Team No. 36

C.A. No. 11-1245

UNITED STATES COURT OF APPEALS
FOR THE TWELFTH CIRCUIT

STATE OF NEW UNION,

Plaintiff-Appellant,

v.

UNITED STATES,

Defendant-Appellee,

v.

STATE OF PROGRESS,

Intervenor-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW UNION

BRIEF OF PLAINTIFF-APPELLANT, STATE OF NEW UNION.

ORAL ARGUMENT REQUESTED

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JURISDICTIONAL STATEMENT

This is an appeal of a decision granting summary judgment for defendants the United States and the State of Progress[1] with respect to violations of the Clean Water Act, 33 U.S.C. §§ 1251 *et seq*. (2006) ("CWA") by Plaintiff the State of New Union. (R. at 3.) The district court had federal subject matter jurisdiction over these claims based on federal question jurisdiction. 28 U.S.C. § 1331 (2006). Specifically, New Union has standing under Article III of the United States Constitution and the CWA. This Court has jurisdiction over final decisions of district courts from within the Twelfth Circuit. Judge Romulus N. Remus issued his decision granting summary judgment for defendants on June 2, 2011 and the plaintiff filed a timely appeal. 28 U.S.C. § 1291 (2006).

STATEMENT OF THE ISSUES

1. Did New Union have Article III standing to bring this action?
2. Does Lake Temp constitute "navigable waters" under the CWA?
3. Did the Army Corps of Engineers ("COE") exceed its authority under § 404 of the CWA, 33 U.S.C. § 1344, by issuing a permit for disposal of used munitions in Lake Temp?
4. Did the Office of Management and Budget ("OMB") exceed its authority when it granted permitting power to COE and instructed the Environmental Protection Agency ("EPA") not to veto the § 404 permit issued by COE? Did EPA act beyond its discretion in complying with that directive?

STATEMENT OF THE CASE

The State of New Union brought a suit challenging the validity of a permit issued by

[1] The State of Progress intervened on behalf of Defendant United States. Throughout this brief, "defendants" will refer to both the United States and the State of Progress.

COE allowing the Department of Defense ("DOD") to dispose of used munitions in Lake Temp. New Union avers that the issuance of the permit violates the CWA, the regulations to the CWA, and the guidelines issued by the EPA for granting such a permit. Specifically, New Union challenges the issuance of a permit to dispose of used munitions by grinding them up and mixing them with chemicals and water and discharging this mixture into Lake Temp. New Union disputes the classification of used munitions as fill material, and contends that EPA therefore maintains authority over the discharge under § 402. 33 U.S.C. § 1342. New Union further alleges that OMB intervened in the permit review process in violation of the Administrative Procedure Act ("APA"), 5 U.S.C. §§ 551 *et seq*. (2006).

After discovery, all parties filed motions for summary judgment and the district court granted summary judgment for defendants, ruling that New Union lacked standing, that COE had authority to issue the permits, and that OMB's role in the permitting process did not constitute a violation of law. (R. at 5.)

STATEMENT OF THE FACTS

The facts relevant to this case are not contested by the parties and involve the potential discharge of used munitions into Lake Temp, a major body of water in an arid region. (R. at 3). Lake Temp is located on a military reservation within the State of Progress and close to the border of New Union. (R. at 4.) A major interstate highway runs directly past Lake Temp and connects New Union to the State of Progress. (R. at 4.) DOD has taken no action to discourage the public's recreational use of the lake and its environs since it posted warning signs along a nearby highway when Lake Temp became part of the military reservation in 1952. (R. at 4.) Lake Temp is unfenced and there are clear signs of rowboats and canoes being dragged from the highway to the banks of the lake. (R. at 4.) Lake Temp is also a stopover for migrating ducks,

and, for the past one hundred years, duck hunters have visited the lake. (R. at 4.)

Lake Temp varies in size depending upon rainfall and runoff from the surrounding mountains. (R. at 4.) During wet years, it is shaped like an oval and measures approximately nine miles long and three miles wide. (R. at 3-4.) One out of ever five years, the lake is dry. (R. at 4.) Directly under Lake Temp sits the Imhoff Aquifer, which extends into New Union and has been included in New Union's groundwater inventory since the time the project was first proposed. (R. at 4.) New Union also maintains authority over all groundwater, requiring a permit from the New Union Department of Natural Resources before any withdrawal of water. (R. at 6.) Dale Bompers, a New Union resident, operates and resides on a ranch directly above the Imhoff Aquifer and close to Lake Temp. (R. at 6.) The Imhoff Aquifer contains naturally-occurring sulfur. (R. at 6.) No testing wells were ever constructed to monitor or predict the possible contamination resulting from the discharge despite New Union's willingness to install and operate such wells and to collect data from them. (R. at 6.)

DOD proposes to construct a military munitions processing facility on the shores of Lake Temp where used munitions will be pulverized, mixed with chemicals and water, and discharged into the Lake. (R. at 6.) These used munitions contain substances classified as hazardous substances under § 311 of the CWA. (R. at 6.) This process is expected to take four years and raise the lake bed six feet and expand its surface area two square miles. (R. at 6.) DOD applied for, and was granted, a COE § 404 permit to discharge the toxic munitions into Lake Temp. (R. at 3-4). Before COE issued the permit, however, both EPA and COE issued briefing papers and attended a meeting with OMB to discuss which agency possessed the permitting authority. (R. at 9.) Over EPA's objection, OMB determined that COE had jurisdiction to issue the permit. (R. at 9.) COE then issued the permit. (R. at 9.) EPA expressed its intent to veto the permit, using

its authority under § 404(c), but OMB intervened and instructed EPA not to veto the permit. (R. at 9.) EPA complied with OMB's directive, effectively granting DOD the permit to discharge the mixture of used munitions, chemicals and water into Lake Temp. (R. at 7.)

STANDARD OF REVIEW

Federal Courts of Appeals review district courts' grants of summary judgment *de novo*. *See Ortiz v. Jordan*, 131 S. Ct. 884, 891 (2011). Summary judgment is only appropriate where there is no "genuine issue of material fact" and all facts and inferences must be construed "in the light most favorable to the non-moving party, drawing all reasonable and justifiable inferences in favor of that party." *Chavez v. Ill. State Police*, 251 F.3d 612, 635 (7th Cir. 2001).

SUMMARY OF THE ARGUMENT

I. The pollution of Lake Temp with used munitions constitutes an imminent harm to New Union both in its sovereign and *parens patriae* capacities, satisfying the requirements of Article III standing. New Union is harmed in its sovereign capacity as owner and regulator of the groundwater within its borders, and is harmed in its *parens patriae* capacity by the deprivation of its citizens of the aesthetic and recreational benefits of Lake Temp and by the decrease in value of their property.

II. Lake Temp meets the definition of navigable waters under the CWA because it is capable of use by the public for transportation of commerce and because it is a relatively permanent, standing body of water.

III. COE had no authority to issue a § 404 permit because the disposal of spent munitions into Lake Temp falls under the § 402 permitting program, which is administered solely by EPA.

IV. Even if COE's grant of the permit had been permissible under the CWA and applicable regulations, OMB acted outside of its authority in instructing EPA not to veto the

permit, and EPA acted arbitrarily and capriciously in acceding to OMB's order.

Therefore, COE's grant of a § 404 permit to DOD is invalid and this Court should reverse the grant of summary judgment for the defendants and instead grant New Union's cross motion for summary judgment.

ARGUMENT

I. THE DISTRICT COURT ERRED IN HOLDING THAT NEW UNION DOES NOT HAVE STANDING TO CHALLENGE THE PERMIT.

The district court failed to make reasonable and justifiable inferences in favor of New Union with respect to the injuries that it will suffer in both its sovereign and *parens patriae* capacities. "Standing under Article III of the Constitution requires that an injury be concrete, particularized, and actual or imminent; fairly traceable to the challenged action; and redressable by a favorable ruling." *Monsanto Co. v. Geertson Seed Farms*, 130 S. Ct. 2743, 2752 (2010). New Union has standing on two independent bases: (A) New Union is harmed in its sovereign capacity when its groundwater is polluted or threatened with risk of pollution, and (B) it is harmed in its *parens patriae* capacity when its citizens are harmed, either through the loss of access to aesthetic and recreational resources or through a reduction in the productivity or value of their property.

