Team No. 35

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 STATE OF NEW UNION,
Appellant and Cross-Appellee

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JURISDICTION

The State of New Union sought judicial review of an agency action under 28 U.S.C. § 1331 (2006) and the Administrative Procedure Act (APA), 5 U.S.C. § 702 (2006). The district court had jurisdiction pursuant to 28 U.S.C. § 1331 (2006). The district court granted summary judgment on June 2, 2011. The State of New Union filed a timely Notice of Appeal pursuant to Fed. R. App. P. 4(a)(1)(B). This Court has jurisdiction pursuant to 28 U.S.C. § 1291 (2006).

STATEMENT OF THE ISSUES

I. Whether New Union has standing to request judicial review of an agency action when such action threatens New Union's economic and proprietary interests, as well as its interest in the welfare of its residents.

II. Whether the district court correctly held that Lake Temp, a large body of surface water that supports the boat traffic of interstate hunters, is a navigable water of the United States under the Clean Water Act ("CWA" or "the Act") as a matter of law.

III. Whether the district court erred in holding that the Department of Defense's ("DOD") discharge of spent munitions containing many substances listed has hazardous under the CWA was subject to the U.S. Army Corps of Engineers' ("COE") jurisdiction as a matter of law.

IV. Whether the district court erred when it held that the Office of Management and Budget's ("OMB") directive that the U.S. Environmental Protection Agency's ("EPA") not veto COE's section 404 permit for fill material even though EPA determined that the material at issue was a pollutant, requiring instead a section 402 permit, was not improper as a matter of law.

STATEMENT OF THE CASE

Appellant New Union appeals the District Court for the District of New Union's June 2, 2011 Order granting Appellee the United States' motion for summary judgment. (R. at 1, 10-11.) New Union petitioned for review under 28 U.S.C. § 1331 and the APA, 5 U.S.C. § 702, of

an individual permit issued by COE under section 404 of the CWA, 33 U.S.C. § 1344, to DOD. (*Id.* at 3.) That permit allowed DOD to discharge munitions into Lake Temp, which is a lake in a military reservation owned by the United States in the State of Progress ("Progress"). (*Id.*)

The United States filed a motion for summary judgment, arguing: (1) New Union did not have standing to appeal issuance of the permit; (2) COE had jurisdiction to issue a permit under section 404 because (a) Lake Temp was navigable water and (b) *Southeast Alaska Conservation Council v. Couer Alaska, Inc.*, 129 S. Ct. 2458 (2009) held that a 404 permit was appropriate in a similar situation; and (3) OMB's participation in the decision did not violate the CWA. (*Id.* at 5.) Progress intervened and also filed a motion for summary judgment. (*Id.* at 3.) It asserted that (1) New Union did not have standing; and either (2) Lake Temp was not navigable water; or (3) COE had jurisdiction to issue the permit under section 404 pursuant to *Coeur Alaska*; and (4) OMB's participation was not improper. (*Id.* at 5.)

New Union filed a cross-motion for summary judgment and asked the district court to find the section 404 permit to be invalid. (*Id.* at 1, 5.) It contended that (1) it had standing to appeal the permit issuance; and (2) Lake Temp was navigable water; but (3) COE lacked jurisdiction to issue a section 404 permit because the munitions were pollutants, not fill material, requiring EPA to issue a permit under section 402; and (4) OMB's intervention in the decision-making process violated the CWA. (*Id.*)

The district court granted the United States' motion. (*Id.* at 10.) Specifically, it held that (1) New Union had no standing; (2) COE had jurisdiction to issue a section 404 permit because Lake Temp was navigable water and the slurry was a fill material; and (3) OMB's intervention did not violate the CWA. (*Id.* at 10-11.) New Union and Progress each filed a timely Notice of Appeal. (*Id.* at 1.)

STATEMENT OF THE FACTS

I. COE issued DOD a section 404 permit to discharge munitions, which contain many hazardous substances, into Lake Temp.

DOD seeks to discharge munitions into Lake Temp. (*Id.* at 4.) To do so, it proposes to build a facility on Lake Temp's shore to receive and prepare the discharge material. (*Id.*) It first wishes to empty the munitions of liquid, semi-solid, and granular contents, which include many chemicals on the CWA's list of hazardous substances, under section 311. (*Id.*) In an effort to render the discharge non-explosive, it will then mix those contents with other chemicals. (*Id.*) Remaining solids will be ground and pulverized. (*Id.*) Then, it will add water to both forms of waste to create a slurry. (*Id.*)

A movable multi-port pipe will deposit the slurry over the entire dry bed of the lake, possibly raising the lakebed several feet and the lake's top water elevation by six feet. (*Id.*) The lake's surface area might be two square miles larger than its present size. (*Id.*) Under this plan, the lake will remain because it is the low point in a drainage basin and precipitation in the mountains has nowhere else to flow. (*Id.*) Eventually, alluvial deposits from precipitation will cover the lakebed again. (*Id.* at 4-5.) The lake will then be returned to its pre-operation state, but at a higher elevation. (*Id.* at 5.) DOD also plans to grade the lake's edges so that runoff from the surrounding mountains will continue to flow into the lake. (*Id.* at 4.)

DOD was issued a permit to carry out this plan by its subsidiary, COE, under section 404 of the CWA. (*Id.* at 1, 7-9.) EPA sought to exercise its veto power to halt the permit issuance because the material at issue is a pollutant, requiring an EPA section 402 permit, rather than a COE section 404 permit for fill material. (*Id.* at 7-8.) COE and EPA both sent briefs on the issue to OMB. (*Id.* at 9 n. 1.) They also attended a meeting on the subject with OMB. (*Id.*)

However, OMB directed EPA not to use its veto power through an oral decision and directive. (*Id.* at 9-10, 9 n. 1.)

II. Lake Temp is navigable water and has been openly used by the public for many years.

Lake Temp is an oval-shaped body of water that lies completely within Progress. (*Id.* at 3-4.) It is up to three miles wide and nine miles long during the rainy season in wet years, smaller during the dry season, and completely dry roughly one out of five years. (*Id.*) Water flows into Lake Temp from an eight hundred square mile watershed of surrounding mountains, located primarily within Progress, with a small portion located in New Union. (*Id.* at 4.) Water does not flow from the lake. (*Id.*)

Lake Temp is heavily used by the public despite DOD's efforts to post signs warning that entry is illegal. (*Id.*) Those signs are located on the south side of the lake and are 100 feet apart. (*Id.*) Perhaps thousands of hunters have used Lake Temp, roughly three fourths of which were Progress residents. (*Id.*) Ducks use Lake Temp as a stopover in their migration to and from the Arctic. (*Id.*) Clearly visible trails surrounding the lake show that people have brought rowboats and canoes to the lake. (*Id.*) People also visit Lake Temp for birdwatching. (*Id.*)

There is no dispute that DOD has knowledge of Lake Temp's use by the public. (*Id.*) But it has taken no measures to stop this use except for the signs noted above. (*Id.*) There is no fence surrounding the lake despite a Progress state highway running less than 100 feet from the south side of the lake along the military reservation. (*Id.*) Several roads that lead into New Union intersect this highway. (*Id.*)

III. DOD's permitted activity will cause injury within New Union.

The Imhoff Aquifer is located around one thousand feet below Lake Temp. (*Id.*) The aquifer generally follows the lake's boundaries, but is overall larger than Lake Temp. (*Id.*) Five

percent of the aquifer is located in New Union, with the rest under Progress. (*Id.*) The portions in Progress are located under the boundaries of the military reservation. (*Id.*)

Contaminated water from the operation could enter the aquifer. (*Id.* at 5.) Important information regarding the movement of pollutants in the Imhoff Aquifer can only be discovered by drilling and sampling from a grid of monitoring wells throughout the aquifer. (*Id.* at 6.) Even if such a grid of wells was immediately installed, conclusive results might not be available until after the permitted activity begins. (*Id.*) New Union is willing to install and operate the wells and collect the data, but it cannot do so without permission from DOD. (*Id.*) However, DOD will not grant access to the military reservation for that or other non-military purposes. (*Id.*)

