Team # 38

C.A. No. 11-1245

In the United States Court of Appeals for the Twelfth Circuit

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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

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Brief for State of New Union, Appellant and Cross-Appellee

Attorneys for Appellant and Cross-Appellee

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I. Statement of Jurisdiction

On appeal is the final decision of the United States District Court for the District of New Union. The district court had original jurisdiction over this case pursuant to 28 U.S.C. § 1331 because it involved federal questions under Article III of the United States Constitution and the Clean Water Act. The district court entered its final decision on June 2, 2011, granting the United States' motion for summary judgment, and the State of New Union timely filed notice of appeal. Under 28 U.S.C. § 1291, jurisdiction extends to this Court to review the decision of the lower court.

II. Statement of the Issues

A. Whether the State of New Union's interest in protecting the groundwater of Lake Temp from discharges of pollutants entitles it to special solicitude in the standing analysis of Article III to the United States Constitution, or whether it may assert standing in a *parens patriae* capacity as a representative of its citizens who reside above the groundwater.

B. Whether Lake Temp constitutes "navigable" water under the Clean Water Act, 33 U.S.C. § 1362(7).

C. Whether a proposed discharge of an enormous quantity of munitions, chemicals, and metals which qualifies as "hazardous materials" under § 311 constitutes "fill" material under the Clean Water Act § 404, 33 U.S.C. § 1344, and is thus within the permitting authority of the Corps of Engineers.

D. Whether a directive handed down from the Office of Management and Budget for the Environmental Protection Agency to not veto a § 404 permit issued by the Corps of Engineers is an impermissible exercise of executive authority causing a violation of the Clean Water Act.

III. Statement of the Case

Pursuant to 33 U.S.C. § 1311(a), pollutant discharges into navigable waters of the United States are banned unless the discharger obtains a permit issued under either § 402, 33 U.S.C. § 1342 or § 404, 33 U.S.C. § 1344 of the Clean Water Act (CWA). The State of New Union (NU) sued the United States Army Corps of Engineers (COE) for incorrectly issuing a § 404 permit for "fill" material to the Department of Defense (DOD). NU argues that the DOD discharge is a hazardous pollutant which requires a § 402 permit from the Environmental Protection Agency (EPA), and thus COE went beyond its statutory authority by issuing a permit under § 404. (R. at 3.) NU argued in the district court that DOD requires a § 402 permit for its proposed slurry discharge into Lake Temp because the discharge will consist of hazardous pollutants which do not qualify as fill material simply because of their excessive volume. (R. at 5.) NU argues that the proposed discharge will cause imminent injury to the health and welfare of its citizens which threatens NU in its sovereign capacity. (R. at 5.) NU sought review of COE's decision to issue a § 404 permit under the Administrative Procedure Act (APA), 5 U.S.C. § 702. Shortly thereafter, the State of Progress ("Progress") intervened in the lawsuit. (R. at 3.)

In response, the COE filed a motion for summary judgment against NU, alleging that (1) NU lacked standing, (2) the COE had jurisdiction to issue a § 404 permit because Lake Temp is navigable water, and (3) participation by the Office of Management and Budget (OMB) in advising the issuance of a § 404 permit did not violate the CWA. (R. at 5.) NU filed a cross-motion for summary judgment, arguing that (1) NU may assert standing as a sovereign state, and (2) while Lake Temp is navigable water, (3) the COE lacked jurisdiction to issue a § 404 permit for this discharge of pollutants, and (4) the OMB's participation violated the CWA. (R. at 5.) Finally, Progress also filed a cross-motion for summary judgment, alleging that (1) NU had

standing, (2) Lake Temp is not navigable water and the DOD required neither a § 402 nor a § 404 permit, or alternatively, (3) the COE had jurisdiction to issue a § 404 permit pursuant to the decision in *Coeur Alaska*, and (4) participation of the OMB did not violate the CWA. (R. at 5.)

The district court held in favor of the COE, finding that (1) NU lacked standing, (2) Lake Temp is navigable water and (3) the COE acted within its authority to issue a § 404 permit because this pollutant discharge qualifies as fill material, and (4) the OMB's participation did not violate the CWA. (R. at 10.) Following the decision of the district court, NU filed notice of appeal. The case is now before this Court for review.

IV. Statement of the Facts

NU and Progress are neighboring states. (R. at 4.) Lake Temp is wholly within the state of Progress, although its roughly eight-hundred square mile watershed and aquifer are shared by both NU and Progress. (R. at 4.) Lake Temp is close to the border of Progress, and residents from outside the state regularly use Lake Temp for bird watching, hunting, and boating. (R. at 4.) There is a highway that runs along the shore of Lake Temp. (R. at 4). There are signs that boaters frequently use this highway as a staging area to enter and conduct their recreational activities on the lake. (R. at 4.) The size of Lake Temp fluctuates depending on the level of rainfall, and is predicted to go completely dry roughly once every five years as a result of drought conditions. (R. at 4.) Lake Temp is also routinely three miles wide by nine miles long at its historical high water levels, and is present in some form at least four out of every five years. (R. at 3-4.) Residents of Progress and many out of state residents have grown accustomed to traveling to Lake Temp in order to conduct recreational activities, as the lake has been a popular destination for over one hundred years. (R. at 4.)

COE is a subordinate agency of DOD. COE issued its parent organization a § 404 permit in order for DOD to discharge a slurry consisting of ground up military munitions, chemicals, and metals. (R. at 4.) The components of this slurry discharge are considered "hazardous materials" under § 311 of the CWA. (R. at 4.) The proposed discharge of hazardous materials would be in a quantity great enough to raise the level of the lake bed by several feet, such that the overall surface area of the lake would be expanded by two square miles. (R. at 4.) The lower court based its decision that the discharge qualified for a § 404 permit on the fact that the discharge would be in such a large quantity that it would change the level of the lake bed. (R. at 8.) The record provides evidence that EPA was prepared to veto COE's § 404 permit in favor of a § 402 permit, but did not because OMB instructed EPA not to exercise its statutory authority to do so. (R. at 9.)

NU contests the issuance of the § 404 permit as facilitating a harmful discharge that violates NU's sovereign interests and the health and welfare of its citizens. NU resident Dale Bompers (Dale) resides near the border of NU. (R. at 4.) Dale is a local rancher who operates his business and resides on the border of NU, above the Imhoff Aquifer. (R. at 4.) The aquifer is an underground layer of saturated permeable rock that naturally purifies running groundwater. Due to the presence of sulfur, which is common in most aquifers, Dale cannot presently drink the groundwater or use it for agricultural purposes until NU treats the groundwater and issues a permit for him to withdraw it for personal use. (R. at 4, 6.) NU has named Dale a representative in its *parens patriae* capacity because NU has expressed a desire to install monitoring wells near his property, which is a step toward granting Dale a permit that would allow him to use the groundwater from the Imhoff Aquifer. (R. at 6.)

V. Summary of the Argument

The CWA authorizes a broad measure of regulatory authority to government agencies in order to clean the waters of the United States and prevent further pollution discharges. Congress intended the CWA to apply broadly in order to achieve Congressional objectives to combat widespread pollution problems. What Congress did not intend was for the clearly laid out goals of the CWA to be ignored when such inaction proved more convenient for a polluter such as the DOD.

