters. Dist. Ct. Op. at 4.

It is not dispositive that the DOD's slurry is derived from munitions while the slurry in *Coeur Alaska* was related to mining. The agencies explained in the rule defining "fill material" that "[t]he general intent of this rule is to cover materials that have the effect of fill, *not simply to focus on any one industrial activity*." Final Revisions to Definitions of "Fill Material," 67 Fed. Reg. at 31135 (emphasis added). New Union's attempt to distinguish *Coeur Alaska* based on the composition of the material in the slurry is also irrelevant. Dist. Ct. Op. at 8. Although the material in *Coeur Alaska* was crushed rock, arguably an inert material, the key factor is not the effect of the substance on the environment as an inert or toxic material. Rather, the critical factor is the effect of the substance on the bottom elevation of a water of the United States. 40 C.F.R. § 232.2; 33 C.F.R. 323.2(e)(1). Furthermore, the requirements set forth by EPA's guidelines implementing § 404(b) ensure the discharges will not have a significant adverse environmental effect on Lake Temp.[10]

Finally, the explicit exclusion for "trash or garbage" within the definition of "fill material" does not apply here. *See* 40 C.F.R. § 232.2; 33 C.F.R. 323.2(e)(3). In *Coeur Alaska* the Supreme Court recognized "'feces and uneaten feed,' 'litter,' and waste produced in 'battery

---

[9] *Compare Coeur Alaska*, 129 S.Ct. at 2464 (describing the "froth flotation" process of churning crushed mining rock with water and chemicals so that gold-bearing minerals float to the surface and are skimmed off, and then pumping the remaining slurry into a tailings pond) *with* Dist. Ct. Op. at 4 (describing DOD's plan to empty spent munitions, mix the contents with chemicals to ensure they are not explosive, mix with water, and then spray over the bed of Lake Temp).

[10] *See* 33 U.S.C. § 1344(b) (2006); 40 C.F.R. Part 230 (2010) (requiring a demonstration that there are no less damaging alternatives to the discharge, and that all appropriate and practicable steps have been taken to avoid, minimize, and compensate for any effects on the waters); *see also* A46 (explaining the COE fully complied with the guidelines in issuing DOD's § 404 permit).

manufacturing'" as types of materials that might fall under the exception, but that the agencies would make any such interpretation. 129 S.Ct. at 2468. In that case, as here, such "difficulties are not presented . . . because the slurry meets the regulation's definition of fill." *Id.* Plus, the reasoning behind the garbage and trash exception does not apply here. The agencies have explained that adverse impacts of discharges of trash or garbage, unlike other waste, "are generally avoidable . . . because there are widely available landfills and other approved facilities for disposal of trash or garbage." Final Revisions to Definitions of "Fill Material," 67 Fed. Reg. at 31134. Pursuant to the § 404(b) guidelines, the COE analyzed and determined the proposed discharge into Lake Temp was the least environmentally damaging practicable alternative. *See* 40 C.F.R. § 230.10(a). Hence the COE properly issued a § 404 permit to the DOD.

III. THE OMB'S EXPERTISE WAS PROPERLY EMPLOYED IN THE INTERAGENCY CONFLICT AND CANNOT BE THE SUBJECT OF NEW UNION'S COLLATERAL ATTACK.

Executive Order 12,088 secures federal compliance with pollution control standards and establishes a procedure within the Executive Branch to adjudicate conflicts between departments. 43 Fed. Reg. 47,707. E.O. 12,088 "prescribe[s] a method of resolving interagency disputes should they arise." *Constitutionality of Nuclear Regulatory Comm'n's Imposition of Civil Penalties on the Air Force*, 13 Op. O.L.C. 131 (1989). New Union's claim that the OMB was unduly involved in the permitting procedures under the CWA is unfounded for three reasons. First, the OMB's involvement is a non-justiciable political question. Second, the EPA and the COE conflict over the definition of "fill material" is an appropriate question to bring before the OMB. Finally, New Union's challenge to the OMB is a collateral attack on EPA's veto decision, which as a discretionary action is not subject to judicial review.

A. The OMB involvement evokes a non-justiciable political question that this court should decline to answer.

The issue of OMB's role in resolving the inter-agency dispute between the EPA and the COE is a non-justiciable political question. Among the six factors indicative of political questions identified by the Supreme Court, two are of particular importance in this case: the "textually demonstrable constitutional commitment of the issue to a coordinate political department" and "the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government . . . ." *Baker,* 369 U.S. at 217; *accord Immigration & Naturalization Svc. v. Chadha*, 462 U.S. 919, 941 (1983); *United States v. Munoz-Flores*, 495 U.S. 385, 389 (1990). With the executive power constitutionally vested in the President, U.S. Const. art. II, § 1, the internal management of the executive branch agencies is committed solely to the President. Since OMB's actions in this case pertain to the internal management of the Executive Branch, they are not subject to judicial review. *See Meyer v. Bush*, 981 F.2d 1288, 1297 n.8 (D.C. Cir. 1993) ("An Executive Order devoted solely to the internal management of the executive branch—and one which does not create any private rights—is not . . . subject to judicial review.").