A. New Union is Harmed in its Sovereign Capacity as Owner and Regulator of the Groundwater Within its Borders When Its Groundwater is Subjected to a Risk of Pollution.

Sovereign states are harmed by actions that strike at the core of their sovereignty and are subject to a lower threshold for standing determinations than individuals and private organizations. *Massachusetts v. EPA*, 549 U.S. 497, 498 (2007), citing *Lujan v. Defenders of Wildlife,* 504 U.S. 555, 573 (1992) ("Massachusetts has a special position and interest here. It is

a sovereign State and not, as in *Lujan*, a private individual. . .”). As Justice Holmes explained in *Georgia v. Tenn. Copper Co.*, 206 U.S. 230, 237 (1907), “[i]n that [sovereign] capacity the State has an interest independent of and behind the titles of its citizens, in all the earth and air within its domain.” Both EPA and COE have taken actions that harm New Union in its sovereign capacity by exposing its groundwater to risk of pollution. Specifically, (1) EPA’s failure to veto the permit allowing DOD to pollute Lake Temp harms New Union by creating a risk of pollution to New Union’s groundwater and (2) COE’s grant of the permit interferes with New Union’s sovereign right under the public trust doctrine to preserve its waters for its citizens.

1. EPA’s failure to carry out its duty under the CWA to protect groundwater from toxic pollution harms New Union in its sovereign capacity.

When a federal agency fails to protect the interests of a sovereign state, as mandated by Congress, that state is harmed for the purposes of Art. III standing. The Supreme Court in *Massachusetts v. EPA* held that the agency’s failure to take appropriate action constituted a harm to Massachusetts that was both “actual and imminent.” *Id.* at 498-499. The trial court here was therefore not required to reach the questions of whether pollution from Lake Temp was certain to pollute the portion of the Imhoff Aquifer located in New Union or the extent and timing of that pollution. The issuance of the § 404 permit in contravention of law constituted a harm in and of itself. (R. at 5-6.)

The present case is analogous to *Massachusetts v. EPA* as both involve: 1) sovereign rights of a state to protect its citizens from environmental harms that are “now lodged in the federal government;” 2) Congressional legislation requiring EPA to protect those sovereign rights; and 3) EPA’s failure to protect those rights. *Id*. at 519. The district court erred in failing

to apply the holding of *Massachusetts v. EPA* to the facts of this case.[2] Specifically, the district court erroneously based its decision to grant summary judgment on the lack of evidence regarding the extent of the potential pollution of Lake Temp. (R. at 5-6.)

By granting DOD a permit to dispose of used munitions in Lake Temp, COE created an imminent threat that pollutants will flow from Lake Temp through its lakebed into the Imhoff Aquifer, of which a portion is located in New Union. (R. at 4.) This harm is more than sufficient for New Union to have standing to bring suit against COE. Groundwater contamination is "more than sufficient" to establish standing. *See Harris v. Bd. of Supervisors*, 366 F.3d 754, 761 (9th Cir. 2004). As naturalist John Muir observed, "When we try to pick out anything by itself, we find it hitched to everything else in the Universe." John Muir, *My First Summer in the Sierra* Boston, Houghton Mifflin (1911) (p.110 of the Sierra Club Books 1988 edition). The disposal of used munitions in Lake Temp will pollute the lake's ecosystem, which is "hitched" to all organisms and animals of the lake, causing a deprivation to the New Union citizens that constitutes injury in fact.

The district court further erred in placing on New Union the burden of predicting the timing and intensity of pollution that would reach the portion of the Imhoff Aquifer located in New Union. (R. at 6.) The district court accepted DOD's conclusion that because New Union did not file an application to install monitoring wells on the military reservation, the occurrence, timing, and severity of any contamination on Lake Temp were completely speculative. (R. at 6.) However, the district court's shifting of the burden from DOD to New Union to determine the

[2] Although the district court appeared to downgrade the holding in *Massachusetts v. EPA* by stating, "[s]ignificantly, four of the Justices in that case dissented from the majority's view…," majority Supreme Court decisions are binding on lower courts regardless of whether the decision is unanimous. (R. at 5). While plurality decisions must be understood in the context of concurring views (as well as minority views), majority decisions are binding in their own right without reference to the views of dissenters.

probability that the pollution would reach New Union is a mistake of law. An injury need not be certain to establish Article III standing; rather, a mere "risk of harm" suffices. *Massachusetts v. EPA,* 549 U.S. at 521. The installation of wells that would predict the timing and intensity of pollution reaching the portion of the aquifer located in New Union is unnecessary for standing where the risk itself is sufficient for standing. In fact, the more serious the potential injury, the less the risk need be to establish standing. "The more drastic the injury that government action makes more likely, the lesser the increment in probability to establish standing; even a small probability of injury is sufficient to create a case or controversy--to take a suit out of the category of the hypothetical--provided of course that the relief sought would, if granted, reduce the probability." *Id.* at 526 (internal quotation marks and citation omitted). The risk of New Union's groundwater becoming polluted with toxic substances is sufficiently grave that even a small probability of that consequence is sufficient to establish standing.[3]

2. By granting a permit that exposes the Imhoff Aquifer to potential pollution, COE obstructed New Union's ability to carry out its public trust duties.

Independent of Congress' action to invest New Union with the right to protect its citizens from water pollution through the passage of the CWA, New Union has the duty to protect the water rights of its citizens under the public trust doctrine.

> The Court from an early date has acknowledged that the people of each of the Thirteen Colonies at the time of independence "became themselves sovereign; and in that character hold the absolute right to all their navigable waters and the soils under them for their own common use, subject only to the rights since surrendered by the Constitution to

[3] It is also worth noting that any such application to install monitoring wells would have been futile, since DOD would not have allowed "access to the military reservation for that or other non-military purposes." (R. at 6.) Under the doctrine of futility, a plaintiff is not required to take action that would be futile in light of a party-opponent's policies and practices. *Ellison v. Connor*, 153 F.3d 247, 255 (5th Cir. 1998). Whether pursuit of other remedies would have been futile is a jury question and when such an inference is available, "further factual development is required." *Moore v. United States Dept. of Agric. on Behalf of Farmers Home Admin.*, 993 F.2d 1222, 1224 (5th Cir. 1993).

the general government."

Idaho v. Coeur D'Alene Tribe, 521 U.S. 261, 283 (1997). Interference with a sovereign state's ability to carry out its duties to its people is exactly the sort of harm envisioned in *Massachusetts v. EPA*: "When a State enters the Union, it surrenders certain sovereign prerogatives." 549 U.S. at 519.

States may apply the public trust doctrine to the protection of groundwater. *New Mexico v. Gen. Elec. Co.*, 467 F.3d 1223, 1243 (10th Cir. 2006). By prohibiting the withdrawal of groundwater without a permit from the New Union Department of Natural Resources, New Union effectively asserted public trust authority over its groundwater. (R. at 6.) COE's permit allowing DOD to dispose of hazardous substances in Lake Temp poses a risk that New Union groundwater will become polluted. The permit thereby diminishes New Union's ability to carry out its public trust duties to its citizens, constituting an imminent harm to New Union in its sovereign capacity.

B. New Union Has Standing in Its *Parens Patriae* Capacity, As Protector of Its Citizens, When Its Citizens Are Harmed.

In addition to its standing as a sovereign state, New Union has standing under the principle of *parens patriae*, which prescribes that a harm to a citizen of a state may be imputed to the state itself. *Alfred L. Snapp & Son v. P.R., ex rel., Barez*, 458 U.S. 592, 600 (1982). Under this doctrine, New Union has standing on the basis of the imminent harm to its citizens caused by COE's issuance of a permit allowing DOD to dispose of used munitions in Lake Temp. Those harms include not only of the pollution of New Union's groundwater, as discussed above, but also (1) the decreased aesthetic and recreational enjoyment of the lake currently available to New Union citizens, and (2) the decreased value of New Union citizen Dale Bompers' property.

