C.A. No. 11-1245

IN THE UNITED STATES
COURT OF APPEALS FOR THE TWELFTH CIRCUIT

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 UNITED STATES
DISTRICT COURT FOR THE DISTRICT OF NEW UNION

BRIEF FOR APPELLEE
UNITED STATES

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JURISDICTIONAL STATEMENT

The State of New Union ("New Union") filed a complaint in the United States District Court for the District of New Union under the citizen suit provision of the Administrative Procedure Act ("APA"), 5 U.S.C. § 702 (2006). The district court had subject matter jurisdiction pursuant to 28 U.S.C. § 1331. The district court entered final judgment on June 2, 2011, granting the United States' motion for summary judgment on all counts. New Union appeals that decision. This Court has jurisdiction pursuant to 28 U.S.C. § 1291.

STATEMENT OF THE ISSUES

I. Does New Union have standing in either its sovereign capacity or in its *parens patriae* capacity to challenge the issuance of DOD's § 404 permit when the state has produced no evidence that any contamination will ever reach the small portion of the Imhoff Aquifer beneath its own borders?

II. Does the Corps have jurisdiction to issue DOD a § 404 permit for Lake Temp, an intrastate lake that spans 27 square miles in its ordinary condition and that interstate travelers have used for the past 100 years for hunting, bird-watching, boating, and canoeing?

III. Does the Corps have jurisdiction to issue DOD a § 404 permit for the discharge of slurry that will eventually raise the lakebed of Lake Temp by six feet and cause the lake to increase in size by two square miles?

IV. Did OMB's resolution of the jurisdictional dispute between EPA and the Corps or EPA's subsequent decision not to exercise its discretionary authority to veto DOD's § 404 permit violate the CWA?

STATEMENT OF THE CASE

This case began when the U.S. Army Corps of Engineers ("Corps") issued a § 404 permit under the Clean Water Act ("CWA"), 33 U.S.C. § 1344(a) (2006), to the Department of Defense ("DOD") for the discharge of slurry into Lake Temp, a federally owned body of water located entirely within the State of Progress ("Progress"). (R. 3). Prior to the issuance of the permit, the

Office of Management and Budget ("OMB") resolved a dispute between the Corps and the U.S. Environmental Protection Agency ("EPA") as to which agency had jurisdiction over DOD's proposed discharge. (R. 10). OMB ultimately determined that the Corps had the authority to regulate the discharge under § 404, while EPA did not have authority under § 402, 33 U.S.C. § 1342(a)(1). (R. 9). While EPA could have vetoed the Corps' permitting decision, it chose not to do so. (R. 10).

Subsequently, New Union sought judicial review of the Corps' decision to grant DOD a § 404 permit in the United States District Court for the District of New Union under the Administrative Procedure Act, 5 U.S.C. § 702. (R. 3). New Union alleged that the Corps did not have authority to issue a § 404 permit because DOD's slurry qualified as a "pollutant" under 33 U.S.C. § 1362(6), the discharge of which ordinarily requires a § 402 permit issued by EPA. (R. 5). New Union further argued that OMB impermissibly resolved the jurisdictional dispute between EPA and the Corps, thereby influencing EPA's decision not to veto DOD's permit. (R. 5, 10). In response, the United States refuted New Union's claims and counter-argued that it did not have standing to challenge the permit because its injuries were speculative and unredressable. (R. 5). Progress intervened, and all parties filed cross-motions for summary judgment. (R. 3, 5).

The district court granted the United States' motion for summary judgment on all counts. (R. 10–11). First, the court held that New Union did not have standing because neither New Union nor its citizens had demonstrated a legally cognizable injury to their interests in the state's groundwater. (R. 5–7). Second, the court held that the Corps, not EPA, was the proper agency to issue a permit for the discharge of slurry into Lake Temp. (R. 8). Citing the U.S. Supreme Court's decision in *Coeur Alaska, Inc. v. Southeast Alaska Conservation Council*, 129 S. Ct. 2458 (2009), the court ruled that § 404 applied because the slurry met the Corps' regulatory

definition of "fill material" as a substance that would have the effect of changing the bottom elevation of Lake Temp. (R. 7–8). Finally, the court held that OMB's participation in the dispute between EPA and the Corps did not violate the CWA because OMB has the authority to resolve disputes between agencies of the executive branch. (R. 9–10). This appeal followed.

STATEMENT OF FACTS

Lake Temp is a nearly permanent lake located entirely within DOD's military reservation in Progress. (R. 4). The lake is fed by an 800-square-mile watershed, but has no outflow. *Id.* During rainy years, Lake Temp spans an area of 27 square miles; in dry years, the lake decreases in size. *Id.* Approximately once every five years, the lake dries completely. *Id.* Yet, for over a century, outdoorsmen have come to Lake Temp to hunt, bird-watch, boat, and canoe. *Id.* While 75 percent of these outdoorsmen hail from Progress, the other 25 percent arrive from out of state. *Id.* DOD has posted signs on the reservation warning that entry onto Lake Temp is prohibited, but the duck hunters and bird-watchers have ignored these signs and continue to use the lake. *Id.*

The slurry that DOD seeks to discharge into Lake Temp consists of solid, semi-solid, granular, and liquid munitions mixed with chemicals to ensure that the materials are safe and no longer explosive. *Id.* DOD will discharge the slurry evenly over the lakebed from a continually moving multi-port pipe. *Id.* DOD estimates that the slurry will eventually raise the lakebed by six feet, causing Lake Temp to increase in size by approximately two square miles. *Id.* Over time, alluvial deposits will cover the lakebed, returning Lake Temp to its pre-operation condition, albeit at a higher elevation. (R. 4–5).

The Imhoff Aquifer lies approximately 1,000 feet below Lake Temp. (R. 4). The aquifer is located almost completely within Progress, but a small, five-percent portion lies beneath New Union. *Id.* The groundwater in the Imhoff Aquifer contains so much sulfur that it is not potable

or suitable for agriculture without treatment. *Id.* New Union has presented circumstantial evidence that water from the Lake Temp project might enter the Imhoff Aquifer, but it has produced no evidence that any contamination will ever reach the small portion of the aquifer beneath its own borders. (R. 5–6). Similarly, New Union has produced no evidence of the potential strength or severity of any future contamination. (R. 6). New Union acknowledges its lack of evidence, noting that the severity of any future contamination will depend upon the direction and rate of flow of the groundwater as well as the top and bottom elevations of the aquifer throughout its expanse, all of which are presently unknown. *Id.* While New Union has expressed a willingness to install monitoring wells above the aquifer to determine direction and rate of flow, it never filed an application with DOD to begin this process. *Id.*

New Union also has revealed that one of its citizens, Dale Bompers, has a ranch situated above its portion of the Imhoff Aquifer. *Id.* Because the aquifer is contaminated with sulfur, Mr. Bompers does not use the groundwater and has no definite plans to do so in the future. *Id.* New Union state law requires groundwater users to obtain a permit before making any withdrawals, but neither Mr. Bompers nor any other New Union citizen has ever sought a permit to withdraw groundwater from the Imhoff Aquifer. (R. 6–7). Despite these facts, Mr. Bompers claims that the discharge of slurry into Lake Temp will diminish his ranch's property value. (R. 6).

STANDARD OF REVIEW

The district court's grant of summary judgment is subject to de novo review. *Eastman Kodak Co. v. Image Technical Servs., Inc.*, 504 U.S. 451, 466 n.10 (1992). Summary judgment is appropriate "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a).

SUMMARY OF THE ARGUMENT

Despite New Union's attempts to confound the issues in this case, this Court is presented with a simple question—Does the slurry that DOD proposes to discharge into Lake Temp constitute "fill material"? If the answer is yes, then the Corps has the sole authority to regulate the discharge pursuant to § 404 of the CWA. The district court correctly held that the Corps, not EPA, had the authority to regulate DOD's discharge because it qualified as "fill material" under the agencies' objective, effects-based test. This Court should affirm that ruling.

As a preliminary matter, this Court lacks jurisdiction to hear New Union's claims because New Union does not have Article III standing. New Union does not have standing to sue in its sovereign capacity because it is not entitled to "special solicitude" under *Massachusetts v. EPA*, nor can it satisfy the traditional requirements of injury, causation, and redressability. New Union is not entitled to "special solicitude" because it has not suffered a procedural injury, and the meager interest it has in its sulfur-contaminated groundwater pales in comparison to the interest Massachusetts had in its coastline. Furthermore, New Union has not suffered an injury in fact because there is no evidence that pollution from the Lake Temp project will ever reach its groundwater.