1. Article II of the Constitution textually commits the power to resolve conflicts between the EPA and COE to the Executive Branch, barring judicial review.

The process established in E.O. 12,088 does not give the OMB any authority to issue permits under the CWA, but instead provides a mechanism to resolve interpretive conflicts. 43 Fed. Reg. at 47,708. E.O. 12,088 establishes procedures for agency coordination, technical advice, compliance and conflict resolution—activities clearly internal to the executive branch. 43 Fed. Reg. at 47,708; *Constitutionality of Nuclear Regulatory Comm'n's Imposition of Civil Penalties on the Air Force*, 13 Op. O.L.C. 131 (1989) (noting the Atomic Energy Act precludes the possibility of litigation between two agencies and that such litigation would not be

justiciable). In resolving the conflict between EPA and the COE pursuant to these procedures, the OMB was within its role in the Executive Office of the Presidency to manage internal executive branch activities. Thus, its actions are not subject to judicial review.

New Union's reliance on *Environmental Defense Fund v. Thomas* is misplaced. 627 F. Supp. 566 (D.D.C. 1986). In that case the actions of the OMB caused delay such that EPA violated a clear congressional mandate to promulgate statutorily-required regulations by a date-certain deadline. *Id.* at 569–70. In our case, however, the OMB did not violate any statute, nor did its directive cause either agency to break the law because the EPA's decision not to veto the COE permit was voluntary and independent of the OMB findings. Dist. Ct. Op. at 8. While New Union has alleged that OMB substituted its own judgment in a matter properly reserved to EPA, there is no evidence that the OMB did not defer to the EPA's "technological judgment" regarding "the applicability of statutes and regulations." E.O. 12,088, 43 Fed. Reg. at 47,708.

2. Judicial intervention in executive agency management violates the separation of powers and exhibits a lack of respect for coordinate branches of government.

Second, because OMB's role is wholly internal to the Executive Branch, the court cannot substitute its independent judgment regarding any dispute between the EPA and the COE without "expressing lack of the respect due coordinate branches of government." *Baker*, 369 U.S. at 217. The Office of Legal Counsel and courts have long held the view that lawsuits between federal agencies are not generally justiciable. *See, e.g.*, Proposed Tax Assessment Against the United States Postal Service, 1 Op. O.L.C. 79 (1977) (finding a dispute between the Postal Service and the IRS over the service's tax liability could not be entertained in court).[11] The EPA and the COE have no avenue to resolve an interpretive and jurisdictional conflict other

[11] Where cases have been found to be justiciable between two executive agencies, there has been an underlying claim of a private party. *See, e.g.*, *United States v. Nixon*, 418 U.S. 683 (1974) (holding justiciable a dispute between the special prosecutor and President Nixon because the real party of interest was President Nixon in his private capacity).

than within the executive branch. Thus the involvement of the OMB is necessary and within the bounds of executive authority under Article II of the Constitution. U.S. Const. art. II., § 3 (charging the President with the duty to "take care that the Laws be faithfully executed"). E.O. 12,088 "establishes an arbitration mechanism in the Executive Branch," *Natural Res. Def. Council, Inc. v. Zeller*, 688 F.2d 706, 710 (11th Cir. 1982), providing an *internal* mechanism for resolving inter-agency conflicts. Since "[t]he nonjusticiability of a political question is primarily a function of the separation of powers," *Baker*, 369 U.S. at 210, the impropriety of the court's interference in the internal workings of the Executive Branch go the heart of the political question doctrine.

B. E.O. 12,088 permits the EPA and COE to consult the OMB in order to resolve any potential conflicts.

Conflicts regarding the permitting schemes within the CWA are generally limited because enforcement under §§ 402 and 404 is mutually exclusive. *Coeur Alaska, Inc.*, 129 S.Ct. at 2480. Where there is an interpretive question, the EPA and COE have made efforts to eliminate potential conflicts.[12] The conflict between the EPA and the COE was whether the "nature of the discharge … requir[ed] a section 402 permit at least for treatment of the non-fill liquid and semi-solid portion of material." Dist. Ct. Op. at 7. This conflict rested ultimately on the interpretation of the agencies' regulations under §§ 402 and 404. 40 C.F.R. § 122.3 (excluding from § 402 permitting any permit granted under §404); 40 C.F.R. § 232.2 (defining "[f]ill material"). The EPA and COE's voluntary decision to consult the OMB regarding the proper application of § 402 versus § 404 was an appropriate question to bring before the OMB.