1. The Disposal of Used Munitions in Lake Temp Would Harm New Union Residents' Recreational Enjoyment of the Lake and Its Environs.

"[E]nvironmental plaintiffs adequately allege injury in fact when they aver that they use the affected area and are persons for whom the aesthetic and recreational values of the area will be lessened by the challenged activity." *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 183 (2000) (citing *Sierra Club v. Morton*, 405 U.S. 727, 735 (1972)).[4] Visitors to Lake Temp make use of its natural assets and enjoy bird watching, hunting, and boating. (R. at 4.) Due to the lake's close proximity to New Union, it is a reasonable inference that New Union residents are among the lake's many visitors. (R. at 4.) Only one such visitor from New Union would be sufficient for New Union to have standing. *See* U.S. CONST. art. III, § 2, cl. 1; *Rumsfeld* v. *Forum for Academic and Institutional Rights, Inc.*, 547 U. S. 47, 53 (2006) (presence of one party with standing is sufficient to satisfy Article III's case-or-controversy requirement).

New Union residents have standing individually due to the actual or imminent injury in fact, the causal connection between the injury and the conduct complained of, and the likelihood that a favorable decision will redress the injury. *Lujan v. Defenders of Wildlife* at 561-62. When the fish and other living organisms in Lake Temp are killed by the toxins in the used munitions, birds who feed on them will also be affected, thus depriving New Union birdwatchers and duck hunters the opportunity to enjoy their recreational pastimes. Cynthia A. Paszkowski & William M. Tonn, *Community concordance between the fish and aquatic birds of lakes in northern Alberta, Canada: the relative importance of environmental and biotic factors, in* FRESHWATER BIOLOGY 43, 421-437 (2000).

[4] While *Friends of the Earth*, 528 U.S. 167, 181 (2000), concerned associational standing, the same principles apply.

2. The Disposal of Used Munitions in Lake Temp Would Harm New Union Resident Dale Bompers' Property Value and Use of His Land.

Real estate derives much of its value from its proximity to desirable resources and amenities. New Union resident Dale Bompers' ranch is located in close proximity to Lake Temp. (R. at 6.) Some portion of Mr. Bompers' property value can therefore be attributed to its proximity to this pristine lake that is popular for hunting and bird-watching, especially given that Lake Temp is a major body of water in an arid region. (R. at 3.) As the Imhoff Aquifer carries water with a high sulfur content to Mr. Bompers' ranch, pollution of this water would directly impact Mr. Bompers' land and soil. (R. at 4.) Since sulfur is a vital nutrient for plant growth, the pollution of the aquifer poses an imminent threat to the soil quality of Mr. Bompers' land. *See* "*Soil Facts: Sulfur as a Plant Nutrient*," Jack Baird, the North Carolina Agricultural Extension Service (1991), available at http://www.soil.ncsu.edu/publications/Soilfacts/AG-439-15_Archived/AG-439-15.pdf. A favorable decision from this Court would therefore preserve Lake Temp as a valuable recreational destination for New Union residents and would protect the value of Dale Bompers' land.

New Union therefore has standing to challenge COE's grant of a § 404 permit allowing DOD to dispose of used munitions in Lake Temp on two independent grounds: 1) because it is harmed in its sovereign capacity by the issuance of the permit in contravention of its right to protect its citizens and 2) because execution of the permit would deprive New Union citizens of the aesthetic and recreational enjoyment of Lake Temp and decrease the value of New Union resident Dale Bompers' property.

II. LAKE TEMP MEETS THE DEFINITION OF NAVIGABLE WATERS UNDER THE CWA BECAUSE IT IS CAPABLE OF USE BY THE PUBLIC FOR TRANSPORTATION OF COMMERCE AND BECAUSE IT IS A RELATIVELY PERMANENT, STANDING BODY OF WATER.

CWA grants authority to COE and EPA over the discharge of pollutants into "navigable waters." 33 U.S.C. §§ 1311(a), 1342, 1344. Lake Temp falls under both the traditional definition of navigable waters and Justice Scalia's definition for the plurality in *Rapanos v. United States*, 547 U.S. 715, 731 (2006) because possible uses of Lake Temp affect interstate commerce and the lake qualifies as "relatively permanent." As such, the CWA unequivocally requires DOD to obtain a permit for the munitions discharge into Lake Temp. 33 U.S.C. §§ 1311(a), 1342(a), 1362(7).

A. Lake Temp is Capable of Use to Transport Interstate Commerce and Therefore Qualifies as Navigable Water of the United States.

Because Lake Temp is capable of use to transport interstate commerce, it qualifies as navigable waters of the United States. The court in *Rapanos* recognized that the CWA "uses the phrase 'navigable waters' as a *defined* term, and the definition is simply 'the waters of the United States.'" *Rapanos*, 547 U.S. at 730-31 (emphasis original), citing 33 U.S.C. § 1362(7). Congress has traditionally defined navigable waters as "[a]ll waters which are currently used, or were used in the past, or *may be susceptible to use in interstate . . . commerce*." See, e.g., 33 C.F.R. § 328.3(a)(1) (2011); 40 C.F.R. § 230.3(s)(1)(2011); 40 C.F.R. § 122.2 (2011) ("waters of the U.S."(a)); 40 C.F.R. § 110.1 (2011) ("navigable waters" (a)) (emphasis added). Clarifying its jurisdiction, COE defined interstate commerce:

> "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. . . . The presence of recreational craft may indicate that a waterbody is capable of bearing some forms of commerce, either presently, in the future, or at a past point in time." 33 C.F.R. § 329.6(a) (2011) (emphasis added).[5]

Additionally, "[a] waterbody may be entirely within a state, yet still be capable of carrying

[5] The authority for 33 C.F.R § 329.6(a) rests in 33 U.S.C. §§ 401 *et seq.* (2006), which is administered by COE.

interstate commerce," 33 C.F.R. § 329.7 (2011), or "affect[ing] interstate . . . commerce" if used by "interstate . . . travelers for recreational . . . purposes." 40 C.F.R. § 122.2; see generally *United States v. Utah*, 283 U.S. 64, 76 (1931) (finding that so long as a water is susceptible to use as a highway of commerce, it is navigable-in-fact, even if the water has never been used for any commercial purpose); see also *Atlanta School of Kayaking, Inc. v. Douglasville-Douglas Cnty. Water and Sewer Auth.*, 981 F.Supp. 1469, 1474 (N.D. Ga. 1997) (finding a river located wholly within Georgia navigable due to the presence of kayaks and canoes on the river). Specifically, the First Circuit Court of Appeals determined that "irregular canoe trips may support a finding of navigability." *Knott v. FERC*, 386 F.3d 368, 372 (2004); see also *FPL Energy Me. Hydro LLC v. FERC*, 287 F.3d 1151, 1157 (D.C. Cir. 2002) (holding that a canoe trip taken solely for the purpose of demonstrating a waterbody can be navigated was deemed sufficient to meet the standard of "affecting interstate commerce").[6]

Moreover, EPA and COE jointly issued guidance explaining how to determine CWA jurisdiction:

> "Waters will be considered traditional navigable waters if they are susceptible to being used in the future for . . . commercial waterborne recreation. . . . A likelihood of future . . . commercial waterborne recreation, can be demonstrated by current boating or canoe trips for recreation or other purposes."

