
IN THE UNITED STATES COURT OF APPEALS

FOR THE TWELFTH CIRCUIT

C.A. No. 11-1245

STATE OF NEW UNION,
Appellant and Cross-Appellee,

v.

UNITED STATES,
Appellee and Cross-Appellant,

v.

STATE OF PROGRESS,
Appellee and Cross-Appellant.

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

BRIEF FOR NEW UNION

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Appellant-Cross-Appellee State of New Union (New Union) sought judicial review of a Clean Water Act (CWA) Section 404 permit, 33 U.S.C. § 1344, in the United States District Court for the District of New Union under 28 U.S.C. § 1331 (2006) and the Administrative Procedure Act (APA), 5 U.S.C. § 702 (2006). Appellee-Cross-Appellant Secretary of the Army (United States), acting through the U.S. Army Corps of Engineers (COE) issued the section 404 permit to the U.S. Department of Defense (DOD). R. at 3. The State of Progress (Progress) intervened and the United States and New Union filed motions for summary judgment.

This appeal is from the District Court's Order dated June 2, 2010 (Civ. 148-2011) that denied New Union's motion for summary judgment for lack of standing and granted the United States' motion for summary judgment on the Clean Water Act counts. R. at 10-11. New Union and Progress filed appeals to the District Court's Order, and this Court has jurisdiction pursuant to 28 U.S.C. § 1291 (2006).

QUESTIONS PRESENTED

I. Whether the State of New Union has standing in its sovereign capacity as owner and regulator of the groundwater in the state or in its *parens patriae* capacity as protector of its citizens who have an interest in the groundwater in the state.

II. Whether the COE has jurisdiction to issue a permit under CWA Section 404, 33 U.S.C. § 1344, because Lake Temp is navigable water under CWA Sections 301(a), 404(a), and 502(7), 33 U.S.C. §§ 1331(a), 1344(a), 1362(7).

III. Whether the COE has jurisdiction to issue a permit under CWA Section 404, 33 U.S.C. § 1344, or the EPA has jurisdiction to issue a permit under CWA Section 402, 33 U.S.C. § 1342, for the discharge of slurry into Lake Temp.

IV. Whether the decision by OMB that the COE had jurisdiction under CWA Section 404, 33 U.S.C. § 1344, and that EPA did not have jurisdiction under CWA Section 402, 33 U.S.C. § 1342, to issue a permit for DOD to discharge slurry into Lake Temp and EPA's acquiescence in OMB's decision violated the CWA.

STATEMENT OF THE CASE

PROCEDURAL HISTORY:

State of New Union (New Union) sought judicial review of a Clean Water Act (CWA) Section 404 permit, 33 U.S.C. § 1344, in the United States District Court for the District of New Union under 28 U.S.C. § 1331 (2006) and the Administrative Procedure Act (APA), 5 U.S.C. § 702 (2006). The Secretary of the Army (United States), acting through the U.S. Army Corps of Engineers (COE) issued the section 404 permit to the U.S. Department of Defense (DOD). R. at 3. The State of Progress (Progress) intervened and the United States, Progress and New Union all filed motions for summary judgment. R. at 3.

On June 2, 2010 the District Court issued an Order (Civ. 148-2011) that denied New Union's cross-motion for summary judgment for lack of standing and granted the United States' motion for summary judgment on the Clean Water Act counts. R. at 10-11. New Union and Progress filed appeals to the District Court's Order in the United States Court of Appeals for the Twelfth Circuit, which granted certiorari to review the claims (C.A. No. 11-1245). R. at 1.

FACTUAL BACKGROUND:

DOD sought a CWA Section 404 permit from COE for its proposal to construct a facility on the shore of Lake Temp that will receive and prepare munitions to discharge into the lake. R. at 4. New Union asserts that Lake Temp is protected water under CWA jurisdiction and DOD's discharge requires a permit under the CWA. R. at 4. Although New Union does not contest that DOD's discharge will have the effect of fill material, it does contend that the discharge will contain hazardous substances and is disqualified from being fill material thus requiring a Section 402 permit from EPA. R. at 4, 8.

Before a permit was issued, EPA and COE briefed and met with OMB, which resulted in OMB's oral decision granting COE jurisdiction to issue a permit and OMB's oral directive to EPA not to veto COE's permit issuance. R. at 9. OMB's involvement in the process was an unlawful exercise of the Executive branch's power and violated the CWA because it usurped EPA's role as Administrator of the CWA and affected COE's determination to issue the permit. R. at 10. Additionally, EPA's acquiescence to OMB's directive was arbitrary and capricious, violated the CWA and is subject to judicial review. R. at 10.

STANDARD OF REVIEW

An appellate court should review a district court's ruling on cross-motions for summary judgment *de novo*, and should construe the evidence in a light most favorable to the non-moving party in each case. *NRDC v. U.S. Dept. of Agriculture*, 613 F.3d 76, 83 (2d Cir. 2010). A court's review under the Administrative Procedure Act is limited, however, this Court may disturb agency action if it was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law, in excess of the agency's statutory jurisdiction or authority, or without observance of procedure required by law." *Id*; 5 U.S.C. §§ 706(2)(A), (C), (D). An agency's action should be overturned if it "relied on factors which Congress has not intended 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 to the product of agency expertise." *Motor Vehicle Mfrs. Ass'n, Inc. v. State Farm Mut. Auto. Ins. Co.*, 436 U.S. 29, 43 (1983).

SUMMARY OF ARGUMENT

New Union has standing under its sovereign capacity as owner and regulator of the groundwater in the state and in its *parens patriae* capacity as protector of its citizens who have

an interest in the groundwater in the state. New Union's standing in its sovereign capacity derives from its interest in regulating the groundwater underneath its borders, it has established a regulatory program to manage those resources and will effectively be preempted by the CWA when DOD begins to discharge pollutants into Lake Temp. DOD's discharge will also cause harm to the health and welfare of the citizens of New Union thereby triggering New Union's standing under its *parens patriae* capacity.

The COE has jurisdiction to issue permits for Lake Temp because it is a navigable water of the United States. CWA jurisdiction extends over navigable bodies of water and non-navigable tributaries adjacent to or abutting traditional navigable water, or those waters that have a significant nexus to traditional navigable waters. Navigability is determined by a body of water either being navigable-in-fact or if it is susceptible of being used, or has been used in interstate commerce. Lake Temp is both navigable-in-fact as evidenced by signs that both canoes and rowboats have been used on the lake, and Lake Temp has previously been used in interstate commerce, as evidenced by its prior use by duck hunters and birdwatchers alike.

Although COE has jurisdiction to issue a section 404 permit for Lake Temp, the discharge that DOD proposes is not slurry and does not qualify as fill material; therefore, a section 402 permit, issued by EPA, is required for DOD's discharge. Although DOD's discharge is a liquid waste mixture, it is from ground and pulverized spent munitions. Munitions are not slurry, nor qualify as fill material, even if the discharge will have the same effect that fill material has. DOD's discharge contains many hazardous substances protected by CWA § 402; therefore, DOD's discharge requires an EPA issued section 402 permit.

Finally, OMB had no authority under to decide that COE had jurisdictional authority under section 404 of the CWA and that EPA did not have authority pursuant to section 402 of the

CWA. What is more, OMB also violated the CWA by instructing EPA not to veto the permit and EPA violated the statute by acquiescing to OMB's directive. Both these actions are incompatible with the will of Congress and unsustainable as a valid exercise of the Presidents Article II powers. OMB's actions are not entitled to Chevron deference because OMB had no authority to interpret the CWA, and EPA's decision not veto COE's section 404 permit was ultimately arbitrary and capricious.

ARGUMENT

I. NEW UNION HAS STANDING UNDER BOTH ITS SOVEREIGN CAPACITY AND ITS *PARENS PATRIAE* CAPACITY TO CHALLENGE THE CWA § 404 PERMIT.

The State of New Union asserts two types of interests that are affected by the issuance a permit under the Clean Water Act Section 404. 33 U.S.C. § 1344 (2006). First, New Union contends that the Section 404 permit effectively preempts the states statutory permitting scheme for the use and apportionment of New Union's groundwater, affecting New Union's sovereign interest in the validity of its own laws. Second, New Union asserts as parens patriae its quasi-sovereign interest in protecting the health and welfare of New Union Citizens.