[12] *See e.g.*, Envtl. Prot. Agency, Mem. of Agreement Between the Environmental Protection Agency and the Department of the Army (Aug. 11, 1992), *available at* http://water.epa.gov/lawsregs/guidance/wetlands/dispmoa.cfm.

The permitting conflict between the EPA and the COE was properly brought before the OMB because E.O. 12,088 seeks to objectively resolve interagency conflicts, while maintaining the primacy of the EPA Administrator. The Administrator retains the ultimate authority in making "technological judgments and determinations with regard to the applicability of statutes and regulations." E.O. 12,088, 43 Fed. Reg. at 47,708. Only in the event that the Administrator is unable to resolve a conflict will the Director of the OMB be tasked to resolve the conflict. *Id.* This process was established to ensure "federal agency … compl[iance] with . . . pollution control standards." *Sierra Club v. Peterson*, 705 F.2d 1475, 1476–77 (9th Cir. 1983). E.O. 12,088 is "directed specifically to the EPA Administrator" in the event that conflicts cannot be resolved independently. *Tenn. Valley Auth. v. EPA*, 278 F.3d 1184, 1201 (11th Cir. 2002), *opinion withdrawn in part sub nom, Tenn. Valley Auth. v. Whitman*, 336 F.3d 1236 (11th Cir. 2003) (citation omitted). While the directives issued by the OMB are meant to eliminate conflict, they are "in addition to, not in lieu of other procedures . . . for the enforcement of applicable pollution control standards." 43 Fed. Reg. at 47,708. Thus, there is nothing in E.O. 12,088 that makes an OMB directive binding upon the Administrator if it conflicts with other statutory or regulatory procedures, especially the authority to exercise a veto under § 404(c). The EPA Administrator was under no obligation during the permitting process to act contrary to the CWA.

The conflict between the EPA and COE was within the resolution guidelines described in E.O. 12,088. At no point was the Administrator's "technical judgment" or decision regarding the "applicability of the statutes and regulations" ignored. E.O. 12,088, 43 Fed. Reg. at 47,708; Dist. Ct. Op. at 9–10. New Union's perception that the OMB barred the Administrator's veto authority is based on the EPA's decision to take no further action after the OMB decision—*not*

in response to an affirmative directive issued by the OMB. Dist. Ct. Op. at 10. Even if the OMB directive had exceeded the scope of the conflict resolution process, E.O. 12,088 establishes that "applicable pollution control standard[s]" cannot be "revise[d] or modif[ed]" by an OMB determination. 43 Fed. Reg. at 47,708. Plus, EPA reserves authority "for the enforcement of applicable pollution control standards," and thus is not bound to follow any directive that conflicts with its authority as delegated by Congress. *Id.*

The failure of the Administrator to veto the § 404 permit does not signify undue influence or control over the permitting procedures by the OMB. Consultation with the OMB is a natural component of the § 404 permitting process, and ultimately preserves the Administrator's authority to make technical and rule based determinations. The Administrator's consultation with the OMB was proper.

C. New Union's challenge to the OMB's involvement is an impermissible collateral attack.

New Union cannot be permitted to do indirectly what it cannot do directly. New Union's challenge to the OMB's involvement is tantamount to a challenge to EPA's decision not to veto the § 404 permit. Yet this decision is discretionary and not reviewable. 5 U.S.C. § 701(a)(2) (limiting review under the APA to actions that are not committed to agency discretion by law). EPA's action is "committed to agency discretion by law" based on the clear text of § 404(c). *See United States v. Am. Trucking Ass'n*, 310 U.S. 534, 543 (1939) (explaining the most persuasive evidence of Congressional intent is the wording of the statute). EPA "is authorized to deny or restrict the use of any defined area for specification . . . *whenever* [it] determines . . . the discharge of such materials into such area will have an unacceptable adverse effect." 33 U.S.C. § 1344(c) (2006) (emphasis added). EPA's regulations further clarify that the decision not to veto a § 404 permit is within the discretion of the Administrator. *See* 40 C.F.R. § 231.1 (2010)

(EPA "*may* exercise a veto") (emphasis added); *id.* at § 231.3(a) ("*If* the Regional Administrator has reason to believe . . . that an 'unacceptable adverse effect' could result . . . he *may*" institute veto proceedings) (emphasis added). Because New Union is precluded from seeking judicial review of EPA's decision not to veto the § 404 permit, it may not challenge that decision through a carefully-crafted challenge to the OMB's involvement.