COE's issuance of a § 404 permit for the DOD to discharge hazardous slurry into Lake Temp is a violation of the Clean Water Act. As a result of the violation, NU satisfied all requirements under Article III of the United States Constitution to assert standing against the COE. In particular, NU suffered injuries-in-fact that were fairly traceable to the challenged conduct and redressable by the court. Because NU has expressed a quasi-sovereign interest in protecting the health and welfare of its citizens who reside above the Imhoff Aquifer and the proposed discharge threatens to injure a substantial segment of the population, it may alternatively assert standing in its *parens patriae* capacity.

Both Congress and the Supreme Court read the term "navigable waters" broadly. Lake Temp is a water body with a continuous surface connection which covers several square miles at its greatest extent and is used frequently by out of state hunters, boaters, and birdwatchers. As such, Lake Temp is within the broader definition of navigability intended by Congress and recognized by the Supreme Court, and is also navigable-in-fact based on its use in commercial recreational activity. The fluctuations in Lake Temp's size are based on dry conditions which are not nearly frequent or complete enough to qualify the Lake as an intermittent body of water under either agency regulations or the interpretation of the Supreme Court.

As Lake Temp is a navigable water, pollutant discharges into the lake require a permit. COE went beyond its statutory authority in issuing a § 404 permit for DOD's proposed discharge of hazardous materials. Allowing COE's permitting decision to stand would eviscerate the statutory authority granted by Congress to EPA to regulate dangerous pollutant discharges which violate § 311 of the CWA. If DOD's proposed discharge was of a lesser quantity, a § 402 permit from EPA would be necessary. Allowing COE to issue a § 404 permit simply because the discharger emits an enormous quantity would defeat the intent of the CWA's entire regulatory scheme. As such, COE acted outside of their permitting authority by issuing a § 404 permit for this proposed discharge.

The interference of OMB in deciding which permit was applicable in this case caused both OMB and EPA to violate the terms of the CWA. OMB's decision when resolving the dispute between EPA and COE was improper because the decision effectively usurped the power from EPA to execute the CWA according to EPA's expert knowledge. The decision of EPA to acquiesce to OMB's directive is judicially reviewable because clear guidelines are in place for EPA to consider when deciding to veto a § 404 permit. OMB's directive to EPA to ignore such guidelines was an application of executive powers that are not permissible under the separation of powers doctrine provided by the Constitution, as no such power to direct the Administrator of EPA is found in the relevant statutory text. As such, the interference of OMB and EPA's subsequent compliance were both violations of the CWA.

VI. Standard of Review

Appellate review of summary judgment is *de novo*. *Koscis v. Multi-Care Mgt., lnc.*, 97 F.3d 876, 882 (6th Cir. 1996). Summary judgment is only appropriate when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Fed. R.

Civ. P. 56; *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-323 (1986). A material fact is one which could lead a reasonable jury to find in favor of the non-moving party. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986).

VII. Argument

A. NEW UNION IS ENTITLED TO STANDING TO CHALLENGE THE PERMIT ISSUED BY COE TO THE DOD AS A VIOLATION OF THE CWA.

The district court improperly granted the COE's motion for summary judgment because NU had standing to bring its claim. A party bringing a lawsuit into federal district court may establish standing if it has suffered an actual or imminent injury-in-fact that is concrete and particularized, fairly traceable to the challenged conduct, and redressable through a favorable decision by the court. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992). As a sovereign state with independent interests in preserving its natural resources, protecting its local economy, and safeguarding the health and welfare of its people, all of which are proximately related to the contamination of Lake Temp, NU holds a special position in the standing analysis. *Massachusetts v. E.P.A.*, 549 U.S. 497, 519-20 (2007). Beyond the traditional inquiry to establish standing, NU may also invoke standing in its *parens patriae* capacity due to its quasi-sovereign interests as an affected state and the injuries which contamination poses to a substantial segment of its population. *Alfred L. Snapp & Son, Inc. v. Puerto Rico, ex rel., Barez*, 458 U.S. 592, 607 (1982).

1. New Union will suffer an injury-in-fact as a result of a COE permit facilitating the discharge of hazardous pollutants into Lake Temp.

The threat of devastation to the Imhoff Aquifer from contamination in Lake Temp is a sufficient injury-in-fact to establish the first element of standing. To establish injury-in-fact, the

law requires that the party be injured. *Lujan*, 504 U.S. at 563. Put another way, all that is necessary is for the party to be personally affected by an "identifiable trifle" of harm. *Friends of the Earth, Inc., v. Gaston Copper Recycling Corp.*, 204 F.3d 149, 156 (4th Cir. 2000). The uncontested facts of this case demonstrate that the imminent threat of the proposed discharge constitutes an injury sufficient to meet this requirement.

As the DOD proposed, the slurry will consist of spent military munitions that are mixed with chemicals and sprayed onto the lake bed of Lake Temp above Imhoff Aquifer. 42 U.S.C. § 6924(y) of the Resource Conservation and Recovery Act recognizes spent military munitions as a potentially hazardous waste and none of the parties involved in this dispute deny that the resultant mixture of slurry would be a pollutant subject to regulation if discharged into navigable water. This slurry mixture also contains substances which qualify as "hazardous materials" under § 311 of the CWA. 33 U.S.C. § 1321. Lake Temp is in close proximity to the NU-Progress border. (R. at 4.) This proximity, along with the fact that a large number of out of state recreationists use the lake, make it all but certain that citizens from NU use Lake Temp. As the slurry settles into the alluvial fill on the bottom of the lakebed, the DOD acknowledges that the surface water will permanently expand by a radius of two miles in all directions. An expansion this significant threatens to encroach on NU's sovereign border and potentially derail the infrastructure of its local economy, as well as cut off the highway that runs one hundred feet from the lake shore. Such consequences are potentially disastrous to residents of NU that use the lake for recreation, as well as any businesses that directly benefit from these activities. Such imminent threat meets the injury requirement of standing for NU.

Although the district court conceded that NU presented circumstantial evidence of contamination to the Imhoff Aquifer, it concluded that without more concrete evidence, NU had

not established that it actually suffered injury-in-fact. However, such a conclusion contradicts the Supreme Court's consistent opinion that the injury-in-fact element is not restricted to actual harm. A petitioner may assert a constitutional basis for injury-in-fact by relying on imminent harm. *Lujan*, 504 U.S. at 560. Harm becomes imminent under the doctrine of standing when there is an impending threat. *Gaston*, 204 F.3d at 160 (quoting *Gladstone Realtors v. Village of Bellwood,* 441 U.S. 91, 99 (1979)).

Even without information indicating the precise time when pollution will reach the edge of the Imhoff Aquifer, legal precedent supports NU's position that the imminent harm requirement can, or indeed in some cases *must* be based on a precautionary principle, rather than scientific uncertainty. *See Massachusetts,* 549 U.S. at 534 (EPA could not avoid its statutory obligation to enforce the Clean Air Act by relying on the uncertainty of climate change); *Ethyl Corp. v. Envtl. Prot. Agency,* 541 F.2d 1, 6-7, 24-25 (D.C. Cir. 1976) (EPA could not ignore the threat to public health posed by lead in automotive emissions even with little to no evidence); *Indus. Union Dept., AFL-CIO v. Am. Petroleum Inst.*, 448 U.S. 607, 672 (1980) (in determining the risk of benzene to the health of industrial laborers, the Supreme Court cautioned that scientific uncertainty is irrelevant in the analysis). Perhaps the D.C. Circuit best articulated the precautionary principle in writing that:

> Questions involving the environment are particularly prone to uncertainty. Technological man has altered his world in ways never before experienced or anticipated. The health effects of such alterations are often unknown . . . . Yet the statutes and common sense demand regulatory action to prevent harm, even if the regulator is less than certain that harm is otherwise inevitable.