Dale Bompers owns, operates, and resides on a ranch located above the aquifer in New Union. (*Id.* at 4.) The aquifer's water must be treated before it is consumed or used in agriculture because of its sulfur level. (*Id.*) Bompers does not currently use the aquifer. (*Id.* at 6.) A New Union statute requires water withdrawals from the aquifer to first be approved by the New Union Department of Natural Resources. (*Id.*) This is to ensure that withdrawals will not deplete groundwater over a period of twenty years. (*Id.*) However, the statute gives preference to owners of land above the groundwater. (*Id.*) Bompers' ranch's value could be diminished if the aquifer is contaminated with the permitted discharge. (*Id.*)

SUMMARY OF THE ARGUMENT

Congress did not vest an agency with authority to issue a permit to its parent agency in contravention of Congressional will. The lower court incorrectly granted summary judgment declaring that such usurpation of Congressional authority was appropriate. First, the court erred when it ruled that New Union did not have standing to challenge an agency action, although the

agency action causes injuries in fact to New Union. Second, while it correctly found that Lake Temp is navigable water, it wrongly held that COE had authority to issue a permit for the discharge of spent munitions into Lake Temp. Finally, it erroneously held that OMB had authority to prevent EPA from exercising its veto power over COE's permit.

New Union has standing to seek review of COE's action because it will suffer injuries in fact if DOD goes forward with its plan. First, five percent of the Imhoff Aquifer lies within New Union. New Union has a proprietary interest in this portion of the aquifer remaining an unspoiled resource of New Union. Further, DOD's proposed action will force New Union to monitor the aquifer to ensure that the substances, hazardous under the CWA, do not pose a threat to the residents of New Union. Additionally, New Union has a quasi-sovereign interest in its capacity as *parens patriae* in the health and welfare of her residents. Through these interests, New Union has standing to challenge COE's permit.

Moreover, under the Act's plain meaning, Congress intended an expansive interpretation of what constitutes navigable water. Accordingly, Lake Temp is navigable water under the CWA, and thus subject to the Act's provisions regarding the discharge of pollutants. The degradation or destruction of Lake Temp would impact interstate commerce. Although Lake Temp is an intrastate resource, interstate travelers use Lake Temp. DOD's introduction of hazardous materials around the lake is a degradation or destruction of a resource that would have a significant impact on interstate commerce. Moreover, Lake Temp is "navigable-in-fact" because boat traffic occurs on the lake. True, CWA jurisdiction requires that a body of water be relatively permanent; however jurisdiction does not require that Lake Temp be absolutely permanent. Lake Temp constitutes a body of water 80% of the time, during which boats navigate the water. Thus, Lake Temp is navigable water under the provisions of the CWA.

Further, COE has no authority to permit the discharge of pollutants into Lake Temp because the substances are not fill material. Additionally, the Court should not accord *Chevron* deference to COE because COE is an interested party. First, spent munitions do not constitute fill material, but rather trash or garbage, which the CWA expressly prohibits as appropriate fill material. Additionally, COE has here issued a permit to its parent agency, DOD, allowing it to dump pollutants into Lake Temp. Effectively, COE self-interestedly acted in a quasi-judicial capacity, which renders *Chevron* deference inappropriate. Thus, the Court should rule that COE lacked authority to permit the discharge of pollutants into Lake Temp.

Finally, OMB had no authority to prevent EPA from vetoing the permit. Congress grants administration of the CWA to EPA because of EPA's expertise regarding hazardous materials. OMB usurped EPA's veto authority, ignoring EPA's expert judgment, when OMB improperly directed EPA to abstain from vetoing the permit. This is not a result Congress intended. Alternatively, EPA has a non-discretionary duty to review COE permits because Congress could not have intended to allow a citizen to challenge an erroneous determination made by EPA but prohibit such a challenge when COE makes the determination and EPA fails to exert its authority over that determination. OMB has no authority under the CWA to bar EPA's veto power because Congress granted this power to EPA.

For these reasons, this Court should hold that New Union has standing, Lake Temp is navigable water, spent munitions are not fill material, and OMB does not have authority to usurp EPA's veto power under the CWA. This Court should reverse the lower court's judgment.

ARGUMENT

Standard of Review

This Court reviews a district court's granting of summary judgment *de novo*, viewing all facts in a light most favorable to the non-moving party. *D.L. v. Unified Sch. Dist. No. 497*, 596 F.3d 768, 772 (10th Cir. 2010) (citing *Clark v. Edmunds*, 513 F.3d 1219, 1221-22 (10th Cir. 2010)). The Court grants summary judgment only "if the pleadings, the discovery and disclosure materials on file, and any affidavits show that 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).

I. New Union has standing because it satisfies Article III requirements both as a private litigant and in its capacity as *parens patriae*.

Article III of the U.S. Constitution restricts the power of the federal judiciary to "Cases" and "Controversies." U.S. Const. art III, § 2, cl. 1. This restriction is, in part, intended to limit a party's invocation of federal-court jurisdiction to "an adversary context . . . a form historically viewed as capable of resolution through the judicial process." *Flast v. Cohen*, 392 U.S. 83, 95 (1968). However, States are not typical litigants in the context of Article III standing. *See Massachusetts v. E.P.A.*, 549 U.S. 497, 518 (2007). A State invoking the power of the federal judiciary asserts standing in one of three capacities: (1) as a private party, alleging direct injury to a proprietary interest; (2) as sovereign, often requesting settlement of boundary or water right controversies; or (3) as *parens patriae*, seeking to protect quasi-sovereign interests. *See Connecticut v. Cahill*, 217 F.3d 93, 97 (2d Cir. 2000).

New Union has standing as a private party because it suffers injury caused by COE and OMB action. Further, New Union has *parens patriae* standing in it capacity as quasi-sovereign because the actions of COE and OMB impact the physical and economic health and well-being of her residents.

A. New Union has Article III standing as a private party because it is a "citizen" under the CWA, it suffers "injuries in fact", and the "zone of interest" test is inapplicable.

In *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992), the Supreme Court articulated the Article III requirement for standing. To preserve the adversarial nature of courtroom proceedings, standing requires: (1) "the plaintiff must have suffered an injury in fact . . . which is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical[;]" (2) "there must be a causal connection between the injury and the conduct complained of—the injury has to be fairly…traceable to the challenged action of the defendant, and not the result of independent action of some third party not before the court[;]" and (3) "it must be likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision." 504 U.S. at 560-61 (internal citations and quotations omitted). However, the *Defenders of Wildlife* court acknowledged that "'procedural rights' are special: The person who has been accorded a procedural right to protect his concrete interests can assert that right without meeting all the normal standards for redressability and immediacy." *Id.* at 572, n. 7. Accordingly, when Congress grants plaintiffs a procedural right to challenge an agency action, then "that litigant has standing if there is some possibility that the requested relief will prompt the injury-causing party to reconsider the decision that allegedly harmed the litigant." *Massachusetts v. E.P.A.*, 549 U.S. at 518 (citing *Defenders of Wildlife*, 504 U.S. at 572, n. 7).

New Union invokes the procedural right granted by Congress pursuant to section 10 of the APA, which provides that "[a] person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action with the meaning of a relevant statute, is entitled to judicial review thereof." 5 U.S.C. § 702. Prudential standing to obtain judicial review under section 10 of APA is dependent on whether "the challenged action had caused [the

plaintiff] 'injury in fact,' and where the alleged injury was to an interest 'arguably within the zone of interests to be protected or regulated' by the statutes that the agencies were claimed to have violated." *Sierra Club v. Morton*, 405 U.S. 727, 733 (1972) (citing *Ass'n of Data Processing Serv. Orgs., Inc. v. Camp*, 397 U.S. 150 (1970), and *Barlow v. Collins*, 397 U.S. 159 (1970)).