New Union also does not have standing to sue as *parens patriae* on behalf of its citizens. Under the *Snapp* test, a state can only sue as *parens patriae* if it alleges a concrete injury to a quasi-sovereign interest that affects a sufficiently substantial segment of its population. New Union cannot satisfy this test because it has only invoked the interests of a single citizen, Mr. Bompers. New Union also lacks *parens patriae* standing because Mr. Bompers has suffered no injury himself. Mr. Bompers does not use the groundwater beneath his ranch and has no plans to

do so. Finally, under the U.S. Supreme Court's decision in *Massachusetts v. Mellon*, it is highly questionable whether a state can even bring a *parens patriae* suit against the federal government.

Even if this Court finds that New Union has standing, New Union's claims fail on the merits. Section 404 of the CWA authorizes the Corps to issue permits "for the discharge of dredged or fill material into the navigable waters at specified disposal sites." Lake Temp qualifies as part of the "navigable waters" in two ways. First, the Corps has jurisdiction over Lake Temp because it is a traditional navigable water. Traditional navigable waters are those that are navigable in fact, meaning they are *susceptible* to use as highways for commerce in their ordinary condition. Even entirely intrastate lakes and bodies of water solely capable of supporting navigation by small watercraft can be navigable in fact. Lake Temp is navigable because outdoorsmen have traversed the lake in rowboats and canoes for 100 years. Second, the Corps has jurisdiction over Lake Temp as an intrastate lake that substantially affects interstate commerce. Twenty-five percent of the people hunting and bird-watching on Lake Temp travel from out of state. In the aggregate, these activities generate over $84 billion annually. Finally, even though Lake Temp dries once every five years, it is relatively permanent and thus falls within the limits of the Corps' jurisdiction established under *Rapanos v. United States*.

The Corps has the authority to issue a permit for DOD's proposed discharge into Lake Temp because the slurry qualifies as "fill material." EPA and the Corps have defined "fill material" as any substance that will have the effect of changing the bottom elevation of a water body. Once a discharge qualifies as "fill material," it is subject to regulation under § 404 and not § 402. Because DOD's discharge of slurry will have the effect of changing the bottom elevation of Lake Temp, it clearly constitutes "fill material" under the agencies' effects-based test. While the slurry contains spent munitions, which are listed as a "pollutant" under the CWA, neither a

material's classification as a pollutant nor its status as waste precludes the Corps from issuing a § 404 permit. Indeed, the § 404 permitting process contains numerous procedural safeguards to involve the public, mitigate environmental damage, and prevent the discharge of toxic pollutants. These same safeguards ensure that the Corps is unbiased when dealing with permit applicants.

Finally, OMB did not impermissibly interfere with the jurisdictional dispute between EPA and the Corps. Pursuant to Article II, the President has broad authority to ensure the uniform execution of the laws, which includes the power to resolve disputes between agencies of the executive branch. In matters involving environmental law and policy, the President has traditionally delegated this authority to OMB, which permissibly determined that the Corps, and not EPA, had the authority to issue a permit to DOD in this case. Additionally, any influence OMB had on EPA's decision not to veto DOD's permit is immaterial because EPA's authority to veto a § 404 permit is discretionary and therefore unreviewable by this Court. Agency action is unreviewable when it is "committed to the agency's discretion by law" such that a reviewing court would have no meaningful standard against which to judge the agency's exercise of discretion. The language of § 404(c) is discretionary, stating only that EPA is *authorized* to veto a § 404 permit if a discharge will have an unacceptable adverse effect on an aquatic resource. Consequently, there is no meaningful way for this Court to evaluate EPA's decision not to veto DOD's permit. Even if this Court determines that judicial review is warranted, the scope of that review is limited to determining whether EPA's decision was arbitrary or capricious. Under this narrow standard of review, a reviewing court must defer to an agency's decision if it involves scientific expertise. EPA has traditionally been reluctant to exercise its veto authority once the Corps has issued a permit and this Court should defer to EPA's scientific expertise on this point. For these reasons, this Court should affirm the ruling of the district court.

ARGUMENT

I. THIS COURT DOES NOT HAVE JURISDICTION TO HEAR NEW UNION'S CLAIMS BECAUSE NEW UNION DOES NOT HAVE ARTICLE III STANDING.

The doctrine of Article III standing requires a party seeking the jurisdiction of the federal courts to "allege[] such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult . . . questions." *Baker v. Carr*, 369 U.S. 186, 204 (1962). By positing purely hypothetical injuries to its groundwater and the interests of its citizens, New Union has not alleged such a stake. Indeed, New Union has failed to establish that it is entitled to sue either (A) in its sovereign capacity or (B) in its capacity as *parens patriae*.

A. New Union Does Not Have Standing to Sue in Its Sovereign Capacity.

New Union argues that it has standing in its sovereign capacity as owner and regulator of the groundwater in its state, relying primarily on the U.S. Supreme Court's decision in *Massachusetts v. EPA* ("*Mass. v. EPA*"), 549 U.S. 497 (2007). In that case, a closely divided Court held that Massachusetts had standing to challenge the denial of its rulemaking petition asking EPA to regulate greenhouse gas emissions from motor vehicles under the Clean Air Act. *Id.* at 526. Explaining first that Massachusetts was entitled to "special solicitude" in its standing analysis, the Court proceeded to find that Massachusetts' coastline was sufficiently threatened by rising sea levels to satisfy the traditional Article III requirements of injury, causation, and redressability. *Id.* at 520–21. New Union's reliance on this decision is misplaced, however, because unlike Massachusetts, New Union has not demonstrated (1) that it is entitled to "special solicitude" or (2) that it meets the traditional standing requirements.

1. New Union is not entitled to "special solicitude" under *Massachusetts v. EPA* because it has not implicated a procedural right or demonstrated a sufficient stake in protecting its sovereign interests.

This Court should not afford New Union the same "special solicitude" that Massachusetts received when seeking to protect its coastline from the effects of climate change. In *Mass. v. EPA*, the Court determined that Massachusetts was entitled to "special solicitude" for two reasons. First, the Court explained that Massachusetts had a procedural right to protect its concrete interests and could assert that right "without meeting all the normal standards for redressability and immediacy." *Id.* at 517–18 (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 572 n.7 (1992)). A plaintiff has a procedural right when the government must adhere to specific procedural requirements before making a substantive decision that could affect the plaintiff's concrete interests, such as the requirement for a hearing before the denial of a permit or the requirement for an EIS before a federal facility can be constructed nearby. *Lujan*, 504 U.S. at 572. In *Mass. v. EPA*, the Court reasoned that because the Clean Air Act grants states the "right to challenge agency action unlawfully withheld," Massachusetts had a procedural right to challenge the denial of its rulemaking petition. 549 U.S. at 517. [1]

[1] In so ruling, the Court deviated from the traditional understanding of what constitutes a procedural injury. The right to challenge agency action unlawfully withheld as arbitrary and capricious is found in the Clean Air Act's judicial review provision. 42 U.S.C. § 7607(b)(1) (2006). While a judicial review provision undoubtedly grants aggrieved parties a cause of action, it does not create any procedural rights in a plaintiff or impose any procedural requirements on the federal government. *See Lujan*, 504 U.S. at 572 (explaining that a plaintiff suffers a procedural injury only when the federal government "disregard[s]" a procedural requirement). For this reason, the Court's reasoning has been heavily criticized by legal scholars. *See, e.g.*, Jonathan H. Adler, *Warming Up to Climate Change Litigation*, 93 Va. L. Rev. In Brief 63, 68 (2007) ("[T]he CAA provision has nothing to do with Massachusetts' claims in this case, as it does not establish equivalent procedural rights, at least not as such terms have been defined to date. Rather, Massachusetts claimed *substantive* injury, for which it sought *substantive* relief.") (emphasis added).