See EPA and Army Corps of Engineers Guidance Regarding Identification of Waters Protected by the Clean Water Act, 76 Fed. Reg. 24479 (May 2, 2011); Environmental Protection Agency, Clean Water Act Definition of "Waters of the United States," *Proposed Guidance* (PDF), p. 6,

[6] Most states have expanded the definition of navigability to include waterways that are used solely for recreational purposes. Clinton Lancaster, *Property Law—The Use of the Recreational Navigation Doctrine to Increase Public Access to Waterways and Its Effect on Riparian Owners*, 33 U. Ark. Little Rock L. Rev. 161, 165-166 (2011); see e.g., *Ryals v. Pigott*, 580 So. 2d 1140, 1150, 1152 (Miss. 1990), *State v. McIlroy*, 595 S.W.2d 659, 663 (Ark. 1980).

available at http://water.epa.gov/lawsregs/guidance/wetlands/CWAwaters.cfm. This proposed guidance is consistent with the principles established by the Supreme Court cases discussed above. EPA and Army Corps of Engineers Guidance, 76 Fed. Reg. at 24479.

Lake Temp's location within the State of Progress (R. at 4) does not preclude CWA jurisdiction over it, as the use of the lake affects interstate commerce. 33 C.F.R. § 329.7. There are clearly visible trails leading from the road to Lake Temp indicating the occurrence of recreational boating. (R. at 4.) As in *Knott*, the presence of boating demonstrates that Lake Temp is capable of generating interstate profit from its recreational activity. The efforts being made to drag canoes and rowboats to Lake Temp demonstrate the lake's economic potential. In addition, Lake Temp's proximity to New Union supports the inference that New Union residents are also among its many visitors. The lake is therefore capable of use to transport interstate commerce.

The defendants may argue that *Solid Waste Auth. of N. Cook Cnty. v. U.S. Army Corps of Eng'rs* ("*SWANCC"*), 531 U.S. 159 (2001) precludes migratory birds as a basis for categorizing a water as navigable. The court in *SWANCC* acknowledges, however, that COE, in its original interpretation of "navigable waters," "emphasized that '[i]t is the water body's capability of use by the public for purposes of transportation or commerce which is the determinative factor.'" *Id*. at 168. Therefore, after *SWANCC*, it is not the birds themselves that should concern the Court, but the presence of hunters and birdwatchers who travel across state lines to enjoy the lake and its environs.

In contrast to *SWANCC*, Lake Temp is navigable for reasons other than the presence of migratory birds. When full, Lake Temp is shaped like and oval, nine miles long and three miles

wide with an area of approximately 21 square miles (R. at 3-4)[7], which is more than 500 times larger than the largest *SWANCC* pit pond at a mere 23 acres. *Id.* Unlike the sand and gravel pits in *SWANCC*, Lake Temp is frequented by birdwatchers, duck hunters, and boaters. (R. at 4.) Such recreational activities have taken place at Lake Temp for at least a hundred years, while the pit ponds only emerged less than 40 years prior to the lawsuit. *Id.* The migratory birds in *SWANCC* represented the only interstate activity on the pit ponds, whereas Lake Temp is visited by hundreds of hunters, boaters, and birdwatchers from Progress, New Union, and perhaps, other states. (R. at 4.)

Even if the court were to find that the factors above do not significantly affect interstate commerce, Lake Temp is also navigable under "the cumulative impact doctrine, in which a single activity that itself has no discernible effect on interstate commerce may still be regulated if the aggregate effect of that class of activity has a substantial impact on interstate commerce." *United States v. Hicks*, 106 F.3d 187, 189-90 (7th Cir. 1997), citing *United States v. Lopez*, 514 U.S. 549, 561 (1995); see also *United States v. Jones*, 178 F.3d 479 (7th Cir. 1999). The aggregate effect of the "destruction of the natural habitat of migratory birds" on interstate commerce is substantial because each year millions of Americans cross state lines and spend over a billion dollars to hunt and observe migratory birds. *SWANCC* at 173. According to a U.S. Fish and Wildlife Service study, birdwatchers alone contributed 36 billion dollars to the US economy in 2006, and one fifth (20 percent) of all Americans are identified as birdwatchers. U.S. Fish and Wildlife Service, *Birding in the United States: A Demographic and Economic Analysis* (June 2009) *available at* http://library.fws.gov/Pubs/birding_natsurvey06.pdf. The boating activities taken together with the hunting and bird watching demonstrate the potential for

[7] An oval 9 miles long and 3 miles wide has an area of 21.2 square miles, since the area of an oval is its length times its width times pi divided by 4.

commercial use of Lake Temp. The regular occurrence of these recreational activities make Lake Temp capable of use to transport interstate commerce and thus, a navigable water of the United States.

B. Lake Temp is Navigable Water Because it is a Relatively Permanent, Standing Body of Water.

Even if Lake Temp is not deemed capable of use to transport interstate commerce, it still qualifies as navigable water because it is a relatively permanent standing body of water. In *Rapanos,* 547 U.S. 715, five Justices issued opinions regarding whether isolated wetlands constituted navigable waters under the CWA. The plurality opinion, written by Justice Scalia, created a "relatively permanent" test, declaring that "waters of the U.S. applies to relatively permanent, standing or continuously flowing bodies of water, and wetlands with a continuous surface connection to such waters."[8] *Id.* at 716. Justice Scalia explained that the term "relatively permanent . . . do[es] not necessarily exclude streams, rivers, or lakes that might dry up in extraordinary circumstances, such as drought [or] *seasonal* rivers, which contain continuous flow during some months of the year but no flow during dry months."[9] *Rapanos* at 733, n. 5 (emphasis in original). Lake Temp therefore meets the definition of "relatively permanent," since its waters cover an area of up to three miles wide by nine miles long. (R. at 4.) Lake Temp is smaller during the dry season, and is dry only one out of five years. (R. at 4.) The court in *Rapanos* did not determine at what point the "drying-up" is too long or too often, but suggested that "[c]ommon sense and common usage distinguish between a wash and a seasonal river." *Id.*

The court in *United States v. Vierstra,* 2011 WL 1064526, *1 (D. Idaho March 18, 2011)

[8] Justice Kennedy's test in *Rapanos*, though significant, is not pertinent here.
[9] The plurality defined "waters" as "water '[a]s found in streams and bodies forming geographical features such as oceans, rivers, [and] lakes.'" *Rapanos* at 716, quoting from Webster's New International Dictionary 2882 (2d ed. 1954).

used this common-sense approach, finding that a canal with water flowing through it on a seasonal basis only six to eight months each year was "relatively permanent." Though the canal in *Vierstra* was seasonal, the court determined it was recurring, regular, and substantial. *Id.* Lake Temp also meets the definition of recurring, regular and substantial, as it only becomes dry only once out of every five years. (R. at 4.) Moreover, the Ninth Circuit determined in *United States v. Moses*, 496 F.3d 984, 986 (9th Cir. 2007), that an intermittent tributary was part of the "waters of the United States," even though the channel held water continuously for only two months out of the year. Although the tributary flowed into a navigable body of water during significant rainfall, the court did not exclude the waterway even though it remained dry more than 80 percent of the time. *Id*.

The substantial, almost continuous, presence of water in Lake Temp makes it a relatively permanent, standing body of water that precisely meets the Supreme Court's definition of navigable water.

III. THE PERMIT TO DISPOSE OF USED MUNITIONS IN LAKE TEMP IS INVALID.

COE acted outside the boundaries of its statutory authority when it granted DOD a permit to discharge toxic munitions into Lake Temp. 33 U.S.C. § 1344. The permit issued by COE is not valid because (A) § 404 of the CWA does not authorize COE to issue permits for disposal of used munitions in the waters of the United States and (B) COE's regulations to § 404 do not authorize it to issue permits for the disposal of used munitions.

