TEAM # 14

UNITED STATES COURT OF APPEALS
FOR THE TWELFTH CIRCUIT

C.A. No. 11-1245

STATE OF NEW UNION,
Appellant and Cross-Appellee,

v.

UNITED STATES
Appellee and Cross-Appellant,

v.

STATE OF PROGRESS
Appellee and Cross-Appellant.

On Appeal from the Order of the United States District Court of the District of New Union,
Civ. No. 148-2011, Dated June 2, 2011.

BRIEF OF THE APPELLANT-CROSS-APPELLEE

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JURISDICTIONAL STATEMENT

New Union seeks review under 28 U.S.C. § 1331 (2006) and the Administrative Procedure Act, 5 U.S.C. § 702 (2006), of a permit issued by the Secretary of the Army, acting through the U.S. Army Corps of Engineers, under the authority of § 404 of the Clean Water Act (CWA), 33 U.S.C. § 1344. Section 404 of the CWA limits federal jurisdiction to "navigable waters," and the District Court correctly held that Lake Temp is a jurisdictional water because it is "navigable."

QUESTIONS PRESENTED

This appeal presents the following issues:

I. Whether the State of New Union has standing to challenge the Corps' jurisdiction to issue the DOD a CWA § 404 permit to discharge its toxic spent munitions slurry given the substantial injury the munitions slurry will inflict on New Union and its citizens by contaminating the Imhoff Aquifer.

II. Whether EPA and the Corps have the power to regulate Lake Temp as "navigable water" under CWA § 404 and under the Commerce Clause, U.S. Const. art. I, § 8, cl. 3, given that it is part of the highway of interstate commerce, is large in size, and is only intermittently dry.

III. Whether EPA has sole jurisdiction to issue a discharge permit under CWA § 402, 33 U.S.C. 1342, for the DOD's spent munitions slurry because munitions are statutorily listed pollutants and the slurry fails to pass muster as "fill material" under the EPA/Corps' joint fill regulations.

IV. Whether the OMB's directive to EPA not to veto the DOD's § 404 permit and EPA's subsequent acquiescence to that directive violated the CWA because Congress intended EPA, not the OMB, to administer the CWA and veto permits; and whether the OMB's decision and EPA's acquiescence were arbitrary and capricious because EPA and the OMB failed to offer a reasoned explanation for arriving at this new conclusion.

STATEMENT OF THE CASE AND THE FACTS

I. PROCEDURAL BACKGROUND

The State of New Union filed suit in the United States District Court of the District of New Union contesting a fill permit issued to the U.S. Department of Defense (DOD) by the U.S.

Army Corps of Engineers (the Corps) under § 404 of the Clean Water Act (CWA), 33 U.S.C. § 1344 (2006), to discharge a slurry of pulverized spent munitions into Lake Temp. The boundaries of the surface waters of Lake Temp lie wholly within a military reservation owned by the United States in the State of Progress, which neighbors New Union, but Lake Temp's underlying aquifer, the Imhoff Aquifer, straddles both states. New Union argues that the munitions slurry is a pollutant, not a fill material, and that any discharge permit for the slurry must be administered by the U.S. Environmental Protection Agency (EPA) pursuant to its authority to issue pollution discharge permits under CWA § 402, 33 U.S.C. § 1342 (2006).

The State of Progress successfully obtained status as an intervenor in New Union's case against the United States, and on June 2, 2011, the District Court rendered its decision on the three parties' cross-motions for summary judgment. In granting the United States' motions for summary judgment on the CWA counts, the Court ruled that (1) New Union lacks standing; (2) the Corps has jurisdiction to issue a § 404 fill permit to the DOD because (a) the munitions slurry is a fill material, and (b) Lake Temp is a navigable water; and (3) the Office of Management and Budget's direction to EPA not to veto the Corps' permit issuance did not violate the CWA. Both the State of New Union and the State of Progress filed Notices of Appeal with this Court. New Union contests each of the District Court's rulings, except for its navigability determination.

II. FACTUAL BACKGROUND

The DOD intends to spray a slurry of pulverized spent munitions over Lake Temp in such quantities that it would eventually raise the level of the lakebed by several feet. Lake Temp is a mountain lake that, for hundreds of years, has served as both a stopover for migratory ducks and recreational grounds for interstate hunters, boaters, and bird watchers alike. The DOD knows that

interstate travelers continue to use Lake Temp, as evidenced by the DOD's failure to erect a fence around the lake despite visible trails leading from the adjacent highway to the lake.

The DOD's munitions slurry is a toxic amalgam of pulverized metals mixed with liquid and semi-solid chemicals. New Union contends that if the DOD discharges this metal-laden slurry into Lake Temp, the slurry will likely contaminate the Imhoff Aquifer, the transboundary aquifer beneath Lake Temp that extends into New Union's territory. New Union specifically claims that Lake Temp's polluted surface waters will percolate through the unconsolidated alluvial fill below the lake and contaminate the aquifer.

SUMMARY OF THE ARGUMENT

The State of New Union asserts a sovereign interest in its groundwaters, as well as a *parens patriae* interest in maintaining uncontaminated groundwater as a public resource for its citizens. As a state, New Union is entitled to a relaxed standing inquiry, but New Union meets the constitutional requirements for standing even under a standard standing analysis. Moreover, New Union surmounts the prudential limitations on suits brought under APA § 702. As such, New Union establishes standing to challenge the Corps' issuance of the DOD's § 404 fill permit.

Treating Lake Temp as a "navigable water" is a permissive construction of the CWA because its position on the highway of interstate commerce, large size, and infrequent dry season make it similar to "navigable-in-fact" water. Additionally, regulating Lake Temp is an appropriate exercise of Congress' power under the Commerce Clause, U.S. Const. art. I, § 8, cl. 3. Because the degradation of isolated lakes used by migratory birds and interstate duck hunters and duck watchers could, in the aggregate, affect interstate commerce, Lake Temp meets the "minimum rationality" test for economic activities under the CWA. Alternatively, even if the

regulation at hand does not concern an economic issue, it has a significant enough effect on interstate commerce for it to fall within Congress' power under the Commerce Clause.

The Corps does not have jurisdiction to issue the DOD a CWA § 404 discharge permit for its spent munitions slurry because the slurry is not a fill material. Rather, the slurry is a pollutant, over which EPA has exclusive jurisdiction under CWA § 402. More specifically, the DOD's spent munitions slurry is "trash or garbage" and *per se* excluded from the EPA/Corps' joint definition of "fill material." Additionally, the DOD's munitions slurry is vastly dissimilar in composition to "soil, rock, and earth" material and, therefore, fails the agencies' threshold inquiry set forth in the preamble to their joint fill regulations, which requires that waste material must be similar to "traditional" fill material for the Corps to assert regulatory jurisdiction.

The OMB's decision to direct EPA not to veto the Corps' § 404 permit issuance and EPA's acquiescence to that decision violated the CWA because their actions were contrary to Congress' unambiguously expressed intent for EPA "to administer" the CWA generally, 33 U.S.C. § 1251(d), and, in particular, to veto permits proposed by the Corps, 33 U.S.C. § 1344(c) (2006). Alternatively, granting the OMB directive authority over EPA's decisions to veto permits does not have the "power to persuade" because the power granted to EPA over numerous sections of the CWA supports to notion that EPA, not the OMB, should make the final decision to veto permits under CWA § 404. Also, the OMB's decision not to veto the permit and EPA's acquiescence to that decision were arbitrary and capricious because EPA failed to offer a reasoned explanation for its conclusion. Congress intended for EPA to use its relevant expertise in reaching decisions, but in this case it was the OMB, not EPA, whose reasoning ultimately backed the final decision to grant the DOD's discharge permit.