The above cases establish the appropriate test for a State's standing in its capacity as a private litigant. First, the relevant statute must give the State a cause of action. Second, the challenged action caused "injury in fact" to the plaintiff. Third, the injury is within the zone of interest protected by the relevant statute.

1. New Union is entitled to sue under section 505 of the CWA because New Union is a "citizen" within the plain meaning of the Act.

Section 505 of the CWA states in part that "[A]ny citizen may commence a civil action on his own behalf—(1) against any person (including . . . the United States . . .) who is alleged to be in violation of (A) an effluent standard or limitation under this chapter . . . ." 33 U.S.C. § 1365(a). Section 505 defines "citizen" as "a person or persons having an interest which is or may be adversely affected." § 1365(g). Additionally, the CWA provides that a State is a "person" for the purpose of the Act. *See* 33 U.S.C. § 1362(5). Accordingly, the Supreme Court clearly stated in *U.S. Department of Energy v. Ohio*, 503 U.S. 607 (1992), that the CWA deems a State a "citizen", entitling it to bring action under the Act. *See id.* at 616.

Despite section 505's provisions, some district courts have disregarded its plain meaning both on the grounds that the legislative history of section 505 does not indicate that Congress contemplated a State bringing action under the citizen suit provision and that courts holding that a State did have standing under section 505 did so in dicta. *See California v. Dep't of Navy*, 631 F. Supp. 584, 587-90 (N.D. Cal. 1986) (discussing a State as "citizen" under the CWA), *aff'd*

sub nom. California v. U.S. Dep't of Navy, 845 F.2d 222 (9th Cir. 1988). Notably, the courts finding that a State was not a "citizen" did so prior to the Supreme Court addressing the issue in *U.S. Department of Energy v. Ohio*. Moreover, these courts ignored the first principle of statutory construction that "Congress's 'authoritative statement is the statutory text, not the legislative history.'" *Chamber of Commerce of U.S. v. Whiting*, 131 S. Ct. 1968, 1980 (2011) (quoting *Exxon Mobil Corp. v. Allapattah Services, Inc.*, 545 U.S. 546, 568 (2005)).

The citizen suit provisions of section 505 entitle New Union to sue under the CWA because the statute's plain meaning defines New Union as both a "person" and a "citizen" for its purpose. Accordingly, this Court should find that New Union entitled to sue under the citizen suit provisions of the Act.

2. New Union suffers "injuries in fact" because the procedural violations impact New Union's economic interests and its proprietary interest in the Imhoff Aquifer.

Standing requires that a plaintiff establish a "'personal stake' in the alleged dispute, and that the alleged injury suffered is particularized as to him." *Raines v. Byrd*, 521 U.S. 811, 819 (1997). Further, many circuits have recognized that a credible threat of environmental harm will support standing even though the potential harm has not yet occurred. *See Cent. Delta Water Agency v. United States*, 306 F.3d 938, 949-50 (9th Cir. 2002) (citing cases). This reasoning relies on the commonsense notion that "the fouling of air and water are harms that are frequently difficult or impossible to remedy." *Id.* at 950. Additionally, a party, who will likely suffer economic injury, has standing under the APA. *See Data Processing*, 397 U.S. at 154. Moreover, the extent of injury required to establish standing is irrelevant because the injury-in-fact requirement serves to distinguish parties with a stake in the controversy from parties who are not adversely affected but have an interest in the outcome. *See United States v. Students*

Challenging Regulatory Agency Procedures (SCRAP), 412 U.S. 669, 689 n. 14 (1973) (citing cases).

Here, New Union has an economic stake and a proprietary interest in the controversy. First, many of these chemicals, which DOD plans to release around Lake Temp, are listed as hazardous substances under section 311 of the CWA. (R. at 4.) The release of these pollutants into Lake Temp will require New Union to maintain costly monitoring of Imhoff Aquifer to ensure that these section 311 substances do not pose a health risk to its residents. While the cost of the monitoring may be small, as noted above, the extent of injury is irrelevant for the purpose of Article III standing. "It is sufficient if this interest is no more than an 'identifiable trifle.'" *Louisiana, through Dep't of Commerce and Indus. v. Weinberger*, 404 F.Supp. 894, 896 (E.D. La. 1975) (quoting *SCRAP*, 412 U.S. at 669).

Even if this Court rules that New Union does not have an economic interest in the Imhoff Aquifer, New Union will still suffer injury to its proprietary interest if COE's permit stands. First, the permit allows the discharge of chemicals around Lake Temp, which feeds the Imhoff Aquifer. (R. at 5.) New Union's regulatory scheme indicates that no New Union resident has a right to groundwater prior to DNR issuing withdrawal permit. (R. at 6-7.) If no New Union citizen has a right to the groundwater before permit issuance, then either New Union owns the groundwater or it holds it in trust for the benefit of its residents. In either event New Union has legal title to the groundwater. The release of these hazardous substances poses a credible threat to the Imhoff Aquifer, part of which New Union owns.

New Union suffers a credible threat to its economic interests as well as to its proprietary interest in the Imhoff Aquifer because of the permit. Accordingly, this Court should find that New Union suffers "injuries in fact".

3. The "zone of interest" test is inapplicable here because the CWA grants standing to the full extent of Article III.

As the Ninth Circuit has recognized, the citizen suit provision of the CWA "extends to the outer boundaries set by the 'case or controversy' requirement of Article III of the Constitution." *Ecological Rights Found. v. Pacific Lumber Co.*, 230 F.3d 1141, 1147 (9th Cir. 2000) (citing *Middlesex County Sewerage Auth. v. Nat'l Seal Clammers Ass'n*, 453 U.S. 1, 16 (1981)). Accordingly, this Court should rule that the "zone of interest" test is inapplicable here.

New Union has standing to challenge the actions of COE and OMB. First, Congress granted the States a procedural right under 5 U.S.C. § 702 to challenge agency actions and New Union is a "citizen" for the purposes of the CWA. Second, New Union suffers "injuries in fact" because the COE permit will adversely affect New Union's economic interests and proprietary interest in the Imhoff Aquifer. Finally, the "zone of interest" test is inapplicable because the CWA grants standing to the full extent of Article III. Accordingly, this Court should reverse the lower court's decision that New Union does not have standing.

B. New Union has standing as *parens patriae* because it is not merely a nominal party, it has a quasi-sovereign interest in the controversy, and a "substantially significant segment" of its population will be affected.

In *Alfred L. Snapp & Son, Inc. v. Puerto Rico ex rel. Barez*, 458 U.S. 592 (1982), the Supreme Court established that a State asserting standing in its capacity as *parens patriae* must: (1) "articulate an interest apart from the interest of particular private parties, *i.e.*, the State must be more than a nominal party"; (2) "express a quasi-sovereign interest"; and (3) "allege[] injury to a sufficiently substantial segment of its population." *Id.* at 607. Regarding New Union's satisfaction of the first prong of the test, see Part I.A.2 *supra* for discussion of New Union's interests, which are distinct from the interests of other private parties.