A. Section 404 of the CWA does not authorize COE to issue permits for disposal of used munitions.

The district court erred in upholding COE's grant of a § 404 permit for disposal of used munitions in Lake Temp because COE lacked authority to issue the permit. In determining

whether a federal agency correctly interpreted its enabling statute, courts apply the two-step *Chevron* test. *Chevron, U.S.A., Inc., v. Natural Res. Def. Council, Inc.,* 467 U.S. 837, 842-43 (1984). First, the Court determines whether "Congress has directly spoken to the precise question at issue." *Id.* If Congress has done so, that ends the inquiry since "the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." However, in cases where Congress' intent is not clear through the use of "traditional tools of statutory construction," the Court asks "whether the agency's answer is based on a permissible construction of the statute." *Id.* at 843. Although the inquiry begins with the language of the statute, courts must consider the whole law, "its object and policy." *United States Nat'l Bank of Or. v. Indep. Ins. Agents of America, Inc.*, 508 U.S. 439, 455 (1993).

COE's reading of § 404 as allowing issuance of a permit for disposal of used munitions was flawed because (1) the plain language of the CWA precludes disposal of used munitions under a § 404 permit; (2) COE's reading of "fill material" is inconsistent with § 404; and 3) the district court's reliance on *Coeur Alaska* for the proposition that used munitions constitute fill material was misplaced.

1. <u>The Plain Language of the CWA Precludes Disposal of Used Munitions Under a § 404 Permit.</u>

Applying step one of *Chevron*, the plain language of the CWA indicates Congress' intent that EPA, not COE, regulate the discharge of such toxic pollutants as used munitions. In enacting the CWA, Congress' objective was to eliminate the discharge of pollutants into U.S. waters and to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a). The CWA prohibits "the discharge of any pollutant by any person" unless in compliance with the Act. 33 U.S.C. § 1311(a). The CWA authorizes EPA, under § 402, to "issue a permit for the discharge of any pollutant" "[e]xcept as provided

in" § 404. 33 U.S.C. § 1342(a). While § 402 specifically manages *pollutant* discharge, § 404 of the CWA bestows limited power on COE to "issue permits . . . for the discharge of *dredged* or *fill* material." 33 U.S.C. § 1344(a) (emphasis added). The § 404 permitting program is not intended to circumvent the purpose of the CWA, rather, it was developed as a way to continue COE's traditional role in granting permits for civil engineering-related activity. *See* 1 Sen. Comm. on Public Works, 93d Cong., 1st Sess., A Legislative History of the Water Pollution Control Act Amendments of 1972, at 177 (Comm. Print 1973) ("The Conferees were uniquely aware of the process by which dredge and fill permits are presently handled and did not wish to create a burdensome bureaucracy in light of the fact that a system to issue permits already existed.").

The CWA does not specifically define what constitutes "dredged or fill material." When terms in a statute are not defined, courts read them in accordance with their ordinary meaning. *See Brown v. Entm't Merchs. Ass'n*, 131 S. Ct. 2729, 2745 (2011). Specifically, "dredged material" refers to sediments removed from the bottom of a body of water, often to widen or to deepen the body of water or to improve flow, and "fill material" refers to rock, gravel, and dirt removed from dry land. *See* Dredging and Sediment Management, Environmental Protection Agency, *available at* http://www.epa.gov/region9/water/dredging/ (last visited Nov. 19, 2011). "Congress gave [COE] the responsibility of regulating the discharge of dredged or fill material into navigable waters in recognition of [COE's] historical role . . . as the permitting agency for dredge and fill activities in the nation's navigable waters." *Resource Invs. Inc. v. United States Army Corps of Eng'rs*, 151 F.3d 1162, 1166 (9th Cir. 1998); *see also* Rivers and Harbors Appropriation Act of 1899, § 10. As such, the intent of Congress is clear that § 404 permitting is to be limited to the discharge of crushed rock, soil, and other naturally-occurring materials used

in the widening, deepening, filling, and other modification of navigable waters. Since used munitions are not comprised of naturally-occurring materials or materials traditionally used to widen, deepen or otherwise modify navigable waters, COE had no authority to issue a permit for the discharge of used munitions into Lake Temp.

In addition, Congress intended the CWA to apply to relatively benign materials that, while technically defined as pollutants, were not classified as "hazardous substances" subject to § 404.[10] Congress' intent to limit the § 404 program is clear when read in context with the § 402 program, which has more rigorous standards. *Coeur Alaska, Inc. v. Se. Alaska Conservation Council*, 129 S. Ct. 2458, 2468 (2009). Essentially, Congress allowed for a lower standard with respect to "dredged or fill" material because, though they were defined as pollutants in the CWA, they were much less hazardous to the environment than the toxic materials that fell under § 402. The used munitions that DOD seeks to dispose of in Lake Temp contain "many chemicals on the [CWA's] § 311 list of hazardous substances." (R. at 4.) The plain language of a statue is controlling "[a]bsent a clearly expressed legislative intention to the contrary." *North Dakota v. United States*, 103 S. Ct. 1095, 1102 (1983). Therefore, the phrase "discharge of dredged material or fill" should not be read as including the hazardous materials contained in the used munitions discharge. Based on this plain reading of the CWA, COE had no authority to issue a permit for the discharge of these materials into Lake Temp, which should end the *Chevron* analysis.

2. <u>COE's Interpretation of "Fill Material" Is Impermissible.</u>

However, *arguendo*, if the definition of "fill material" in § 404 were ambiguous, COE's

[10] EPA was granted the power to define hazardous substances, 33 USC § 1321(b)(2)(A), and Congress also empowered EPA to establish the federal standards of performance for new source pollutants under 33 U.S.C. § 1316(b).

construction of the statute to include used munitions as "fill material" is impermissible. While an agency's understanding of its enabling statutes should receive deference, with regard to environmental statutes, the agency must "advance a reasonable explanation for its conclusion that the regulations serve the environmental objectives" of the statue. *Chevron*, 467 U.S. at 863. Classifying used munitions containing hazardous substances as "fill material" constitutes an impermissible reading of the statute under *Chevron*'s second prong because it creates a loophole that undermines the fundamental purpose of the CWA of eliminating toxic pollution from waters of the United States, such as Lake Temp.

COE and EPA define "fill material" as "material placed in waters of the United States where the material has the effect of: (i) Replacing any portion of a water of the United States with dry land; or (ii) Changing the bottom elevation of any portion of a water of the United States." 40 C.F.R. § 232.2 (2011); 33 CFR § 323.2(e)(1) (2011). An interpretation of § 404 permitting COE to regulate *all material* which has the "effect of fill" would create a loophole so large that it would swallow the rule, allowing any toxic material to be disposed of in any body of water, so long as the polluting material was mixed with something that would make it sink to the bottom and raise the water level. While the regulation does exclude trash and garbage from the definition of fill, if the CWA were read to allow all other waste and byproducts that affects the bottom elevation of a body of water despite its toxicity level to be disposed of under a § 404 permit, § 402 would be rendered meaningless, since *any* material placed on the bottom of a lake in sufficient quantity will raise the water level of that lake. This outcome is not what Congress intended.

As the CWA seeks to protect U.S. water quality, allowing such an unrestricted definition would directly contradict the goals of Congress and the CWA. Thus, COE's inclusion

of munitions as fill is inconsistent with the enabling statute and should be set aside.

B. The Regulations to Section 404 Do Not Authorize COE to Issue Permits for the Disposal of Used Munitions in the Waters of the United States.

In issuing the permit for DOD to dispose of used munitions in Lake Temp, COE failed to comply with its regulations to the statute. Further compounding this error, the district court erroneously relied on *Coeur Alaska*, which does not apply to the facts of the present case.

1. COE's interpretation of their own regulation is fundamentally flawed as used munitions are "trash," not "waste."

COE's inclusion of non-mining discharge within the definition of waste material subject to § 404 is unreasonable in light of the regulation's construction. In *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410, 413-14 (1945), the Court stated that an agency's interpretation of its own regulation deserves "controlling weight . . . unless [the interpretation] is plainly erroneous or inconsistent with the regulation."