Second, the Court explained that because Massachusetts surrendered a measure of its sovereignty to the federal government upon joining the Union, it was not a "normal litigant for the purposes of invoking federal jurisdiction" if its sovereign interests were at stake. *Id.* at 518–19. Borrowing from the doctrine of *parens patriae*, the Court reasoned that Massachusetts' "independent interest 'in all the earth and air within its domain'" supported its desire to preserve its coastline. *Id.* at 519 (citation omitted). Massachusetts has 1,519 miles of coastline with an estimated coastal population of 4,783,167 as of the 2000 census. Nat'l Oceanic & Atmospheric Admin., Dep't of Commerce, Ocean and Coastal Management in Massachusetts, *available at* http://coastalmanagement.noaa.gov/mystate/ma.html. In addition to the relative significance of Massachusetts' interest, the Court characterized the threat of climate change as "catastrophic" and "the most pressing environmental challenge of our time." *Mass. v. EPA*, 549 U.S. at 504, 526. Moreover, the Court found that the threat of climate change was concrete and imminent because "rising seas have already begun to swallow Massachusetts' coastal land." *Id.* at 522.

In this case, New Union has not implicated a procedural right that would entitle it to a relaxed standard for redressability or immediacy. New Union was not denied a permit in the absence of a hearing or other procedural safeguards. Rather, New Union seeks to challenge the substantive decision of the Corps to grant a permit to a third party, DOD. (R. 3). Nor has New Union invoked its procedural right to challenge DOD's EIS for possible failure to comply with the procedural requirements of National Environmental Policy Act. Indeed, New Union never even commented on the EIS despite having the opportunity to do so. (R. 6). Finally, New Union cannot even satisfy the questionable standard for procedural injury put forth by the Court in *Mass. v. EPA*. New Union did not file a petition for rulemaking that was subsequently denied, nor has it invoked the right to challenge agency action unlawfully withheld.

New Union is also not entitled to "special solicitude" because the sovereign interest that it seeks to protect—the small portion of the Imhoff Aquifer that lies beneath its borders—pales in comparison to Massachusetts' interest in its coastline. The groundwater in the Imhoff Aquifer is not potable or usable in agriculture without treatment because it is contaminated with a high level of sulfur. (R. 4). The only New Union resident that resides near the aquifer, Mr. Bompers, has never used the groundwater. (R. 6). This is not the same type of interest that was at stake in *Mass. v. EPA*, where an entire state coastline and millions of people were at risk. Furthermore, New Union has admitted that it does not know if pollution from Lake Temp will ever reach the edge of the aquifer beneath its borders. (R. 5–6). In contrast, Massachusetts demonstrated that the "catastrophic" threat of rising sea levels had already begun to swallow its coastline. For these reasons, this Court should not afford New Union "special solicitude" in its standing analysis.

2. New Union cannot satisfy the traditional Article III requirements because its alleged injuries are hypothetical and unlikely to be redressed by a favorable decision of this Court.

Regardless of whether New Union is afforded "special solicitude," it still cannot satisfy the traditional requirements of Article III standing. Under Article III, "a plaintiff must 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." *Friends of the Earth v. Laidlaw Envtl. Servs., Inc.*, 528 U.S. 167, 180–81 (2000) (citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560–61 (1992)). The party that invokes federal jurisdiction bears the burden of establishing each of these elements, which "must be supported . . . with the same manner and degree of evidence required at the successive stages of the litigation." *Lujan*, 504 U.S. at 561. Thus, a plaintiff seeking summary judgment "can no

longer rest on . . . 'mere allegations,' but must 'set forth' by affidavit or other evidence 'specific facts' . . . ." *Id.* (internal citation omitted).

In *Mass. v. EPA*, the Court analyzed whether Massachusetts met the traditional standing requirements despite its grant of "special solicitude." 549 U.S. at 521. Based on Massachusetts' uncontested affidavits, the Court held that EPA's refusal to regulate greenhouse gases presented a risk to Massachusetts that was both "actual" and "imminent." *Id.* at 521–22. Furthermore, the Court concluded that there was a "substantial likelihood" that the relief Massachusetts requested would prompt EPA to take steps to reduce that risk. *Id.* at 521.

Here, New Union has not alleged sufficient facts to demonstrate that it has standing. While New Union has produced circumstantial evidence that contaminated water will enter the Imhoff Aquifer, it has failed to produce any evidence indicating if pollution will reach the edge of the aquifer beneath its borders or the strength of the pollution if it reaches that edge (R. 5–6). Indeed, New Union is not even sure which direction the groundwater flows. (R. 6). Thus, New Union's assertion that its groundwater will be contaminated by the Lake Temp project is purely conjectural. Furthermore, New Union has provided no evidence to show that its hypothetical injury is fairly traceable to the Lake Temp project. New Union admits that it could have installed monitoring wells to demonstrate this causal link, but offers this Court excuses for why it has not done so instead. *Id.* Finally, New Union's hypothetical injury cannot be redressed by a favorable decision of this Court. New Union seeks to have DOD's permit vacated under the theory that it was issued by the wrong agency. (R. 3). However, even if this Court were to vacate the permit, DOD would still be free to apply for a § 402 permit from EPA. Therefore, it is only speculative, as opposed to likely, that a favorable decision would redress New Union's grievance. While New Union's bare allegations might have sufficed at the pleadings stage, they are insufficient to

support its standing upon a motion for summary judgment. Therefore, this Court should hold that New Union lacks standing to sue in its sovereign capacity.

B. New Union Does Not Have Standing to Sue in Its *Parens Patriae* Capacity.

New Union also argues that it has standing to sue in its *parens patriae* capacity as protector of its citizens who have an interest in the state's groundwater. In *Alfred L. Snapp & Son, Inc. v. Puerto Rico ex rel. Barez*, the U.S. Supreme Court outlined the general requirements of *parens patriae* standing. 458 U.S. 592, 600–08 (1982). First, the state "must articulate an interest apart from the interests of particular private parties . . . ." *Id.* at 607. Second, the state "must express a quasi-sovereign interest," such as its interest in "the health and well-being . . . of its residents in general." *Id.* Finally, the state must allege a "concrete" injury to that interest that affects "a sufficiently substantial segment of its population." *Id.* at 602, 607. Here, New Union does not have standing to sue in its capacity as *parens patriae* because (1) it has not alleged a concrete injury to a quasi-sovereign interest that affects a sufficiently substantial segment of its population; (2) Mr. Bompers cannot individually satisfy the requirements of Article III standing; and, alternatively, (3) states cannot bring *parens patriae* actions against the federal government.

1. New Union cannot satisfy the *Snapp* test because it has not alleged a concrete injury to a quasi-sovereign interest that affects a sufficiently substantial segment of its population.

New Union does not have *parens patriae* standing because it cannot meet the third prong of the *Snapp* test. While the *Snapp* Court did not say what proportion of a state's population constitutes a "substantial segment," it explained that "more must be alleged than injury to an identifiable group of individual residents." *Id.* at 607; *see also Connecticut v. Am. Elec. Power Co.*, 582 F.3d 309, 339 (2d Cir. 2009), *rev'd on other grounds*, 131 S. Ct. 2527 (2011) ("[T]he injury must affect a substantial segment of the population, *not one individual*.") (emphasis added). For example, in *Missouri v. Illinois*, Missouri sought to enjoin the discharge of sewage

into the Mississippi River because thousands of its citizens relied on the river for drinking water, domestic use, and agricultural and manufacturing purposes. 180 U.S. 208, 209–10, 212 (1901). Similarly, in *Georgia v. Tennessee Copper Co.*, Georgia filed suit to enjoin toxic air pollution that had damaged forests, orchards, and crops across five of its counties. 206 U.S. 230, 236 (1907). The *Snapp* Court cited these cases as examples of injuries to the public health and comfort that are "graphic and direct." 458 U.S. at 604.

In this case, the United States does not dispute that New Union has articulated a quasi-sovereign interest in its groundwater. Nonetheless, New Union's *parens patriae* standing must fail because the state cannot meet the third prong of the *Snapp* test. As discussed *supra* in Part I.A., New Union's alleged injuries are anything but concrete. New Union has not shown that the portion of the Imhoff Aquifer that lies beneath its borders will ever be contaminated by the Lake Temp project. (R. 5–6). In contrast, the pollution in *Missouri* and *Tennessee Copper* was graphic and direct, threatening public drinking water, forests, and croplands. Furthermore, New Union's hypothetical injuries do not affect a substantial segment of its population. Rather, New Union has implicated the interests of a single citizen, Mr. Bompers, who neither drinks nor uses the groundwater beneath his ranch. (R. 6). While the courts have never clarified what proportion of a state's population must be affected by the challenged behavior, a single individual will not suffice. Consequently, New Union does not have standing in its capacity as *parens patriae*.