Regarding New Union's quasi-sovereign interest, while the Supreme Court declined to define all interests which may qualify as quasi-sovereign, it did make clear that a State's interest in the physical and economic health and welfare of its residents qualifies. *See id.* Granted, "[w]hen a state seeks only compensatory and/or punitive damages, courts have held that there is no quasi-sovereign interest." *Colo. Civil Rights Comm'n v. Wells Fargo Bank and Co.*, No. 10-cv-02427-MSK-MJW, 2011 WL 2610205, at *6 (D. Colo. July 1, 2011). However, if a State requests relief in the form of injunction, then the courts find that a quasi-sovereign interest is affected. *See id.* (citing cases). Further, when the injury is to the environment, courts have generally held that a State does have *parens patriae* standing. *See Oregon v. Legal Serv. Corp.*, 552 F.3d 965, 970-71 (9th Cir. 2009) (citing cases). Here, New Union's interest is in the physical health and well-being of its residents. The DOD's proposed "fill material" consists of substances that the CWA deems hazardous. (R. at 4.) New Union seeks to protect the health and welfare of its residents by preventing their exposure to these hazardous substances. Moreover, New Union seeks judicial review, not damages, regarding a pending environmental injury. This is indicative of New Union's quasi-sovereign interest. Accordingly, this Court should rule that New Union does have an interest in its capacity as *parens patriae*.

Concerning the test's third prong, while the Supreme Court stated that a "sufficiently substantial segment" of a State's residents must be injured, "[t]here is no numerical talisman to establish *parens patriae* standing." *People v. Peter & John's Pump House, Inc.*, 914 F. Supp. 809, 812 (N.D.N.Y. 1996). Indeed, courts have stated that determination of the affected segment does not involve "the raw number of individuals[.]" *People v. Mid Hudson Med. Group, P.C.*, 877 F. Supp. 143, 148 (S.D.N.Y. 1995). Rather, when determining whether a State has alleged

injury to "a substantial segment" of its residents, courts should also look to "the indirect effects of injury[.]" *Snapp*, 458 U.S. at 607.

In *In re Hemingway*, 39 B.R. 619 (N.D.N.Y. 1983), the court reversed on appeal a bankruptcy court's finding that an attorney general did not have standing as *parens patriae* to maintain an action because the attorney general named only six consumers affected by consumer fraud. The court reasonably held that the bankruptcy court failed to recognize that, although the suit had only six named consumers, the State's "representation is part of a much broader scheme of consumer protection. When viewed as a whole, and fully considering the future impact that an adverse decision to the State would have, the [c]ourt finds that *parens patriae* standing is appropriate[.]" *Id.* at 622. Likewise, this Court should find *parens patriae* standing appropriate here. While only Dale Bompers is named in this action, the procedural violations adversely affect a "substantially significant" portion of New Union's residents by ignoring the broader policy goals of the CWA. Congress enacted this legislation not to provide the DOD a means of disposing of hazardous substances, but rather "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a). This broad policy goal indirectly affects a "significant segment" of the population. Likewise, COE's permit indirectly affects a "significant segment" of New Union's residents because of the policy goals the permit circumvents.

Granted, *Massachusetts v. Mellon*, 262 U.S. 447 (1923), holds that a state may not engage in a *parens patriae* action against the United States in an attempt to usurp Congressional authority. *See id.* at 485-86. *Mellon* is inapplicable here. In *Abrams v. Heckler*, 582 F. Supp. 1155 (S.D.N.Y. 1984), plaintiffs claimed standing as *parens patriae*, on behalf of the citizens of New York, to enjoin the U.S. Department of Health and Human Services from violating a federal

statute. The court noted that "a suit to 'vindicate the Congressional will' by preventing an administrative agency from violating a federal statute, unlike a challenge to the constitutionality of the underlying statute, does not implicate the federalism concerns behind the *Mellon* decision." 582 F.Supp. at 1159 (citing *Washington Utilities & Transp. Comm'n v. Fed. Communc'ns Comm'n*, 513 F.2d 1142, 1153 (9th Cir. 1975)). Similarly, New Union does not challenge the authority of Congress with the present action. On the contrary, New Union seeks to "vindicate the Congressional will" through ensuring that the CWA is properly administered.

For the foregoing reasons, New Union has standing under Article III. First, New Union has standing as a private party because it suffers injury caused by COE and OMB action. Second, New Union has *parens patriae* standing in it capacity as quasi-sovereign because the actions of COE and OMB impact the physical and economic health and well-being of its residents. Accordingly, this Court should reverse the judgment of the lower court.

II. The district court correctly concluded that Lake Temp is navigable water and therefore subject to the requirements of the CWA.

Lake Temp constitutes navigable water of the United States, and it is therefore subject to the jurisdiction of the CWA. Generally, the CWA makes it unlawful to "discharge . . . any pollutant." 33 U.S.C. § 1311(a). As defined in the statute, "discharge" includes "any addition of any pollutant to navigable waters from any point source." 33 U.S.C. § 1362(12). "Navigable waters" are defined as "waters of the United States, including the territorial seas." 33 U.S.C. § 1362(7).

The term "navigable waters," as used in the CWA, has a broader definition than it has in common usage. In *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121 (1985), the Supreme Court noted that, by broadly defining "navigable waters" to include "the waters of the United States," Congress "intended to . . . regulate at least some waters that would not be

deemed 'navigable' under the classical understanding of that term." *Id*. at 133. Two years later, the Court reiterated this expansive view, noting in dicta that the CWA "applies to virtually all surface water in the country." *Int'l Paper Co. v. Ouellette*, 479 U.S. 481, 486 (1987).

A. Lake Temp constitutes navigable water under EPA and COE regulations, because its use, degradation, or destruction could affect interstate or foreign commerce.

Lake Temp falls under the agencies' regulations implementing 33 U.S.C. § 1362(7). COE regulations broadly interpret section 1362(7) to include "other waters such as intrastate lakes . . . the use, degradation or destruction of which could affect interstate or foreign commerce." 33 C.F.R. § 328.3(a)(3) (2010). EPA regulations use substantially identical language. *See* 40 C.F.R. § 232.2 (2010). It is well settled that, "if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute." *Chevron, U.S.A., Inc. v. Natural Res. Defense Council, Inc.*, 467 U.S. 837, 843 (1984). Therefore, because the CWA is silent as to the reach of section 1362(7), this Court's review should be "limited to the question whether it is reasonable" to interpret the statute to apply to an intrastate lake which may have a substantial effect on interstate commerce. *See Riverside Bayview*, 474 U.S. at 131.

The Tenth Circuit has upheld the application of the CWA to an intrastate lake, based solely on its use by interstate travelers. In *Utah v. Marsh*, 740 F.2d 799 (10th Cir. 1984), the Utah Division of Parks and Recreation "placed a small cofferdam across the mouth of the boat harbor" in Utah Lake. *Id*. at 801. That lake is located entirely within the State of Utah. *Id*. at 800. COE later claimed that the state had violated the CWA by placing "fill material" in the lake, which COE found to be a "water of the United States." *Id*. at 801. The state then sued the COE, claiming that Utah Lake "[was] beyond the constitutional reach of . . . Congress" under the

Commerce Clause. *Id*. (internal quotations omitted). The court held that the application of the CWA to Utah Lake was within the "permissible bounds" of the Commerce Clause, because the discharge of material into the lake could have had "a substantial economic effect on interstate commerce." *Id*. at 803. The court relied on several factors to reach that conclusion, including the use of the lake's water to irrigate crops, as well the lake's use as a recreational site for hunting, fishing, boating, and camping. *Id*. Significantly, the court noted that out of state travelers accounted for "2% of total visitation" of Utah Lake. *Id*.

Granted, the reach of the CWA has been thrown into doubt by recent Supreme Court decisions. In *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers*, 531 U.S. 159 (2001) (hereinafter "*SWANCC*"), a group of Chicago suburbs purchased a parcel of land that had formerly been a mining site. *Id*. at 162-63. The group intended to discharge solid waste onto the land, which included "a scattering of permanent and seasonal ponds." *Id*. at 163. The ponds ranged "from less than one-tenth of an acre to several acres" in surface area, and "from several inches to several feet" in depth. *Id*. Ultimately, COE claimed jurisdiction over the proposed disposal site by virtue of its "Migratory Bird Rule," which deemed intrastate waters "[w]hich are or would be used as a habitat by other migratory birds which cross state lines" to be "waters of the United States." *Id*. at 164; 51 Fed. Reg. 41,217 (Nov. 13, 1986). The Court held, however, that the Migratory Bird Rule "exceed[ed] the authority granted to [the COE] under § 404(a) of the CWA." *Id*. at 174. In so holding, the Court determined that the rule was not entitled to *Chevron* deference, because it raised "significant constitutional questions." *Id*. at 172-74. Specifically, the Court found that the "nonnavigable, isolated, intrastate . . . sand and gravel pit" at issue in *SWANCC* did not constitute water of the United States merely because of its importance to migratory birds. *Id*. at 171, 174.