A. States are subject to a relaxed standing analysis under Article III.

The United States Army Corps of Engineers (COE) alleges that the majority view in *Massachusetts v. EPA* did not create a relaxed standing requirement for States and, even if it did, New Union would fall short of meeting this special test. R. at 5; 549 U.S. 497 (2007). This reasoning misstates both the essential holding of *Mass. v. EPA* and the obvious applicability of that holding to this case.

The Court in *Mass. v. EPA* characterized Massachusetts as a "sovereign state" and emphasized the State's "well-founded desire to preserve its sovereign territory" in bringing the action against the EPA. 549 U.S. at 516-21. After conceding that the state had surrendered

certain sovereign rights to the federal government as a condition of federalism, the Court nonetheless insisted that the State was asserting its own rights under federal law when it distinguished the suit from actions where a state litigates to "protect her citizens," as in traditional *parens patriae* lawsuits. *Id.* at 519-20, 520 n.17. Thus, the Court sought to identify a concrete harm to the State's unique interests—its ability to exercise its rights to regulate and protect its territory—and coupled this interest with the state's rights under the Clean Air Act to seek review of harmful agency action. *Id*. at 518-20. Additionally, the Court noted that another basis for special solicitude was the fact that the State's lawmaking powers to reduce greenhouse gas emissions "might well be preempted," and decisions involving preemption disputes have largely been categorized as sovereign interests cases. *Id.* at 519; *see Alaska v. U.S. Dept. of Transp*., 868 F.2d 441, 443-44 (D.C. Cir. 1989) (holding that states suffered injury to their sovereign power to enforce state law because administrative rules threatened to preempt state statutes); *Florida v. Weinberger*, 492 F.2d 488, 492-94 (5th Cir. 1974) (reasoning that a state had standing because a new federal law conflicted with state law and the state faced sanctions if forced to comply with federal standard). *Massachusetts* confirmed that a state is a litigant of an entirely different order than a private party and such status affects the standing analysis.

The U.S. Supreme Court, the Ninth Circuit Court of Appeals, and other courts have applied a relaxed standing test to actions brought by states in a variety of situations. In *Maine v. Taylor*, the Court held that "a state clearly has a legitimate interest in the continued enforceability of its own statutes." 477 U.S. 131, 137 (1986). In *Diamond v. Charles*, the Court held that a private party lacked standing to pursue an appeal of a lower court's ruling that portions of Illinois's abortion law are unconstitutional, but the Court indicated that the State of Illinois would satisfy the Article III requirements because "a state has standing to defend the

constitutionality of its statute." 476 U.S. 54, 62 (1986). In *Bowen v. Public Agencies Opp. to Soc. Sec. Entrap*., the Court affirmed a district court's conclusion that the State of California had standing to challenge the validity of a federal statute because California alleged "a judicially cognizable interest in the preservation of its own sovereignty." 476 U.S. 54, 62 (1986). In *South Carolina v. Katzenbach*, the Court held that South Carolina had standing to challenge the validity of the federal Voting Rights Act based on the state's interest in the continued operation of its own election laws. 383 U.S. 301, 324 (1962). Finally, in *New York v. United States*, the Court assumed without addressing the issue that New York had standing to bring a declaratory judgment action alleging that a federal statute violated New York's rights under the Tenth Amendment. 505 U.S. 144, 112 (1992).

In *Washington Utilities & Transp. Comm'n v. FCC*, the Ninth Circuit held that a Washington agency had standing to "seek judicial review of government action that affects the performance of its duties." 513 F.2d 1142, 1151 (9th Cir. 1975), cert. denied, 423 U.S. 838 (1975). The Ninth Circuit explained that the "impairment of an administrative agency's interest in the effective discharge of the obligations imposed upon the agency by law is the equivalent of the 'personal stake,' 'injury-in-fact,' or 'concrete injury' that would support standing of a private plaintiff." *Id*. at 1149. Also, in *Ohio ex rel. Celebrezze v. U.S. Dept. of Transp.*, the Sixth Circuit held that Ohio "has standing to challenge the Department's regulation and undertake to vindicate its own law." 766 F.2d 228, 233 (6th Cir. 1985). The Court explained, "Since Ohio is litigating the constitutionality of its own statute, [it] has a sufficient stake in the outcome of this litigation to give it standing to seek judicial review of the rulemaking action of the U.S. Department of Transportation." *Id*. at 232-33.

New Union's ability to protect and regulate its groundwater is effectively being preempted by the lower court's holding that New Union lacked standing under the relaxed standing test of *Massachusetts v. EPA*. The lower court's decision misapplied *Mass. v. EPA* and is erroneous because New Union is asserting its rights in its sovereign capacity to regulate, and in this capacity, the state's sovereign interest is sufficient to maintain standing.

B. New Union's sovereign interest in the continued enforcement of its state law is sufficient to support standing.

States have a sovereign interest in "the power to create and enforce a legal code, both civil and criminal" and the power to demand "recognition of other sovereigns." *Alfred L. Snapp & Son, Inc. v. Puerto Rico ex rel Barex*, 458 U.S. 592, 601 (1982). In *Snapp*, the Court noted that a sovereign interest suit might also involve "the exercise of power over individuals and entities within the relevant jurisdiction." *Id*. at 601. "The [U.S.] Supreme Court has explicitly stated that 'a State clearly has a legitimate interest in the continued enforceability of its own statutes' and has held that this interest is sufficient to 'satisfy the constitutional requirement of genuine adversity' even when the intervening state is the sole appellate party." *Matter of Dunn*, 988 F.2d 45, 47 (7th Cir. 1993). In *Oregon v. Mitchell*, the U.S. Supreme Court further noted that no question had been raised with respect to standing in cases brought by states against the federal government to determine the constitutionality of a statute that would displace state law. 400 U.S. 112, 117 n.1 (1970). In several post-*Lujan* cases, courts have noted that the existence of a sovereign interest but did not cite to *Lujan* or its three factors for prudential standing when deciding that the state could bring suit. For instance, in *Pacific Gas & Elec. Co. v. FERC*, the Fifth Circuit reasoned that the state has, among other things, "an interest…in avoiding the expense of imposing their own regulation of natural gas to compensate for FERC's decision to bow out of the regulation of gatherers affiliated with interstate pipelines." 106 F.3d 1190, 1193-

96 (5th Cir, 1997). These cases make clear that when a state brings an action on the basis of a sovereign interest, injury-in-fact, causation and redressability are easily satisfied.

New Union has standing based on its sovereign interest in ensuring the continued enforceability of its statutory permitting scheme for the use and apportionment of groundwater from the Imhoff Aquifer. Under the statute, no one has rights in groundwater unless and until New Union's Department of Natural Resources (DNR) issues a withdrawal permit. R. at 6-7. The discharge authorized by DOD's section 404 permit threatens to contaminate the groundwater in the portion of the aquifer underlying the territorial boundaries of New Union. The section 404 permit that COE issued to DOD will substantially alter New Union's ability to issue permits for the use of its groundwater. If water quality is not suitable for any beneficial use due to contamination, the intent and purpose of New Union's water rights statute and regulation are thoroughly undermined. A water right obtained under a state allocation system cannot serve its intended purpose if the quality of water is not suitable for beneficial use. Likewise, the important public role of the State in protecting the public health and the environment cannot be attained in the absence of controlling pollutants in groundwater at suitable levels.

C. New Union has a quasi-sovereign interest sufficient to support *parens patriae* standing.

The special status of States when proceeding as *parens patriae* is firmly rooted in federal court jurisprudence. *See, e.g., Georgia v. Pennsylvania R.R. Co.,* 324 U.S. 439, 447 (1945) ("Suits by a State, *parens patriae*, have long been recognized."). Many of the earliest *parens patriae* decisions of the U.S. Supreme Court resulted from cross-border pollution disputes and similar controversies over natural resource preservation, in these cases, the Court never seriously, if at all, questioned any State's Article III standing to bring the claim.