2. Mr. Bompers does not have Article III standing because his alleged injuries are hypothetical and conjectural, rather than actual and imminent.

New Union also lacks *parens patriae* standing because the only citizen it seeks to represent, Mr. Bompers, has suffered no injury himself. "[T]he requirement of injury in fact is a hard floor of Article III jurisdiction . . . ." *Summers v. Earth Island Inst.*, 555 U.S. 488, 497 (2009). As Chief Justice Roberts explained in his dissent in *Mass. v. EPA*: "Just as an association

suing on behalf of its members must show not only that it represents the members but that at least one satisfies Article III requirements, so too a State asserting quasi-sovereign interests as *parens patriae* must show that its citizens satisfy Article III." 549 U.S. 497, 538 (2007) (Roberts, C.J., dissenting); *see also Md. People's Counsel v. FERC*, 760 F.2d 318, 322 (D.C. Cir. 1985) (explaining that a state can only sue as *parens patriae* "where the citizen interests represented are concrete interests which the citizens would have standing to protect in the courts themselves"); *but see Connecticut v. Am. Elec. Power Co.*, 582 F.3d 309, 339 (2d Cir. 2009), *rev'd on other grounds*, 131 S. Ct. 2527 (2011) (holding that states suing in their *parens patriae* capacity need not demonstrate that the citizens they seek to protect also satisfy Article III's core requirements).

In *Table Bluff Reservation (Wiyot Tribe) v. Phillip Morris, Inc.*, the Ninth Circuit applied this rule in a lawsuit between Indian tribes and tobacco companies. 256 F.3d 879 (9th Cir. 2001). The tribes argued that they had standing to sue on behalf of their smoking members who had to pay higher cigarette prices as a result of the massive settlement between the tobacco companies and 46 states. *Id.* at 885. The Ninth Circuit explained that in addition to satisfying the *Snapp* test, the tribes also had to "allege[] injury in fact to the citizens they purport to represent as *parens patriae*." *Id.* The court concluded that the tribes did not have standing because no constitutional injury occurs when a manufacturer passes on higher costs in the form of price increases. *Id.*

Like the cigarette smokers in *Table Bluff*, Mr. Bompers has not suffered an Article III injury. Mr. Bompers has claimed that the value of his ranch will be diminished if the groundwater beneath his property is contaminated. (R. 6). While a loss in property value can constitute an injury in fact, *see Friends of the Earth v. Laidlaw Envtl. Servs., Inc.*, 528 U.S. 167, 182–83 (2000), the loss must be actual or imminent, not hypothetical or conjectural. Mr. Bompers has presented no proof of a loss in property value, only speculation. (R. 6). Nor has Mr.

Bompers suffered an injury to his ability to use the groundwater. Indeed, Mr. Bompers does not presently use the groundwater at all, nor is it potable or fit for agricultural use without treatment. *Id.* Furthermore, Mr. Bompers has no right to withdraw the groundwater because New Union requires a permit for all withdrawals. (R. 6–7). Mr. Bompers has not averred that he intends to install treatment equipment or apply for a permit, but even were he to do so, "'some-day intentions' . . . without any descriptions of concrete plans . . . do not support a finding of [an] 'actual or imminent' injury . . . ." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 564 (1992). At most, Mr. Bompers could argue that the groundwater itself might someday be injured, but "[t]he relevant showing for purposes of Article III standing . . . is not injury to the environment but injury to the plaintiff." *Laidlaw*, 528 U.S. at 181. Because Mr. Bompers has suffered no such injury, New Union's claim of *parens patriae* standing must fail.

3. A state cannot represent its citizens as *parens patriae* in a suit against the federal government.

This Court should also reject New Union's *parens patriae* claim because the U.S. Supreme Court has held that a state cannot bring such claims against the federal government:

> While the state, under some circumstances, may sue in [its *parens patriae*] capacity for the protection of its citizens, it is no part of its duty or power to enforce their rights in respect of their relations with the federal government. In that field it is the United States, and not the state, which represents them as parens patriae, when such representation becomes appropriate; and to the former, and not to the latter, they must look for protective measures as flow from that status.

Massachusetts v. Mellon, 262 U.S. 447, 485–86 (1923) (internal citation omitted); *see also South Carolina v. Katzenbach*, 383 U.S. 301, 324 (1966); *Florida v. Mellon*, 273 U.S. 12, 18 (1927).

In *Mellon*, Massachusetts sought to challenge the constitutionality of a federal statute. 262 U.S. at 479. Lower courts are split, however, if the *Mellon* rule applies when a state seeks to challenge the actions of a federal agency instead. *See Michigan v. EPA*, 581 F.3d 524, 529 (7th Cir. 2009) (*Mellon* rule applies); *Citizens Against Ruining the Env't v. EPA*, 535 F.3d 670, 676

(7th Cir. 2008) (same); *Wyoming ex. rel Sullivan v. Lujan*, 969 F.2d 877, 883 (10th Cir. 1992) (same); *but see Md. People's Counsel v. FERC*, 760 F.2d 318, 322 (D.C. Cir. 1985) (holding that the *Mellon* rule is a prudential requirement that Congress can eliminate by statute). Because the U.S. Supreme Court has never definitively clarified the scope of its holding in *Mellon*, this Court should follow its sister circuits that adhere to the rule as binding precedent. *See Hart v. Massanari*, 266 F.3d 1155, 1171 (9th Cir. 2001) ("A decision of the Supreme Court will control that corner of the law unless and until the Supreme Court itself overrules or modifies it."). Thus, this Court should hold that the *Mellon* rule bars New Union from representing its citizens in a *parens patriae* suit against a federal agency.

II. THE CORPS HAS JURISDICTION TO ISSUE A § 404 PERMIT TO DOD BECAUSE LAKE TEMP IS PART OF THE "WATERS OF THE UNITED STATES."

Under § 404 of the CWA, the Corps has the authority to issue permits for discharges of fill material "into the navigable waters." 33 U.S.C. § 1344(a) (2006). The CWA defines the term "navigable waters" as "the waters of the United States." *Id.* § 1362(7). Although the CWA itself does not define "waters of the United States," EPA and the Corps have promulgated regulations that comprehensively define which types of water bodies are included in the phrase. 33 C.F.R. § 328.3 (2010); 40 C.F.R. § 401.11(l). Under these definitions, the Corps has jurisdiction over Lake Temp because (A) Lake Temp is a traditional navigable water; (B) Lake Temp is an intrastate lake that substantially affects interstate commerce; and (C) Lake Temp is relatively permanent and thus within the Corps' jurisdictional limits under *Rapanos v. United States*.

A. The Corps Has Jurisdiction over Lake Temp Because It Is a Traditional Navigable Water.

The Corps has jurisdiction over Lake Temp because the lake is a traditional navigable water. Traditional navigable waters include those that are navigable in fact. *Rapanos v. United States*, 547 U.S. 715, 778–79 (2006) (Kennedy, J., concurring). Water bodies are navigable in

fact when they "are used, or are susceptible of being used, in their ordinary condition, as highways for commerce." *The Daniel Ball*, 77 U.S. 557, 563 (1870). Accordingly, the Corps' regulations define "waters of the United States" to include "[a]ll waters which are currently used, or were used in the past, or may be susceptible to use in interstate or foreign commerce . . . ." 33 C.F.R. § 328.3(a)(1). The U.S. Supreme Court has approved of the Corps' jurisdiction in these cases. *See Rapanos*, 547 U.S. at 760 (Kennedy, J., concurring) (The Corps "has construed the term 'waters of the United States' to include . . . waters susceptible to use in interstate commerce—the traditional understanding of the term 'navigable waters of the United States.'").

Intrastate waters may qualify as navigable in fact even if they are "not part of a navigable interstate or international commercial highway." *Utah v. United States*, 403 U.S. 9, 10 (1971). The Corps explains that "[i]nterstate commerce may of course be existent on an *intrastate voyage* which occurs only between places within the same state. It is only necessary that goods *may* be brought from, or eventually be destined to go to, another state." 33 C.F.R. § 329.6(b) (emphasis added). For example, in *Utah*, the Court held that the wholly intrastate Great Salt Lake was navigable in fact because ranchers used the lake to transport animals, even though the transport was not commercial in nature. 403 U.S. at 11. The Court rejected the argument that boats must carry freight rather than animals in order to be navigable in fact, finding the distinction was "an irrelevant detail. The lake was used as a highway and that is the gist of the federal test." *Id.*; *see also Alaska v. Ahtna*, 891 F.2d 1401, 1402–03, 1406 (9th Cir. 1989) (holding that an intrastate river was navigable in fact because fishermen and sightseers used powerboats, inflatable rafts, and canoes on the river); *FLP Energy Marine Hydro LLC v. FERC*, 287 F.3d 1151, 1157 (D.C. Cir. 2002) (finding that an intrastate stream was navigable in fact and formed a "highway for commerce" based on three *experimental* canoe trips).