STANDARD OF REVIEW

The questions of law to be evaluated by the Court should be reviewed *de novo*. *See, e.g., Kentuckians for the Commonwealth, Inc. v. Rivenburgh*, 317 F.3d 425, 444-45 (4th Cir. 2003). Summary judgment is appropriate when "there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c)(2). Federal agency action is reviewed under the Administrative Procedure Act, 5 U.S.C. § 551 (2006), and should be overturned if the agency "offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or 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). This Court has jurisdiction to determine whether the Corps lacks jurisdiction under CWA § 404, 33 U.S.C. 1344, to issue a discharge permit for the DOD's spent munitions slurry because the slurry is a pollutant and not fill material.

ARGUMENT

I. NEW UNION HAS STANDING TO CHALLENGE THE CORPS' § 404 DISCHARGE PERMIT BECAUSE NEW UNION IS INJURED IN BOTH ITS SOVEREIGN AND *PARENS PATRIAE* CAPACITIES.

The State of New Union challenges the legality of the U.S. Army Corps of Engineers' (the Corps) jurisdiction to issue the DOD a § 404 permit for its spent munitions slurry and seeks injunctive relief under § 702 of the Administrative Procedures Act (APA), 5 U.S.C. § 702, on the grounds that the resulting release of pulverized spent munitions into Lake Temp will violate §§ 301, 402, and 404 of the Clean Water Act (CWA) and cause grave injury to the State. New Union is injured on two independent grounds in this case, either of which is sufficient to create standing. First, the State is injured in its sovereign capacity by the threatened degradation of its portion of the Imhoff Aquifer; and second, the State is injured in its *parens patriae* capacity on

behalf of the well-being of its citizens who will be adversely affected by the DOD's unlawful dumping of pulverized spent munitions into Lake Temp. These substantial injuries make New Union the proper party to bring this suit, and as a state, New Union is entitled to a relaxed standing inquiry under *Massachusetts v. EPA*, 549 U.S. 497, 518-20 (2007). The State satisfies the constitutional standing requirements of Article III as well as the judicially imposed requirements of the APA. Accordingly, this Court should reverse the holding of the District Court and hold that New Union has standing to challenge the Corps' regulatory jurisdiction.

A. New Union is injured in its sovereign capacity by the threatened degradation of the Imhoff Aquifer.

As a state, New Union has a special interest in ensuring that its sovereign territory is not contaminated by pollutants from sources outside of its territory, and the Court has long recognized this interest under federal common law. *Alden v. Maine*, 527 U.S. 706, 715 (1999) (observing that, in the federal system, states "retain the full dignity, though not the full authority, of sovereignty."); *Georgia v. Tennessee Copper Co.*, 206 U.S. 230, 237 (1907) ("[T]he State has an interest independent of and behind the titles of its citizens, in all the earth and air within its domain."). New Union is uniquely and substantially harmed by the Corps' unlawful issuance of a § 404 permit to the DOD to discharge its toxic spent munitions slurry. Further, this Court is the only forum where the State can bring its claim and should hold that New Union's special interest as a state entitles it to review of the Corps' unlawful permit issuance.

The injury to New Union is cognizable under the federal common law because neither Congress nor the Corps or Environmental Protection Agency (EPA) have directly spoken to the issue of transboundary groundwater contamination. The test for determining if the federal common law has been displaced is whether Congress has spoken "directly to [the] question" at issue. *Mobil Oil Corp. v. Higginbotham*, 436 U.S. 618, 625 (1978). In this case, neither Congress

nor the courts have extended CWA jurisdiction to groundwater, which in turn precludes the Corps and EPA from regulating groundwater. *See e.g.*, *Town of Norfolk v. U.S. Army Corps of Engineers*, 968 F.2d 1438, 1450-51 (1st Cir. 1992). Because federal common law covers transboundary groundwaters, New Union has grounds to bring suit in federal court.

New Union's interest in preserving its groundwater within the Imhoff Aquifer is real and concrete, and the State has gone to great lengths to preserve it groundwater resources. To that end, New Union state law requires its Department of Natural Resources (DNR) to ensure that "permitted withdrawals will not deplete the groundwater over a period of twenty years." (R. at 6). The presence of naturally occurring sulfur in the groundwater does not negate the State's valid interest in protecting its water resources from contamination by the DOD's toxic and heavy metal-laden munitions slurry.

B. New Union has a duty as *parens patriae* to protect its citizens from the effects of the Corps' unlawful issuance of a § 404 discharge permit.

The citizens of New Union are injured by the Corps' illegal issuance of the § 404 permit and will be further harmed each time the DOD discharges, in direct violation of CWA § 301, its spent munitions into Lake Temp. New Union has a "quasi-sovereign" interest in the health and welfare of its citizens, and this interest entitles the State to *parens patriae* standing. *Louisiana v. Texas*, 176 U.S. 1, 19 (1900). Quasi-sovereign interests are construed broadly as a "set of interests that the state has in the well-being of its populace." *Alfred L. Snapp & Son, Inc. v. Puerto Rico*, 458 U.S. 592, 602 (1982).

The citizens of New Union, including Dale Bompers, are directly injured by the imminent violation of CWA §§ 301, 402, and 404. Mr. Bompers lives directly above the Imhoff Aquifer and enjoys a preferential right to groundwater withdrawal in the event of threatened depletion. Under normal conditions when the groundwater table is not depleted, *all* New Union

citizens are free to apply to DNR for withdrawal permits. (R. at 4). Therefore, if the DOD is permitted to discharge its munitions slurry as planned, any resultant chemical and heavy metal contamination of the groundwater would deprive Mr. Bompers and *all* New Union citizens of their rights to withdraw groundwater that is free of toxic pollutants. The Court has not set a precise portion of a state's citizens that must be affected to establish *parens patriae* standing, but has stated that one factor in establishing *parens patriae* is whether the problem is of the sort that a state would "likely attempt to address through its sovereign lawmaking powers." *Snapp & Son*, 458 U.S. at 607. New Union would likely address heavy metal groundwater contamination through its own lawmaking powers, and precisely because New Union cannot protect its citizens with its own lawmaking powers in this case, this Court should extend *parens patriae* standing.

New Union is empowered to bring suit on behalf of its citizens to protect them from violations of federal law. *See e.g.*, *Snapp & Son, Inc.*, 458 U.S. at 608 (allowing Puerto Rico to bring suit as *parens patriae* on behalf of citizen-farmers injured by violation of federal anti-discrimination statute); *Georgia v. Pennsylvania Railroad Co*., 324 U.S. 439, 447 (1945) (allowing State of Georgia to bring suit as *parens patriae* on behalf of citizens injured by violations of federal anti-trust law). The doctrine also extends to economic harms. *Maryland v. Louisiana*, 451 U.S. 725, 725-26 (1981) (granting standing to states as *parens patriae* to protect citizens from economic injury presented by imposition of First-Use Tax by defendant state). New Union's interest in protecting its citizens from the adverse health and economic effects that would likely result from the Corps' unlawful permit issuance is at least as compelling as the states' interests recognized by the Court in these precedent cases.

Congress can also confer *parens patriae* standing. *Maryland People's Counsel v. FERC*, 760 F.2d 318, 321-22 (D.C. Cir. 1985). While a "[s]tate does not have standing as *parens patriae*

to bring an action against the Federal Government," *Massachusetts v. Mellon*, 262 U.S. 447, 485-86 (1923), this presumption can be overcome. Congress purposely enlarged the scope of potential litigants under the CWA by including a citizen-suit provision, which provides, in relevant part, that "any citizen may commence a civil action. . . against the Administrator where there is alleged a failure of the Administrator to perform any act or duty under this chapter which is not discretionary with the Administrator." CWA § 505(a), 33 U.S.C. § 1365(a). States are "citizens" under CWA § 502(5). *United States Dep't of Energy v. Ohio*, 503 U.S. 607, 616 (1992). Also, the United States has waived its immunity to suits brought by states pursuant to CWA § 505. *See Massachusetts v. U.S. Veterans Administration*, 541 F.2d 119, 122 (1st Cir. 1976). While New Union does not bring suit under § 505 directly, this provision is still evidence of Congress' intent to broaden the scope of potential litigants under the CWA.