Ethyl Corp., 541 F.2d at 24-25. Because the imminent harm caused by pollution is virtually free of scientific uncertainty in this case, the district court erred in requiring more than circumstantial evidence of contamination to the Imhoff Aquifer. As a sovereign state, NU is entitled to special

solicitude and even greater flexibility in the standing analysis than that already given by the precautionary principle.

In *Massachusetts*, the nexus of harms associated with climate change and those alleged by the State of Massachusetts satisfied the injury-in-fact requirement of standing. 549 U.S. at 521. The Supreme Court reached this decision despite many of the harms it referenced occurring outside the borders of MA, and the rise in sea levels, in particular, not predicted to occur for another hundred years. *Id.* By comparison, NU has not complained of abstract environmental damage that might occur a century away, but rather, points to a tangible pollutant of toxic slurry that all parties acknowledge will contaminate Lake Temp, and consequently, the Imhoff Aquifer, immediately upon implementation of the DOD's plan. For the district court to suggest that Massachusetts' injury was far less speculative than the circumstantial evidence presented by NU reflects an inappropriate dismissal of facts that indicate a serious threat of harm. Indeed, NU needs only to look to its own border to find the "barbarians at the gate." For these reasons, the district court erred in finding that NU lacked injury-in-fact.

2. The COE's issuance of a § 404 permit is the cause of NU's imminent injury.

But for the COE's issuance of a § 404 permit, NU would not be faced with imminent harm to its economic and proprietary interests as a sovereign state. The district court erred in maintaining that circumstantial evidence is insufficient to prove causation until the contamination actually reaches the part of the Imhoff Aquifer that is located in NU. A plaintiff is not required to wait until it is too late to remedy harm before it seeks judicial relief. This is not what causation requires. Nor does causation require NU to trace the injury to the challenged conduct with scientific certainty. *Gaston*, 204 F.3d at 161. All the law requires is for NU to show that the COE caused or *contributed* to its injury. *Id.* Here, the imminent and substantial threat of

harm is directly traceable to COE's issuance of the permit which would allow the potentially catastrophic and irreversible damage to NU's interests in using Lake Temp and the Imhoff Aquifer. As out of state residents frequently and repeatedly use Lake Temp for recreational activities, it is reasonably likely that any adverse impact due to the slurry discharge facilitated by COE's permit will put an abrupt end to these activities. Without Lake Temp being viable for wildlife or human use, the droves of hunters, boaters, and birdwatchers that use the lake will no longer come to the area. This will affect interstate travel, as roughly a quarter of Lake Temp's users are known to travel from outside of Progress to use the waterway. (R. at 4.) Given NU's close proximity to Lake Temp, it is likely that the discharge will cause an end to economic interests which benefit from this migration of recreational users. This imminent economic injury would be a direct cause of COE's action. An imminent threat to economic interest is sufficient to satisfy standing. *See Whitmore v. Arkansas*, 495 U.S. 149, 159 (1990). Here, the discharge is an imminent threat to economic interests associated with Lake Temp's use as a recreational venue. Without COE's decision to issue a permit, there is no discharge, and therefore no injury.

In a similar cause of action, the environmental group called "Friends of the Earth" brought a citizen suit against Gaston Copper Recycling Company for discharging pollutants into the waterways of two of the Friends of the Earth members. The district court held that without evidence of the chemical content of the waterways, petitioner could not trace the challenged conduct to defendant. *Gaston*, 204 F.3d at 155. On appeal, the Fourth Circuit reversed the decision because it found that the available evidence was sufficient to demonstrate a nexus between the challenged conduct and the area of environmental impairment. *Id.* at 159-60. It thus concluded that parties may rely on "circumstantial evidence such as proximity to polluting

sources, predictions of discharge influence, and past pollution to prove both injury-in-fact and traceability." *Id.* at 163.

The circumstantial evidence before this Court underscores the existence of a nexus tracing NU's injury to the challenged conduct. The effect of the discharge on NU's citizens with a commercial stake in the use of the lake and the potential harm to any future economic benefit that NU may glean from the use of the aquifer indicates there is sufficient evidence that COE's action contributes to NU's injury.

Even if, as the district court contends, there was no way to prove that pollution would ever reach the edge of the Imhoff Aquifer, or, even if it did reach the aquifer, that the strength of contamination would damage the groundwater, the fact that the DOD will discharge toxic slurry into Lake Temp and acknowledges it will enter the aquifer is enough to trace the injury to the COE. The Supreme Court made clear that when an agency can take even incremental steps to prevent harm to a sovereign state, the agency's inaction is just as much the cause of harm as if it had intended to directly harm the state instead. *Massachusetts*, 549 U.S. at 524. On this basis alone, this Court should find that the COE is responsible for the harm to NU through its active role in issuing the § 404 permit to the DOD.

3. A verdict in favor of NU would redress the imminent injury caused by the COE's issuance of the § 404 permit.

The district court made no mention of the redressability of NU's claim because it is uncontested that a decision in its favor would provide relief. A claim, such as NU's, seeking review of a § 404 permit, is redressable when the court's intervention would tangibly benefit the petitioner. *Gaston*, 204 F.3d at 162. Action by this Court would redress NU by withdrawing the § 404 permit issued by COE and enjoining the DOD from discharging toxic slurry into Lake

Temp. Alternatively, issuance of a § 402 permit by EPA that would adequately limit the discharge of hazardous pollutants into Lake Temp could achieve the same result. Because action by this court would have a tangible benefit, it should find that NU has satisfied all elements of standing in its special position as a sovereign state.

4. NU has standing to bring its claim under the doctrine of *parens patriae*.

Having established NU's quasi-sovereign interests in preventing the DOD from discharging toxic slurry into Lake Temp, its *parens patriae* standing turns on whether contamination would injure a substantial segment of its population. Ordinarily, a state cannot invoke *parens patriae* standing as a "nominal party in order to forward the claims of individual citizens[,]" however, a state may bring a claim as a representative of its citizens when an injury "affects the general population in a substantial way." *Maryland v. Louisiana*, 451 U.S. 725, 737 (1981). Here, the question of whether NU may assert standing in its representative capacity thus turns on whether the action of the defendants will injure NU's general population in a substantial way.

While the Supreme Court chose not to define the exact proportion of the population that must be adversely affected, it explained that the injury must extend beyond a group of individual residents and instructed lower courts to consider the indirect effects of the injury in making a decision. *Alfred L. Snapp & Son*, 458 U.S. at 607. In *Alfred L. Snapp & Son*, the Supreme Court found little difficulty in concluding that the apple industry's termination of 797 migrant laborers indirectly effected the population of Puerto Rico by undermining the Commonwealth's efforts to "reduce unemployment." *Id.* at 598, 609. It reached this decision despite the small number of Puerto Rican citizens directly involved in the incident because "a State's interests in the health and well-being of its residents extend beyond mere physical interests to economic and

commercial interests … .” *Id.* at 609. Similarly, the injury caused by the contamination of Lake Temp, and thereby the Imhoff Aquifer, is not limited to the adverse effects directed to the lone named citizen, Dale Bompers. As much as the district court insists otherwise, Dale is but a representative of the citizens of NU, who reside and operate their businesses above the edge of the Imhoff Aquifer, and not the sole individual who will suffer from contamination. As noted, an untold number of NU citizens use Lake Temp for recreational purposes, and the COE permit is likely to prevent all future use as it will fill the lake with hazardous materials that pose a catastrophic risk of harm to the Lake's ability to support these recreational activities.