Even after *SWANCC*, lower courts continued to uphold CWA jurisdiction over intrastate lakes based on their recreational use. In *Colvin v. United States*, 181 F. Supp. 2d 1050 (C.D. Cal. 2001), for example, the defendant dumped waste onto land adjacent to the Salton Sea, a lake located wholly within the State of California. *Id.* at 1052. After some of that waste entered the Salton Sea, the defendant was convicted of violating the CWA by "discharging pollutants into navigable waters of the United States without a permit." *Id.* He then moved to vacate his conviction, arguing that the "Salton Sea [was] not a 'navigable water' under the CWA." *Id.* at 1053. The district court denied the motion, holding that the Salton Sea was "[navigable water] under most any meaning of the term." *Id.* at 1055. The court's conclusion rested largely on the fact that the lake was "a popular destination for out-of-state and foreign tourists"; they used it to "water ski, fish, hunt ducks, and race boats." *Id.*

Here, Lake Temp is subject to the CWA because its "use, degradation or destruction" could have a substantial effect on interstate commerce. *See* 33 C.F.R. § 328.3(a)(3). Much like the lake at issue in *Marsh*, out of state travelers use Lake Temp for hunting and boating. (R. at 4.) In fact, those non-residents historically account for around 25% of the lake's hunters, a figure that greatly exceeds the percentage of out-of-state travelers using Utah Lake. (*Id.*) Thus, unlike COE in *SWANCC*, Plaintiff does not assert jurisdiction *solely* on the basis that ducks stop at the lake during migration. Rather, because of the presence of those ducks, "thousands of duck hunters" have used Lake Temp during the last century. (R. at 4.) *SWANCC* simply held that the "migratory bird rule" exceeded the COE's authority under section 404 of the CWA; "[a]ny other interpretive language in the case was merely *dicta*." *United States v. Jones*, 267 F. Supp. 2d 1349, 1360 (M.D. Ga. 2003) (citing *United States v. Lamplight Equestrian Ctr., Inc.*, No. 00 C 6486, 2002 WL 360652 (N.D. Ill. March 8, 2002). As noted in *Colvin*, "the *SWANCC* Court did

not invalidate other Corps interpretations (i.e., non-Migratory Bird Rule interpretations) of navigable waters . . . ." 181 F. Supp. 2d at 1055. Thus, Lake Temp is clearly distinguishable from the "abandoned sand and gravel pits" at issue in *SWANCC*. 531 U.S. at 174.

Granted, DOD has posted signs indicating that entry onto the reservation is illegal. (R. at 4.) It has made no attempt, however, to enforce that prohibition, and it "has knowledge that people continue to use the lake for hunting and bird watching." (*Id*.) Further, the fact that the use of the lake is illegal does not detract from its effect on interstate commerce. *See Gonzales v. Raich*, 545 U.S. 1, 18 (2005) (upholding the application of the federal Controlled Substances Act under the Commerce Clause based on the "established, albeit illegal, interstate market" for marijuana). Thus, this argument is a red herring. Regardless of what measures DOD has taken to prohibit the use of Lake Temp, hunters still frequent the lake, and its degradation would have a substantial effect on their activities.

Thus, Lake Temp is navigable water of the United States, because its use, degradation or destruction could have a substantial effect on interstate commerce.

B. Lake Temp is navigable water under the plain meaning of 33 U.S.C. § 1362(7) because it is a navigable-in-fact.

Lake Temp is "navigable-in-fact," and therefore a navigable water of the United States. Under the CWA, "navigable waters" are defined as "waters of the United States, including the territorial seas." 33 U.S.C. § 1362(7). When first interpreting the CWA's definition of "navigable waters," the COE determined that, at minimum, it covered waters that were "navigable in fact." *Riverside Bayview*, 474 U.S. at 123 (1985) (citing 40 Fed. Reg. 31,320 (1975)). The term "navigable-in-fact" describes "a body of water in which navigation, i.e. boat or ship traffic, takes place or *could* take place." *United States v. Johnson*, 437 F.3d 157, 161 n.3 (1st Cir. 2006), *vacated on other grounds*, 467 F.3d 56 (1st Cir. 2006) (emphasis added).

The concept of "navigable waters of the United States" was incorporated into "several statutes" prior to the passage of the CWA. *See Hardy Salt Co. v. S. Pac. Transp. Co.*, 501 F.2d 1156, 1167 (10th Cir. 1974). In *The Daniel Ball*, 77 U.S. 557 (1870), for example, the Court interpreted the Act of 1838, which prohibited the transport of "merchandise or passengers upon . . . navigable waters of the United States" without a license. *Id.* at 557. The Court defined "navigable waters" as follows:

> Those rivers must be regarded as public navigable rivers in law which are navigable in fact. And they are navigable in fact when they are used, or are susceptible of being used, in their ordinary condition, as highways for commerce, over which trade and travel are or may be conducted in the customary modes of trade and travel on water. And they constitute navigable waters of the United States within the meaning of the acts of Congress, in contradistinction from the navigable waters of the States, when they form in their ordinary condition by themselves, or by uniting with other waters, a continued highway over which commerce is or may be carried on with other States, or foreign countries in the customary modes in which such commerce is conducted by water.

Id. at 563.

Even if a water is navigable-in-fact, it does not fall under CWA jurisdiction unless it is "relatively permanent." In *Rapanos v. United States*, 547 U.S. 715 (2006), the defendants discharged fill material into three Michigan wetlands without a permit. *Id*. at 729. The plurality concluded that the "waters of the United States" included "only those relatively permanent, standing, or continuously flowing bodies of water 'forming geographic features' that are described in ordinary parlance as 'streams[,] . . . oceans, rivers, [and] lakes.'" *Id*. at 739 (citations omitted). In the plurality's opinion, "intermittent[] or ephemeral[]" flows were not contemplated by section 1362. *Id*. The plurality noted, however, that such waters need not be absolutely permanent:

> By 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 . . . . It suffices for present purposes that channels containing permanent flow are plainly within the definition, and that . . . streams whose flow is "coming and going at intervals . . . [b]roken, fitful," . . . or "existing only, or no longer than, a day; diurnal . . . short-lived," . . . are not.

Id. at 732 n.5.

Here, Lake Temp is navigable-in-fact. During wet years, the lake has a surface area as large as twenty-seven square miles. (R. at 3-4.). Historically, Lake Temp has been a popular site for duck hunting. During the last century, "perhaps thousands" of hunters have used the lake for that purpose, a quarter of whom were from other states. (R. at 4.) Trails can be found between the highway and Lake Temp, indicating that "rowboats and canoes [were] dragged" to the lake. (R. at 4.) Hunters have hunted from such vessels and used them to cross Lake Temp "to hunt from the shore opposite the highway." (R. at 7.) Thus, because Lake Temp is water "over which trade and travel are . . . conducted," it is navigable-in-fact. *See The Daniel Ball,* 77 U.S. at 563.