Congressional conferral of *parens patriae* is effective where the following three conditions are met: 1) the state meets the traditional test for standing; 2) the interest is a "concrete" one that its citizens would have standing in court to protect, and; 3) the subject of the challenge is executive compliance with a regulatory command in an area where the "federal government and the states have long shared regulatory responsibility." *Maryland People's Counsel*, 760 F.2d at 321-22. Each of these conditions is met in this case. New Union meets the Article III standing test as set forth *infra*, individual citizens of the State would have standing to sue under CWA § 505, and the State and federal government have long shared a responsibility to comply with federal environmental laws.

Lastly, the Court has demonstrated great flexibility in granting *parens patriae* standing to the states, especially where states seek only injunctive relief. *See Hawaii v. Standard Oil Co. of California*, 405 U.S. 251, 258-59 (1972). Because New Union merely seeks an injunction in this

case, this Court should hold that New Union is entitled to *parens patriae* standing because it has a substantial interest in protecting its citizens from the harmful health and economic effects of toxic groundwater pollution.

C. As a state, New Union is entitled to a relaxed standing inquiry.

Congress expressly included a right of action for states under the CWA and this, in conjunction with the special interests of New Union as a state, creates a relaxed standing inquiry. *See Massachusetts v. EPA*, 549 U.S. at 518-20. The citizen-suit provision of the CWA § 505, 33 USC § 1365 (2006), grants standing to the states, and as such this case presents a situation closely analogous to *Massachusetts v. EPA*. In that case, the Supreme Court applied a relaxed standing inquiry to Massachusetts based on a procedural right provided in the Clean Air Act. The Court held, "Given that procedural right and Massachusetts' stake in protecting its quasi-sovereign interests, the Commonwealth is entitled to special solicitude in our standing analysis." 549 U.S. at 519-20. While Congressional grants of standing are generally read narrowly, *United States v. King*, 395 U.S. 1, 89 (1969), Congress demonstrated a clear intent to vest states with a procedural right to bring suit against the United States for agency failures under the CWA. This entitles New Union to a relaxed standing inquiry, but even under a standard standing analysis, the State has established standing to challenge the legality of the § 404 permit.

D. New Union presents a federal question under 28 U.S.C. § 1331 and meets the constitutional standing requirements of Article III of the U.S. Constitution.

The Corps violated CWA § 402 by asserting jurisdiction over a regulatory area solely delegated to EPA. The Corps' permit issuance is an unlawful agency action and invariably sets the stage for the DOD to violate CWA § 301 when it follows through with its planned discharges without the proper § 402 pollutant discharge permit, which can only be issued by EPA. The

DOD's planned discharges threaten imminent injury to New Union and, as such, New Union presents a "federal question" under 28 U.S.C. § 1331 (2006).

New Union meets the three Article III standing requirements as set out by the Court in *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992): 1) New Union has suffered an "injury in fact"- an invasion of a legally protected interest which is concrete and particularized and actual or imminent, not "conjectural" or hypothetical; 2) there is a causal connection between the injury and the challenged action, such that the injury is "fairly trace[able] 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."

First, New Union and its citizens have been injured as a result of the Corps' illegal issuance of the § 404 permit. This violation of the law is enough to create standing, particularly since New Union is not required to show actual contamination of the Aquifer to establish injury-in-fact. *See Friends of the Earth, Inc. v. Laidlaw Environmental. Services., Inc*., 528 U.S. 167, 181 (2000) ("The relevant showing for purposes of Article III standing. . . is not injury to the environment but injury to the plaintiff."); *see also*, *Ecological Rights Foundation v. Pacific Lumber Co*., 230 F.3d 1141, 1151 (9th Cir. 2000) (the "threshold question" is not physical injury, but rather "concerns about violations of environmental laws."). Furthermore, New Union does not have to prove that the permitted activity will at any time completely inundate the Aquifer with toxic pollutants. Rather, the threat of even a small amount of chemical pollutants reaching the Aquifer is enough to create standing. *See Elk Grove Village v. Evans*, 997 F.2d 328, 329 (7th Cir. 1993) ("[E]ven a small probability of injury is sufficient to create a case or controversy."). New Union presents a substantial injury-in-fact, and given its special status as a State, this is sufficient to satisfy the first standing requirement.

Second, the Corps' illegal permit issuance is the direct cause of injury to New Union. By allowing the DOD to carry out its planned operations, the Corps will cause further harm to New Union and its citizens, and this imminent harm is "fairly traceable" to the Corps' illegal permit issuance. New Union presented evidence that the land between the lakebed of Lake Temp and the underlying aquifer is composed primarily of "unconsolidated alluvial fill" (R. at 5), and, thus, some of the toxic pollutants discharged by the DOD will unavoidably migrate through the loose soil and contaminate the entire aquifer, including the groundwaters that are a public resource for New Union's citizens. Notably, New Union offered to install a grid of monitoring wells to map the aquifer and empirically quantify the contaminant levels as the water migrates from Lake Temp and into New Union's groundwater. However, the DOD refused this request. (R. at 6).

New Union has also submitted evidence establishing that, even if it could install a grid of monitoring wells, conclusive results may not be available until "after the permitted activity begins." (R. at 6). Instead of passively waiting for toxic pollutants to poison its groundwater, New Union proactively challenges the Corps' jurisdiction to issue the permit in the first place. But-for this illegal permit, the DOD would not be authorized to discharge its spent munitions slurry into Lake Temp and, thus, would not threaten the chemical integrity of the Aquifer below. As such, the State satisfies the second standing requirement.

Third and finally, this Court can redress New Union's injury by enjoining the DOD's § 404 permit and holding, as a matter of law, that the EPA retains sole jurisdiction to issue a discharge permit in this case because the DOD will be discharging pollutants into a navigable water. New Union does not argue, necessarily, that the discharge of spent munitions into Lake Temp should not be allowed under any circumstances. Rather, the State argues that the Corps is not the proper agency to issue a discharge permit in this case. Because this Court can redress the

injury to New Union by invalidating the Corps' illegal § 404 permit, the third requirement is satisfied and the State has established constitutional standing.

E. New Union is entitled to challenge the Corps' § 404 permit under the APA.

Neither federal law nor agency regulations have spoken to the issue of transboundary groundwater contamination, and in the absence of any other mechanism for protecting its sovereign territory and its citizens, New Union relies on the APA to challenge the Corps' authority to issue a § 404 permit to the DOD. *See* 5 U.S.C. § 704 (2006) (filing suit under the APA is permissible when there is "no other adequate remedy in a court"); *see also FEC v. Akins*, 524 U.S. 11, 25 (1998) ("[T]hose adversely affected by a discretionary agency decision generally have standing to complain that the agency based its decision upon an improper legal ground."). The APA provides that "[a] person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof." 5 U.S.C. § 702 (2006). Importantly for this case, "The United States may be named as a defendant in any such action." *Id*.

Congress granted states a procedural right to bring suit for CWA violations under the Act's § 505 citizen-suit provision. For this reason, the challenge presented by New Union completely bypasses the "prudential limitations" test imposed by the courts on suits brought under the APA. CWA § 505 is sufficient to waive prudential limitations because, unlike Article III requirements, prudential limitations do not have constitutional force, and Congress may override them by granting an express right of action. *Warth v. Seldin*, 422 U.S. 490, 501 (1975). In the alternative, if this Court finds that Congress has not waived prudential limitations for the kind of case presented by New Union, the State is still entitled to review under the APA because it passes muster under the prudential limitations analysis.