Furthermore, the U.S. Supreme Court considers waters to be navigable in fact even where people typically use only wooden watercraft because "[i]t would be a narrow rule to hold that in this country, unless a river was capable of being navigated by steam or sail vessels, it could not be treated as a public highway." *The Montello*, 87 U.S. 430, 441–42 (1874); *see also United States v. Holt State Bank*, 270 U.S. 49, 56 (1926) (stating that "navigability does not depend on the particular mode in which such use is or may be had—whether by steamboats, sailing vessels or flatboats . . ."). The Corps' regulations confirm that the *use* of watercraft determines navigability, not the *type* of watercraft used:

> The types of commercial use of a waterway are extremely varied and will depend on the character of the region, its products, and the difficulties or dangers of navigation. It is the waterbody's capability of use by the public for purposes of transportation of commerce which is the determinative factor, and not the time, extent or manner of that use . . . it is sufficient to establish the potential for commercial use at any past, present, or future time. Thus, sufficient commerce may be shown by historical use of canoes, bateaux, or other frontier craft, as long as that type of boat was common or well-suited to the place and period.

33 C.F.R. § 329.6(a). In this case, Lake Temp has been used as a highway for commerce for at least 100 years by "hundreds perhaps thousands" of duck hunters and bird-watchers. (R. 4). These outdoorsmen use rowboats and canoes to navigate from shore to shore on the lake, an area covering 27 square miles. (R. 7). Like in *Utah*, the duck hunters on Lake Temp routinely transport animals, in this case hunted ducks. (R. 4). Furthermore, 25 percent of the outdoorsmen using Lake Temp are interstate travelers who ultimately depart the state with their bounty in tow. (R. 4). These facts demonstrate that Lake Temp is susceptible to use as a highway for commerce.

Nonetheless, Progress contends that Lake Temp is not navigable in fact because it dries up once every five years. But a waters' navigability does not require the "absence of occasional difficulties in navigation" and instead depends "on the fact . . . that the [lake] in its natural and *ordinary condition* affords a channel for useful commerce." *United States v. Holt State Bank*,

270 U.S. 49, 56 (1926) (emphasis added). In its ordinary condition, Lake Temp is susceptible to use as a highway for commerce. During the rainy season and wet years, Lake Temp spans an area of 27 square miles. (R. 3–4). While Lake Temp decreases in size during the dry season, it only dries completely approximately once every five years. (R. 4). Hence, Lake Temp's *ordinary condition*—four out of five years—fosters activities such as hunting, bird-watching, boating, and canoeing. (R. 3–4). Moreover, Lake Temp is used as highway by both intrastate and interstate travelers, which is the gist of the federal test. (R. 4). Therefore, the Corps has jurisdiction to grant DOD a § 404 permit because Lake Temp is navigable in fact.

B. The Corps Also Has Jurisdiction over Lake Temp Because It Is an Intrastate Lake, the Use of Which Substantially Affects Interstate Commerce.

The Corps has jurisdiction over Lake Temp because it is an intrastate lake that supports duck hunting and bird-watching activities that substantially affect interstate commerce. The Corps' regulations define "waters of the United States" to include "intrastate lakes . . . the use . . . of which would affect or could affect interstate or foreign commerce . . ." 33 C.F.R. § 328.3(a)(3). These waters include those "[w]hich are or could be used by interstate or foreign travelers for *recreational* or other purposes." *Id.* (emphasis added). This language comports with Congress' Commerce Clause authority to regulate "those activities that substantially affect interstate commerce." *United States v. Lopez*, 514 U.S. 549, 558–59 (1995) (citation omitted). Furthermore, the Commerce Clause power extends to aggregated activities, i.e., those activities which by themselves may be "trivial," but which substantially affect interstate commerce when viewed together with "many others similarly situated." *Id.* at 556 (quoting *Wickard v. Filburn*, 317 U.S. 111, 127–28 (1942)).

In this case, the use of Lake Temp by duck hunters and bird-watchers has a substantial effect on interstate commerce. Hundreds or thousands of duck hunters and bird-watchers have

used Lake Temp for at least 100 years. (R. 4). While roughly 75 percent of these outdoorsmen hail from Progress, the other 25 percent travel to Lake Temp from out of state. *Id.* In the aggregate, these activities generate more than $84 billion annually. U.S. Fish & Wildlife Serv., Report 2006-2, *Economic Impact of Waterfowl Hunting in the United States* 12 (2008); U.S. Fish & Wildlife Serv., Report 2006-4, *Birding in the United States: A Demographic and Economic Analysis* 14 (2009). Consequently, the Corps was well within its authority to assert jurisdiction over Lake Temp as an intrastate lake that substantially affects interstate commerce.

Nonetheless, Progress argues that Lake Temp is indistinguishable from the "*nonnavigable*, isolated, intrastate waters" that the U.S. Supreme Court determined were outside of the Corps' jurisdiction in *Solid Waste Agency of Northern Cook County. v. U.S. Army Corps of Engineers* ("*SWANCC*"), 531 U.S. 159, 171–72 (2001) (emphasis added). The "waters" in *SWANCC* consisted of "a scattering of permanent and seasonal ponds of varying size (from under one-tenth of an acre to several acres) and depth (from several inches to several feet)." *Id.* at 163. The Corps asserted jurisdiction over the isolated ponds based on the "Migratory Bird Rule," which classified all bodies of water used by migratory birds as "waters of the United States." *Id.* at 164, 171–72. The Court ultimately held that the Corps did not have jurisdiction over the "abandoned sand and gravel pits" at issue and struck down the Migratory Bird Rule because it "exceed[ed] the authority granted to [the Corps] under § 404 of the CWA." *Id*. at 174.

In contrast to the abandoned sand and gravel pits in *SWANCC*, Lake Temp is a *navigable*, natural lake. (R. 3–4). The lake is nearly permanent, spanning an area of 27 square miles. (R. 4). Furthermore, the Corps' sole basis for jurisdiction in *SWANCC* was the presence of migratory birds. Here, the Corps has asserted jurisdiction based on the presence of hundreds or thousands of interstate duck hunters and bird-watchers who use Lake Temp. *Id.* Therefore, Progress'

contention that *SWANCC* controls has no merit. The Corps has jurisdiction over Lake Temp as an intrastate lake, the use of which substantially affects interstate commerce.

C. Lake Temp is Relatively Permanent and Thus Falls Within the Limits of the Corps' Jurisdiction as Established Under *Rapanos v. United States*.

Lake Temp qualifies as part of the "waters of the United States" because it is relatively permanent. In *Rapanos v. United States*, the U.S. Supreme Court held that the phrase "waters of the United States" included "only *relatively permanent*, standing or flowing bodies of water." 547 U.S. 715, 732 (2006) (emphasis added). The plurality further explained:

> [b]y describing "waters" as "relatively permanent," we do not necessarily exclude streams, rivers, or lakes that might dry up in extraordinary circumstances, such as drought. We also do not necessarily exclude *seasonal* rivers, which contain continuous flow during some months of the year but no flow during dry months . . . .

Id. at 732 n.5 (emphasis in original). In other words, a body of water may dry up periodically or even seasonally and still qualify as part of the "waters of the United States."

Contrary to Progress' assertions, Lake Temp satisfies *Rapanos*' "relatively permanent" requirement because the lake ordinarily contains water. During the rainy season, Lake Temp spans an area of 27 square miles, while in the dry season it is still quite large. (R. 3–4). Only in "extraordinary circumstances" does Lake Temp dry up completely, approximately once every five years. (R. 4). Indeed, Lake Temp is a far cry from the "transitory puddles or ephemeral flows of water" that concerned the plurality in *Rapanos*. 547 U.S. at 733. Therefore, this Court should affirm the district court's ruling that the Corps has jurisdiction over Lake Temp.

III. THE CORPS HAS AUTHORITY TO ISSUE A § 404 PERMIT TO DOD BECAUSE THE DISCHARGE OF SLURRY QUALIFIES AS "FILL MATERIAL."