This conclusion is not affected by *The Daniel Ball*'s holding that the phrase "waters of the United States" denotes "a continued highway . . . with other States." *Id*. That case was decided well before the enactment of the CWA, and the Supreme Court has made it clear that the term "navigable waters," as used in the CWA, covers more than the "classical understanding of that term." *Riverside Bayview*, 474 U.S. at 123. In fact, the Court's opinion in *SWANCC* suggests that intrastate waters may be deemed "waters of the United States" under the CWA if they are navigable-in-fact. As discussed above, that case involved "nonnavigable, isolated, intrastate" ponds. *SWANCC*, 531 U.S. at 171. In large part, the Court was concerned that the exercise of COE jurisdiction over such waters would give the "navigable" qualifier "no effect whatsoever." *Id*. at 172. That problem is not presented here, as Lake Temp is navigable by boat. Indeed, the evidence indicates that it has been so navigated.

Finally, unlike the wetlands in *Rapanos*, Lake Temp is not a "transitory puddle[]," but a "lake." 547 U.S. at 733. It is dry 20% of the time, but at other times, its surface water extends for nine miles. (R. at 3-4.) Therefore, Lake Temp is not "intermittent" or "ephemeral," but "relatively permanent." *See Rapanos*, 547 U.S. at 734.

Thus, Lake Temp is navigable-in-fact, and therefore subject to CWA jurisdiction.

III. The district court erred in concluding that COE, rather than EPA, had jurisdiction to issue a permit for the discharge of pollutants into Lake Temp.

Because the spent munitions at issue do not constitute "fill materials" under the CWA, the COE did not have jurisdiction to issue a permit for their discharge into Lake Temp. The COE's contrary conclusion is not entitled to *Chevron* deference, given its inherent conflict of interest.

Generally, EPA may issue permits for the discharge of pollutants into navigable waters. 33 U.S.C. § 1342(a)(1). COE, however, "may issue permits . . . for the discharge of dredged or fill material into navigable waters." 33 U.S.C. § 1344(a). Generally, the EPA may not issue permits for activities under the COE's jurisdiction. *Coeur Ala., Inc. v. Se. Ala. Conservation Council*, 129 S. Ct. 2458, 2467 (2009). It may, however, veto such permits. *See* 33 U.S.C. § 1344(c); *Coeur*, 129 S. Ct. at 2467.

A. Spent munitions are not "fill material," and therefore do not fall under the permitting authority of 33 U.S.C. § 1344.

Under any reasonable interpretation of COE and EPA regulations, spent munitions do not constitute "fill material." Under the current regulations, "fill material" includes "material [that] has the effect of: (i) Replacing any portion of a water of the United States with dry land; or (ii) Changing the bottom elevation of any portion of a water of the United States." 40 C.F.R. § 232.2; 33 C.F.R. § 323.2(e)(1). For guidance, the agencies have listed several examples of such

material, including "rock, sand, soil, clay, plastics, construction debris, wood chips, [and] overburden from mining . . . activities . . . ." 40 C.F.R. § 232.2; 33 C.F.R. § 323.2(e)(2). The regulations also designate "slurry . . . or similar mining-related materials" as "fill material." 40 C.F.R. § 232.2; 33 C.F.R. § 323.2(f). Significantly, the regulations make it clear that "fill material does not include trash or garbage." 40 C.F.R. § 232.2; 33 C.F.R. § 323.2(e)(3).

When enacting those joint amendments, the agencies justified the "trash or garbage" exclusion by noting that some materials, such as "debris, junk cars, used tires, discarded kitchen appliances, and similar materials, are not appropriately used . . . for fill material in waters of the U.S." Final Revisions to the Clean Water Act Regulatory Definitions of "Fill Material" and "Discharge of Fill Material," 67 Fed. Reg. 31,134 (May 9, 2002). Further, under the CWA, some substances are designated as "hazardous." *See* 33 U.S.C. § 1321(b). Discharges of such materials are severely restricted. *See id*. § 1321(b)(1) ("The Congress hereby declares that it is the policy of the United States that there shall be *no discharge* of oil or hazardous substances into or upon the navigable waters of the United States . . . .") (emphasis added).

The Supreme Court recently articulated a fairly expansive reading of the "fill material" definition. In *Coeur,* the defendant sought to use "froth flotation" to reclaim "gold-bearing minerals" from the crushed rock of an abandoned mine. 129 S. Ct. 2458, 2463-64 (2009). It would then dispose of the byproduct of that process, a "mixture of crushed rock and water" called "slurry," into a small lake. *Id*. at 2464. This process would have raised the lakebed by fifty feet and increased its acreage by more than one-hundred percent. *Id*. EPA and COE agreed that the "slurry" constituted "fill material," and COE granted a permit for its discharge. *Id*. EPA declined to veto the permit "[a]fter considering the Corps findings." *Id*. at 2465. The Southeast

Alaska Conservation Council sued COE, claiming that EPA, and not COE, had jurisdiction to issue a permit. *Id.*

The Court held that the slurry constituted "fill material" under the agencies' regulations, and that its discharge was therefore under the exclusive permitting authority of COE. *Id*. at 2476-77. The Court noted, however, that even when section 404 applies, EPA retains the "power to veto a permit." *Id*. at 2467; *see* 33 U.S.C. 1344(c). Further, it specifically suggested that the outcome could be different in circumstances similar to the case at bar:

> SEACC expresses a concern that Coeur Alaska's interpretation of the statute will lead to § 404 permits authorizing the discharges of other solids that are now restricted by EPA standards. . . . (listing, for example, "feces and uneaten feed," "litter," and waste produced in "battery manufacturing"). But these extreme instances are not presented by the cases now before us. If, in a future case, a discharge of one of these solids were to seek a § 404 permit, . . . then SEACC could challenge that decision as an unlawful interpretation of the fill regulation; or SEACC could claim that the fill regulation as interpreted is an unreasonable interpretation of § 404.

Id. at 2468.

Here, the spent munitions do not fit comfortably into the regulatory definition of "fill material." New Union concedes that the discharge of those munitions into Lake Temp will have the effect of "[c]hanging the bottom elevation of" the lake. 33 C.F.R. § 323.2(e)(1); (*See* R. at 4.) The munitions themselves, however, are nevertheless excluded from the fill definition, because they constitute "trash or garbage." 33 C.F.R. § 323.2(e)(3). Indeed, the munitions are "similar materials" to "debris, junk cars, used tires, [and] discarded kitchen appliances." *See* 67 Fed. Reg. 31,134 (May 9, 2002). As such, they are not "appropriately used" as "fill material." *Id*.

The *Coeur* Court acknowledged that its holding was not absolute. It specifically noted that the outcome may have been different had the defendants attempted to discharge materials

that were "restricted by EPA standards." *Coeur*, 129 S. Ct. at 2468. Here, the munitions which the DOD intends to dump into Lake Temp contain "*many* chemicals on the Clean Water Act § 311 list of hazardous substances." (R. at 4.) (emphasis added). Thus, this situation touches upon precisely the concern that the Court addressed. Indeed, it would be absurd to allow entities to dispose of hazardous materials, the discharge of which was prohibited under 33 U.S.C. § 1321(b), merely because they assured that their disposal would raise the surface level of a navigable water.

Therefore, because spent munitions do not constitute "fill materials" under agency regulations, their discharge does not fall under COE's section 404 permitting authority.

B. This Court should not accord *Chevron* deference to COE's decision labeling spent munitions as "fill material," because COE is an interested party.

COE's determination that the spent munitions are "fill material" is not entitled to judicial deference. As discussed above, courts will generally defer to an agency's interpretation of a statute "if the statute is silent or ambiguous with respect to the specific issue." *Chevron*, 467 U.S. at 843. In some circumstances, however, the self-interest of an agency may militate against such a permissive standard of review. *See* Timothy K. Armstrong, Chevron *Deference and Agency Self-Interest*, 13 Cornell J. L & Pub. Pol'y 203, 205 (2004) (noting that "courts have stated or implied that self-interested agency action warrants little judicial deference," even though "they have generally failed to enunciate clear and consistent rationales for such a result").