New Union satisfies all prudential limitations and is entitled to bring suit under the APA because its claim "relates to an agency action" and involves a "legal wrong" and an "injury falling within the zone of interests" sought to be protected by CWA §§ 301, 402, 404, and 505. *Center for Biological Diversity v. Lueckel*, 417 F.3d 532, 536 (6th Cir. 2005). The Corps' permit issuance is "agency action," and its erroneous interpretation of CWA § 404 is a "legal wrong" because spent munitions slurry is a pollutant, not "dredged or fill material." As such, the DOD can only discharge the slurry in accordance with EPA's § 402 permitting program. The DOD's planned discharges will also violate CWA § 301(a), which states that, unless in accordance with a § 402 permit, "the discharge of any pollutant by any person shall be unlawful." 33 U.S.C § 1311(a) (2006). New Union seeks to correct this violation of the law, but it does not seek a mere declaratory judgment. Rather, the State also seeks injunctive relief to protect its sovereign territory and the welfare of its citizens and as such, its claim falls well within the zone of interests sought to be protected by CWA §§ 301 and 402, both of which Congress enacted to prevent the unauthorized discharge of pollutants into the navigable waters. For these reasons, New Union is entitled to seek judicial review of the Corps' permit issuance under the APA.

II. EPA AND THE CORPS HAVE JURISDICTION TO REGULATE LAKE TEMP UNDER THE CWA.

The District Court correctly held that Lake Temp is "navigable water" under the CWA. Congress passed the Act with the specific objective of "restor[ing] and maintain[ing] the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a) (2006). EPA and the Corps each have individual regulatory definitions for "navigable waters." According to both the Corps and EPA, "navigable waters" include "intrastate lakes" which are used by interstate travelers for "recreational or other purposes." 33 C.F.R. § 328.3 (2010). Regulating Lake Temp, which falls under the definitions of EPA and the Corps, is a "permissible

construction" of the CWA. *Chevron U.S.A. v. Natural Resources Defense Council*, 467 U.S. 837, 842-43 (1984). Additionally, regulating Lake Temp under the CWA is not an invalid exercise of Congress' powers under the Commerce Clause, U.S. Const. art. I, § 8, cl. 3.

A. Regulating Lake Temp is a permissible construction of the CWA because the lake's strategic position on the highway of interstate commerce, large size, and infrequent dry seasons make it similar to "navigable-in-fact" waterbodies.

The CWA clarifies that "[t]he term 'navigable waters' means the waters of the United States. . . ." 33 U.S.C. § 1362(7) (2006). However, the CWA is silent on the precise scope of the definition of "navigable waters." As the Supreme Court noted in *Chevron*, "if the statute is silent or ambiguous with respect to the specific question, the issue for the court is whether the agency's answer is based on a permissible construction of the statute." 467 U.S. at 842–843. The relevant question, then, is whether regulating Lake Temp under the CWA constitutes a "permissive" construction of the CWA.

Under the CWA, "navigable waters" and "waters of the United States" include "at least some water other than would not be deemed 'navigable' under the classical understanding of that term." *United States v. Riverside Bayview Homes*, 474 U.S. 121, 133 (1985) (internal citation omitted). The Supreme Court has narrowed down the scope of waters that are not "navigable-in-fact" but still qualify as "waters of the United States." First, in *Riverside Bayview*, the Court held that "navigable waters" could include wetlands adjacent to navigable waters, even if those wetlands were not inundated or frequently flooded by navigable water. 474 U.S. at 133. Next, in *Solid Waste Agency v. Army Corps of Engineers*, 521 U.S. 159, 171-72 (2000) ("*SWANCC*"), the Court held that isolated ponds did not qualify as a "navigable water" simply because they served as a habitat for migratory birds. Most recently, in a plurality opinion in *Rapanos v. United States*, 547 U.S. 715, 732 (2006), the Court held that "waters of the United States" included only

relatively permanent, standing, or flowing bodies of water." The *Rapanos* Court clarified, however, that it did not decide exactly when the drying up of a streambed is continuous and frequent enough to disqualify the channel as a "water of the United States.' *Id.* at 732. n.5.

A plain reading of the CWA supports the notion that Congress intended "navigable water" to apply broadly. Congress defined "navigable waters" to include "waters of the United States," 33 U.S.C. § 1362(7), which is an overtly broad term with no clear legal meaning. As noted by *Babbitt v. Sweet Home Chapter of Communities for a Great Oregon,* 515 U.S. 687, 705 (1995), "[a]n obviously broad word that the Senate went out of its way to add to an important statutory definition is precisely the sort of provision that deserves a respectful reading."

The legislative history of the CWA also supports the contention that Congress intended "navigable waters" to apply broadly. When Congress was vetting the CWA for eventual passage, both the House and Senate Committees expressed concern that "navigable waters" might be given an unduly narrow reading. The House Committee noted that its intent was that "the term 'navigable waters' be given the broadest possible constitutional interpretation. . . ." H.R. Rep. No. 911, at 131 (1972). Similarly, the Senate Committee noted that "[t]hrough a narrow interpretation of the definition of interstate waters the implementation [of the] 1965 Act was severely limited. Water moves in hydrologic cycles and it is essential that discharge of pollutants be controlled at the source." S. Rep. No. 92-414, at 77 (1972). Additionally, the Conference Report that accompanied the CWA explained that "[t]he conferees fully intend that the term 'navigable waters' be given the broadest possible constitutional interpretation unencumbered by agency determinations which have been made or may be made for administrative purposes." S. Rep. No. 1236, at 144 (Conf. Rep.) (1972).

Lake Temp is precisely the type of water that, while not "navigable-in-fact," Congress nonetheless intended to fall under the jurisdiction of the CWA. Its placement on the highway of interstate commerce renders it functionally equivalent to "navigable-in-fact" waterbodies, which are "currently used, or were used in the past, or may be susceptible to use in the interstate or foreign commerce." 33 C.F.R. §328.3(a)(1) (2010); 40 C.F.R. § 230.3(s)(1) (2010). Although Lake Temp's surface waters are wholly within the State of Progress, many hunters utilize interstate highways to connect to the state highway adjacent to Lake Temp, and then ride their boats from one side of the lake to the other. (R. at 4). Of the hundreds, or perhaps even thousands, of duck hunters who come to Lake Temp, one quarter are from out of state. *Id.* Lake Temp's geographic position in the highway of interstate commerce distinguishes it from the isolated wetland in *SWANCC*, which merely served as a habitat for migratory birds.

Lake Temp's large size also renders it similar to a "navigable-in-fact" waterbody. Unlike the small pond in *SWANCC*, Lake Temp is a large lake that, during the wet season, is three miles wide and nine miles long. (R. at 3-4). Its large size allows more travelers to boat from one side to the other. Therefore, a significantly greater number of interstate travelers can travel across Lake Temp than could travel across the small pond in *SWANCC*.

Also, unlike the sometimes-saturated soil in *Rapanos*, Lake Temp is only dry one out of five years. (R. at 4). The Supreme Court clarified in *Rapanos* that it did not decide exactly when the drying up of a streambed is continuous and frequent enough to disqualify the channel as a "water of the United States." 547 U.S. at 732 n.5. The *Rapanos* Court characterized the type of water that does not qualify as waters of the United States: "water whose flow is "[c]oming and going at intervals . . . [b]roken, fitful," or "existing only, or no longer than a day; duirnal . . . short-lived." *Id.* (citing Webster's New International Dictionary 1296, 857 (2d ed. 1940)). Lake

Temp is distinguishable from waterbodies characterized by *Rapanos* because it is dry for only a small amount of time and does not come and go at intervals.