In the seminal interstate air pollution case of *Georgia v. Tennessee Copper, Co.*, the Court announced that "[t]he States by entering the Union did not sink to the position of private owners subject to one system of private law." 206 U.S. 230, 237-38 (1907). The Court focused its attention not on the State's proprietary interest—which it termed merely a "makeweight"—but instead on its "interest independent of and behind the titles of its citizens, in all the earth and air within its domain," that is, its "quasi-sovereign" interest. *Tennessee Copper*, 206 U.S. at 237. It is such a "quasi-sovereign" interest that the State may vindicate in a suit as *parens patriae. Hawaii v. Standard Oil Co.,* 405 U.S. 251, 258 (1972) (A State may "sue as *parens patriae* to prevent or repair harm to its 'quasi-sovereign' interests."). That a state may bring a *parens patriae* suit to protect quasi-sovereign interests was first recognized in *Louisiana v. Texas*, 176 U.S. 1 (1900). Louisiana sought to enjoin the governor and health officer of Texas from continuing to prohibit commerce between New Orleans and Texas; although it dismissed the case as not within its original jurisdiction, the Court sustained Louisiana's standing as *parens patriae*:

> [The complaint's] gravamen is not a special and peculiar injury such as would sustain an action by a private person, but the State of Louisiana presents herself in the attitude of *parens patriae*, trustee, guardian, or representative of all her citizens....[T]he cause of action must be regarded not as involving any infringement of the powers of the State of Louisiana, or any special injury to her property, but as asserting that the State is entitled to seek relief in this way because the matters complained of affect her citizens at large.

Louisiana v. Texas, 176 U.S. at 19.

More recently, in *Alfred L. Snapp & Son, Inc. v. Puerto Rico ex rel Barez*, the Court defined two categories of quasi-sovereign interests where a state qualifies for *parens patriae* standing: (1) the interest in the health and well-being of its residents in general; and (2) the interest in not being discriminatorily denied its rightful status within the federal system. 458 U.S.

at 607. Under the first category, there is no definitive proportion of citizens whose health or well-being must be adversely impacted, but it must be more than an identifiable subgroup of the citizens, and indirect injuries must be considered. *Id*. An indicator of when a state should have standing under the first category of interests is "whether the injury is one that the State, if it could, would likely attempt to address through its sovereign lawmaking powers." *Id*. Under the second category, a state has *parens patriae* standing when it is seeking to ensure that "its residents are not excluded from the benefits that are to flow from participation in the federal system." *Id*. at 607-08. Federal statutes creating benefits and preventing hardships in turn create legitimate state interests in assuring that the benefits of the federal system are not denied to its residents. *Id*.

The quasi-sovereign interest test under *Snapp* ensures that the interest asserted by the state meets the requirements of a "case or controversy" under the Constitution. The fact that a State has a quasi-sovereign interest does not mean that it has *parens patriae* standing under Article III in all such cases. But historically the U.S. Supreme Court has not questioned the existence of a jurisdictional controversy once the complaining State has established its *parens patriae* interest. *E.g., Missouri v. Illinois*, 180 U.S. 208, 240-41 (1901) (finding a controversy to exist in a public nuisance action after concluding that the State had alleged a *parens patriae* interest). That is, standing in such cases appears to be self-evident.

1. New Union has a quasi-sovereign interest in the health and welfare of its citizens.

If DOD discharges its "slurry" of spent munitions into Lake Temp, the health and welfare of the citizens of New Union will be threatened through the groundwater contamination in Imhoff Aquifer and from diminished use of Lake Temp for recreational purposes. Economic harm is not required to confer standing in environmental pollution cases: "environmental

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) (quoting *Sierra Club v. Morton*, 405 U.S. at 735); *Friends of the Earth v. Consolidated Rail Corp.*, 768 F.2d 57, 60 (2d Cir. 1985). Because "[a]esthetic perceptions are necessarily personal and subjective, and different individuals who use the same area for recreational purposes may participate in widely varying activities, according to different schedules," standing is conferred upon many individuals. *Ecological Rights Found. v. Pacific Lumber Co.*, 230 F.3d 1141, 1150 (9th Cir. 2000). An organization could have standing if it can show that "'[it] or one or more of its members used the [waterway at issue] or would be affected by its pollution.'" *Consolidated Rail Corp.*, 768 F.2d at 61 (quoting *SCM*, 747 F.2d at 107). Where there is a direct nexus between the plaintiff and allegedly polluted area, no Circuit Court has required scientific proof of contamination at the summary judgment stage. *Friends of the Earth, Inc. v. Gaston Copper Recycling Corp.*, 204 F.3d 149, 159 (4th Cir. 2000).

Furthermore, every appellate court that has considered standing under the CWA has adopted a low threshold of entry. *See, e.g., Consolidated Rail Corp.*, 768 F.2d at 61 (Second Circuit found standing from one member's statement that he passes the Hudson River regularly and "find[s] the pollution in the river offensive to [his] aesthetic values" and another who stated that his family fishes, swims and picnics along the river); *United States v. Metropolitan St. Louis Sewer Dist.*, 883 F.2d 54, 56 (8th Cir. 1989) (Eighth Circuit has upheld standing for a group of members who "visit, cross, and frequently observe" the polluted area and occasionally use the water for recreational purposes); *Sierra Club v. Simkins Indus., Inc.*, 847 F.2d 1109, 1112 n. 3 (4th Cir. 1988) (Fourth Circuit has even upheld standing to an organization's member who hiked

along a polluted river). Therefore, contrary to the lower court's opinion, "specific allegations or evidence of the actual level of the pollution in the waterway" is not necessary. *Gaston Copper Recycling Corp.*, 204 F.3d at 159.

It is of no moment that New Union has not proved the extent of injury to its citizens with scientific certainty. New Union's citizens have and are likely to use Lake Temp in the future for recreational purposes. It is uncontroversial that New Union citizens, ranging from duck hunters, bird watchers, and boaters using Lake Temp to the boundaries of landowners living directly above the Imhoff Aquifer, allege an injury sufficient for Article III standing.

D. New Union has standing as *parens patriae* to bring this suit against the Federal Government.

In his dissenting opinion in *Massachusetts v. EPA*, Chief Justice Roberts argued that a state may not assert a quasi-sovereign interest against the federal government. *Massachusetts v. EPA*, 549 U.S. 497, 535 (2007) (Roberts, C.J., dissenting) (citing *Massachusetts v. Mellon*, 262 U.S. 447, 485-86). The *Mellon* decision held that states may not sue the federal government in *parens patriae* capacity because the federal government is in the position of *parens patriae*, for those same citizens are both federal and state citizens. *Mellon*, 262 U.S. at 485-86. A footnote in the *Alfred L. Snapp* decision expressed agreement with the *Mellon* decision that states cannot file *parens patriae* suits against the federal government. *Alfred L. Snapp & Son, Inc. v. Puerto Rico ex rel. Barez*, 458 U.S. 592, 610 n.16 (1982) ("A State does not have standing as parens patriae to bring an action against the Federal Government.") (citing *Mellon*, 262 U.S. at 485-86 (1923)).

The *Massachusetts* majority opinion distinguished *Mellon* by limiting it to its facts involving a suit to prevent the application of federal tax laws in Massachusetts. Justice Stevens stated "there is a critical difference between allowing a State 'to protect her citizens from the operation of federal statutes' (which is what *Mellon* prohibits) and allowing a State to assert its

rights under federal law (which it has standing to do)." *Massachusetts*, 549 U.S. at 520 n.17 (majority opinion). Accordingly, the Court concluded that Massachusetts properly asserted its quasi-sovereign interest to require the federal government to enforce the Clean Air Act. *Id*. The majority opinion cited *Nebraska v. Wyoming* as evidence that it did not prohibit parens patriae suits by states against the federal government in all circumstances. *See id*. (citing *Nebraska v. Wyoming*, 515 U.S. 1, 20 (1995) (holding that Wyoming had standing to bring a cross-claim against the United States "to vindicate its 'quasi-sovereign' interests which are 'independent of and behind the titles of its citizens, in all the earth and air within its domain"').