The court below failed to analyze the narrow context in which COE promulgated 33 C.F.R. § 323.2. In enacting the current regulation, COE sought to establish that *mining waste* fell within the definition of fill and amended the regulation to replace the phrase "the placement of coal mining overburden" in the definition of fill materials to read, "placement of overburden, slurry, or tailings or similar mining-related materials." Final Revisions to the Clean Water Act Regulatory Definitions of "Fill Material" and "Discharge of Fill Material," 67 Fed. Reg. 31129, 31135 (May 9, 2002). In so doing, COE stated, "the language in today's final rule will clarify that any mining-related material that has the effect of fill when discharged will be regulated as 'fill material.'" 67 Fed. Reg. 31129, 31135 (May 9, 2002). While it is true that the list of material constituting fill is not inclusive, COE declared that the new rule would not alter its or EPA's approach to the regulation of fill and pollution. 67 Fed. Reg. 31129, 31135 (May 9,

2002). COE's inclusion of military munitions under its fill definition contradicts the agency's express intent in issuing the regulation, as used munitions do not meet the historic definition of fill material. Additionally, the court may not rely on an agency's interpretation of its regulation where that interpretation has been inconsistent and arbitrary. *Seminole Rock*, 325 U.S. at 414. When COE and EPA jointly promulgated the current regulation defining "discharge of fill material," they explained that the changes to the definition were for purposes of clarification and "will not modify existing regulatory practice." 67 Fed. Reg. 31129, 31135 (May 9, 2002). Up until that point, used munitions were not considered fill material, making COE's interpretation in the present case inconsistent with its promulgation of the regulation.

Even if the term "waste" included more than just mining waste, the military munitions discharged into Lake Temp constitute trash, which is subject to § 402. As articulated by COE, trash includes junk and metal appliances, both of which categories arguably include used military munitions. Simply pulverizing surplus metal does not transform it into waste. This interpretation is consistent with the plain language of the regulation, since trash or garbage are commonly understood as being valueless waste, whereas fill material has great value in construction and other civil engineering endeavors. *See, e.g.* "How to Use Fill Material in Stabilizing Shoreline Bluffs or Banks" (1986), J. Philip Keillor, University of Wisconsin Sea Grant Advisory Services, *available at* nsgd.gso.uri.edu/wiscu/wiscuh86001.pdf. Allowing COE to interpret its statute in this manner would permit polluters to escape the stricter EPA pollution requirements by pulverizing their trash before discharging it into navigable waters. This absurd result is not only inconsistent with the CWA, it is also not consistent with the intent COE expressed when it promulgated the regulation.

2. The district court's reliance on *Coeur Alaska* for the proposition that disposal of used munitions constitutes discharge of fill material was misplaced.

The district court made an error of law when it relied on *Coeur Alaska* as controlling authority with respect to the present case. *Coeur Alaska* inquired as to whether pollutant material subject to a § 404 permit must comply with effluent limitations required under § 306. While the Supreme Court found that § 404 did not require § 306 conformity, it did not address the validity of the fill regulation itself. *Coeur Alaska*, 129 S. Ct. at 2468. The majority noted in response to concerns about the use of a § 404 permit to discharge toxic solids, that "[i]f, in a future case, a discharger of one of these solids were to seek a § 404 permit, the dispositive question for the agencies would be whether the solid at issue . . . came within the regulation's definition of 'fill' . . . or . . . [a party] could claim *that the fill regulation as interpreted is an unreasonable interpretation of §404*." *Id*. (emphasis added).

Not only has COE incorrectly interpreted § 404, but the discharge of used munitions is categorically different from the naturally occurring waste product at issue in *Coeur Alaska* for three reasons. *Coeur Alaska*, 129 S. Ct. at 2463. First, in *Coeur Alaska*, the processed wastewater and resulting discharge were direct byproducts of the mining activity. *Coeur Alaska*, 129 S. Ct. at 2464. In this case, DOD did not engage in any activity which produced this "discharge" and would have to transport the munitions to Lake Temp and drastically alter the munitions in order to discharge them in a semi-solid form. *See also Sierra Club v. El Paso Gold Mines*, 421 F.3d 1133, 1145 (10th Cir. 2005) (finding that § 404 maintains authority over "dredged" and "redeposit" pollutant material). Thus, only discharges which are directly funneled back into the environment are subject to a § 404 permit.

Second, in *Coeur Alaska* the Court determined that the discharge method selected by the mining organization utilized sound environmental principles. In contrast, there are numerous alternatives to discharging the munitions into Lake Temp. *Coeur Alaska*, 129 S. Ct. at 2465. For

example, DOD could dispose of the discharge as solid waste in accordance with the requirements of the Resource Conservation and Recovery Act, 42 U.S.C. §§ 6901 *et seq.* (1976) ("RCRA") on dry land.

Third, the tailing pond at issue in *Coeur Alaska* was dramatically smaller than the Lake Temp— 23 acres in area, compared with Lake Temp's full dimensions of three by nine mile dimensions, making Lake Temp, when full, more than 500 times larger than the largest of the tailing ponds. *Coeur Alaska*, 129 S. Ct. at 2464. It does not logically follow that simply because storing crushed rock from a mine in a small pond is not subject to § 306 that the disposal of a cocktail of pulverized used munitions, toxic chemicals, and water in a large pristine lake is similarly unconstrained.

Therefore, either the regulation that the district court relied upon is invalid or the court misread that regulation as classifying used munitions as "fill material." In either circumstance, the court's reliance on that regulation to support its conclusion that the mixture of used munitions and other materials proposed for disposal in Lake Temp constitute "fill material" under the regulations was in error.

For all the forgoing reasons, the permit issued by COE to allow DOD to dispose of used munitions in Lake Temp is invalid and the decision of the district court to grant summary judgment should be reversed.

IV. OMB ACTED OUTSIDE OF ITS AUTHORITY IN INSTRUCTING EPA NOT TO VETO THE PERMIT, AND EPA ACTED ARBITRARILY AND CAPRICIOUSLY IN ACCEDING TO OMB'S ORDER.

OMB violated the CWA by ordering the EPA not to veto the permit and EPA violated the CWA by acquiescing to that directive. Both actions are "incompatible with the will of Congress and . . . [un]sustainable as a valid exercise of the President's Article II powers." *Envtl. Def.*

Fund v. Thomas, 627 F. Supp. 566, 570 (D.D.C. 1986). Neither the CWA nor Executive Order No. 12088, 43 Fed. Reg. 47707 (Oct. 13, 1978), allows OMB to settle jurisdictional disputes between COE and EPA, or to command EPA not to carry out the duties required of it by the CWA. EPA's inaction was arbitrary and capricious, and the actions of OMB were not in accordance with the law. § 701(a)(2)(A). Therefore, this Court should reverse the trial court's grant of summary judgment for defendants and instead grant summary judgment to New Union.

The court below erred in determining that it could not review EPA's failure to veto the § 404 permit under the Administrative Procedure Act (APA), 5 U.S.C. §§ 551 *et seq*. (2006).[11] Under the APA, any person "adversely affected or aggrieved by agency action," including a failure to act, is "entitled to judicial review thereof" as long as the action is a "final agency action for which there is no other adequate remedy in a court." See §§ 702, 704; 5 U.S.C. § 551(13); *Heckler v. Chaney*, 470 U.S. 821, 828 (1985). Section 702 of the CWA explicitly waives sovereign immunity, permitting judicial review of EPA and OMB's decisions. The APA bars review where "statutes preclude judicial review" or the "agency action is committed to agency discretion by law." § 701(a)(1-2). Because § 701 does not preclude judicial review, New Union requests that the Court set aside the agencies' unlawful actions under § 706(2)(a).

A. The Court Should Invalidate OMB's Arbitrary and Capricious Determination that COE, and not EPA, Was Authorized by the CWA to Issue a Permit for Discharge of Spent Munitions.

1. OMB's determination is subject to judicial review under the APA.

[11] While not raised below, § 404(c) creates a nondiscretionary duty for EPA to review all permits and to veto those which "will have an unacceptable adverse effect." 33 U.S.C. § 1344(c). The citizen suit provision of the CWA, § 505(a)(2), authorizes review of EPA's nondiscretionary acts. Congress intended for EPA to act when a permit creates such a risk to the overall goals of the CWA. See *Nat'l Wildlife Fed'n v. Hanson*, 859 F.2d 313, 316 (4th Cir. 1988). As such, EPA failed to perform a nondiscretionary duty and its actions are subject to judicial review under § 505(a)(2).