Case law supports that EPA's decision not to veto a § 404 permit is discretionary. *See Preserve Endangered Areas of Cobb's History, Inc. v. U.S. Army Corps of Eng'rs*, 87 F.3d 1242, 1249 (11th Cir. 1996) (agreeing with EPA that the veto power is discretionary); *see also City of Olmstead Falls v. U.S. Envtl. Prot. Agency*, 266 F. Supp. 2d 718, 722–23 (N.D. Ohio 2003); *Cascade Conservation League v. M.A. Segale, Inc.*, 921 F. Supp. 692, 698 (W.D. Wash. 1996). The few decisions to the contrary were erroneously decided.[13] For example, in *National Wildlife Federation v. Hanson*, the Fourth Circuit summarily concluded that "EPA is ultimately responsible for the protection of wetlands," and thus allowed a challenge to EPA's failure to veto a § 404 permit under the CWA's citizen suit provision. 859 F.2d 313, 316 (4th Cir. 1988). The court held EPA failed "to exercise the *duty of oversight* imposed" by § 404(c). *Id.* (emphasis added). This generalization of a broad duty flies in stark contrast to the discretionary text of § 404(c). *See* 33 U.S.C. § 1344(c) (EPA "is *authorized*" to veto a § 404 permit "*whenever*" it makes a determination) (emphasis added). A court is not allowed to impute a duty where Congress intended none. *See Chevron*, 467 U.S. at 842–843 (explaining "the court . . . must give effect to the unambiguously expressed intent of Congress).

Even if EPA's decision not to veto the § 404 permit was a nondiscretionary duty, and not barred by APA § 701(a)(2), there has been no final agency action and review is precluded under

[13] Even if these cases were correctly decided, their analysis is not applicable in this case, where New Union has not named EPA as a party to the suit.

APA § 704. 5 U.S.C. § 704 (2006). Under the APA, the definition of "agency action" includes an agency's "failure to act." 5 U.S.C. § 551(13) (2006). Yet EPA's regulations expressly define final agency action in the context of a § 404 permit. 40 C.F.R. § 231.6 (providing that "[f]or purposes of judicial review, a final determination constitutes final agency action"). A final determination by EPA "shall describe the satisfactory corrective action, if any, make findings, and state the reasons for the final determination." *Id.* There has been no final determination in this case. Hence there is no final agency action to review under the APA.[14] Reviewing EPA's decision not to veto the § 404 permit would contravene the procedures and express language set forth in the regulations.

Finally, even if this Court were to consider EPA's decision not to veto, under the arbitrary and capricious standard of review this challenge would fail. EPA is not authorized to veto a § 404 permit simply because it would prefer to issue a § 402 permit, but may only veto a permit if it determines "the discharge of such materials into such area will have an unacceptable adverse effect on municipal water supplies, shellfish beds and fishery areas . . . wildlife, or recreational areas." 33 U.S.C. § 1344(c); *see also Coeur Alaska*, 129 S.Ct. at 2483 n.5 (J. Ginsburg, dissenting, with J. Stevens and J. Souter) (explaining EPA's veto power is limited to "a finding of 'unacceptable adverse effect'"). Because the COE complied with the § 404(b) guidelines, *see* A46, there is no basis for an EPA veto. New Union can only challenge EPA's

[14] For these reasons, the district court in *Alliance To Save Mattaponi v. U.S. Army Corps of Engineers*, 515 F. Supp. 2d 1, 7–9 (D.D.C. 2007), improperly held EPA's decision not to veto "is essentially a decision . . . to indirectly approve a permit." The court relied on *Sierra Club v. Thomas*, 828 F.2d 783 (D.C. Cir. 1987), to hold "the decision not to veto the permit had the same impact on the parties as an express denial of relief," and thus constituted final agency action. Because EPA may issue a veto "whenever," 33 U.S.C. § 1344(c), until the agency makes a final determination pursuant to its regulations, there can be no final agency action.

veto decision directly, and even then, only after a final determination. New Union fails to make such allegations here.

CONCLUSION

The district court properly granted the United States' motion for summary judgment, and this court should affirm for three reasons. First, New Union fails to satisfy its burden to show the irreducible minimum required for Article III standing by alleging conjectural and probabilistic harms. Second, the COE properly exercised jurisdiction over Lake Temp because it is a navigable water under the CWA and the proposed discharge is subject to § 404 as fill material. Finally, New Union impermissibly attacks the OMB's involvement in the permitting process and EPA's decision not to veto the § 404 permit, which are beyond the scope of judicial review. For the foregoing reasons, the United States respectfully requests that this court affirm the decision of the district court on all grounds.