Section 404 of the CWA provides that the Corps "may issue permits . . . for the discharge of dredged or fill material into the navigable waters at specified disposal sites." 33 U.S.C. § 1344(a) (2006). Here, the Corps had the authority to issue DOD a permit to discharge slurry

into Lake Temp because (A) the slurry qualifies as "fill material" as a substance that will have the effect of changing the bottom elevation of a water body; (B) the Corps can issue § 404 permits for pollutants or waste as long the fill criteria are satisfied; and (C) the Corps did not demonstrate any bias toward DOD when it issued the permit.

A. DOD's Discharge of Slurry Constitutes "Fill Material" Because It Will Have the Effect of Changing the Bottom Elevation of Lake Temp.

The slurry DOD proposes to discharge into Lake Temp constitutes "fill material" because it will have the effect of raising the bottom elevation of the lake. While the CWA itself does not define "fill material," EPA and the Corps have promulgated regulations defining the term to include any material that has "the effect of [c]hanging the bottom elevation of any portion of a water of the United States." 33 C.F.R. § 323.2(e)(1) (2010); 40 C.F.R. § 232.2. As EPA and the Corps have explained, this "objective effects-based" test is designed to promote consistency and provide the regulated community with certainty. Final Revisions to the Clean Water Act Regulatory Definitions of "Fill Material" and "Discharge of Fill Material", 67 Fed. Reg. 31,129, 31,132–33 (May 9, 2002). Moreover, as both agencies concede, a discharge that qualifies as "fill material" is subject to regulation under § 404 and not § 402. 40 C.F.R. § 122.3; *Coeur Alaska, Inc. v. Se. Alaska Conservation Council*, 129 S. Ct. 2458, 2467–68 (2009) ("The [CWA] is best understood to provide that if the Corps has authority to issue a permit for a discharge under § 404, then the EPA lacks authority to do so under § 402.").

In *Coeur Alaska*, the U.S. Supreme Court approved of the Corps' effects-based test in a case similar to this one. 129 S. Ct. at 2468–69. In that case, a mining company sought to discharge a mixture of crushed rock, tailings, and water into Lower Slate Lake, a small, intrastate lake in the State of Alaska. *Id.* at 2464. The slurry also contained concentrations of heavy metals, such as aluminum, copper, lead, and mercury. *Id.* at 2480 (Ginsburg, J., dissenting). Over the life

of the mine, the mining company intended to discharge 4.5 million tons of slurry into the lake, raising the lakebed by 50 feet and increasing its surface area by 60 acres. *Id.* at 2464. Applying the Corps' effects-based test, the Court held that the slurry constituted "fill material" because it would have the effect of changing the bottom elevation of Lower Slate Lake. *Id.* at 2468. Thus, the Court concluded that "the Corps of Engineers, and not the EPA, ha[d] authority to permit Coeur Alaska's discharge of the slurry." *Id.* at 2469.

This case is virtually indistinguishable from *Coeur Alaska*. DOD seeks to discharge a slurry of solid, semi-solid, granular, and liquid munitions into Lake Temp. (R. 4). DOD will combine the slurry with chemicals to ensure that the materials are safe and no longer explosive and then distribute it evenly over the lakebed. *Id.* Over the course of the project, DOD estimates that the slurry will eventually raise the lakebed by six feet, causing Lake Temp to increase in size by approximately two square miles. *Id.* Because DOD's discharge of slurry will have the effect of changing the bottom elevation of Lake Temp, it clearly constitutes "fill material" under EPA and the Corps' effects-based test. Therefore, § 404 controls and the Corps has the authority to issue a permit for DOD's proposed discharge.

B. New Union's Attempt to Distinguish *Coeur Alaska* Based on the Toxicity and Composition of DOD's Slurry Fails Because the Corps Can Issue § 404 Permits for Pollutants or Waste as Long as They Change the Bottom Elevation of a Water Body.

Despite New Union's efforts to draw distinctions between this case and the situation in *Coeur Alaska* based on the toxicity and composition of DOD's slurry, *Coeur Alaska* still controls. New Union argues that *Coeur Alaska* is distinguishable because the discharge in that case was primarily crushed rock, whereas the discharge here will be spent munitions, which more closely resemble a toxic pollutant than an inert fill. This argument fails for several reasons.

First, as the U.S. Supreme Court explained in *Coeur Alaska*, the fact that a given material might qualify both as a "pollutant" under 33 U.S.C. § 1362(6) and as "fill material" under 33 C.F.R. § 323.2(e)(1) does not preclude the material from being regulated under § 404. 129 S. Ct. at 2468. The slurry at issue in *Coeur Alaska* was composed of a mixture of crushed rock and frothing water that contained concentrations of aluminum, copper, lead, and mercury. *Id.* at 2464, 2480. Despite the presence of these heavy metals and the inclusion of "rock" and "sand" in the CWA's list of pollutants, the Court held that the sole test of whether § 404 applied was whether the slurry changed the bottom elevation of the lake. *Id.* at 2468–69.

Similarly, the Fourth Circuit has held that the Corps may issue a § 404 permit even where the discharge of fill material serves no other purpose than waste disposal. *Kentuckians for the Commonwealth, Inc. v. Rivenburgh*, 317 F.3d 425, 448 (4th Cir. 2002). In *Rivenburgh*, the plaintiffs argued that the Corps did not have the authority to issue a § 404 permit that allowed a coal mining company to place mining spoil and excess overburden into valley streams when the discharge had no primary beneficial purpose. *Id.* at 430. The Fourth Circuit disagreed, stating that the CWA "clearly intended to divide functions between the Corps and the EPA based on the *type of discharge involved*." *Id.* at 447 (emphasis added). The court ultimately deferred to the Corps' determination that fill material included "all material that displaces water or changes the bottom elevation of a water body" with the limited exceptions of trash and garbage. *Id.* at 448.

In fact, EPA and the Corps specifically rejected a definition of "fill material" that would have excluded all "waste" from the § 404 program when they promulgated their most recent version of the fill rule in 2002. Final Revisions to the Clean Water Act Regulatory Definitions of "Fill Material" and "Discharge of Fill Material", 67 Fed. Reg. 31,129, 31,133–34 (May 9, 2002). In the preamble to the 2002 rule, the agencies stated that "[s]imply because a material is disposed

of for purposes of waste disposal does not . . . justify excluding it categorically from the definition of fill. . . . Instead, where a waste has the effect of fill, we believe that regulation under the section 404 program is appropriate." *Id.* at 31,133. The exclusion of the waste exception was justified, the agencies explained, because "the section 404 permitting process was expressly designed to address the entire range of environmental concerns arising from discharges of dredged or fill material." *Id.*

Indeed, as Justice Breyer noted in his concurrence in *Coeur Alaska*, the procedural safeguards associated with the § 404 permitting process prevent permit applicants from gaining immunity from pollution control standards simply by "add[ing] 'sufficient solid matter' to a pollutant 'to raise the bottom of a water body' . . . ." 129 S. Ct. at 2478 (Breyer, J., concurring). For example, EPA's § 404(b)(1) guidelines prohibit the Corps from authorizing discharges that "will cause or contribute to significant degradation of the waters of the United States," 40 C.F.R. § 230.10(c), or will violate "any applicable toxic effluent standard or prohibition under section 307" of the CWA. *Id.* § 230.10(b)(2). In addition to these safeguards, Congress included an oversight role for EPA in the § 404 permitting process, authorizing the Administrator to veto any discharge of fill material that "will have an unacceptable adverse effect on municipal water supplies, shellfish beds and fishery areas (including spawning and breeding areas), wildlife, or recreational areas." 33 U.S.C. § 1344(c). Finally, the issuance of a § 404 permit triggers the requirement for an EIS under NEPA. 42 U.S.C. § 4332(2)(C); *White Tanks Concerned Citizens, Inc. v. Strock*, 563 F.3d 1033, 1036 (9th Cir. 2009). In sum, "the § 404 permitting process requires extensive review and coordination with numerous federal and state agencies, as well as significant consideration of the public interest." *Ohio Valley Envtl. Coal. v. Aracoma Coal Co.*, 556 F.3d 177, 190–91 (4th Cir. 2009) *cert. denied*, 131 S. Ct. 51 (2010).