OMB acted outside the boundaries of its authority when it determined that COE, and not EPA, held the power to issue the permit for discharge into Lake Temp. See *Sierra Club v. Peterson*, 705 F.2d 1475, 1478 n.4 (9th Cir. 1983) ("The fact that there is no express or implied private right of action under EO 12088 does not prevent review of agency action under the APA"). Neither the CWA nor Executive Order No. 12088 precludes judicial review of OMB's action. As such, its decision is reviewable under the APA because the action is (1) a final agency action with (2) no other adequate remedy and (3) is not committed to agency discretion by law.

In regards to finality, OMB acted as an adjudicative body and issued its order after both COE and EPA presented briefing papers on the issue. (R. at 9.) OMB's oral decision manifested itself as a final agency mandate, directing the agencies to comply.[12] Even if this Court

[12] While not raised below, § 404(c) creates a nondiscretionary duty for EPA to review all permits and to veto those which "will have an unacceptable adverse effect." 33 U.S.C. § 1344(c). As the citizen suit provision of the CWA, § 505(a)(2), authorizes review of EPA's nondiscretionary acts, the Court must review such decisions. *Alliance to Save Mattaponi, et al., v. United States Army Corps of Eng'rs, et al.*, 515 F.Supp.2d 1, 4-5 (D.D.C. 2007). In *Nat'l Wildlife Fed'n v. Hanson*, 859 F.2d 313, 315 (4th Cir. 1988) the court approved a citizen suit against EPA for failing to exercise its authority over a disputed track of land. The court stated clearly that the government did not challenge the allegation of EPA's "failure to carry out a mandatory duty." *Id*. While it could be argued that *Hanson* dealt with a wetland determination and not the issuance of a § 404 permit, EPA mechanism for asserting control over the land after COE's impermissible categorization, would still have been a § 404(c) veto. *See also Envtl. Def. Fund v. Tidwell*, 837 F.Supp. 1344, 1364-65 (E.D.N.C.1992) ("EPA has a non-discretionary duty to regulate dredged or fill material under section 1344."). While the defendants may allege that EPA's duty to veto a § 404(c) permit is completely discretionary and not subject to review under § 505(a)(2), *Alliance to Save Mattaponi* at 4-5. New Union submits that the paths adopted in those cases are fundamentally flawed. At the threshold, the courts fail to recognize that § 404(c) *requires* EPA to release a report documenting its rationale for refusing to veto the permit; "[t]he Administrator *shall* set forth in writing and make public his findings and his reasons for making *any* determination under this subsection." 33 U.S.C. § 1344(c) (emphasis added). If EPA possesses a nondiscretionary duty to oversee all permits, it logically follows that it also has a nondiscretionary duty to veto permits that "have an unacceptable adverse effect." *Id.* Congress intended for EPA both to oversee and to act when a permit creates such a risk to the overall goals of the CWA. See *Hanson* at 316. As such, EPA failed to perform a nondiscretionary duty and its actions are subject to judicial review under § 505(a)(2).

determines that OMB's determination was not final, OMB still acted beyond the authority conferred to it. *Leedom v. Kyne*, 358 U.S. 184, 188 (1958) (An agency action which is non-final, and therefore otherwise non-reviewable, may be set aside if the court finds that the agency acted beyond the authority conferred on it by statute). Under §701(a)(2) there is a meaningful standard by which to analyze OMB's action. Executive Order No. 12088 declares:

> 1-601. Whenever the Administrator . . . notifies *an Executive agency that it is in violation of an applicable pollution control standard* . . . the Executive agency shall promptly consult . . . and provide . . . a plan to achieve and maintain compliance with the applicable pollution control standard.
>
> 1-602. The Administrator shall make every effort to resolve *conflicts regarding such violation* between Executive agencies. . . . If the Administrator cannot resolve a conflict, the Administrator shall request the Director of the Office of Management and Budget to resolve *the conflict* (emphasis added).

Executive Order No. 12088, 43 Fed. Reg. 47707 (Oct. 13, 1978). This executive order only permits OMB to resolve conflicts *between* executive agencies pertaining to alleged *violations of the applicable pollution control standards*. The term "conflicts" in § 1-602 must be read in conjunction with § 1-601, and thus, refers to the violation of an applicable pollution control standard. Here, there was no such violation by COE or EPA, and OMB's determination that the COE, and not the EPA, should issue the permit falls outside the bounds of OMB's authority. As such, the action is reviewable.

2. <u>OMB's determination that COE, and not EPA, possessed the permitting power was in excess of statutory authority, arbitrary and capricious, and not in accordance of law.</u>

Congress conferred authority directly on EPA "to administer" the CWA generally, 33 U.S.C. § 1251(d), and in particular, to veto permits proposed by COE, 33 U.S.C. § 1344(c). Congress conferred no authority directly or indirectly on OMB to issue permits or to veto permits under 33 U.S.C. §§ 1342 or 1344, or to decide which permit should be issued in any

particular instance. OMB's interference with EPA's permit review denied EPA the opportunity to play its statutorily-mandated role of preventing discharge of pollutants into the waters of the United States. OMB therefore acted in excess of its statutory authority. 5 U.S.C.A. § 706(2)(C). Moreover, OMB's action did not pertain to the type of conflict between executive branch entities that it was authorized to resolve. If OMB had not intervened in the matter, the decision to veto would have remained with the EPA where it lawfully belonged.

For an agency's decision to survive review under the "arbitrary and capricious" standard, the agency must "examine the relevant data and articulate a satisfactory explanation for its action, including a rational connection between the facts found and the choice made." *PPL Wallingford Energy LLC v. FERC,* 419 F.3d 1194, 1198 (D.C.Cir. 2005) (citing *Motor Vehicle Mfrs. Ass'n of the United States, Inc. v. State Farm Mut. Auto. Ins. Co.,* 463 U.S. 29, 43 (1983)) (internal citations and quotations omitted). Here, we have no explanation of why OMB instructed EPA not to veto because OMB offered no documentation for its reasoning. (R. at 9.) Without any explanation, OMB's determination cannot survive the "arbitrary and capricious" standard.

The permitting issue in *Coeur Alaska* is not analogous here. In *Coeur Alaska*, EPA made a positive decision not to veto COE's section 404 permit because they agreed with and participated in the COE's interpretation of the statute under the facts of the case. *Coeur Alaska*, 129 S.Ct. at 2465. But here, EPA was preparing to exercise its authority to veto COE's § 404 permit and to issue a § 402 permit, and OMB instructed EPA not to do so. (R. at 9.) In fact, EPA argued to OMB that the nature of the discharge here was significantly different from the discharge in *Coeur Alaska*, requiring a § 402 permit at least for treatment of the non-fill liquid and semi-solid portion of the material. (R. at 9.)

B. EPA's Decision Not to Veto the § 404 Permit is Subject to Judicial Review, and Was Arbitrary and Capricious.

1. EPA's failure to veto the § 404 permit is subject to judicial review.

EPA's failure to veto the § 404 permit constitutes reviewable inaction because (1) it was a final, "consummated agency action" and (2) the determination is not committed to agency discretion by law.[13] *Alliance to Save the Mattaponi v United States Army Corps of Eng'rs,* 515 F.Supp.2d 1, 10 (D.D.C. 2007).