Further, the DOD's warning signs posted along the highway (R. at 4) do not disqualify Lake Temp from being "water of the United States." The DOD knows that people frequently use the lake for hunting and bird watching, but still has not taken measures beyond the signs to restrict public entry. *Id.* In particular, they have not built a fence despite the existence of visible trails leading from the highway to the Lake. *Id.* Without a fence, interstate travelers have no physical barrier to entry. Regardless of the signs, hundreds, if not thousands, of interstate travelers have been using Lake Temp for recreational purposes for at least a century. *Id.*

Additionally, regulating Lake Temp as "navigable" falls in line with Congress' fundamental purpose for enacting the CWA: to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 § U.S.C. 1251(a) (2006). The *Riverside Bayview* Court determined that an isolated wetland was a jurisdictional water on the basis that "water moves in hydrological cycles and it is essential that discharge of pollutants be controlled at the source." 474 U.S. at 134 (citing S. Rep. No. 92-414, at 77 (1972)). In *Riverside Bayview*, the Corps noted that adjacent wetlands may "serve significant natural biological functions, including food chain production, general habitat, and nesting, spawning, rearing and resting sites for aquatic . . . species." *Id.* at 134-35. Thus, wetlands adjacent to lakes, rivers, streams, and other bodies of water may function as integral parts of the aquatic environment even when the moisture creating the wetlands does not find its source in the adjacent bodies of water. *Id.* at 135. Similarly, as a stopover for migratory ducks, Lake Temp serves a significant natural biological function and thus functions as an integral part of the aquatic environment.

B. Regulating Lake Temp does not surpass Congress' power under the Commerce Clause.

The Commerce Clause, U.S. Const. art. 1, § 8, cl. 3, grants Congress the power "to regulate commerce . . . among the several states. . . ." The power to regulate commerce necessarily includes power over navigation. *Gibbons v. Ogden*, 22 U.S. 1, 189-90 (1824); *Leovy v. United States*, 177 U.S. 621, 632 (1900). The Supreme Court held in *United States v. Lopez* , 514 U.S. 549, 558 (1995) that for commercial activities, courts use a "minimum rationality test" to determine whether the aggregate of the activity could affect interstate commerce. If the Act passes this fairly deferential standard of review, then Congress has appropriately exercised its authority. *See id.* at 558. On the other hand, for non-commercial activities, the Court engages in an independent evaluation of the significance of the impact. *Id.* at 559.

The activities regulated under the CWA are commercial in nature. Most activities regulated are industrial and commercial operations, including manufacturing, resource extraction, construction, land development, agriculture, and waste disposal. *See* 40 C.F.R. 403-610 (2010). Surely enough, at issue here is the spraying of a slurry of pulverized spent munitions over Lake Temp. (R. at 4).

Since the dumping of a slurry of spent munitions is commercial in nature, the determinative question is whether regulating isolated lakes used by migratory ducks, duck hunters, and birdwatchers could, in the aggregate, affect interstate commerce. In 2006, waterfowl hunters in the U.S. spent a total of $900.3 million on waterfowl hunting expenditures, including firearms, ammunition, decoys, hunting dogs, binoculars, camping equipment, lodging expenses, and transportation expenses. U.S. Fish & Wildlife Service, *Economic Impact of Waterfowl Hunting in the United States* 4 (2006). Additionally, in 2006, bird watchers in the U.S. spent a total of $35.7 billion on bird-watching expenditures, including food, lodging, transportation, binoculars, cameras, bird food, nest boxes, day packs, tents, backpacking equipment, boats,

campers, trucks, and cabins. U.S. Fish & Wildlife Service, *Birding in the United States: A Demographic and Economic Analysis* 12 (2006). Given the significant amount of money spent throughout the country on bird watching and hunting, degradation of waterbodies used by duck hunters and bird watchers will affect interstate commerce.

Even if the regulation at hand does not concern an economic issue, it has a significant enough effect on interstate commerce for it to fall within Congress' power under the Commerce Clause. Lake Temp's position on the highway of interstate commerce facilitates its use by interstate duck hunters and bird watchers. The degradation of Lake Temp would hinder its use as a habitat for migratory birds and, in turn, will affect the interstate market for duck meat and duck products. Additionally, the degradation of Lake Temp would affect the interstate market for duck hunting and bird watching equipment.

III. EPA HAS EXCLUSIVE JURISDICTION UNDER CWA § 402, 33 U.S.C. § 1342, TO ISSUE THE DOD A DISCHARGE PERMIT FOR THE SPENT MUNITIONS SLURRY BECAUSE IT IS A POLLUTANT, NOT A FILL MATERIAL.

Under the CWA, Congress bifurcated authority to issue permits for discharges into navigable waters between EPA and the Corps. While EPA has sole jurisdiction over "pollutants" through the § 402 permit program, the Corps retains authority over "dredged or fill material" through § 404 permit program. 33 U.S.C. § 1342(a)(1) (2006); 33 U.S.C. § 1362(6) (2006). In very limited instances when a discharge material is both a statutorily defined "pollutant" under the CWA and a "fill material" pursuant to EPA/ Corps' joint regulations, e.g. mining related waste, EPA and the Corps have mutually exclusive authorities to issue discharge permits – that is, EPA relinquishes permitting authority to the Corps. *Coeur Alaska, Inc. v. Southeast Alaska Conservation Council*, 129 S. Ct. 2458, 2467 (2009) ("The [CWA] is best understood to provide that if the [Corps] has authority to issue a permit for a discharge under § 404 [as fill material],

then EPA lacks authority to do so under § 402 [as a pollutant]."). Conversely, when a waste material is unambiguously listed as a "pollutant" under § 502 of the CWA but is excluded from the agencies' interpretation of "fill material," then EPA alone has jurisdiction.

Because munitions are expressly listed as pollutants under the CWA, *see* 33 U.S.C. § 1362(6), the dispositive question in determining which agency has sole permitting jurisdiction in this case is whether the munitions slurry may be concurrently regulated as a fill material. The EPA/Corps' joint fill regulations, the preamble to those regulations, and the CWA's broader purpose all unequivocally confirm that the munitions slurry is not fill material. Therefore, only EPA may issue a discharge permit in this case.

A. Munitions are "trash or garbage" and *per se* excluded from the agencies' regulatory definition of "fill material."

The Corps' jurisdiction over discharge permits for "fill material" is significantly constrained by a proviso in the EPA/Corps' joint fill regulations – "the term 'fill material' does not include trash or garbage." 40 C.F.R. § 232.2 (2010). In the preamble to the final rule defining "fill material," the agencies interpret the "trash or garbage" exclusion to include such waste materials as "debris, junk cars, used tires, and discarded kitchen appliances." *See* 67 Fed. Reg. 31,129, 31,134 (May 9, 2002). Spent munitions are tantamount to junk cars or kitchen appliances. Therefore, the Corps' issuance of a discharge permit for the munitions slurry directly contravenes the agencies' initial interpretation of the fill regulations articulated in the preamble.

i. *The agencies' interpretation of "trash or garbage" in the preamble to the final rule controls this case.*

The preamble to the agencies' joint fill regulations is entitled to deference as to the rule's meaning because it is an authoritative expression of the agencies' interpretation of that rule. *See Auer v. Robbins*, 519 U.S. 452, 461 (1997) ("*Auer* deference" refers to the principle of judicial

deference to an agency's reasonable construction of its own regulations). Moreover, in this case, the preamble is "dispositive" of the agencies' intent because it was a clear statement published in the Federal Register upon promulgation of the rule. *See Hillsborough County v. Automated Med. Labs., Inc.*, 471 U.S. 707, 714-16 (1985). Therefore, this Court should not accord deference to the Corps' permit issuance because it is conspicuously inconsistent with the preamble. *See Thomas Jefferson Univ. v. Shalala*, 512 U.S. 504, 512 (1994) (quoting *Gardebring v. Jenkins*, 485 U.S. 415, 430 (1988) ("That the current interpretation runs counter to the 'intent at the time of the regulations' promulgation,' is an additional reason why *Auer* deference is unwarranted.")).

ii. *Categorizing spent munitions as "trash or garbage" comports with both the agencies' interpretation of the term and the congressional intent of the CWA.*

The agencies stress in the preamble that when trash and garbage, such as junk cars or kitchen appliances, are dumped into water bodies, they very often result in adverse environmental impacts such as altered natural hydrology, physical hazards, or compromised water quality standards. 67 Fed. Reg. at 31,134. The agencies make no exceptions for junk cars or kitchen appliances just because they have been deconstructed or pulverized. Therefore, any waste materials that are closely analogous in composition, though not necessarily in form, to junk cars or kitchen appliances must also be excluded from the definition of "fill material."