For these reasons, the composition of the slurry DOD seeks to discharge into Lake Temp has no bearing on the Corps' jurisdiction to issue a § 404 permit and *Coeur Alaska* controls.[2] While "munitions" are listed as a "pollutant" under 33 U.S.C. § 1362(6), neither a material's classification as a pollutant nor its status as waste precludes the Corps from issuing a § 404 permit if the discharge will change the bottom elevation of a water body. Furthermore, the § 404 permitting process itself contains numerous procedural safeguards to protect against environmental damage and the discharge of toxic pollutants. Therefore, this Court should defer to the Corps' determination that the munitions are "fill material."

C. New Union's Assertion that the Corps Cannot Grant a § 404 Permit to DOD Is Without Merit Because the § 404 Permitting Process Includes Procedural Safeguards to Prevent Bias Toward Any Particular Permit Applicant.

New Union also argues that the Corps cannot issue a § 404 permit to DOD because to do so would create a "classic conflict of interest situation." (R. 8). This argument is without merit. In addition to the procedural safeguards discussed *supra* in Part II.B., the § 404 permitting process includes two other provisions that prevent bias toward permit applicants. First, § 404 only allows the Corps to issue permits "after notice and opportunity for public hearings." 33 U.S.C. § 1344(a). Second, the Corps' regulations require extensive public interest review before a permit may be issued. The Corps must balance "[t]he benefits which reasonably may be expected to accrue from the proposal . . . against its reasonably foreseeable detriments." 33

[2] New Union's argument that *Coeur Alaska* is distinguishable because Lake Temp is not serving as a "treatment alternative" is equally without merit. (R. 8). In *Coeur*, EPA issued a § 402 permit to regulate the discharge of water from Lower Slate Lake into a downstream creek that required Coeur Alaska to treat the water to remove aluminum, suspended solids, and other pollutants. 129 S. Ct. at 2466. Here, Lake Temp has no outflow, so treatment is unnecessary. (R. 4). Indeed, the Corps determined that DOD's plan for Lake Temp was the least environmentally damaging practicable way to dispose of its spent munitions largely because using the lake will prevent the discharge of any pollutants or wastewater into other navigable waters. (R. 8).

C.F.R. § 320.4(a)(1). In this balancing, the Corps must consider a permit's effects on, *inter alia*, "conservation, economics, aesthetics, general environmental concerns, wetlands, historic properties, fish and wildlife values . . . [and] the needs and welfare of the people." *Id.*

Furthermore, New Union's argument ignores the fact that the Corps itself is quite possibly the world's largest engineering firm in need of § 404 permits and review. Garrett Power, *The Fox in the Chicken Coop: The Regulatory Program of the U.S. Army Corps of Engineers*, 63 Va. L. Rev. 503, 504 (1977). Certainly, if Congress entrusted the Corps to act as a regulator of its own dredge and fill activities, the Corps can be trusted to act as an uninterested regulator of DOD's activities, even as its subordinate. Indeed, Congress chose the Corps to regulate dredge and fill activities precisely because of its experience and expertise developed over more than a century under the Rivers and Harbors Act, 33 U.S.C. § 401 (1899). *See* 118 Cong. Rec. 33,699 (1972) (statement of Sen. Edmund Muskie) (stating that "[t]he Conferees were uniquely aware of the process by which dredge and fill permits are presently handled [under the Rivers and Harbors Act] and did not wish to create a burdensome bureaucracy in light of the fact that a system to issue permits already existed.").

In light of these considerations, it is apparent that New Union's argument borders on the absurd. The facts of this case present no indication that the Corps shirked its review duties or ignored any procedural safeguards in favor of DOD. Absent such a showing, New Union may challenge the adequacy of the Corps' review, but cannot simply assume that it acted improperly. As the district court explained, New Union's argument asks this Court to rewrite the CWA. (R. 9). Therefore, the district court's decision should be affirmed.

IV. NEITHER OMB NOR EPA VIOLATED THE CWA BECAUSE OMB PERMISSIBLY RESOLVED AN INTER-AGENCY JURISDICTIONAL DISPUTE AND DID NOT INTERFERE WITH EPA'S DISCRETIONARY AUTHORITY TO VETO DOD'S § 404 PERMIT.

New Union alleges that OMB impermissibly resolved the jurisdictional dispute between EPA and the Corps regarding which agency had the authority to issue a permit for the Lake Temp project. New Union further contends that EPA violated the CWA when it chose not to veto DOD's permit. To the contrary, neither OMB nor EPA acted impermissibly because (A) the President has authorized OMB to resolve disputes between executive branch agencies and (B) EPA's authority to veto a § 404 permit is discretionary and therefore unreviewable by this Court.

A. OMB Acted Permissibly Because It Has the Authority to Resolve Inter-Agency Disputes and Did Not Cause EPA to Violate the CWA.

New Union's contention that OMB impermissibly interfered with the jurisdictional dispute between EPA and the Corps is without merit. The U.S. Constitution vests the executive power in the President. U.S. Const. art. II, § 1, cl. 1. Moreover, it charges the President with the duty to "take care that the laws be faithfully executed." *Id.* § 3. As the U.S. Supreme Court explained in *Myers v. United States*, the President "may supervise and guide [agencies'] construction of the statutes under which they act in order to secure that unitary and uniform execution of the laws which Article II of the Constitution evidently contemplated in vesting general executive power in the President alone." 272 U.S. 52, 135 (1926). Necessarily, the President's supervisory authority under Article II includes the duty to resolve disputes between agencies of the executive branch. *See Tenn. Valley Auth. v. United States*, 13 Cl. Ct. 692, 701 (Cl. Ct. 1987) (recognizing that "[a] court must be mindful" of the President's authority to establish "administrative remedies" for the resolution of inter-agency disputes).

In this case, the President has delegated his dispute-resolution authority to OMB. For example, Executive Order 12,088 authorizes OMB to resolve conflicts relating to pollution

control that arise between EPA and other federal agencies. Exec. Order No. 12,088, 43 Fed. Reg. 47,707, 47,708 (Oct. 13, 1978) (stating that "[i]f the Administrator cannot resolve a conflict, [she] shall request the Director of the Office of Management and Budget to resolve the conflict"). While this Order pertains specifically to situations in which a federal agency violates one of EPA's pollution control standards, OMB has historically assisted EPA in resolving inter-agency jurisdictional disputes as well. For example, in 1973, OMB resolved a dispute between EPA and the Atomic Energy Commission over the scope of EPA's authority to regulate radiation from nuclear power facilities. In a memorandum to EPA and the Commission, OMB declared:

> On behalf of the President, . . . the decision is that AEC should proceed with its plans for issuing uranium fuel cycle standards . . . ; that EPA should discontinue its preparations for issuing, now or in the future, any standards for types of facilities; and that EPA should continue, under its current authority, to have responsibilities for setting standards for the total amount of radiation in the general environment . . . .

Memorandum Concerning Responsibility for Setting Radiation Protection Standards from Roy L. Ash, Dir., OMB, to Russell E. Train, Adm'r, EPA, and Dixy Lee Ray, Chair, Atomic Energy Comm'n (Dec. 7, 1973). As this example illustrates, the President has granted OMB broad authority to carry out his Article II mandate of ensuring the unitary and uniform execution of the laws. Here, OMB exercised that same authority when it determined that the Corps, and not EPA, had the authority to issue a permit for the Lake Temp project.

Despite OMB's long history of helping EPA resolve inter-agency disputes, New Union argues that OMB acted unlawfully in this case based on *Environmental Defense Fund v. Thomas*, 627 F. Supp. 566 (D.D.C. 1986). In *Thomas*, the D.C. District Court considered whether OMB impermissibly interfered with EPA's ability to promulgate a regulation by a statutory deadline mandated by RCRA. *Id.* at 567. Under Executive Order 12,291, executive agencies must submit proposed and final rules to OMB prior to publication. *Id.* Nonetheless, the court held that OMB

did not have the authority to use its regulatory review under E.O. 12,291 to delay promulgation of EPA regulations. *Id.* at 571–72. The *Thomas* decision has no bearing on this case. OMB did not cause EPA to violate a statutory deadline or any other statutory requirements. OMB simply resolved a jurisdictional dispute between EPA and the Corps as to who had the authority to issue DOD a permit. (R. 9). [3] Because OMB permissibly exercised its delegated authority to ensure the uniform execution of the laws, this Court should affirm the ruling of the district court.