"When a failure to act is the basis for an APA claim pursuant to Section 706(2), a plaintiff must show that it is the functional equivalent of final agency action." *Hi-Tech Pharmacal Co., Inc., v. United Sates Food and Drug Admin.*, 587 F.Supp. 2d 1, 10 (D.C. Cir. 2008); see also *Sierra Club v. Thomas,* 828 F.2d 783, 793 (D.C. Cir. 1987). APA review is appropriate because "when administrative inaction has precisely the same impact . . . as denial of relief, an agency cannot preclude judicial review by casting its decision in the form of inaction rather than in the form of an order denying relief." *Envtl. Def. Fund, Inc. v. Hardin*, 428 F.2d 1093, 1099 (D.C. Cir. 1970); *Alliance to Save Mattaponi*, 515 F. Supp. 2d at 9 (permitting review "where agency inaction is final action having the same impact as agency action"). In *Alliance to Save Mattaponi*, the court found that failure to issue a § 404(c) veto constituted a "consummated 'agency action'" because "the permit had the same impact on the parties as an express denial of relief." *Alliance to Save Mattaponi*, 515 F. Supp. at 9. In this case, when EPA succumbed to OMB's directive and failed to exercise its § 404(c) veto power, the Administrator

[13] New Union's challenge is ripe for review as the permit has already been issued and New Union exhausted all administrative remedies available. See generally *Abbott Lab. v. Gardner*, 387 U.S. 136, 148 (1967). Furthermore, § 701(a)(1) or § 702 does not preclude review as the CWA does not "expressly or impliedly forbid" such relief. *See generally Alliance to Save Mattaponi* at 7 (finding "APA § 701(a)(1) and § 702 . . . do not preclude plaintiff's claims against EPA" for violating the CWA).

essentially approved the discharge permit. *Id.* Moreover, after the approval of the permit, no other relief was available, as discretionary determinations are explicitly precluded under the citizen suit provision of § 505(a)(2).

Section 701(a)(2) similarly does not preclude review as EPA's decision is not committed to agency discretion by law. The defendants may claim that *Chaney* creates a presumption against review of agency inaction, however, that presumption is rebuttable as long as there is a "meaningful standard against which to judge the agency's exercise of discretion." *Chaney,* 470 U.S. at 830. Moreover, courts may look towards an agency's self-imposed mandatory regulations to provide guidance for review. *Service v. Dulles,* 354 U.S. 363, 388 (1957). Thus, the regulations articulated in 40 CFR § 230.10 function as standards by which the Court can judge EPA's decision.

Though *Sierra Club v. Jackson*, 648 F.3d 848 (D.C. Cir. 2011) and *Chaney* precluded judicial review, both found that there is no meaningful standard for reviewing decisions whether to *prosecute* alleged violations.[14] "The inaction here, however, is very different from a decision not to enforce or prosecute: it is essentially a decision . . . to indirectly approve a permit, one that does not involve to the same extent the difficult decisions regarding manpower and allocation of resources that inform enforcement decisions and give rise to the hesitancy to undertake judicial review." *Alliance to Save Mattaponi*, 515 F. Supp. at 8. Based on this principle, judicial review of EPA's failure to veto the § 404 permit is proper.

2. EPA's failure to veto the § 404 permit was arbitrary and capricious.

The defendants argue that EPA's decision not to veto COE's grant of a § 404 permit to

[14] Enforcement decisions regarding whether to prosecute alleged violations require a "careful balancing of the need for enforcement against the chances of success and the resources it would require." *Chaney,* 470 U.S. at 831.

DOD was neither arbitrary nor capricious because it was either required by or consistent with *Coeur Alaska*.[15] (R. at 10.) As discussed in Section III, *Coeur Alaska* involved a very different set of facts and is not applicable to the present matter. *Supra* Section III(B)(2). While COE has primary responsibility for administering the § 404 permitting process, it must follow guidelines developed by EPA and consider input from EPA, which must sign off before any such permit may be granted. 33 U.S.C. § 1344(b)(1). These guidelines require COE to examine alternatives to discharge of dredged material or fill into waters of the United States. 40 C.F.R. § 230.10(a) (2011) (". . . no discharge of dredged or fill material shall be permitted if there is a practicable alternative to the proposed discharge which would have less adverse impact on the aquatic ecosystem, so long as the alternative does not have other significant adverse environmental consequences").[16] In addition, findings of significant degradation related to the proposed discharge *shall* be based upon appropriate factual determinations, evaluations, and tests. 40 CFR § 230.10(c). EPA was obligated to veto the permit because alternatives were never examined and the well tests were never executed, as DOD would not allow New Union to install monitoring wells. (R. at 6). Due diligence was not done and thus, it was arbitrary and capricious for EPA not to issue the veto.

In addition to following EPA guidelines, COE must also consider input from EPA regarding environmental impacts when considering § 404 applications. *Nat'l Mining Ass'n v. United States Army Corps of Eng'rs*, 145 F.3d 1399, 1401 (D.C. Cir. 1998) ("EPA oversight" is

[15] EPA action under statutes governing permits for dredged or fill material is reviewable under the "arbitrary and capricious" standard, not the "substantial evidence" test. Federal Water Pollution Control Act Amendments of 1972 (Clean Water Act), § 404(c), as amended, 33 U.S.C.A. § 1344(c); 5 U.S.C.A. § 706(2)(E).

[16] This provision does not apply "in any case where such guidelines . . . would prohibit the specification of a site, through the application additionally of the economic impact of the site on navigation and anchorage," (33 U.S.C. § 1344), but that exception does not obtain here.

an integral part of the § 404 permit consideration process). In *Hughes River Watershed Conservancy v. Glickman*, 81 F.3d 437, 440 (4th Cir. 1996), EPA expressed concerns regarding the impact of a project on a native species of mussels. The permit was invalidated on the grounds that COE "did not take a hard look at the problem of zebra mussel infestation resulting from the Project." *Id.* at 441-442. Similarly, in *Nat'l Wildlife Fed'n v. Marsh*, 721 F.2d 767, 786 (11th Cir. 1983), the Eleventh Circuit invalidated COE's grant of a § 404 permit because COE had failed to give adequate consideration to such environmental mitigation measures as "green tree reservoirs." *See also Sierra Club v. United States Army Corps of Eng'rs*, 772 F.2d 1043, 1050 (2d Cir. 1985) (COE grant of § 404 permit reversed for failure of COE to give adequate consideration to EPA's environmental impact concerns); *Sierra Club v. United States Army Corps of Eng'rs*, 701 F.2d 1011, 1030 (2d Cir. 1983) ("An inadequate environmental impact statement can invalidate a § 404 permit.").

In the present case, the district court describes the factual analysis in COE's Environmental Impact Statement ("EIS") as covering the same "facts regarding the lake and the aquifer" as its decision. (R. at 6). If COE failed to consider the environmental impact of the proposed permit on Lake Temp's wildlife populations (which exists as evidenced by the presence of many birds), it is in violation of the National Environmental Policy Act, 44 U.S.C. §§ 4321 *et seq*. (2006) ("NEPA").[17] Furthermore, the record reveals that when EPA expressed concerns about the environmental impact of the proposed disposal of used munitions in Lake Temp, COE chose to bypass EPA involvement by appealing to OMB rather than addressing EPA

[17] The district court dismisses the possibility that COE failed to comply with NEPA on the grounds that New Union is "estopped from raising issues here that could have been dealt with in the EIS." (R. at 6.) However, the court cites no authority for the proposition that a party that is harmed by the grant of a § 404 permit is estopped from seeking judicial relief from the illegal grant of that permit merely on the basis of not having participated in the EIS process.

concerns. COE's disregard for EPA's concerns about environmental impact of the permit to dispose of used munitions in Lake Temp violates both CWA and NEPA, and is therefore grounds for invalidating the permit.

Finally, it should be noted that in situations such as this one that involve a potential conflict of interest, EPA's veto role is of heightened importance. COE is an interested subsidiary of the permit applicant, DOD. COE, as a regulator, should be protecting the public, but in the current situation, cannot help serving the interests of DOD. For this reason and those stated above, OMB's interference with the § 404 permit process requires that the permit be invalidated.

CONCLUSION

For the forgoing reasons, New Union asks this Court to reverse the order of summary judgment for the defendants and to grant New Union's cross-motion for summary judgment.