New Union has standing to bring suit against the COE to vindicate its quasi-sovereign interests that are independent of and behind the titles of its citizens. New Union brings suit against the COE in its *parens patriae* capacity to enforce its rights under the Clean Water Act, not to protect its citizens from the operation of federal statutes. For these reasons, New Union may bring suit against the COE in its capacity as *parens patriae*.

II. THE COE HAS AUTHORITY TO ISSUE A PERMIT FOR LAKE TEMP UNDER CWA § 404 BECAUSE IT IS WATER OF THE UNITED STATES SUBJECT TO CWA JURISDICTION.

Navigable waters under the Clean Water Act (CWA) are "the waters of the United States, including the territorial seas." 33 U.S.C. § 1362(7). EPA and COE regulations further define navigable waters to include:

> (a) All waters that are currently used, were used in the past, or may be susceptible to use in interstate or foreign commerce, including all waters that are subject to the ebb and flow of the tide;
> (b) Interstate waters, including interstate wetlands;
> (c) All other waters such as intrastate lakes, rivers, streams (including intermittent streams), mudflats, sandflats, and wetlands, the use, degradation, or destruction of which would affect or could affect interstate or foreign commerce…

40 C.F.R. §§ 110.1, 122.2, 230.3 (2010); 33 C.F.R. § 328.3 (2010). Historically, federal courts, the EPA and COE all support the broadest possible interpretation of the act within the bounds of the authority permitted by Congress consistent with the Commerce Clause. U.S. CONST. art. I, § 8, cl. 3; *see e.g. Leslie Salt Co. v. Froehlke*, 578 F.2d 742, 755 (9th Cir. 1978) (citing *EPA v. State Water Res. Control Bd.*, 426 U.S. 200 (1976)); *U.S. v. Byrd*, 609 F.2d 1024, 1029 (1st Cir. 1979) (quoting S. Conf. Rep. No. 236, 92d Cong., 2d. Sess. 144 (1972)); *U.S. v. Texas Pipe Line Co.*, 611 F.2d 345, 347 (10th Cir. 1979).

However, the U.S. Supreme Court has limited the scope of CWA jurisdiction to: traditional navigable waters; interstate waters; wetlands adjacent to either traditional navigable waters or interstate waters; non-navigable tributaries to traditional navigable waters that are relatively permanent; and wetlands that directly abut relatively permanent waters. *U.S. v. Riverside Bayview Homes*, 474 U.S. 121 (1985); *Solid Waste Agency of Northern Cook County v. U.S. Army Corps. of Engineers*, 531 U.S. 159 (2001) (hereinafter *SWANCC*); *Rapanos v. United States*, 547 U.S. 715 (2006). EPA and COE plan to issue new guidance regarding how they will identify waters protected under CWA jurisdiction pursuant to those opinions. 76 Fed. Reg. 24479 (2011).

A. Lake Temp is navigable water of the United States subject to CWA jurisdiction.

Traditional navigable waters are "[a]ll waters which are currently used, or were used in the past, or may be susceptible to use in interstate or foreign commerce, including all waters which are subject to the ebb and flow of the tide." 33 C.F.R. § 328.3(a)(1); 40 C.F.R. §§ 110.1(a); 122.2(a); 230.3(s)(1); *see U.S. v. Appalachian Elec. Power Co.*, 311 U.S. 377 (1940). It also includes waters that are navigable-in-fact, "water is navigable-in-fact when it is used, or is susceptible of being used as a highway for commerce." *The Daniel Ball*, 77 U.S. (10 Wall.) 557,

563 (1871). Navigability may be shown by physical characteristics and experimentation as well as by the uses to which it has been put. *FPL Energy Maine Hydro, LLC v. FERC*, 287 F.3d 1151, 1157-58 (D.C. Cir. 2002) (finding navigability based upon the agency's three test canoe trips). DOD has knowledge that people have used and continue to use Lake Temp for hunting and bird watching and there are clearly visible trails showing signs of rowboats and canoes being dragged from the state highway to the lake. R. at 4.

Relying on *Rapanos*, Progress claims that Lake Temp is not navigable because it is an intermittent body of water that regularly disappears entirely. 547 U.S. 715; R. at 7. In *Rapanos*, COE claimed jurisdiction over a fifty-four acre parcel of land with "sometimes-saturated soil conditions" eleven to twenty miles away from "the nearest body of navigable water." 547 U.S. at 719. The Court found that the only plausible interpretation of "waters of the United States" includes "only those relatively permanent, standing or continuously flowing bodies of water forming geographic features that are described in ordinary parlance as streams, oceans, rivers and lakes." 547 U.S. at 739 (citing Webster's New International Dictionary 2882 (2d ed. 1954) (internal marks and quotations omitted). This definition does not "necessarily exclude streams, rivers, or lakes that might dry up in extraordinary circumstances, such as drought…[or] exclude *seasonal* rivers, which contain continuous flow during some months of the year but no flow during dry months." *Rapanos*, 547 U.S. at 732-33 n.5. However, "[n]one of these terms encompasses transitory puddles or ephemeral flows of water." *Id*.

Lake Temp is not a transitory puddle or ephemeral flow of water, it is a relatively permanent, standing body of water nine miles long and three miles wide during the wet season, smaller during the dry season and dries up every one in five years. R. at 4. This fits COE's definition of a lake because it is "a standing body of open water that occurs…in an isolated

natural depression that is not a part of a surface river or stream." 33 C.F.R. § 323.2(b). CWA jurisdiction covers lakes. *See Utah v. Marsh*, 740 F.2d 799, 803-804 (10th Cir. 1984); *Minnehaha Creek Watershed Dist. v. Hoffman*, 597 F.2d 617, 624 (8th Cir. 1979); *Colvin v. U.S.*, 181 F. Supp. 2d 1050 (C.D. Cal. 2001). Even if this Court found Lake Temp intermittent or seasonal, it still falls under the *Rapanos* definition of navigable waters. 547 U.S. at 732-33. Accordingly, the lower court correctly found that the size and nature of use of Lake Temp puts it within the ambit of COE jurisdiction. R. at 7.

B. Lake Temp's use in interstate commerce also subjects it to CWA jurisdiction.

The Constitution of the United States gives Congress plenary authority to regulate commerce "among the several states." U.S. CONST. art. I, § 8; *see Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 196 (1824). Pursuant to that grant, Congress designed the CWA to "regulate to the fullest extent possible, sources emitting pollution into rivers, streams and lakes." *Quivira Mining Co. v. EPA*, 765 F.2d 126, 129 (10th Cir. 1985) (citing *U.S. v. Earth Sciences, Inc.*, 599 F.2d 368, 373 (10th Cir. 1979)).

Relying on *SWANCC,* Progress argues that Lake Temp's previous recreational use is not within the Court's definition of interstate commerce. R. at 7. In *SWANCC*, COE claimed jurisdiction over manmade sand and gravel excavation trenches that became "seasonal ponds of varying size (from under one-tenth of an acre to several acres) and depth (from several inches to several feet)" after thirty years of nonuse. 531 U.S. at 163. COE was not sure of its jurisdiction at first—initially COE determined that it did not have jurisdiction over the ponds, and then decided it did, based on its "Migratory Bird Rule." *Id*. at 164-65; 51 Fed. Reg. 41217 (1986) (codified in part as 33 C.F.R. 328.3(a)(3)). The Court held that COE did not have jurisdiction over the excavation trenches because Congress did not contemplate the expansive definition of

navigability promulgated under COE regulations, thereby invalidating the "Migratory Bird Rule." *Id*. at 174 (invalidating 51 Fed. Reg. 41217). In *Rapanos*, the Court stated that *SWANCC* held "nonnavigable, isolated, intrastate waters which do not actually abut on a navigable waterway were not included as waters of the United States." *Rapanos*, 547 U.S. at 726 (citing *SWANCC*, 531 U.S. at 167, 171)) (internal quotations omitted).