To echo the words of the Supreme Court, even if, *arguendo*, the district court were correct in its opinion that Dale would not, or even could not, use the Imhoff Aquifer due to the naturally occurring sulfur in the groundwater, "this is too narrow a view of the interests at stake here." *Id.* To begin, the DOD has admitted that discharging toxic slurry into the lake will expand the surface water by at least two square miles. (R. at 4.) Such an expansion threatens to inundate Dale's land and that of his neighbors, resulting in enormous damage to their property. If the COE permit is allowed to stand, there is the potential for complete inundation of a large area of NU land. Although Dale or other citizens of NU cannot presently prove the danger will manifest, as noted earlier, enforcement of the CWA is not dependent on scientific certainty. Acknowledgment by all parties in this lawsuit that Lake Temp will expand in the direction of Dale's home is sufficient to uphold the precautionary principle.

Beyond the property damage to those residing above the Imhoff Aquifer, the indirect effect of contamination extends to those citizens who rely on Lake Temp to sustain NU's economy. For the past one-hundred years migratory birds have stopped at Lake Temp, attracting thousands of local and out-of-state sightseers and hunters. (R. at 4.) The spread of this hazardous

pollution threatens to damage their natural habitat and prevent them from using the lake. Were that to occur, a significant contribution to NU's economic and commercial infrastructure would cease to exist. In *Alfred L. Snapp & Son*, the Supreme Court warned that precisely such a threat would warrant *parens patriae* standing. *Id.* For these reasons, this Court should find that NU has established the elements to bring a claim in its *parens patria* capacity by demonstrating its quasi-sovereign interest in protecting the health and welfare of its citizens and that the indirect effect of contamination poses an injury to a substantial segment of its population.

B. LAKE TEMP CONSTITUTES "NAVIGABLE WATER" BECAUSE IT IS BOTH NAVIGABLE-IN-FACT AND FALLS UNDER THE BROADER DEFINITION OF NAVIGABILITY INTENDED BY CONGRESS UNDER THE CWA.

Pursuant to 33 U.S.C. § 1311(a), pollutant discharges into "navigable waters" of the United States are banned unless the discharger obtains a permit issued under either § 402, 33 U.S.C. § 1342, or § 404, 33 U.S.C. § 1344 of the CWA. The CWA defines "navigable waters" as "the waters of the United States, including the territorial seas." 33 U.S.C. § 1362(7). Thus, as a threshold issue, DOD needs either a § 402 or a § 404 permit only if Lake Temp constitutes navigable waters under the CWA.

1. Lake Temp is a relatively permanent body of water with a continuous surface connection.

The navigability requirement of the CWA includes more than waters that are navigable-in-fact, but less than all waters of the United States. *Rapanos v. United States*, 547 U.S. 715, 731-733 (2006). A plurality of the Supreme Court has limited the term "navigable waters" to "relatively permanent, standing or flowing bodies of water 'forming geographic features[,]'" or those with a "continuous surface connection [to waters that are navigable-in-fact.]" *Id.* This definition does "not necessarily exclude . . . lakes that might dry up in extraordinary

circumstances, such as drought." *Id*. at 733. Thus, Lake Temp is navigable if it is relatively permanent and has a continuous surface connection to waters that are navigable-in-fact.

In *Rapanos*, the Court held that wetlands which lack a continuous surface connection or are not adjacent to open waters are not navigable waters subject to the CWA. *Id*. at 739; *see also United States v. Riverside Bayview Homes*, 474 U.S. 121, 133 (1985). The Court clarified that navigable waters "refers more narrowly to water '[a]s found in streams and bodies forming geographical features such as . . . lakes[.]'" *Id*. at 732.

Here, there is no evidence in the record that Lake Temp lacks a continuous surface connection. Lake Temp's largest extent is three miles by nine miles and is the sole drainage basin for an eight hundred square mile watershed. (R. at 4.) As such, the lake at its greatest extent would satisfy the plurality's requirements for navigability in *Rapanos*. However, given that Lake Temp fluctuates in size and occasionally dries up, the inquiry for the lake as a navigable waterway requires further analysis.

Progress' argument against navigability is based on the fact that Lake Temp is predicted to dry up completely approximately once every five years. (R. at 4.) Based on this periodic drying, Progress deems the lake an "intermittent" water body. (R. at 3-4.) Progress contends that this drying pushes against the requirement that a water body be relatively permanent. (R. at 7.) In order for Progress to prevail on this argument, this Court must decide that a waterway is "intermittent" even though the lake is the sole drainage basin for an eight hundred square mile watershed, is present in some form for at least four out of every five years, and, at its high water mark, covers several square miles.

In *Rapanos*, the plurality notes that their holding does "not necessarily exclude . . . lakes that might dry up in extraordinary circumstances, such as drought." 547 U.S. at 733. Here, Lake

Temp's fluctuations in size and outright disappearance once every five years due to drought conditions are not excluded from navigability under the plurality's express language. As such, Lake Temp is navigable even under the more limited interpretation of navigability in *Rapanos* because Lake Temp's occasional disappearance is due to drought conditions. (R. at 4.)

That said, Progress may argue that the predictable nature of Lake Temp's drought conditions does not present the "extraordinary circumstance[s]" of drought that the plurality in *Rapanos* intends. 547 U.S. at 733. However, Progress' argument strains the interpretation beyond the plain text of the opinion, especially when examined in the light of the plurality's analysis of seasonal rivers. In *Rapanos*, the plurality expressed doubt that a "seasonal river" would necessarily be precluded from the CWA. *Id*. The Court used the example of a river that flowed 290 days out of the year as a "seasonal" flow that may be considered navigable. *Id*. A 290 day per year flow means that water is present in such seasonal waterways roughly eighty percent of the time. This ratio is precisely on point with the presence of water in Lake Temp, which the record indicates is present in some form *at a minimum* of four out of five years. (R. at 4.) If the plurality in *Rapanos* did not preclude waterways that were *seasonally* dry from regulation under the CWA, it seems unlikely that *Rapanos* could be interpreted to exclude waterways such as Lake Temp that are present for *years* at a time. As such, Lake Temp is not an intermittent body of water even though it predictably dries up roughly once every five years. Lake Temp is navigable water and any point-source discharges into Lake Temp will require a permit under either § 402 or § 404.

2. Lake Temp constitutes a geographic feature and is within current COE regulations as a navigable waterway.

The plurality in the *Rapanos* decision stated that navigable water "refers more narrowly to water '[a]s found in streams and bodies forming geographical features such as . . . lakes[.]'" 547 U.S. at 732. Lake Temp, by its very name and characteristics, is expressly within this requirement. Furthermore, the record indicates that Lake Temp is "oval shaped" and has a "historic high" water level. (R. at 3-4.) Under current COE regulations addressing what constitutes navigable waters, the CWA's "jurisdiction extends to the ordinary high water mark" under 33 C.F.R. § 328.4. Accordingly, Lake Temp's greatest extent (three miles by nine miles) is the measure by which the determination for navigability under the COE's regulation must be made. This regulation is entitled to judicial deference as long as it is a reasonable interpretation of the CWA. *See Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842-845 (1984). Given this measure of deference and the plain language of the *Rapanos* decision which includes waters that are "described in ordinary parlance as. . . lakes[,]" Lake Temp is subject to jurisdiction of the CWA as a navigable waterway. 547 U.S. at 732.