Pulverized spent munitions are virtually indistinguishable from pulverized junk cars or kitchen appliances (e.g., microwave ovens or refrigerators) given their comparable metallic compositions. For example, when conducting the soil and water quality sampling for munitions constituents, the Military Munitions Center of Expertise analyzes for a list of twenty-three analyte metals used in a variety military munitions. Military Munitions Center for Expertise, Technical Update: Munitions Constituent Sampling (2005). Many of these metals are also found in common household appliances (e.g., refrigerators contain copper, aluminum, and mercury

components). U.S. Environmental Protection Agency, *Safe Disposal of Refrigerated Household Appliances*, www.epa.gov/ozone/title6/608/disposal/household.html (last visited Nov. 6, 2011). As such, the slurries pose virtually identical environmental hazards based on the shared potential to generate toxic, heavy metal-laden leachate and, ultimately, "compromise water quality standards." *See* 67 Fed. Reg. at 31,133. Because munitions are virtually indistinguishable in composition from junk cars and kitchen appliances, the Corps is *per se* precluded from permitting munitions to be discharged as fill material.

By excluding trash and garbage, particularly those comprised of heavy metals and toxic chemicals, the agencies bolstered Congress' objective of the CWA "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters," 33 U.S.C. § 1251(a). Indeed, the agencies specifically assert that this categorical exclusion helps "prevent utilization of waters as unlicensed dumping grounds for waste material," *see* 67 Fed. Reg. at 31,134.

B. The spent munitions slurry is not similar to "traditional" fill material and, therefore, fails the agencies' threshold inquiry set forth in the preamble to the joint fill regulations.

The District Court's determination that the munitions slurry is a fill material simply because discharging it would change the lakebed's bottom elevation (R. at 7-8) is an egregiously flawed interpretation of the EPA/ Corps' joint fill regulation and, moreover, is based on a severely truncated inquiry. Contrary to the District Court's holding, merely "changing the bottom elevation [of] a water of the United States" is not a sufficient condition for the Corps to assert jurisdiction over waste material as "fill material." *See* 40 C.F.R. 232.2; *see also* 67 Fed. Reg. 31,133 (May 9, 2002). Instead, the agencies must scrutinize the waste material's chemical and physical composition in light of two additional tests that the agencies set forth in the preamble to the fill regulations. These tests considerably constrict the spectrum of waste materials that the Corps may permit as "fill." 67 Fed. Reg. at 31,133. Specifically, waste material must be either:

(1) "similar to 'traditional' fill material used for purposes of creating fast land for development" (e.g., soil, rock, or earth), or (2) "indistinguishable either upon discharge or over time from structures created for purposes of creating fast land." *Id.*

These additional tests set forth in the preamble are reviewable by this Court because they are inextricable elements of the joint fill regulations (i.e., "final agency action") and have binding legal effect on the agencies and regulated entities. *See Natural Resources Defense Council v. U.S. Environmental Protection Agency*, 559 F.3d 561, 564 (D.C. Cir. 2009); *see also Kennecott Utah Copper Corps. v. Dep't of Interior*, 88 F.3d 1191, 1233 (D.C. Cir. 1996). First, these tests, in tandem with the plain language of the final rule, are "final agency action" because they marked the consummation of the agencies' decisionmaking process and created binding legal consequences. *See NRDC*, 559 F.3d at 565 (citing *Bennett v. Spear*, 520 U.S. 154, 177-78 (1997)); *see also Kennecott*, 88 F.3d at 1233. Second, even absent an express statement in the preamble that these additional tests were to be legally binding, this Court may hold that tests enunciated in the preamble have independent legal effect because the tests' language is "sufficiently clear" to signal the agencies intent to bind itself and regulated parties. *See Kennecott*, 88 F.3d at 1233. *Cf. Center for Auto Safety v. Federal Highway Admin.*, 956 F.2d 309, 313 (D.C. Cir. 1992) (preamble to FHA regulations only proffered "suggested" inspection intervals and, thus, was "too general" to be reviewable). Unless the DOD can establish that the munitions slurry passes either test, the Corps may not permit the DOD to discharge it as fill.

In this case, only the first of the two tests (i.e., the "traditional-fill" test) is at issue because the DOD does not intend to either "create fast land" or use the munitions as "structures." *See* 67 Fed. Reg. at 31,133. In fact, the DOD acknowledges that it has no plans to create dry land by discharging the slurry; rather, Lake Temp would remain a lake. (R. at 4) Therefore,

determining whether the discharged slurry would be "indistinguishable" over time from "structures created for the purposes for creating fast land" (i.e., the second test) is wholly irrelevant. The only pertinent inquiry, then, is whether the munitions slurry passes the "traditional-fill" test. This test does not require that discharged material actually be used to create fast land, only that it be "similar" to material used to create that land. 67 Fed. Reg. at 31,133.

Employing the *noscitur a sociis* semantic canon of construction, the term "'traditional' fill material" must be narrowed by the terms around it, namely "soil, rock, and earth." *Id.* In *Coeur Alaska*, for example, the Supreme Court affirmed this reading of "traditional" fill by upholding the Corps' regulatory jurisdiction over mining slurry. The Court specifically noted that the mining slurry would not only have the effect changing the lakebed's elevation, but was also comprised primarily of earthen material similar to "traditional" fill. *See Coeur Alaska*, 129 S. Ct. at 2458. The Court's holding in that case was also undergirded by the preamble's text that specifically lists mining waste as one example of waste similar to "traditional" fill. *See id.*

The Supreme Court's holding in *Coeur Alaska* does not totally control the outcome of this case, however. Although in both cases discharging the slurry would certainly "change the bottom elevation" of the lakes, the cases are distinguishable because, unlike the mining slurry in *Coeur Alaska*, the munitions slurry's composite material does not comport with the agencies' construction of "traditional" fill material. That is, pulverized metal ammunition casings mixed with a chemical concoction of the munitions' liquid, semi-solid, and granular contents (R. at 4) are industrially manufactured – not earthen – and, therefore, the munitions slurry fails the "traditional-fill" test.

The agencies' specific inclusion of "plastics" and "construction debris" as examples of fill material also has no bearing on this case. As with all waste materials that are dissimilar to

"traditional" fill, including munitions, "plastics" and "construction debris" may only be discharged as "fill" if they pass the second effects-based test (i.e., "indistinguishable" from structures created for purposes of creating fast land). While one could plausibly fashion a structure out of plastic or construction debris and use it to "create fast land," the same simply cannot be said of the munitions slurry, which is a viscous semi-solid and does resemble a "structure" in any way.

C. The Corps' permit issuance was not in accordance with the law because the Corps unreasonably interpreted the agencies' joint fill regulations.

Because the munitions slurry is "trash or garbage" (i.e., a pollutant) and, additionally, does not pass the agencies' "traditional-fill" test, the Corps' issuance of a discharge permit was "plainly erroneous and inconsistent with the [fill] regulation." *See Auer v. Robbins*, 519 U.S. 452 (1997); *see also*, *Bowles v. Seminole Rock & Sand Co.,* 325 U.S. 410 (1945). Therefore, the Corps' issuance of a discharge permit violated the APA § 706(2)(A) as "agency action [not] in accordance with the law," 5 U.S.C. § 706(2)(A) (2006), and the District Court erred in upholding the Corps' permitting jurisdiction in this case.