Lake Temp is dissimilar from the excavation trenches in *SWANCC* because it is a three by nine mile natural body of water that is navigable-in-fact (by canoes and rowboats) and is part of interstate commerce (used by interstate hunters and birdwatchers over the past hundred years and is accessible by interstate highway). R. at 4, 7. COE did not rely on the "Migratory Bird Rule" to find CWA jurisdiction in this case—it found that the size of Lake Temp and its past use in interstate commerce justified it being subject to COE jurisdiction. R. at 7. COE's determination that Lake Temp is protected water under the CWA is entitled to deference if it is reasonable and not in conflict with the expressed intent of Congress. *Chevron, Inc. v. NRDC*, 467 U.S. 837, 842-45 (1984). Furthermore, "inquiry into the mental processes of administrative decision-makers is to be avoided" and a court cannot challenge those findings unless there is a "strong showing of bad faith or improper behavior." *Avoyelles Sportsmen's League v. Marsh*, 715 F.2d 897, 911 (5th Cir. 1983). Accordingly, the lower court correctly found that COE's determination of navigability is both factually and legally sound. R. at 7.

III. THE EPA HAS SOLE JURISDICTION TO ISSUE A PERMIT UNDER CWA § 402 FOR THE DISCHARGE OF SLURRY INTO LAKE TEMP BY THE DEPARTMENT OF DEFENSE.

Congress passed the Clean Water Act (CWA) in 1977 so that there was a statutory scheme set up to "restore and maintain the chemical, physical, and biological integrity of the nation's waters." 33 U.S.C. § 1251(a). Pursuant to this objective, the national goal is to eliminate

the discharge of pollutants into the navigable waters of the United States. *Id*. The CWA contains two permitting mechanisms to enforce these goals: one for the authorization and regulation of pollutant discharges into navigable waters, CWA section 402 permits managed by EPA; and another governing the discharge or placement of dredged or fill material in the nation's waters, CWA section 404 permits managed by COE. *Id.* at §§ 1342(a), 1344(a). If there is a discharge of a pollutant from a point source into the nation's navigable waters without a permit, it is unlawful and potentially carries administrative, civil and/or criminal penalties. *See id*. §§ 1311(a), 1319, 1342(k), 1344(p), 1365, 1369.

A. DOD's proposed discharge into Lake Temp requires a CWA § 402 permit.

EPA's jurisdiction covers discharges of pollutants from any point source into navigable water. *Id*. § 1342(a). "Any addition of any pollutant or combination of pollutants to waters of the United States from any point source" without a permit is an unlawful discharge. 33 U.S.C. § 1362(12); 40 C.F.R. § 122.2 (2007). Pollution is any "man-made or man-induced alteration of the chemical, physical, biological, and radiological integrity of the water," and the Act's definition of pollutant includes "munitions…discharged into water." 33 U.S.C. § 1362(19), (6). The authority EPA has over pollutant discharges does have an exception: "[t]he EPA may not issue permits for fill material that fall under the Corps' section 404 permitting authority," which only applies to the discharge of dredged or fill material. *Coeur Alaska, Inc. v. Southeast Alaska Conservation Council*, 129 S. Ct. 2458, 2467 (2009).

In *Coeur*, the Court found that because COE has authority to permit discharges under section 404, then EPA lacks authority to do so under section 402, but EPA: (1) writes "guidelines for [COE] to follow in determining whether to permit a discharge of fill material; and (2) has the "authority to 'prohibit' any decision by [COE] to issue a permit for a particular disposal site." *Id*.

(citing 33 U.S.C. §§ 1344(b), (c)). This determination is confirmed by agency regulations. 40 C.F.R. § 122.3(b). EPA's section 404(b)(1) regulations require

1. DOD's proposed discharge is not slurry, nor is fill material.

New Union does not contest that DOD's proposed discharge will have "the effect of changing the bottom elevation" of Lake Temp, thereby satisfying the *effect* of fill material, but first the *substance* of DOD's discharge must qualify as fill material *before* it gets discharged and has that effect. R. at 7-9; 40 C.F.R. § 232.2; 33 C.F.R. § 323.2(f). Fill material includes, but is not limited to "rock, sand, soil, clay, etc." but specifically excludes "trash or garbage." 40 C.F.R. § 232.2; 33 C.F.R. § 323.2(f). As the lower court correctly notes in *Coeur*, the fill material that Coeur Alaska discharged was slurry (a liquefied mixture of crushed rock), and although it classified as a pollutant under the CWA, was exempt because slurry qualifies as fill material. R. at 7; 129. S. Ct. at 2464 (citing 40 C.F.R. § 232.2). The lower court's characterization of DOD's discharge as slurry misconstrues *Coeur* and the definition of slurry as fill material under the EPA and COE's Federal Regulations. R. at 7-8; 40 C.F.R. § 232.2; 33 C.F.R. § 323.2(f).

The dispositive question is "whether the solid at issue [comes] within the regulation's definition of fill." *Coeur*, 129 S. Ct. at 2468. Accordingly, it is appropriate to use the traditional canon of construction, *noscitur a sociis* that dictates, "words grouped in a list should be given related meaning." *Dole v. United Steelworkers of Am.*, 494 U.S. 26, 36 (1990). Under COE regulations, slurry specifically applies to mining activities—the term fill material generally includes the following activities: "placement of overburden, slurry, or tailings or similar *mining-related materials*." 40 C.F.R. § 232.2; 33 C.F.R. § 323.2(f). DOD's discharge does not come remotely close to the regulation's definition of fill, it contains: munitions of liquid, semi-solid and granular contents mixed with chemicals, and ground and pulverized solids that will all

eventually be mixed with water before it is sprayed into Lake Temp. R. at 4; *see* 40 C.F.R. § 232.2; 33 C.F.R. § 323.2(f). Nor does it qualify as mining or any other applicable activity defined in COE regulations. 40 C.F.R. § 232.2; 33 C.F.R. § 323.2(f). The DOD's discharge does qualify as a hazardous substance, and therefore requires a section 402 permit. R. at 4; 33 U.S.C. § 1321. Accordingly, because the agencies misinterpreted the fill regulation, New Union can "challenge that decision as an unlawful interpretation of the fill regulation." *Coeur*, 129 S. Ct. at 2468.

2. DOD's proposed discharge of treated and pulverized spent munitions contains hazardous substances requiring a CWA § 402 permit.

Congress specifically addressed discharges of hazardous substances by declaring, "there should be no discharges of oil or hazardous substances into or upon the navigable waters of the United States." 33 U.S.C. § 1321(b)(1). In creating this provision, Congress ordered the EPA to promulgate regulations designating hazardous substances "when discharges in any quantity into or upon the navigable waters of the U.S….present an imminent and substantial danger to the public health or welfare." *Id*. §1321(b)(2)(A). Pursuant to that mandate, the EPA has promulgated regulations listing hazardous substances and published guidance that explains which chemicals and metals are commonly contained in spent ammunition and lists some of their potential toxic effects on human and ecological receptors. 40 C.F.R. § 116.4; EPA, *Handbook on the Management of Munitions Response Actions: Toxicity and Human Health and Ecological Impacts of Explosives and Other Munitions Constituents*, 3-4 (Interim Final Guidance May 2005).

The potential human health and ecological effects of DOD's discharge present an imminent and substantial danger to the public health and welfare and is unlawful unless permitted under section 402. 33 U.S.C. § 1321(a)(2). It is no secret that "the military bases in this

nation are some of the most skunked up, defiled and dirty places, contaminated with hazardous waste, radioactivity and other things" or that the "military constantly seeks to get out from under environmental laws." Hope Babcock, *National Security and Environmental Laws: A Clear and Present Danger?*, 25 Va. Envtl. L.J. 105, 156 (2007) (quoting Rep. Dingell (D. Mich) during debates on the Stump Act). In March 2007 DOD gave its annual report to Congress with the following information:

> DOD listed 8,278 individual sites that require environmental cleanup at 4,618 active and closing military installations and formerly used defense sites throughout the United States and its territories. These sites include contaminated buildings, aboveground and underground storage tanks, industrial facilities, open burn areas, firing ranges, mixed waste disposal areas, surface impoundments, landfills, and areas of contaminated soil or groundwater. DOD estimated that investigation and cleanup of these sites will cost more than $32 billion to complete.