The D.C. Circuit has suggested that the self-interest of an administrative agency may render *Chevron* deference inappropriate. In *Transohio Savings Bank v. Director, Office of Thrift Supervision*, 967 F.2d 598 (D.C. Cir. 1992), a large Ohio bank sought financial assistance from the Federal Savings and Loan Insurance Corporation ("FSLIC") for its acquisition of "two insolvent thrifts." *Id.* at 604. The bank's agreement with the FSLIC allowed the bank to count

the funds received from the agency as an "intangible" asset for the purposes of determining whether the bank met the minimum capital requirements under applicable regulations. *Id*. Three years later, however, the Office of Thrift Supervision ("OTS") issued regulations under the Financial Institutions Reform, Recovery and Enforcement Act ("FIRREA") that would have prevented the bank from counting those assets as "regulatory capital." *Id*. at 605. The bank then sued OTS, "claiming that banking regulators improperly interpreted FIRREA to apply to thrifts with forebearance agreements." *Id*. On appeal, the court declined to accord OTS *Chevron* deference, stating that its "reluctan[ce]" to do so was based in part on the agency's self-interest. *Id*. at 614. Significantly, the court noted as follows:

> This court has expressed concern about deferring to an agency interpretation of an agreement to which the agency is a party, . . . and we think the same concern applies to an agency interpretation of a statute that will affect agreements to which the agency is a party. . . . We see the same danger when, as here, an agency interprets a statute as abrogating existing agreements.

Id. at 614 (citations omitted).

The danger of agency self-interest is particularly troubling given the "settled norms associated with due process." *See* Armstrong, *supra*, at 77-97. Generally, the Due Process Clause requires "an impartial and disinterested tribunal in both civil and criminal cases." *Marshall v. Jerrico, Inc.*, 446 U.S. 238, 242 (1980). The Supreme Court has acknowledged the "prevailing view that most of the law concerning disqualification because of interest applies with equal force to . . . administrative adjudicators." *Gibson v. Berryhill*, 411 U.S. 564, 579 (1973). The Court has made clear, however, that the most "rigid [due process] requirements [are] designed for officials performing judicial or quasi-judicial functions . . . ." *Marshall*, 446 U.S. at 248. The Second Circuit has offered a standard for determining whether an administrative officer is acting in a quasi-judicial capacity: "A decision by the [agency] is quasi-judicial if it

does 'not purport to engage in formal rulemaking or in the promulgation of any regulations' but instead amounts to an adjudication of the rights and obligations of parties before it." *Town of Deerfield v. F.C.C.*, 992 F.2d 420, 427 (2d Cir. 1993) (citing *F.C.C. v. Pacifica Found.*, 438 U.S. 726, 734 (1978)).

Here, when COE determined that the discharge of spent munitions fell under its authority to regulate "fill material," it engaged in the same sort of self-interested decision-making that the *Transohio* court feared. Like the decision of OTS to abrogate a contract to which it was a party, *Transohio*, 967 F.2d at 614, COE's decision to allow its parent, DOD, to dump spent munitions into Lake Temp directly implicates the agency's own financial interests. (R. at 8.) In essence, COE issued a permit to itself, allowing it to dump its waste into an adjacent water, rather than incur the expense of transporting it to a more appropriate site.

Further, in choosing to grant a permit for DOD's discharge of spent munitions, COE was acting in a quasi-judicial capacity, and, therefore, its actions raise serious due process concerns. The granting of a permit does not involve promulgating rules or regulations. *See Town of Deerfield*, 992 F.2d at 427. Rather, it is akin to "an adjudication of . . . rights." *See id.* In making the decision, the Secretary of the Army necessarily interpreted the CWA and COE regulations, and applied that law to the facts before him. Those functions, which smack of judicial rather than legislative or executive power, render the Secretary's actions quasi-judicial in nature. As such, the parties affected by the discharge were entitled to "an impartial and disinterested" decision-making process. *Marshall*, 446 U.S. at 242. Because of the parent-subsidiary relationship between COE and DOD, such impartiality was impossible.

Therefore, because COE's exercise of jurisdiction over DOD's own operations was tainted by an inherent self-interest, this Court should not accord *Chevron* deference to that determination.

IV. OMB did not have authority to decide that COE had jurisdiction under CWA section 404, and EPA improperly acquiesced to OMB's directive.

OMB's directive that EPA not veto COE's permit and EPA's acquiescence to that directive were improper under the CWA, and this Court should reverse the lower court's decision. The CWA governs permit issuances for the material at issue in this case. *See* 33 U.S.C. §§ 1342, 1344. EPA may issue permits for the discharge of pollutants into navigable waters. 33 U.S.C. § 1342(a)(1). Such permits are referred to as section 402 permits. *See Coeur*, 129 S. Ct. at 2463. On the other hand, COE can issue permits for the discharge of dredged or fill material. 33 U.S.C. § 1344(a). Such permits are section 404 permits. *See Coeur*, 129 S. Ct. at 2463. Typically, EPA may not issue permits for activities that fall under 33 U.S.C. § 1344. *See Coeur*, 129 S. Ct. at 2463. However, Congress granted it the power to veto such permits. *See* 33 U.S.C. § 1344(c); *Coeur*, 129 S. Ct. at 2467.

Moreover, the CWA and APA allow citizen suits against the United States. 33 U.S.C. 1365(a)(1); 5 U.S.C. § 702. Decisions left to agency discretion are generally non-reviewable, while non-discretionary decisions may be challenged. 5 U.S.C. § 702(a)(2). Courts weigh several factors in determining whether a statute has committed a particular decision to agency discretion, including: (1) whether the statute's language is permissive or mandatory; (2) whether the statutory standards are expressed in broad, general concepts or specific guidelines; and (3) whether the decision requires an expert judgment committed to the special competence of an agency, or merely a legal determination. *Pullman, Inc. v. Volpe*, 337 F. Supp. 432, 436 (E.D. Pa. 1971). OMB and EPA violated the CWA when OMB improperly instructed EPA not to veto

COE's section 404 permit because (1) Congress entrusted EPA to administer the CWA due to EPA's expertise in the field, and OMB's intervention usurped EPA's authority against Congress's will, and (2) EPA's 404(c) veto power is non-discretionary and subject to judicial review. Therefore, this Court should reverse the lower court's grant of summary judgment.

A. OMB's influence was improper because Congress conferred power upon EPA, not OMB, to veto permits under the CWA.

Congress entrusted EPA with the power to administer the CWA. 33 U.S.C. § 1251(d). Critically, Congress gave EPA the authority to deny or restrict the use of defined areas as disposal sites. 33 U.S.C. § 1344(c). In other words, EPA has the power to review and veto permits for these sites. *Id.*

Courts have found lesser OMB intrusions to be inappropriate. In *Environmental Defense Fund v. Thomas*, 627 F. Supp. 566 (D.D.C. 1986), the court held that OMB improperly used its regulatory review to delay the enactment of certain amendments put forth by EPA. *Id.* at 571. In that case, Congress set March 1 as the deadline for EPA to enact certain regulations. *Id.* at 568. OMB began its review of those regulations on March 4. *Id.* OMB had not yet approved the regulations by April 12. *Id.* at 569. At a meeting between OMB and EPA staff members on April 16, OMB sought substantial changes to EPA's proposed regulations. *Id*. OMB altered the substance of the regulations, which it cleared on June 12. *Id.* The EPA Administrator signed them on June 14. *Id.*

The court held that OMB improperly influenced EPA's regulatory process. *Id.* at 571. It acknowledged that "a certain degree of deference" should be given to the President to control and supervise executive policymaking under *Sierra Club v. Costle*, 657 F.2d 298 (D.C. Cir. 1981). *Thomas*, 627 F. Supp. at 571. However, it found that OMB's interference was

incompatible with the will of Congress and not a valid exercise of the President's Article II powers, stating:

> 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. Under EO 12291, if used improperly, OMB could withhold approval until the acceptance of certain content in the promulgation of any new EPA regulation, thereby encroaching upon the independence and expertise of EPA. Further, unsuccessful executive lobbying on Capitol Hill can still be pursued administratively by delaying the enactment of regulations beyond the date of a statutory deadline. This is incompatible with the will of Congress and cannot be sustained as a valid exercise of the President's Article II powers.