The Supreme Court in *Coeur Alaska* considered a scenario closely analogous to the facts in this case and corroborated this same conclusion. In its discussion of the boundary between lawful and unlawful interpretations of the fill regulations and the CWA, the Court opined that if the Corps were interpret the term "fill material" to encompass waste materials like "feces and uneaten feed," "litter," or waste produced in "battery manufacturing," then the Corps' determination could foreseeably be challenged as an "unlawful interpretation of the fill regulation" or an "unreasonable interpretation of § 404 [of the CWA]." *Coeur Alaska*, 129 S. Ct. at 2468. The Court essentially affirmed that these types of waste materials are "trash or garbage,"

a conclusion that underpins New Union's contention in this case that the munitions slurry unquestionably falls outside the bounds of waste materials that the Corps may lawfully regulate.

In addition to being an "erroneous" regulatory interpretation, the Corps' determination that the munitions slurry is "fill material" is also an unreasonable interpretation of the CWA because it flies in the face of the general purpose of the Act "to restore and maintain the chemical, physical, and biological integrity" of waters of the United States. By holding otherwise, the District Court confirmed Justice Ginsburg's fears in her dissent in *Coeur Alaska* that "[w]hole categories of regulated industries can [gain] immunity from a variety of pollution-control standards." *Id.* (Ginsburg, J., dissenting). Sanctioning the Corps' permit issuance to the DOD in this case totally overrides the statutory goal of eliminating water pollution as well as Congress' particular rejection of the use of navigable waters as waste disposal sites. *Coeur Alaska*, 129 S. Ct. at 2483 (citing S.Rep. No. 92-414, at 77 (1972) ("The use of any river, lake, stream or ocean as a waste treatment system," the Act's drafters stated, "is unacceptable.")).

That EPA could have invoked its discretionary veto power over the Corps' permit issuance in this case, *see* 33 U.S.C. § 1344(c), does not cure the fact that the Corps unreasonably interpreted both the fill regulations and the CWA in the first place. Indeed, the Supreme Court in *Coeur Alaska* grossly overstated the practical impact of veto power by characterizing it as a "safeguard" preventing regulated entities from exploiting § 404 as a loophole and evading performance standards simply by discharging enough pollutant to raise the bottom elevation of a body of water. *See Coeur Alaska*, 129 S. Ct. at 2467, and at 2478 (Breyer, J., concurring). As the dissent notably highlights, EPA's veto power is hardly as reassuring as the majority portrays it and is not an adequate substitute for forcing the Corps to comply with the CWA. *Id.* at 2483 n.5 (Ginsburg, J., dissenting). Further, EPA has exercised its veto power less a dozen times over 36

years, encompassing more than one million permit applications, which substantiates that EPA's veto power is functionally lifeless. *Id.* And even if EPA had exercised its veto power in this case, EPA's "reliance on ad hoc vetoes [undermines] Congress' aim to install uniform water-pollution regulation." *Id.*

In short, the Corps unlawfully usurped EPA's exclusive statutory jurisdiction under the CWA to issue discharge permits for pollutants and, unless the DOD first obtains a discharge permit from EPA pursuant to CWA § 402, 33 U.S.C. § 1342 (2006), its activities will patently violate CWA § 301(a). 33. U.S.C. § 1311(a) ("Except as in compliance with § [1342] of this title, the discharge of any pollutant by any person shall be unlawful."). Notwithstanding EPA's veto power, the Corps' issuance of a discharge permit and EPA's subsequent acquiescence to that permit are both undeserving of *Auer* deference from this Court because they were unreasonable and "plainly erroneous" interpretations of the agencies' joint fill regulations, and, moreover, they were wholly inconsistent the purpose of the CWA. This Court should reverse the District Court's ruling and hold, as a matter of law, that EPA has sole jurisdiction to issue a discharge permit in this case because the DOD plans to discharge a pollutant, not a fill material.

IV. THE OMB'S DIRECTIVE VIOLATED THE CWA. ADDITIONALLY, THE OMB'S DECISION NOT TO VETO THE PERMIT AND EPA'S ACQUISENCE TO THAT DECISION WERE ARBITRARY AND CAPRICIOUS.

The District Court erred in holding that the OMB's directive did not violate the CWA. The OMB directed EPA not to veto the permit, and EPA acquiesced to the OMB's directive even though EPA's expert judgment led it to believe that vetoing a permit was appropriate. (R. at 9). The OMB has effectively interpreted the CWA as conferring upon the OMB the authority to administer the CWA, which contravenes Congress' "unambiguously expressed intent" for EPA to administer the statute. *Chevron U.S.A. v. Natural Resources Defense Council*, 467 U.S. 837,

842-43 (1984); *FEC v. Democratic Senatorial Campaign Committee*, 454 U.S. 27, 32 (1981); *SEC v. Sloan*, 436 U.S. 103, 117–118 (1978). Alternatively, the OMB's interpretation should not be given respect because the power granted to EPA over numerous sections of the CWA supports the notion that EPA, not the OMB, should make the final decision to veto permits under CWA § 404. Thus, the OMB's interpretation does not have the necessary "power to persuade" set forth in *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944).

The District Court also erred in holding that the OMB's decision was neither subject to judicial review nor arbitrary and capricious. The decisions of both the OMB and EPA are subject to judicial review because their actions involve the application of law under the CWA. Additionally, the OMB's decision and EPA's acquiescence to that decision were arbitrary and capricious because EPA and the OMB failed to offer a reasoned explanation for arriving at their ultimate conclusions.

A. The OMB's directive and EPA's acquiescence to that directive violated the CWA because these actions were contrary to Congress' unambiguously expressed intent.

An agency and a reviewing court must "give effect to the unambiguously expressed intent of Congress." *Chevron*, 467 U.S. at 842-43; *Democratic Senatorial Campaign Committee*, 454 U.S. at 32; *Sloan*, 436 U.S. at 117–118. When enacting the CWA, Congress specifically clarified that the Administrator of EPA has the authority "to administer" the CWA generally. 33 U.S.C § 1251(d) (2006). Furthermore, Congress conferred upon the Administrator of EPA the particular power to veto permits proposed by the Corps. 33 U.S.C. § 1344(c). However, Congress conferred no authority on the OMB to issue or veto permits under 33 U.S.C. §§ 1342 and 1344 or to decide which permits should be issued in any instance. The OMB has interpreted the CWA as granting the OMB the authority to make the ultimate decision not to veto the Corps' permit, which conflicts with Congress' unambiguously expressed intent.

The OMB's interpretation has also delegated authority to the President in such a way that conflicts with the separation of powers structure of the Constitution. The President derives power over agencies from Article II of the Constitution, *Free Enterprise Fund v. Public Company Accounting Oversight Board*, 130 S. Ct. 3138, 3152 (2010) (internal citation omitted), which states in relevant part that "[t]he executive Power shall be vested in a President of the United States of America." U.S. Const. art II, § 1, cl. 1.

However, the President's Article II power is not without limits. Under the separation of powers structure of the Constitution, the President does not have the power to alter congressional policy, which comes in the form of statutory directives. *See Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 588 (1952); *see also National Federation of Federal Employees v Brown,* 645 F.2d 1017, 1025 (D.C. Cir. 1981). Among Congress' specifically enumerated powers is the power to "make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof," which suggests that there is no constitutional barrier to Congress vesting power in agency heads. U.S. Const. art. I, § 8, cl. 18. Congress, not the President, has the power to make laws. *See Youngstown*, 343 U.S. at 588.

By depriving EPA of its authority to regulate the CWA, the OMB has effectively prevented Congress from exercising its constitutional law-making power. This is an invalid intrusion into the will of Congress and EPA's regulatory expertise because "Congress enacts environmental legislation after years of study and deliberation, and then delegates to the expert judgment of the EPA Administrator the authority to issue regulations carrying out the aims of the law." *Environmental Defense Fund v. Thomas*, 627 F. Supp. 566, 570 (D.D.C. 1986). However,

in this case, the EPA Administrator, who was appointed specifically because of her relevant expertise, was not able to fulfill her function under the CWA.