3. Lake Temp is used in interstate commerce and is thus navigable-in-fact.

The traditional test for navigable waters required that the waters be navigable-in-fact. *See The Daniel Ball*, 77 U.S. 557, 563 (1871); *see also United States v. Appalachian Elec. Power Co.*, 311 U.S. 377, 406 (1940). The Supreme Court has repeatedly recognized that the meaning of "navigable waters" under the CWA is broader than the traditional definition of navigable-in-fact. *See Solid Waste Authority of N. Cook County (SWANCC) v. Army Corps of Eng'rs*, 531 U.S. 159, 167 (2001); *see also Riverside Bayview*, 474 U.S. at 133. A waterway is navigable-in-

fact if it is used or capable of being used in interstate commerce. *See The Daniel Ball*, 77 U.S. at 563. Thus, Lake Temp is navigable if it is capable of being used in interstate commerce.

Here, there is evidence that Lake Temp is used in interstate commerce. The lake has been used by interstate hunters and bird watchers for at least the last one hundred years. (R. at 4.) The record also shows that a highway is a staging point for those who use rowboats and canoes on the lake. (R. at 4.) Roads used by persons traveling from out of state are indispensible as instrumentalities of interstate commerce and are well within Congress regulatory authority. *See Overstreet v. North Shore Corp*., 318 U.S. 125, 129 (1943). Here, there are "clearly visible trails leading from the road to the lake," and it is reasonable to infer that at least some of the users are from out of state given the high volume of out of state hunters and birdwatchers that use the lake. (R. at 4.) The recreational activities of these out of state users support an inference that Lake Temp facilitates commercial activity across state lines. Given this interstate travel and the attendant commercial activity, Lake Temp is navigable-in-fact.

Progress argues that the case at hand is identical to in *SWANCC*. In *SWANCC*, the use of small, isolated, intrastate ponds by migratory birds was insufficient to support a finding that the ponds were navigable waters. 531 U.S. at 167. Unlike in *SWANCC*, Lake Temp is a much larger body of water that is used for recreational purposes and is navigable-in-fact. None of these facts applied to the water bodies in *SWANCC*. NU does not justify navigability on the presence of migratory birds, but on the commercial uses of Lake Temp. Though the recreational activities here are tied to the presence of migratory birds, this presence itself is not the justification for navigability as it was in *SWANCC*. As such, the holding from *SWANCC* does not apply to the current facts.

Current federal regulations further support Lake Temp as navigable-in-fact based on the lake's role in interstate commercial activities. Under 33 C.F.R. § 329.5, navigability turns on a water bodies, "past, present, or potential presence of interstate … commerce[.]" The basis for this determination can be "extremely varied[.]" 33 C.F.R. § 329.6. The regulations specifically state that it is the "waterbody's capability of use by the public for purposes of transportation of commerce which is the determinative factor," and "sufficient commerce may be shown by historical use of canoes ... or other … craft[,]" and "the presence of recreational craft may indicate that a waterbody is capable of bearing some forms of commerce[.]" *Id*. In the case at hand, the public uses small boats on Lake Temp to conduct recreational activities. (R. at 4.) As such, agency interpretation expressly supports Lake Temp's status as navigable-in-fact.

4. Congressional intent supports a broad reading of navigability.

The stated goals of the CWA are to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters" and to bring an end to water pollution. 33 U.S.C. § 1251(a). Congress's statutory intent supports a broad reading of navigable waterways in order to achieve the ambitious goals of the CWA. Though the Supreme Court in *Rapanos* divided over how extensively to interpret navigability, all Justices agreed that the term applied to more than waters that are navigable-in-fact. 547 U.S. at 731, 761, 768. This agreement is in recognition of the inclusive reading of navigability in order to achieve the goals of the CWA. Congress's stated goals require a broad reading of navigability which would include a body of water which is the sole drainage basin for a relatively large area such as Lake Temp. Excluding Lake Temp from CWA jurisdiction is "contrary to clear congressional intent" and is thus prohibited. *Chevron*, 467 U.S. at 843.

C. THE PROPOSED DISCHARGE INTO LAKE TEMP BY DOD CONSISTS OF A HAZARDOUS POLLUTANT WHICH DOES NOT QUALIFY AS FILL MATERIAL SIMPLY BECAUSE IT WOULD BE DISCHARGED IN GREAT QUANTITY.

Pursuant to CWA § 404, 33 U.S.C. § 1344(a), COE has the statutory authority to issue permits for discharges of "fill" material into navigable waterways. Alternatively, discharges of pollutants that do not qualify as fill are subject to EPA's permitting jurisdiction pursuant to CWA § 402, 33 U.S.C. § 1342. As such, the threshold question when determining permitting authority is whether "the discharge is fill[.]" *Coeur Alaska v. Se. Alaska Conservation Council*, 129 S.Ct. 2458, 2469 (2009). If the discharge is fill, "the discharger must seek a § 404 permit from [COE]; if [the discharge is] not [fill], only then must the discharger consider whether any EPA [standards from § 306 apply.]" *Id*. at 2469. From *Coeur*, mine tailings in slurry form were appropriately deemed fill material even though the material would fail EPA standards that would be required under § 306 for a § 402 permit. *Id*. at 2471; *see* 33 U.S.C. § 1316. However, when "extreme instances" present a more harmful pollutant that is the subject of a discharge permit, a party can challenge on the grounds that the fill regulation as interpreted "is an unreasonable interpretation of § 404." *Id*. at 2468. Here, if the hazardous slurry discharge consisting of munitions, chemicals, and metals can be reasonably interpreted to be fill material despite the fact that it is hazardous under §311, COE will have jurisdiction to issue a permit pursuant to § 404. *See* 33 U.S.C. § 1321.

1. The proposed discharge into Lake Temp would require a § 402 permit if it were of a lesser quantity.

The proposed discharge by DOD would require a permit under § 402 if it were of a quantity that would not change the elevation of the lake bed. The proposed discharge consists of materials that are considered hazardous materials under § 311 of the CWA, or 33 U.S.C. § 1321.

(R. at 4.) This section states that "there should be no discharges of . . . hazardous substances into … navigable waters" except "in compliance with a permit under section 1342[.]" 33 U.S.C § 1321. As such, the plain language of § 311 indicates that "any" discharge of hazardous substances requires a § 402 permit. When a statute's "language … is plain[,] … the sole function of the courts is to enforce it according to its terms.'" *Caminetti v. United States*, 242 U.S. 470, 485 (1917). Here, the law expressly requires a § 402 permit for the proposed discharge.

However, the proposed discharge into Lake Temp will change the elevation of the lake bed and thus meets the technical definition of fill under 40 C.F.R. § 232.2. The discharge in *Coeur* also met the definition of fill and the court determined a § 404 permit was permissible for this reason. 129 S.Ct. at 2469. Here, the discharge would require a § 402 permit if discharged in a quantity insufficient to change the lake bed because this discharge will violate § 311 of the CWA which expressly forbids such a discharge except in compliance with § 402.

2. The proposed discharge cannot reasonably be interpreted as fill material because it is also a substantially hazardous pollutant.