B. EPA's Decision Not to Veto DOD's § 404 Permit Did Not Violate the CWA.

New Union alleges that EPA violated the CWA when it chose not to veto DOD's § 404 permit. This argument must fail, however, because (1) EPA's decision whether or not to veto a § 404 permit is discretionary and therefore unreviewable and, (2) even if this Court grants judicial review, EPA's decision was neither arbitrary nor capricious.

1. EPA's decision not to veto DOD's § 404 permit is not subject to judicial review because EPA's veto authority is committed to the agency's discretion by law.

EPA's decision not to veto DOD's § 404 permit is unreviewable because the APA prohibits judicial review of agency actions "committed to the agency's discretion by law." 5 U.S.C. § 701(a)(2) (2006). The exception to judicial review in § 701(a)(2) is narrow and applies only when the court "would have no meaningful standard against which to judge the agency's exercise of discretion." *Heckler v. Chaney*, 470 U.S. 821, 834 (1985); *see also Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 410 (1971) (stating that § 701(a)(2) applies only where "there is no law to apply.") (citation omitted).

[3] It must be noted that even if OMB had not stepped in, the executive branch would have resolved the dispute anyway because EPA and the Corps would have been required to submit the dispute to the Attorney General for resolution before the United States could have taken a litigating position in this case. Exec. Order 12,146, 44 Fed. Reg. 42,657, 42,657 (July 18, 1979).

In *Save the Bay, Inc. v. EPA*, the Fifth Circuit considered whether a district court could review EPA's decision not to veto a state discharge permit under § 402 of the CWA. 556 F.2d 1282, 1292–93 (5th Cir. 1977). Section 402 provides that "[n]o permit shall issue . . . if the Administrator . . . objects in writing to the issuance of such permit as being outside the [applicable] guidelines and requirements . . . ." 33 U.S.C. § 1342(d)(2)(B) (2006). The court reasoned that while "the guidelines and regulations could provide 'law to apply' in reviewing a decision not to veto a permit, EPA . . . retain[ed] discretion to decline to veto a permit *even after* the agency found some violation of applicable guidelines." 556 F.2d at 1294 (emphasis added). The court continued:

> Given discretion to weigh the substantiality of any violations of the guidelines and requirements of the [CWA] as well as a mandate to determine the presence of such violations, EPA's decision not to veto a particular permit takes on a breadth that in our judgment renders the bottom line of that decision unreviewable in the federal courts. Once the relevant factors are before the agency, it can weigh them within this broad mandate with an expertise to which the restraining powers of judicial review could add little. Given such a mandate, a judge's judgment on the significance in terms of water quality of the provisions of a permit is not likely to be sounder or fairer to the challenger, whether environmentalist or industrialist, than that of the EPA.

Id. at 1295. Consequently, the court held that § 701(a)(2) applied and EPA's decision not to veto a permit was immune to judicial review. *Id.*

Likewise, EPA's authority to veto a § 404 permit is discretionary. Section 404(c) provides: "[t]he Administrator is *authorized* to prohibit the specification . . . of any defined area as a disposal site, . . . whenever [she] determines . . . that 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) (emphasis added). Several courts analyzing this provision in the context of CWA citizen suits have held that EPA's decision to veto a § 404 permit is committed to its discretion. *See, e.g.*, *Preserve Endangered*

Areas of Cobb's History v. U.S. Army Corps of Eng'rs, 87 F.3d 1242, 1249 (11th Cir. 1996) ("By statute, the Administrator is authorized rather than mandated to overrule the Corps."); *City of Olmstead Falls v. EPA*, 266 F. Supp. 2d 718, 725 (E.D. Ohio 2003) ("There is nothing mandatory on the face of the statute requiring the Administrator to exercise his veto power.").

While EPA's veto power is clearly discretionary, the D.C. District Court held in *Alliance to Save the Mattaponi v. U.S. Army Corps of Engineers* that § 404(c) contained a meaningful standard against which to judge the agency's exercise of discretion, so judicial review was not precluded. 515 F. Supp. 2d 1, 8 (D.D.C. 2007). The court reasoned that because EPA could choose to veto a permit whenever it determined that a discharge would "have an unacceptable adverse effect," the statute "provid[ed] guidance, however minimal, to assist the court in determining whether the agency abused its . . . discretion." *Id.* The *Mattaponi* decision is unpersuasive, and this Court should not follow its lead. Section 404(c) provides no explanation of what constitutes an "unacceptable adverse effect." Thus, it falls to EPA to weigh the "substantiality" of any adverse effects and determine how they might influence its decision whether or not to veto a permit. *Save the Bay*, 556 F.2d at 1295. Moreover, even if the Administrator finds that a discharge will have an unacceptable adverse effect on an aquatic resource, EPA retains the discretion to decline to exercise its veto authority. Indeed, the plain language of § 404(c) indicates that the finding of an unacceptable adverse effect is a *prerequisite* to EPA's ability to exercise its discretion, not a trigger compelling it do so. 33 U.S.C. § 1344(c) ("The Administrator is authorized . . . *whenever* he determines . . . .") (emphasis added). In this case, EPA has carefully weighed the relevant factors "with an expertise to which the restraining powers of judicial review could add little." *Save the Bay*, 556 F.2d at 1295. Consequently, this

Court should adopt the reasoning of the Fifth Circuit in *Save the Bay* and hold that the APA prohibits judicial review of EPA's decision not to veto DOD's § 404 permit.

2. Even if this Court grants judicial review, EPA's decision not to veto DOD's § 404 permit was not arbitrary or capricious.

Should this Court determine that judicial review is warranted, then the scope of that review is decidedly limited. Under the APA, a reviewing court may only set aside agency action if it is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law . . . ." 5 U.S.C. § 706(2)(A) (2006). In determining whether an agency action was arbitrary or capricious, the reviewing court "must consider whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment." *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 416 (1971). While this inquiry must be "searching and careful, the ultimate standard of review is a narrow one." *Id.* Moreover, where the agency decision involves a high level of scientific expertise, the reviewing court "must generally be at its most deferential." *Balt. Gas & Elec. Co. v. Natural Res. Def. Council, Inc.*, 462 U.S. 87, 103 (1983).

Here, New Union alleges that EPA's decision not to veto DOD's permit was arbitrary and capricious because EPA would have exercised its veto authority if not for OMB's interference. New Union's argument must fail, however, because EPA's decision whether to veto a permit is highly discretionary. Even if EPA considered the advice of OMB, § 404(c) *requires* the agency to seek the advice and opinions of outside parties. 33 U.S.C. 1344(c). For example, before making a veto decision, EPA must "consult with the Secretary [of the Army]" and provide "notice and opportunity for public hearings." *Id.* Furthermore, § 404(c) provides EPA with significant discretion to defer to the Corps' judgment even where it finds unacceptable adverse effects. In *Coeur Alaska*, EPA declined to veto a § 404 permit "even though, in its view, placing

the tailings in the lake was not the 'environmentally preferable' means of disposing of them." 129 S. Ct. 2458, 2465 (2009). The Court acknowledged EPA's discretion to make such a decision when it noted, "[b]y declining to exercise its veto, the EPA in effect deferred to the judgment of the Corps on this point." *Id.* Indeed, EPA has traditionally been reluctant to exercise its veto authority once the Corps has issued a permit. Since 1972, EPA has vetoed only 12 out of roughly 80,000 permits issued. EPA, Clean Water Act Section 404(c) "Veto Authority", *available at* www.epa.gov/owow/wetlands/pdf/404c.pdf (last visited Nov. 22, 2011). Finally, because EPA's decision whether to veto a permit involves a high level of scientific and technical expertise, it is entitled to substantial judicial deference. Thus, this Court should affirm the ruling of the district court that EPA did not act arbitrarily or capriciously.

CONCLUSION

This Court lacks jurisdiction to consider New Union's claims because the state has provided no evidence to support its allegations that the Lake Temp project will injure its groundwater or the interests of its citizens. Speculation and conjecture are insufficient to satisfy the requirements of Article III. Furthermore, New Union's claims fail on the merits. EPA and the Corps have created an objective, effects-based test to determine which agency has the authority to regulate a given discharge. Under that test, DOD's proposed discharge of slurry falls squarely within the jurisdiction of the Corps. Finally, neither OMB's involvement with the jurisdictional dispute nor EPA's decision not to exercise its discretionary authority to veto DOD's § 404 permit affect the outcome of this case. For these reasons, the United States respectfully requests that this Court affirm the decision of the district court.