Relatedly, EPA has acted contrary to the will of Congress. Congress had specifically delegated power to EPA to use its expertise to carry out its will, but EPA ignored its own expert judgment and acquiesced to the OMB. EPA's expert judgment led it to believe that the discharge into Lake Temp required a § 402 permit at least for treatment of the non-fill liquid and semi-solid portion of the material. (R. at 9). By acquiescing to the OMB's directive, EPA placed the role of administration of the statute in the hands of the OMB, which was directly contrary to Congress' intent of having EPA administer the CWA.

B. Alternatively, the OMB's directive and EPA's subsequent acquiescence violated the CWA because their interpretations did not have the "power to persuade."

Even if EPA and the OMB's interpretations were not in violation of Congress' unambiguously expressed intent, their interpretations should not be given respect. Normally, courts defer to an agency's permissive interpretation if a statute is silent or ambiguous. *Chevron*, 467 U.S. at 842-43. However, the Supreme Court in *Chevron* based its decision on the fact that "[j]udges are not experts in the [technical] field, and are not part of either political branch of the Government," while agencies appropriately make "policy choices–resolving the competing interests which Congress itself either inadvertently did not resolve, or intentionally left to be resolved by the agency charged with the administration of the statute in light of everyday realities." *Id.* at 865. Therefore, determining whether an agency action is afforded *Chevron* deference hinges on the agency's expertise on the subject matter.

In this case, the OMB has prevented EPA from exercising its expertise on the subject matter. Therefore, none of the justifications for utilizing the *Chevron* test apply. According to EPA's expert judgment, this case required a § 402 permit at least for the treatment of the non-fill

liquid and semi-solid portion of the material before it was discharged into navigable waters. (R. at 9). However, this expert judgment was not used in the OMB's final decision.

As noted by the Supreme Court, *Chevron* applies when Congress has delegated authority to an agency to make rules having the force of law, and the agency has adopted an interpretation pursuant to this authority. *United States v. Mead Corp*., 533 U.S. 218, 226-27 (2001). Under the CWA, EPA is the agency that Congress has delegated the authority to make rules, as evidenced by the fact that EPA is the administrator of more than a hundred sections of the statute. The OMB, on the other hand, is not an administrator of any portion of the statute and the Corps is the administrator of only one part of the statute. However, in this case, the Court is faced with the interpretation of the OMB rather than of EPA.

An agency decision that does not deserve *Chevron* deference is instead entitled to the less deferential standard articulated in *Skidmore*, 323 U.S. at 140. *See Christensen v. Harris County*, 529 U.S. 576, 576-77 (2000). Pursuant to *Skidmore*, an agency's interpretation is only "entitled to respect" if it has the "power to persuade." *Skidmore*, 323 U.S. at 140. The weight of *Skidmore* "respect" to an agency's judgment "depend[s] on the thoroughness evidenced in [the agency's] consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control." *Id.*

Granting the OMB directive authority over EPA's decisions to veto permits does not have the "power to persuade." Instead, the power granted to EPA over numerous sections of the CWA supports the notion that EPA, not the OMB, should make the final decision to veto permits under CWA § 404. The EPA Administrator has the authority "to administer" the CWA generally, 33 U.S.C § 1251(d), and the particular power to veto permits proposed by the Corps. 33 U.S.C. §

1344(c). On the other hand, the OMB has no authority to issue or veto permits under 33 U.S.C. §§ 1342, 1344 or to decide which permits should be issued in any instance.

C. The OMB's decision and EPA's subsequent acquiesce are subject to judicial review.

Section 701 of the APA, 5 U.S.C. § 701 (2006), specifies that the actions of "each authority of the Government of the United States," which includes both EPA and the OMB, are subject to judicial review except where there is a statutory prohibition on review or where "agency action is committed to agency discretion by law." In the case of the CWA §§ 402 and 404, there is no indication that Congress wanted to prohibit judicial review. *Abbott Laboratories v. Gardner*, 387 U.S. 136, 141 (1967). Additionally, there is no showing of "clear and convincing evidence" of a "legislative intent" to restrict access to judicial review. *Brownell v. We Shung*, 352 U.S. 180, 185 (1956). Therefore, this case does not fall within the "statutory prohibition on review" exception to judicial review.

This case also does not fall within the "committed to agency discretion by law" exception. The legislative history of the APA indicates that this exception is applicable only in those rare cases where "statutes are drawn in such broad terms that in a given case there is no law to apply." *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 413 (1971); S. Rep. No. 79-752, at 26 (1945). EPA's jurisdiction under CWA § 402 is over "pollutants" broadly while the Corps' jurisdiction under § 404 is circumscribed by the agencies' joint definition of "dredged or fill materials." EPA's authority to veto permits under 33 U.S.C § 1344(c) is also confined by these definitions. Thus, the agencies' respective jurisdictional reaches under the CWA are non-discretionary questions of law.

Additionally, the OMB's action, under its authority to resolve disputes set forth by Exec. Order No. 12,088, does not fall within the "committed to agency discretion" exception. The

Executive Order expressly states, "[N]othing in this Order, nor any action or inaction under this Order, shall be construed to revise or modify any applicable pollution control standard," implying that the OMB is still subject to the requirements of the CWA. Exec. Order No. 12,088, 43 Fed. Reg. 47,707 (Oct. 13, 1978). Therefore, the OMB was also confined by the definitional constraints of "pollutants" and "fill material" when making its determination.

D. The decision was "arbitrary and capricious" because EPA and the OMB failed to offer a rational connection between the facts and the choice made.

The APA specifies that "the reviewing court shall . . . hold unlawful and set aside agency action, findings, and conclusions found to be . . . arbitrary, capricious, and abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706. Under the "arbitrary and capricious" standard, an agency must, *inter alia*, examine the relevant data and articulate a satisfactory explanation for its action including a "rational connection between the facts found and the choice made." *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (quoting *Burlington Truck Lines v. United States*, 371 U.S. 156, 168 (1962)).

In this case, neither EPA nor OMB articulated a satisfactory explanation for their decision. Instead, EPA's expert judgment yielded the opposite result of the one proposed by the OMB. EPA believed that the nature of the discharge into Lake Temp was significantly different from the discharge in *Coeur Alaska*. (R. at 9). According to EPA, the discharge into Lake Temp required a § 402 permit at least for treatment of the non-fill liquid and semi-solid portion of the material. *Id.* After the OMB made the decision and EPA acquiesced to that decision, EPA and OMB never offered a "rational connection" between the facts and its new choice even though its final determination directly contradicted its initial determination.

The President's power over agencies does not justify the OMB interfering in such a way that it can disallow EPA from being able to offer a "rational connection" between the facts and

its new choice. Because EPA was appointed specifically by Congress because of its relevant expertise, Congress' intention is for EPA to base its ultimate decisions on this expertise. While the President may have the authority to direct Congressional policy in a manner prescribed by Congress, he cannot override Congressional policy with Presidential policy. *See Youngstown*, 343 U.S. at 588. It necessarily follows that, while the OMB can play a role in the decisions of EPA, EPA must make the final decision and must offer a "rational connection between the facts found and the choice made." *State Farm*, 463 U.S. at 43 (quoting *Burlington Truck Lines*, 371 U.S. at 168). However, in this case, instead of making the final decision based on its expert judgment, EPA improperly succumbed to the judgment of the OMB.

CONCLUSION

For the foregoing reasons, this Court should hold that (1) the State of New Union has standing; (2) Lake Temp is a navigable waterbody; (3) the Corps lacked jurisdiction to issue a CWA § 404 permit because the DOD's munitions slurry is a pollutant, not a fill material; and (4) OMB's dispute resolution between EPA and the Corps violated the CWA.

Respectfully submitted,

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