The regulatory definition of fill under 40 C.F.R. § 232.2 appears broad when taken out of the context of the CWA's regulatory scheme. However, despite Congress' clear statutory requirement that this discharge requires a § 402 permit, the recent Supreme Court decision in *Coeur* instructs otherwise. In *Coeur*, the Supreme Court reasoned that the omission of a reference to § 306 pollutants in § 404 meant that § 306 standards did not apply to materials that met the COE's definition of fill materials, despite the fact that§ 306 expressly forbids any discharge except in compliance with a § 402 permit. 129 S.Ct. at 2460; *see* 33 U.S.C. § 1316. Despite this express command from Congress in § 306, the Court concluded that "Congress has not 'directly spoken' to the 'precise question'" of whether § 306 applies to pollutants which are

discharged in such great quantity as would also qualify them as fill, even though the express purpose of the CWA is to *prevent* pollution from entering waterways. *Id*.; *see* 33 U.S.C. § 1251(a).

Despite the Court's interpretation in *Coeur* of Congress's express prohibition on pollutant discharges, the holding from *Coeur* does not apply to the facts of the case at hand because the proposed discharge by DOD here would also violate § 311 of the CWA. § 311 is similar to § 306 in that it prohibits discharges except in compliance with § 402. *Coeur* is not applicable to the facts at hand because discharges that violate § 311 are far more harmful than those under § 306. In *Coeur*, the dissent expressed fear that allowing § 404 permits for pollutant discharges which are also fill would "swallow" the function of the CWA permitting system to regulate pollution of harmful substances. *Id*. at 2483. The majority addressed this concern by indicating that more "extreme instances" where a discharger seeks a permit for a more harmful pollutant could be "an unreasonable interpretation of § 404." *Id*. at 2468.

Here, DOD's proposed discharge of hazardous pollutants would classify as an "extreme instance" where issuance of a § 404 permit would be unreasonable. While the mine tailings in *Coeur* were a pollutant pursuant to § 306, here DOD is attempting to discharge a mixture that is forbidden under the more stringent language of § 311. Unlike § 306, § 311's criteria for listing of hazardous substances is based on a finding of "imminent and substantial danger to the public health or welfare[.]" 33 U.S.C. § 1321(b)(2)(A). § 311 also encourages handlers of hazardous substances to "achieve a higher standard of care" for listed substances. 33 U.S.C. § 1321(b)(2)(B). Listing under this section indicates that hazardous substances are substantially more dangerous than the tailings discharge in *Coeur*. As such, the discharge in Coeur is markedly dissimilar from the proposed discharge into Lake Temp.

Furthermore, the discharge here will be into a lake bed that is a regular destination for many people. (R. at 4.) In *Coeur*, there was no indication that any people used or would use the tailings pond located in a remote area of Alaska. *Id*. at 2463-2464. The far greater risk presented by DOD's discharge and the frequent use of Lake Temp by recreationists indicate that a § 404 permit allowing a discharge of an enormous amount of harmful material that would otherwise be unlawful in smaller quantities is an unreasonable interpretation of the term "fill material." Unreasonable interpretations of a statute are impermissible. *Chevron,* 467 U.S. at 843.

3. Discharges that violate § 311 are not consistent with the congressional intent behind the CWA, and thus cannot be reasonably interpreted as fill material.

Congress's goal in enacting the CWA was "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. 1251(a). In "order to achieve this objective [Congress] declared that … the discharge of toxic pollutants in toxic amounts be prohibited[.]" *Id*. The CWA delegates primary authority over the enforcement and supervision of the CWA to the EPA. 33 U.S.C. § 1251(d); see also *Milwaukee v. Illinois*, 451 U.S. 304, 317 (1981). The COE also plays a role, having the authority to issue fill permits under § 404. In keeping with the express purposes of the CWA to prevent pollution discharges, COE's authority to issue fill permits rests in the "guidelines developed by the [EPA]" and COE may "only … [issue permits that] will cause … minimal adverse environmental effects[.]" 33 U.S.C. 1344(b),(e). The CWA, by its plain and unambiguous language, is a statutory scheme intended to protect the environment by preventing harmful pollution discharges into waterways.

The lower court's reading stated that the discharge into Lake Temp would "in effect create zero discharge of pollutants, [thus meeting] the goal of the statute" because the discharge would not flow into *other* navigable waters. (R. at 8.) In order for this interpretation to be

correct, the goal of the statute would have to be interpreted as prohibiting all discharges into navigable waters that would subsequently flow into *other* navigable waters. Such a reading has no logical basis in the CWA, and would effectively make the final drainage point of a watershed fair game for any pollutant discharges. To describe such a discharge as "zero" is to rewrite the statute by adding a strange qualifier that is contrary to both the clear text of the CWA and to Congress's intent to regulate all discharges into navigable waters.

Here, allowing COE's definition of fill material to commandeer the clear and unambiguous language of the CWA which prohibits discharges that adversely impact the environment is not permissible. *See Chevron*, 467 U.S. at 843. Such a reading effectively removes the statutory authority of EPA and runs directly counter to the CWA as a statutory scheme. Congress, through the CWA, authorizes a broad sweep of authority to clean America's waters and prevent further pollution. Congress did not grant permitting authority to dual agencies to allow permit applicants an opportunity to game the CWA in order to avoid its clear goals. Here, upholding COE's definition of fill to encompass § 311 hazardous wastes is to say that Congress intended this environmental protection scheme not to apply to polluters who are able to churn out hazardous materials in such great quantities that the discharges will change the level of a lakebed. This is an invalid interpretation of the CWA. DOD requires a § 402 permit in order to discharge any hazardous materials that violate § 311.

D. THE PARTICIPATION OF OMB IN RESOLVING THE DISPUTE BETWEEN COE AND EPA WAS IMPERMISSIBLE AND CAUSED BOTH OMB AND EPA TO VIOLATE THE CWA.

OMB's directive to the EPA to not veto the § 404 permit issued by the COE was a violation of the CWA by both OMB and EPA. As such, the violation of the CWA by both OMB and EPA is subject to judicial review as relevant guidelines and congressional intent properly

direct the circumstances when EPA shall issue a § 402 permit or shall veto a § 404 permit. The influence of OMB resulted in an improper application of the CWA, directly leading EPA to imply that the discharge of hazardous pollutants is permissible under a § 404 permit. Even if OMB had the authority to resolve the original permitting dispute, they had no authority to direct EPA to not act on its congressionally delegated power to veto such permits when EPA finds the permit to lead to an unacceptable environmental impact. EPA violated the CWA when it acquiesced to OMB's directive, as EPA's failure to veto the permit would not be consistent with EPA's duty to act according to the evidence presented in the record. OMB also violated the CWA, as the directive issued to EPA was an improper application of executive authority not delegated to OMB by Congress.

1. Both the interference of OMB and the subsequent decision of EPA to not veto the § 404 permit issued by COE are actions subject to judicial review.

The actions of EPA, OMB, and COE are judicially reviewable under numerous theories. First, the decision by EPA is not wholly discretionary as Congress has given guidelines to be applied when EPA decided whether or not to disapprove a permit issued by COE. Using both these guidelines and the clear intent of congress, EPA did not have the degree of discretion necessary to be excluded from judicial review under 5 U.S.C. § 701(a)(2) of the APA. Second, EPA did not use prosecutorial discretion in choosing to withhold enforcement, but rather approved the enforcement decision made by COE to issue a § 404 permit. Such approval of agency action is presumptively reviewable. Lastly, OMB's intervention into the decision making process of EPA raises judicially reviewable constitutional issues relating to the separations of powers doctrine. Using any of these theories, EPA's failure to veto the § 404 permit is subject to judicial review.