Id. Therefore, the court declared OMB's interference to be "unreasonable and unacceptable" because it encroached upon EPA's independence and expertise. *Id.*

Undue interference with an agencies independence and expertise usurps Congress's will. *See id.* In *Chevron*, the Court held that if Congress has directly spoken to the issue at hand and Congress's intent is clear, then the issue is resolved. *Chevron*, 467 U.S. at 842-43. However, where Congress explicitly leaves a hole for the agency to fill, then it delegates the agency the authority to enact a specific provision of the statute by regulation. *Id.* These regulations are given controlling weight unless they are "arbitrary, capricious, or manifestly contrary to the statute." *Id.* at 843-44. This principle is premised on an agency's expertise in its field. *See, e.g.*, *Thomas*, 627 F. Supp. at 571.

In this case, OMB's interference with EPA's 404(c) veto power was unreasonable and unacceptable, and contrary to the principle established in *Chevron*. EPA sought to veto COE's section 404 permit and issue a 402 permit instead, but OMB instructed EPA not to use its veto power. (R. at 9.) EPA implemented its expert judgment and argued that the discharge here was significantly different than that in *Coeur*, requiring a section 402 permit for, at the very least, the non-fill liquid and semi-solid portion before their discharge into navigable waters. (R. at 9.)

Like in *Thomas*, OMB's disagreement with EPA's decision, and its ensuing directive, were not "valid exercise[s] of the President's Article II powers" because they were incompatible with the will of Congress—they took away EPA's independence and expertise with regard to its veto decision. EPA, not OMB, should have exercised its expertise in applying 404(c).

Moreover, the United States' argument that EPA's authority to veto 404 permits is discretionary and not subject to judicial review under 5 U.S.C. § 701(a)(2) misses the point. EPA did not use its discretion to decide not to veto the permit. Instead, OMB made that determination in its place. Also, the argument that this Court could only overturn EPA's "decision" by proving that it was arbitrary or capricious under 5 U.S.C. § 706(2)(A) is incorrect for the same reason. EPA did not make the decision—OMB did. OMB denied EPA its express authority to exercise its 404(c) veto. 33 U.S.C. § 1344(c); (R. at 9.)

Finally, Executive Order 12,088 and the United States Constitution do not dictate that this Court uphold the lower court's ruling. Article II, Sections 1 and 3, of the United States Constitution provide that "the executive Power shall be vested in a President of the United States of America" and "he shall take Care that the Laws be faithfully executed." U.S. Const. art. II, § 1, cl. 1; U.S. Const. art. II, § 3. Executive Order 12,088 allows OMB to resolve conflicts after the EPA's Administrator fails to do so. Exec. Order No. 12,088, 43 Fed. Reg. 47,707, 1-602 (Oct. 13, 1978).

Despite the United States' assertions, Executive Order 12,088 does not permit OMB to prevent EPA from using its 404(c) veto power. EPA planned to use that power. (R. at 9.) However, OMB directed it not to, and EPA acquiesced to that directive. (R. at 9.) The conflict did not simply involve a disagreement between two agencies. Instead, it dealt with a decision that EPA was entitled to make under 404(c) of the CWA. Section 404(c) would serve no

purpose if Executive Order 12,088 was read as broadly as the United States argues. That is, 404(c) expressly gives EPA the authority to review COE's permit. It provides for a means of resolving a disagreement without involving OMB. *See* 33 U.S.C. § 1344(c). Thus, the Executive Order cannot be read to remove EPA's veto power, or that authority would be meaningless.

Therefore, OMB's involvement was improper and in violation of the CWA. This court should reverse the lower court's decision.

B. EPA's failure to veto COE's permit is subject to judicial review because EPA had a non-discretionary duty to veto the decision.

Putting aside OMB's interference, EPA had a non-discretionary duty to veto the permit, and its failure to do so is subject to judicial review. Such review demonstrates that EPA's failure violated the CWA. *See supra* parts III.A and B. In *South Carolina Conservation League v. U.S. Army Corps of Engineers*, C.A. No. 2:07-3802-PMD, 2008 WL 4280376 (D.S.C. Sept. 11, 2008), the United States District Court for the District of South Carolina held that "a plaintiff may maintain a citizen suit under Section 1365(a)(2) when the 'Administrator fails to exercise the duty of oversight imposed by Section 1344(c).'" *Id.* at *9. There, the plaintiff brought suit against COE and EPA, challenging permits issued by COE. *Id.* at *1. The plaintiff argued that COE improperly issued the permits and EPA erroneously failed to veto them under section 404(c). *Id.* EPA asserted that its decision not to invoke 404(c) was due agency discretion and, thus, was not subject to judicial review under 5 U.S.C. § 701(a)(2). *Id.* at *3.

The court held for the plaintiff. It reasoned that the CWA's inclusion of both COE and EPA for purposes of permitting responsibilities would make little sense if EPA's 404(c) review were found to be discretionary. *Id.* at *6. That is, Congress could not have intended to allow citizen suits against EPA for erroneous section 402 permits, but preclude suits where COE makes a determination over which EPA

fails to exert authority. *Id.* This case is not an outlier. *See Nat'l Wildlife Fed'n v. Hanson*, 859 F.2d 313, 316 (4th Cir. 1988) (upholding district court's decision that plaintiffs can sue EPA for failing to exercise its duty of oversight under 404(c), stating, "Congress cannot have intended to allow citizens to challenge erroneous wetlands determinations when the EPA Administrator makes them but to prohibit such challenges when the Corps makes the determination and EPA fails to exert its authority over the Corps' determination."); *N.W. Envtl. Def. Ctr. v. U.S. Army Corps of Eng'rs*, 118 F. Supp. 2d 1115, 1120 (D. Or. 2000) (finding that EPA's 404(c) duty is non-discretionary because it is acting in tandem with COE); *Envtl. Def. Fund v. Tidwell*, 837 F. Supp. 1344, 1354–55 (E.D.N.C. 1992) (holding that suit could be brought against COE and EPA, and EPA's 404(c) duty was non-discretionary).

These cases are directly on point. Here, COE erroneously issued a permit under section 404. (R. at 7–9.) EPA should have vetoed that permit and issued one under section 402 instead. Section 404(c) expressly gave EPA this authority. However, it failed to exercise its authority. Congress could not have intended COE's permit to be precluded from judicial review simply because EPA failed to exert its veto authority. *See S.C. Conservation League*, 2008 WL 4280376, at *6; *Hanson*, 859 F.2d at 316; *N.W. Envtl. Def. Ctr*., 118 F. Supp. 2d at 1120. Thus, EPA's failure to veto COE's permit is subject to judicial review and clearly erroneous. *See supra* parts III.A and B. Therefore, EPA's failure to veto violated the CWA, and this Court should reverse the lower court's grant of summary judgment.

CONCLUSION

For the foregoing reasons, the lower court incorrectly granted summary judgment declaring that such usurpation of Congressional authority was appropriate. First, the court erred when it ruled that New Union did not have standing to challenge an agency action, although the agency action causes injuries in fact to New Union. Second, while it correctly found that Lake Temp is navigable water, it wrongly held that the COE had authority to issue a permit for the discharge of spent munitions into Lake Temp. Finally, it erroneously held that OMB had authority to prevent EPA from exercising its veto power over COE's permit.

Accordingly, this Court should rule that New Union has standing, Lake Temp is navigable water, spent munitions are not fill material, and OMB does not have authority to usurp EPA's veto power under the CWA. This Court should reverse the judgment of the District Court for the State of New Union.

Respectfully submitted,

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