Charles de Saillan, *The Use of Imminent Hazard Provisions of Environmental Laws to Compel Cleanup at Federal Facilities*, 27 Stan. Envtl. L.J. 43, 49 (2008) (citing DOD, *The Defense Environmental Programs Fiscal Year 2006 Annual Report to Congress*, 13, 14, figs. 15, 16, & 17 (Mar. 2007)). This report indicates that DOD does not take environmental concerns into account before it conducts its activities, and has a huge budget dedicated to cleaning up its contamination. The material DOD plans on discharging into Lake Temp is not slurry, this Court should find that the lower court erred in its determination that DOD's discharge is fill material pursuant to *Coeur* and should require DOD to obtain a section 402 permit for its discharge of hazardous substances into the navigable waters of the United States, or Lake Temp will become another individual site on DOD's list of sites requiring environmental cleanup.

B. <u>There are practicable non-water dependent alternatives to using Lake Temp as a treatment pond</u>.

Pursuant to the CWA's purpose to restore and maintain the chemical, physical, and biological integrity of the waters of the U.S., the CWA's drafters noted that "[t]he use of any river, lake, stream or ocean as a waste treatment system is unacceptable." S. Rep. No. 92-414, 7 (1971). The lower court supported its erroneous decision that a section 404 permit is valid for Lake Temp by relying on *Coeur's* considerations of the lake's purpose as a necessary treatment stage in meeting CWA effluent standards. R. at 8. In *Coeur*, the COE determined that discharging mine tailings into Lower Slate Lake was the "least environmentally damaging practicable way to dispose of the tailings." *Coeur*, 129 S. Ct. at 2465. COE made this determination pursuant to EPA section 404(b)(1) guidelines that require COE to consider "practicable alternatives" to the proposed discharge site. 40 C.F.R. § 230.10. The regulation provides that

> 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

40 C.F.R. § 230.10(a). An alternative is practicable if it is "available and capable of being done after taking into consideration cost, existing technology, and logistics in light of overall project purposes. *Id*. § 230.10(a)(2). If the proposed activity "is not water dependent, practicable alternatives that do not involve special aquatic sites are *presumed to be available*, unless clearly demonstrated otherwise." *Id*. § 230.10(a)(3). Accordingly, DOD has the burden to show that its discharge of hazardous substances will not negatively impact the physical, chemical and biological integrity of Lake Temp; otherwise DOD must clearly demonstrate that no practicable alternatives exist to discharging into Lake Temp. *Id*. § 230.10. DOD and COE have not met this burden pursuant to CWA mandated regulations; therefore, DOD's section 404 permit is invalid.

C. <u>COE is serving the interests of DOD and not of the public</u>.

The Secretary of the Army delegated the authority to issue or deny section 404 permits to the Chief of Engineers. 33 C.F.R. § 323.6. Pursuant to that authority, the COE district engineer reviews applications for section 404 permits in accordance with the guidelines promulgated by the EPA Administrator. 33 U.S.C. § 1344(b)(1) (EPA guidelines codified at 40 C.F.R. § 230.5). Before the COE considers EPA's section 404(b)(1) guidelines, COE is supposed to conduct a public interest review of the permit application. 33 C.F.R. § 320.4. These guidelines can be overcome only if the COE determines that the economic impact on anchorage and navigation demands ignoring them. 33 C.F.R. § 323.6.

1. COE did not weigh the DOD project's reasonably foreseeable detriments against the benefits of the DOD project.

Pursuant to the public interest review, COE is supposed to carefully weigh "the benefits which reasonably may be expected to accrue from the proposal" against "its reasonably foreseeable detriments," which include evaluating the cumulative effects of the discharge on the floodplain encompassing Lake Temp. *Id*. § 320.4(a)(1). According to COE regulations, "Floodplains possess significant natural values and carry out numerous functions important to the public interest," including water resource values such as the "natural moderation of floods, water quality maintenance, and groundwater recharge." *Id*. § 320.4(l)(1). COE weighed the DOD project's benefits but failed to weigh evidence regarding Lake Temp's hydrological connection to Imhoff Aquifer and the potential negative cumulative effects of DOD's discharge.

2. COE did not conduct an indepent review as required by NEPA.

When Congress enacted the National Environmental Policy Act of 1969 it noted, "an *independent* review of the interrelated problems of environmental quality is of critical importance if we are to reverse what seems to be a clear and intensifying trend toward environmental degradation." *Life of the Land v. Brinegar*, 414 U.S. 1052, 1057 (1973) (citing

H.R. Rep. No. 91-378, 91st Cong., 1st Sess., 3 (1969)). NEPA requires a federal agency to "prepare an environmental impact statement (EIS) as part of any 'proposals for legislation and other major Federal actions significantly affecting the quality of the human environment.'" 42 U.S.C. § 4321 *et seq; Norton v. Southern Utah Wilderness Alliance*, 542 U.S. 55, 72 (2004) (quoting 42 U.S.C. § 4332(2)(C)).

The EIS issued by COE for DOD is improper because COE has "an interest in seeing the project accepted and completed in a specific manner as proposed" and "authorship by such a biased party might prevent the fair and impartial evaluation of a project envisioned by NEPA." *NRDC v. Callaway*, 524 F.2d 79, 87 (2d Cir. 1975). This Court may be skeptical as to whether "an EIS's conclusions have a substantial basis in fact" if evidence presented to the COE "is ignored or otherwise inadequately dealt with." *Sierra Club v. U.S. Army Corps of Eng'rs.*, 701 F.2d 1011, 1030 (2d Cir. 1983). Before COE issued the section 404 permit, it knew EPA believed that the non-fill liquid and semi-solid portions of DOD's discharge material altered the nature of the discharge significantly enough to warrant a section 402 permit, but COE ignored that information because it is impartial to DOD's project as a subsidiary arm under DOD.

Additionally, DOD must issue a supplemental EIS (SEIS) because New Union presented circumstantial evidence to DOD that its discharge will percolate into Imhoff Aquifer, this is "new significant impact information, criteria or circumstances relevant to environmental considerations' impact on the recommended plan or proposed action," and provides a "seriously different picture of the environmental landscape." R. at 5-6; *Marsh v. Oregon Nat. Res. Council*, 490 U.S. 360, 372 (1989) (citing 40 C.F.R. § 1502.9(c)(1)); *Lemon v. McHugh*, 668 F. Supp. 2d 133, 138 (D.D.C. 2009).

IV. OMB had no Authority to Decide that COE had Jurisdiction under CWA 404, and that EPA did not have Jurisdiction under CWA 402.

Unless specifically exempted by the CWA, any and every discharge of a pollutant into waters of the United States must be permitted either by EPA under section 402 or by the COE under section 404. *See* 33 U.S.C. § 1311(a) ("the discharge of any pollutant into jurisdictional waters is prohibited under CWA § 301 except in accordance with a permit under §§ 404 or 402"). Congress conferred authority directly on the Administrator of the EPA to administer the CWA generally. 33 U.S.C.§ 1251(d). Congress conferred no authority directly or indirectly on OMB to issue permits under sections 402 or 404, or to decide jurisdictional issues under the CWA; therefore, OMB had no authority to resolve the jurisdictional dispute between EPA and COE and OMB's involvement in the permit issuance process was improper.

A. OMB violated the CWA by Instructing EPA not to Veto COE's § 404 Permit and EPA violated the CWA by Acquiescing to OMB's directive.

In CWA section 404(c) Congress granted the EPA Administrator veto power over a decision of the COE to issue a permit "whenever" the Agency determines that issuance of a permit will have adverse environmental effects. 33 U.S.C. § 1344(c); *National Wildlife Federation v. Hanson*, 859 F.2d 313, 316 (4th Cir. 1988). Under section 404(c), EPA retains the sole authority to decide whether to exercise its veto on a proposed Corps permit. *Bersani v. EPA*, 850 F.2d 36, 38 (2d Cir.1988), *cert. denied*, 489 U.S. 1089 (1989). OMB's political power to jawbone the EPA Administrator into a forced decision frustrated Congress's intent to bestow final decision-making authority on the EPA. *See Envtl. Def. Fund v. Thomas*, 627 F. Supp. 566, 570 (D.D.C. 1986); Stan Miller, *Federal Facilities and Environmental Compliance: Toward a Solution*, 36 Loy. L. Rev. 319, 377 (1990). The actions of OBM, and EPA's acquiescence thereto, are incompatible with the will of Congress and unsustainable as a valid exercise of presidential power. *See Envtl. Def. Fund*, 627 F. Supp. at 570.