There is to be no judicial review of an "agency action … committed to agency discretion by law." 5 U.S.C. § 701(a)(2). However, "[t]his is a very narrow exception." *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 410 (1971). "The legislative history of the [APA] indicates that it is applicable in those rare instances where 'statutes are drawn in such broad terms that in a given case there is no law to apply.'" S.Rep. No. 752, 79th Cong., 1st Sess., 26 (1945). *Overton Park, supra,* 401 U.S. at 410. Judicial review is unavailable only when there is "no meaningful standard against which to judge the agency's exercise of discretion." *Heckler v. Chaney,* 470 U.S. 821, 830 (1985).

EPA's decision to not veto the § 404 permit is reviewable even if this court finds that failure to take action under section 1344(c) closely resembles prosecutorial discretion to not seek enforcement. *Id*. at 831-33. "[T]he failure to act" is a situation defined as an "agency action" which may be subject to judicial review under 5 U.S.C. § 551(13). *See Florida Keys Citizens Coalition v. West*, 996 F. Supp. 1254, 1257 (S.D. Fla. 1998) (Instances of inaction by COE are subject to judicial review). A non-enforcement decision does raise a presumption that such inaction in unreviewable; however, this "presumption may be rebutted where the substantive statute has provided guidelines for the agency to follow in exercising its enforcement powers." *Heckler*, 470 U.S. at 832-33. Review in such cases is necessary to ensure that enforcement agencies do not ignore guidelines the legislature intended to be applied when deciding what violations should be enforced. *Id*. at 833.

EPA's veto power under 33 U.S.C. § 1344(c) lists meaningful guidelines the Administrator shall use to determine when to veto a § 404 permit, stating a veto is "authorized … whenever … the discharge of such materials … will have an unacceptable adverse effect on municipal water supplies, shellfish beds and fishery areas …, wildlife, or recreational areas." The

use of the word "authorized" does not imply a decision left to EPA's discretion when considered in tandem with the Congressional intent behind the CWA. Nearly identical guidelines are listed under the congressional declaration of goals and policies for the CWA, which states that "whenever attainable" such standards of water quality should be met. 33 U.S.C. § 1251(a)(2). Congress therefore intended for a permit to be vetoed whenever EPA determines that discharged materials cause any of the adverse effects listed in § 1344(c), such effects are unacceptable, and appropriate water quality standards remain attainable. EPA's original desire to veto the § 404 permit and issue a § 402 permit indicates that EPA applied the listed standards, found there to be unacceptable adverse effects, and believed acceptable water quality was still attainable by issuing a § 402 permit. Judicial review is therefore necessary to decide if EPA can articulate why these standards were not applied to the case at hand following OMB's influence.

Even if this court determines that the language of § 1344(c) does not overcome the presumption of non-reviewability applied to a decision to not enforce, judicial review is still available because failure to veto a § 404 permit is actually "an affirmative act of approval under a statute that set clear guidelines for determining when such approval should be given." *Heckler*, 470 U.S. at 831. An approval of agency action therefore indicates a presumption of reviewability because an approval is "precisely the opposite situation" of a refusal to enforce. *Id*. EPA consulted with COE before deciding the permit status in accordance with § 1344(c), and EPA's decision to not veto COE's § 404 permit was therefore an approval subject to judicial review.

Judicial review is also available to determine if OMB's intervention into the veto process was an unconstitutional exercise of the President's executive authority. A reviewing court shall hold agency action unlawful when it is contrary to constitutional right, power, or privilege. 5 U.S.C. § 706(2)(B). Because OMB is an office within the Executive Office of the President of

the United States, the actions of OMB should be considered as equivalent to Presidential action for the purposes of review. "[I]t is the rule, not the exception, that executive actions - including those taken at the immediate direction of the President - are subject to judicial review." *Nixon v. Fitzgerald*, 457 U.S. 731, 781 (1982). The authority to veto a § 404 permit was given to the Administrator, not the President, so the constitutionality or legality of the President's actions under the language of the CWA is subject to review. *Id*.

2. EPA's failure to veto the § 404 permit issued by COE was an arbitrary and capricious decision as the discharge in question was a hazardous pollutant.

EPA's decision to not veto the § 404 permit and issue a § 402 permit in its place should be set aside by this court because the decision was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 7 U.S.C. § 706(2)(A). To vacate an agency's decision the record must show that the agency "relied on factors which Congress had not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise." *Motor Vehicle Mfrs. Assn. of United States, Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983).

As previously discussed, EPA's decision to not veto the § 404 permit in the current case was an arbitrary and capricious decision, as the relevant facts were not consistent with the facts of *Coeur*, but were instead consistent with an "extreme instance" where the pollutants in question were too hazardous to justify only a § 404 permit. 129 S.Ct. at 2468. There is a clear indication that the explanation of EPA's decision runs counter to the evidence that the agency considered: Prior to the outside influence of OMB, EPA's original interpretation of the relevant law led to a decision to veto the § 404 permit and instead issue a § 402 permit. (R. at 9.) Using

the guidelines listed in 33 U.S.C. § 1344(c), EPA must have originally found the discharge to have an "unacceptable adverse effect" on Lake Temp that would have justified a veto of the § 404 permit. By failing to veto the § 404 permit, EPA failed to consider an important aspect of the problem, as it disregarded the hazardous qualities of the discharge in question. (R. at 4.) The final decision was therefore not in accordance with statutory language of the CWA as a whole, and certainly not consistent with the congressional intent behind the CWA. As such, the decision of EPA to not veto the § 404 permit should be set aside by this court as arbitrary and capricious.

3. EPA's decision to not veto the § 404 permit at the prompting of OMB was arbitrary and capricious because Congress has not delegated any relevant authority to grant or veto such permits to OMB or the President.

The decision of EPA to not veto the § 404 permit was also arbitrary and capricious because EPA considered a factor not indicated in the statutory language of the CWA; EPA improperly deferred to a directive from OMB, and this directive was both an improper exercise of executive authority and an impermissible interpretation of the relevant law. The statutory language of the CWA clearly indicates that Congress gave the authority to administer all relevant sections of the permitting system to the Administrator of EPA alone, not to OMB or any such party acting on the behalf of the President. Such participation by OMB raises a separation of powers concern because the law is not being executed as intended by Congress.

The president is charged with the duty to "take Care that the Laws be faithfully executed." U.S. Const. art. II, § 3. Nothing in the Constitution gives the President the ability to unilaterally change or create the law without prior legislative action by Congress. This limit of the President's executive power was best demonstrated in *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952), where President Truman attempted to seize private steel mills in an attempt to prevent a nationwide strike during the Korean War. The Court rejected Truman's

argument that such powers were vested in him by the Constitution, and in the absence of a law giving him such powers, his actions were ruled illegal. *Id*. at 587. The Court stated that "[i]n the framework of our Constitution, the President's power to see that the laws are faithfully executed refutes the idea that he is to be a lawmaker." *Id*. The President's role as chief executive is to carry out congressional policies as prescribed by law, not presidential polices as prescribed by the President himself. *Id*.