OMB's intervention in directing EPA not to veto COE's section 404 permit unlawfully required EPA to act at variance with its statutory mandate thus violating the CWA. *Kendall v. U.S. ex rel Stokes*, 37 U.S. 524, 610 (1838). Contrary to COE's argument, the President's power under Article II to "take care that the laws be faithfully administered," does not limit Congress' ability empower an agency to independently enforce the law without presidential supervision. *Morison v. Olson*, 487 U.S. 654, 693 (1988). When Congress specifically commits duties to a particular officer, the President may not overrule or revise the officer's interpretation of a statutory duty. *See Myers v. U.S.,* 272 U.S. 52, 57 (1926). EPA's section 404(c) veto power is one such Congressional empowerment and as a consequence, the President lacked the Article II supervisory authority over the EPA of the type that OMB tried to impose. *See generally Morison*, 487 U.S. at 693. Elena Kagan, now a Justice on the U.S. Supreme Court, also supports this position, noting that: "Congress generally may grant discretion to agency official alone and when Congress has done so, the President must respect the limits of this delegation. Elena Kagan, *Presidential Administration*, 114 Harv. L. Rev. 2245, 2331 (2001).

The case before the Court is analogous to *Portland Audubon Soc'y v. Endangered Species Comm.*, in which President Bush had covertly told the members of an agency body how they should vote on a desired exemption from the Endangered Species Act. 984 F.2d 1534 (9th Cir. 1993). Though the court in *Audubon* rested its majority opinion on the fact that the decision was to be made "on the record," the on the record designation hardly seems limiting because those complaining of presidential intervention did not have personal claims of entitlement to on-the-record procedure. Peter Strauss, *Overseer or Decider, the President in Administrative Law*, 75 Geo. Wash. L. Rev. 696, 710 (2007). Like in *Audubon*, Congress has (validly) assigned a decision to EPA and specified that the Administrator, following directed procedures, should

make it. Therefore, like the President in *Audubon*, OMB was acting outside its authority by attempting to impose its will on a decision maker, and in so doing OMB violated the CWA. 984 F.2d at 1541.

Congress's designation of authority under the CWA explicitly designates who should exercise the power it created in section 404(c). 33 U.S.C. § 1344(c). Furthermore, Congress has not explicitly authorized review by OMB of EPA's section 404(c) veto power. 33 U.S.C. § 1344. The dispute over EPA's exercise of its section 404(c) veto ultimately amounts to a dispute between the White House and EPA; where OMB is unlawfully substituting its judgment for EPA's in a matter reserved to the discretion of the Congress's delegated agency. Such actions implicate Justice Jackson third tier analysis in *Youngstown*:

> When the President takes measures incompatible with the expressed or implied will of Congress, his power is at its lowest ebb, for then he can rely only upon his own constitutional powers minus any constitutional powers of Congress over the matter. Courts can sustain exclusive presidential control in such a case only by disabling the Congress from acting upon the subject. Presidential claim to a power at once so conclusive and preclusive must be scrutinized with caution, for what is at stake is the equilibrium established by our constitutional system.

Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 637 (1952).

The President's power to see that the laws are faithfully executed refutes the idea that he is to be a lawmaker. *Id*. at 635. By circumscribing EPA's ability to regulate under section 404(c), OMB was acting contrary to Congressional intent and exercising Executive power in its "lowest ebb." *Id. at* 637. When the President is acting in the third element of Justice Jackson's triad, Courts can only sustain exclusive presidential control in such a case by disabling Congress from acting on the subject. *Id.* This Court cannot sustain OMB's exercise of Executive power because OMB was acting improperly when it used its powers to encroaching upon the independence and expertise of the EPA in violation of the CWA. Therefore, New Union this Court should hold that

such actions are unsustainable as a valid exercise of Executive power. *See generally Envtl. Def. Fund*, 627 F. Supp. at 570.

1. OMB's Direction to EPA not to issue a CWA § 404(c) Veto is not Subject to Chevron Deference.

Chevron deference is warranted only when Congress delegates authority to an 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; otherwise, the interpretation is entitled to respect only to the extent it has the power to persuade. *Gonzales v. Oregon*, 546 U.S. 243, 258 (2006). OMB was not interpreting its own statute, or interpreting a statute it was entitled to administer in a rulemaking or formal adjudicatory procedure, therefore, OMB's decision to encumber EPA's section 404(c) veto is not subject to *Chevron* deference. *Christensen v. Harris County*, 529 U.S. 576, 587 (2000); *see generally*, *Chevron v. NRDC*, 467 U.S. 837 (1984).

2. EPA's Acquiescence to OMB'S Decision Not to Veto a COE's § 404 Permit is Subject to Judicial Review under the APA**.**

EPA's decision not to veto the section 404 permit is not an unreviewable discretionary decision "committed to agency discretion by law." 5 U.S.C. § 701(a)(2). The rare exception in which section 701(a)(2) of the APA bars suit only occurs when the statute is "drawn in such broad terms that in a given case there is no law to apply and the court would have no meaningful standard against which to judge the agency's exercise of discretion." *Alliance to Save the Mattaponi v. Army Corps of Eng'rs,* 515 F. Supp. 2d 1, 8 (D. D.C. 2007) (*Alliance I)* (citing *Citizens to Preserve Overton Park, Inc. v. Volpe,* 401 U.S. 402, 410 (1971). The CWA provides that EPA may, pursuant to its discretion, veto a section 404 permit whenever "[it] determines...that the discharge...will have an unacceptable adverse effect." 33 U.S.C. § 1344(c);

Alliance I, 515 F. Supp. 2d at 8. Thus, the statute itself provides adequate guidance to assist the court in determining whether the agency abused its discretion. *Id.* at 8.

In analyzing EPA's inaction, the court in *Alliance I* held that: EPA's inaction was final action having the same impact as an affirmative agency action. *Id.* at 9 (citing *Right of Ontario v. EPA,* 912 F.2d 1525, 1531 (D.C. Cir. 1990) ("When administrative inaction has the same impact on the rights of the parties as an express denial of relief, judicial review is not precluded."). The Court concluded that the standard against which to judge the EPA's exercise of discretion, in failing to veto the section 404 permit, is whether the discharge would have an unacceptable adverse effect. *Id*. (*reaff'd, Alliance to Save the Mattaponi v. Army Corps of Eng'rs*, 606 F. Supp. 2d 121 (D. D.C. 2009) (*Alliance II*)).

3. EPA's Acquiescence to OMB's Decision Not to Veto a COE'S § 404 Permit is Subject to Judicial Review under the CWA.

In the alternative if this court finds that EPA's decision is not subject to judicial review under the APA, EPA's decision not to veto the section 404 permit is still subject to judicial review under the CWA. Concerning review under the CWA, section 505(a)(2) should be interpreted in in conjunction with Civil Procedure Rule 20 (joinder) to allow citizens to sue the Administrator when the Administrator fails to exercise the duty of oversight imposed by section 404(c). *Nat'l Wildlife Fed'n v. Hanson*, 859 F.2d 313, 316 (4th Cir. 1988).

B. Executive Order 12,088 is Inapplicable to the Dispute between EPA, COE, and DOD.

New Union acknowledges that Executive Order 12,088 section 1-701 permits the President to exempt federal facilities from applicable pollution control standards; however, DOD did not seek such an exemption. Exec. Order No. 12,088 § 1-701, 43 Fed. Reg. 4707 (Oct. 13, 1978). DOD likely did not apply for a President for an exemption because it could not satisfy the standards outlined in *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 318 (1991) (the court held

that the Navy should receive a permit… there was no need to invoke the Presidential exemption). Since it could not get an exemption for the military reservation, COE filed papers with OMB who acted outside its mandate and erroneously determined that section 402 of the CWA did not apply. R. at 9.

COE admits that OMB resolved a dispute between EPA and COE pursuant to the procedures for reconciling disputes within the Executive Branch first established by Executive Order 12,088. R. at 10. Executive Order 12,088 section 1-602 reads, in part: "[t]he Administrator shall make every effort to resolve conflicts regarding such violations 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." Exec. Order No. 12,088 § 1-602. Thus the dispute resolution clause of E.O. 12088 section 1-602 applies specifically to conflicts between Executive agencies over violations of the CWA, not to legal disputes or questions of jurisdiction which arise among the Executive agencies. *See generally Tennessee Valley Authority v. EPA*, 278 F.3d 1184, 1199-1201 (11th Cir. 2002), *opinion withdrawn in part by*, 336 F.3d 1236 (11th Cir. 2003). Therefore, Executive Order 12,088 section 1-602 is procedurally inapplicable to resolving a jurisdictional dispute between EPA and COE.

When interagency disputes arise between Executive agencies the EPA Administrator may refer the case to either OMB for funding and scheduling problems under Executive Order 12,088 section 1-602, or to Department of Justice (DOJ) for the resolution of legal and jurisdictional disputes under Executive Order No. 12,146, 42 Fed. Reg. 42657 (July 18, 1979). EPA, *Federal Facilities Compliance Program*, 7 (Jan. 4, 1984). Thus, the Attorney General, not OMB, is the ultimate arbiter of legal disputes within the executive branch. Exec. Order No. 12,146 § 1-401.

OMB is not charged with the resolution of legal issues; there is nothing in OMB's mandate, self-description, or expertise to put them in the position of dictating binding jurisdiction legal interpretations under the CWA. Michael Herz, *Imposing Unified Executive Branch Statutory Interpretation*, 15 Cardozo L. Rev. 219, 226 (1993).

1. The Participation by OMB Directing EPA Not to Veto COE Permit was Arbitrary and Capricious.

CWA section 404(c) imposes an affirmative duty of oversight on the EPA Administrator to veto permits that will have an unacceptable adverse impact on the environment. *See Nat'l Wildlife Fed'n v. Hanson*, 859 F.2d 313, 316 (4th Cir. 1988). "Unacceptable adverse effect means impact on an aquatic or wetland ecosystem which is likely to result in significant degradation of municipal water supplies (including surface or ground water)" 40 C.F.R. § 231.2 (e); *see Alliance I*, 606 F. Supp. 2d at 140 (EPA does not need to go through notice and comment rulemaking notice and comment to make a determination that issuance of a permit will or will not have an unacceptable adverse effect).

New Union acknowledges that the EPA Administrator has some degree of discretion in his determination that a section 404 permit will have an unacceptable adverse impact; however, this discretion is not a roving license to ignore the statutory text. *See Mass. v. EPA,* 549 U.S. at 533. The CWA only provides the Administrator the authority to exercise discretion within defined statutory limits. *Id.* Thus the Administrator's exercise of discretion must relate to whether the permit will have an unacceptable adverse effect as defined in the federal regulations. 40 C.F.R. § 231.2; *Alliance I*, 606 F. Supp. 2d at 140.

EPA argued that the nature of the discharge here was significantly different than the discharge in *Coeur*, so as to warrant requiring a section 402 permit, at least for treatment of the non-fill liquid and semi-solid portion of the material before discharge to navigable waters. R. at 9.

OMB rejected that argument and found that COE had jurisdiction under CWA section 404. Congress conferred no authority directly or indirectly on OMB to issue permits under sections 402 or 404 or to decide jurisdictional issues under the CWA. Even under OMB's broadest grant of executive oversight under Executive Order 12,886, OMB did not have the authority to resolve the issue between EPA and COE. Exec. Order No. 12,866, 57 Fed. Reg. 51735 (Sept. 30, 2010).

In *Train v. Colorado Public Interest Research Group, Inc.*, the Supreme Court resolved a dispute similar between EPA and the Atomic Energy Commission over who had jurisdiction. 426 U.S. 1 (1976). More recently in *Coeur*, the Court also resolved a dispute between EPA and COE over who jurisdiction to issue the necessary permits. 557 U.S. 261. Both *Train* and *Coeur* involved matters of statutory interpretation, which the court resolved by looking to the statute, the founding purpose of the act in dispute, and a memorandum between the agencies. *Train,* 426 U.S. at 24. Not only does OMB lack a court's ability to properly review the CWA, but also it was so adamant that the project go forward it curbed both EPA's jurisdiction and EPA's ability to veto.

EPA wanted jurisdiction over the military reservation operation under section 402 of the CWA so that the munitions project would not create adverse environmental impacts. EPA was preparing to veto COE's section 404 permit prior the meeting with OMB. R. at 9. It is therefore clear that the Administrator's decision not to veto the permit was not based on his determination that the permit would likely not have unacceptable adverse impacts, but on the decisions of OMB—reasons completely divorced from the CWA's text. *Alliance I*, 606 F. Supp. 2d at 140. The Administrator did not base his determination not to veto on an analysis of whether the COE permit would have complied with its guidelines under section 404(b)(1) of the CWA, as required in determining whether the issuance of a permit would result in unacceptable adverse effects. 40

C.F.R. § 231.2(e). The Administrator failed to exercise the duty of oversight imposed by section 404(c) by acquiescing to OMB's decision; therefore in relying on factors that Congress has not intended, the Administrator's decision was arbitrary and capricious. *Motor Vehicle Mfrs. Ass'n v. State Farm*, 463 U.S. 29, 43 (1983).

2. COE's Argument that the AG would have resolved the Dispute between COE and EPA is Irrelevant.

COE argues that even if OMB could not have resolved the dispute the Attorney General would have to have decided these matters prior to filing suit; however, opinions from the Attorney General's Office on issues of agency jurisdiction "technically have no binding effect." 9 Op. Att'y Gen. 32, 36 (1857); 7 Op. Att'y Gen. 691, 699-700 (1856) (opinions of the Attorney General are "quasi judicial" in character, and "not compulsory on the President, or even on a Head of Department).

> [W]hile it is the duty of the Attorney-General to give his opinion upon questions of law arising in the administration of any Executive Department at the request of the head thereof, such duty ends with the rendition of the opinion, which is advisory only. The Attorney-General has no control over the action of the head of Department to whom the opinion is addressed, nor could he with propriety express any judgment concerning the disposition of the matter to which the opinion relates, that being something wholly within the administrative sphere and direction of such head of Department.

17 Op. Att'y Gen. 332, 333 (1882).

Pursuant to Executive Order 12146 section 1-401: "Whenever two or more Executive agencies are unable to resolve a legal dispute between them, including the question of which has *jurisdiction to administer a particular program or to regulate a particular activity,* each agency is *encouraged* to submit the dispute to the Attorney General." Exec. Order No. 12,146 § 1-401 (*emphasis added*). The word encouraged designates that the process is not mandatory. *See generally* Strauss, *Overseer or Decider,* 75 Geo. Wash. L. Rev. at 741-743. Executive Order 12,146 section 1-402 is likewise inapplicable because COE and EPA are not embattled in a legal

dispute. Exec. Order No. 12,146 § 1-402. Finally, at least one attorney general has already submitted his opinion that "when the EPA and the Corps conflict on jurisdictional policy matters, the EPA's interpretations are controlling." 43 Op. Att'y Gen. 15 (1979).

CONCLUSION

For the forgoing reasons, New Union requests this Court to REVERSE the district court's decision granting COE's summary judgment motion and find that: (1) New Union has standing in its sovereign capacity or in its *parens patriae* capacity to appeal the CWA § 404 permit issuance; (2) that Lake Temp is navigable water for purposes of CWA jurisdiction; (3) that the COE lacks jurisdiction to issue a § 404 permit because DOD's proposed discharge is primarily of pollutants and is not fill material, requiring instead a § 402 permit issued by EPA for its discharge; and (4) OMB's participation in the decision-making process and EPA's acquiescence to OMB violated the CWA.

Respectfully submitted,

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State of New Union