OMB's involvement in directing EPA's permitting authority is a violation of the CWA and an intrusion on the power of Congress to delegate such authority specifically to the Administrator of EPA. The Supreme Court has stated that the duties given to agency heads by Congress "are subject to the control of the law, and not to the direction of the President." *Kendall v. U.S. ex rel. Stokes*, 37 U.S. 524, 610 (1838). It would be "an alarming doctrine, that [C]ongress cannot impose upon any executive officer any duty they may think proper[,]" and when Congress does decide to impose such duties, "the duty and responsibility grow out of and are subject to the control of the law, and not to the direction of the President." *Id*. It is particularly telling that an executive order issued by President Clinton which established the President's role in resolving disputes between OMB and agencies expressly stated that '[n]othing in this order shall be construed as displacing the agencies' authority or responsibilities, as authorized by law." Exec. Order No. 12,866, 58 Fed. Reg. 51,735 (Sept. 30, 1993).

Had Congress intended for the President or OMB to dictate the outcome of EPA's decision making, it would have been indicated in the relevant statutory language. It has been argued that the President should have the right to exert his executive authority at his discretion when a statute fails to indicate the limits of presidential influence. Elena Kagan, *Presidential Administration*, 114 Harv. L. Rev. 2245, 2326-27 (2001). The language of the CWA clearly states that "[e]xcept as otherwise expressly provided in this chapter, the Administrator of the [EPA] shall administer

this chapter." 33 U.S.C. § 1251(d). Only the Administrator of EPA is mentioned as having authority to issue a § 402 permit or veto a § 404 permit. 33 U.S.C. § 1342(a); 33 U.S.C. § 1344(c). No other executive official, including the President or any representative of OMB, is expressed as having any authority under these sections. This exclusion of all others from executive authority is a clear statement that Congress intended for the CWA to be subject only to the expert discretion of the Administrator of EPA. This language of exclusion is likely included to protect the Administrator's discretion from outside influence, specifically that of the President.

Even the original conflict resolution procedure which led to OMB's ruling that a § 404 permit should be issued by COE rather than a § 402 permit by EPA was not a permissible use of OMB's executive authority. OMB was granted its power to resolve inter-agency conflicts by Exec. Order No. 12,088, 43 Fed. Reg. 47,707 (Oct. 13, 1978). This order clearly states that nothing in the order "shall be construed to revise or modify any applicable pollution control standard[,]" except when the President decides that such an exemption is necessary "in the interest of national security" or "in the paramount interest of the United States." *Id*. at 47,709. OMB's directive in this case alters the applicable pollution control standards governing § 402 and § 404 permits by entirely disregarding the application of § 311 to large quantities of hazardous pollutant discharges, and there is no evidence in the record indicating that a Presidential exemption was issued in support of DOD's activities. OMB's attempt to resolve the conflict between COE and EPA was thus not in accordance with its proper authority.

OMB's directive to EPA following its role as arbitrator of inter-agency conflicts was also improper even if EPA willingly chose to change its interpretation of the relevant permitting regulations following its meeting with OMB. In *Sierra Club v. Costle*, 657 F.2d 298 (D.C. Cir. 1981), the court ruled that the President may have informal intra-executive meetings with agency

officials if such meetings were not barred by statute. The President can suggest that his own policies be adopted by the agency at such meetings; however, the agency can only adopt such policies if they are factually supported by the record. *Id*. at 408. As previously discussed, the factual record in the case at hand indicates that the hazardous properties of the DOD's discharges were not properly addressed by OMB when resolving the conflict. Accordingly, EPA's acquiescence to OMB's directive was not supported by the record or relevant law, and as such, EPA's decision to follow the directive was arbitrary and capricious.

The directive issued by OMB also renders EPA's interpretation of the relevant statutes immune from *Chevron* deference. *Chevron* deference is only warranted "when it appears that Congress delegated authority to the agency generally to make rules carrying the force of law, and that the agency interpretation claiming deference was promulgated in the exercise of that authority." *United States v. Mead Corp.*, 533 U.S. 218, 226–227 (2001). Agencies are given such deference because they have the requisite expertise required to faithfully carry out the responsibilities delegated to them by Congress. *Chevron*, 467 U.S. at 865. In the case at hand, OMB had no such expertise, nor was it delegated any authority under the CWA to make rules carrying the force of law. As such, the interpretation of the permitting statutes by EPA following the directive from OMB is not accorded *Chevron* deference.

4. The constitutional limits placed on the President's executive authority indicate that OMB's interference in EPA's decision making was improper.

OMB's participation is also unwarranted as the President has been granted other avenues of administrative control that are not consistent with the influence OMB demonstrated in this action. The President's ability to unilaterally remove executive agency officials would be meaningless if such officials were required to act at the President's discretion whenever

prompted. Also, the approval of Presidential agency appointees by the Senate would carry no weight if such appointees were exclusively promoting the President's policies at his request.

The President's ability to remove agency officials is primarily determined by whether any restriction on such removal power prevents the President from properly executing his constitutional duties, including unilateral removal of purely executive officials. *Morrison v. Olson*, 487 U.S. 654, 691 (1988); *Myers v. United States*, 272 U.S. 52, 163-64 (1926). On the other hand, Congress may limit the President's power to remove officials from independent agencies that have significant non-executive functions, protecting these officials from unwarranted presidential interference. *Humphrey's Executor v. United States*, 295 U.S. 602, 627 (1935). Because EPA has been granted quasi-legislative authorities to form rules and regulations, Congress likely has the power to restrict the President's removal power of EPA officials, although no such restriction has been granted by Congress on the behalf of the Administrator of EPA. *See* 42 U.S.C. § 4321(b). The mere existence of Congress's ability to limit such removal, however, indicates that the President does not have limitless executive authority over EPA.

Even the President's unfettered removal power of executive agency officials supports such officials' ability to refuse compliance with presidential directives. Agency officials, including EPA officials, have successfully resisted presidential directives in the past, even when threatened with potential removal. Robert V. Percival, *Presidential Management of the Administrative State: The Not-so-unitary Executive*, 79 Fordham L. Rev. 2487, 2534 (2001). This is possible because the President must consider the political cost associated with removal actions. Often the official is willing to be removed because the president's directive is illegal, unwise, or not founded in fact. *Id*. The fact that many officials have survived this situation shows

that the President's power over agency officials rests in his ability to remove them, not in his ability to direct their actions.

The constitutional assurance that the Senate must approve the appointment of the EPA Administrator also implies that the president cannot direct such officials beyond the scope of his authority. *See* 42 U.S.C.A. § 4321(b). If the Administrator had no authority independent from the President, there would be no reason for the Administrator's appointment to be confirmed; the President would ultimately be the only party making decisions on how to execute duties delegated to the EPA. Senate approval in this case is a safeguard against the President dictating policy decisions based on the opinions of non-expert advisors.

These constitutional safeguards against presidential executive power indicate that OMB (acting through the President) violated the CWA as it did not have the authority to direct EPA's interpretation of the CWA, and EPA violated the CWA by adhering to this improper directive.

XIII. Conclusion

This court should find that the State of New Union is entitled to standing under Article III to the United States Constitution, and it has satisfied the requisite elements of injury-in-fact, causation, and redressibility. EPA also has jurisdiction to issue a § 402 permit under the CWA as Lake Temp is a navigable water because it is a geographic feature used in interstate commerce. This court should also find that COE's § 404 permit was improper under the relevant law because the discharge in question was a hazardous pollutant. The intervention of OMB in directing EPA's decision was impermissible as the intervention was an unconstitutional application of OMB's executive authority that caused EPA's decision to be arbitrary and capricious. This court should accordingly rule in favor of New Union on all issued raised in the cross-motion for summary judgment.