Team No. 73

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

Civ. No. 148-2011

The Honorable Romulus N. Remus

BRIEF OF STATE OF NEW UNION, APPELLANT AND CROSS-APPELLEE

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JURISDICTIONAL STATEMENT

The State of New Union seeks review of a permit issued by the Secretary of the Army, acting through the U.S. Army Corp of Engineers (COE), under authority of section 404 of the Clean Water Act (CWA), 33 U.S.C. § 1344, to the U.S. Department of Defense (DOD) to discharge a slurry of spent munitions into Lake Temp. (R. 3). The judgment of the United States District Court District of New Union was entered on June 2, 2011. (R. at 11). The Notice of Appeal was filed on September 15th, 2011. (R. at 2). This Court has appellate jurisdiction under 28 U.S.C. § 1291. The District Court had jurisdiction under 28 U.S.C. § 1331 and the Administrative Procedure Act, 5 U.S.C. § 702.

STATEMENT OF THE ISSUES

1. 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.

2. 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).

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

4. 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

After Discovery, COE filed a Motion for Summary Judgment on the basis that 1) the New Union does not have standing to appeal the permit issuance; 2) COE had jurisdiction to issue a permit for the discharge of fill under section 404 because Lake Temp is navigable water

and the U.S. Supreme Court's holding *Coeur Alaska* holds that a Section 404 permit is required in this situation rather than a section 402; 3) participation by the OMB in the decision that a section 404 permit rather than a section 402 permit should be issued did not violate the CWA. The District Court granted the COE Motion for Summary Judgment. New Union appeals arguing the Court erred in judgment. New Union files a cross motion stating that it does have standing on the basis of an injury to its sovereign capacity as well as representative *parens patriae* of the claims of citizens. New Union further claims that Lake Temp is navigable water but the COE lacked jurisdiction to issue a Section 404 permit because the material it authorized for discharge are primarily pollutants rather than fill material, which would require a permit from EPA under Section 402 of the CWA. Progress intervenes as an interested party.

STATEMENT OF THE FACTS

Lake Temp is an intermittent lake on a military reservation entirely within Progress. During rainy seasons Lake Temp is three miles wide and nine miles across. The Lake is smaller during the dry seasons and completely dry one out of every five years. Surface waters flow into the Lake from an eight-hundred mile wide watershed located mostly in Progress, but with a portion located in New Union. There are no outflows from Lake Temp. Almost one-thousand feet below Lake Temp is the Imhoff Aquifer. Ninety-five percent of the Aquifer is located within the State of Progress, while the remaining five percent extends under the State of New Union. Groundwater from the Aquifer is naturally high in sulfur and cannot be used without treatment.

Ducks have historically used Lake Temp as a stop in their yearly migration cycle when it holds water. Hundreds and perhaps thousands of duck hunters have used Lake Temp for hunting over the past hundred years; twenty-five percent of these hunters were interstate travelers. Similarly, Lake Temp is a common recreational site. Persons in rowboats and canoes enter the

water while birdwatchers sight birds from the shore. A Progress state highway runs along the south edge of the Lake within one-hundred feet of the shore when at its historic high. This highway also intersects with several roads leading into New Union. There is no fence blocking off the area. However, in 1952, when Lake Temp became part of the military reservation signs were posted by the Department of Defense along both sides of the highway at intervals of one-hundred hundred yards and twenty-five feet from the edge of the highway warning of danger and that entry was illegal. Despite this, there are clearly visible trails leading from the highway to the Lake that show signs of rowboat and canoe traffic. Although DOD is aware that people continue to use Lake Temp for recreation and other purposes such as hunting, no further measures have been taken to restrict public entry.

DOD proposes to construct a facility on the lakeshore to receive and prepare a wide variety of munitions for discharge into Lake Temp. The preparation involves the emptying of granular, semi-solid, and liquid contents and mixing them with chemicals to assure they are not explosive. Many of the substances used are listed as 'hazardous substances', that is 'pollutants', under Section 311 of the Clean Water Act. The remaining solids, primarily metals, will be ground and pulverized. Water will be introduced to both sets of waste to form slurry which will be sprayed by movable multi-port pipe to deposit the slurry evenly over the entire dry lake bed. Eventually the lake bed will be raised several feet. DOD estimates that when the project is complete, Lake Temp's top water elevation will be raised approximately six feet higher and its surface area will be two miles larger. The lake will still remain since it is at the low point of the drainage basin and there is nowhere else for precipitation to flow. Over time, alluvial deposits from precipitation falling on the mountains and flowing into the basin will cover the lakebed, returning it to its pre-operation condition albeit at a higher elevation.

SUMMARY OF THE ARGUMENT

New Union has the right to protect its interest in its groundwater under the CWA. The district court erred in holding that New Union does not have standing to bring this claim against the United States. Judicial review of the section 404 permit issued by the COE is proper under 28 U.S.C. § 1331 and the Administrative Procedure Act (APA), 5 U.S.C. § 702. Standing to bring the claim against the United States under the CWA to protect its groundwater should be recognized when a state has a sovereign interest in its capacity as owner and regulator of the groundwater or as parens patriae for its citizens who themselves have an interest in the groundwater of the state. New Union owns the groundwater in the Imhoff Aquifer and also has a responsibility to protect its citizens' interest in the water. The CWA is a federal law, New Union is seeking agency action under that law, and therefore 28 U.S.C. § 1331 provides jurisdiction in the district courts.

Lake Temp is under jurisdiction of the CWA because it is a navigable water of the United States. Lake Temp is a permanent body of water and falls squarely within the definition of navigable water as defined by EPA. Additionally, Lake Temp is used for recreation and hunting which therefore makes it subject to interstate commerce. The common law doctrine defining navigable waters in Rapanos further clarifies the CWA and holds lakes such as Lake Temp under the jurisdiction of the CWA. The United States agrees with New Union that Lake Temp is navigable water and subject to the jurisdiction of the CWA.

EPA had section 402 permitting authority under the CWA to approve the permit for the DOD to dump spent munitions into Lake Temp. The COE does not have jurisdiction to issue a permit for the discharge of spent munitions, a pollutant properly defined under section 402. Although the munitions may have the unintended consequences of raising the water level, they

are not fill as envisioned by Congress in the CWA definition and subsequent regulatory interpretation of the COE and EPA. Because the spent munitions here are not fill material but pollution, the lower court erred in granting COE jurisdiction to issue the permit to the DOD.

EPA improperly delegated its authority to administer the CWA. Congress delegated jurisdiction over 402 permits to EPA and did not provide for any jurisdictional decisions to be made by the OMB. If there was a jurisdictional dispute, then the Attorney General is the proper authority to decide it. Additionally, Congress gave only EPA the power to veto section 404 permits issued by the COE. Congress did not give this authority to any other agency, including the OMB. Because EPA is the only agency vested with veto power regarding section 404 permits, the dispute regarding OMB involvement in EPA veto in this case is actually nonexistent. The OMB lacked authority here both to stop consideration of an EPA section 404 veto, and to decide a dispute regarding a section 404 veto.

STANDARD OF REVIEW

On appeal of a district court's grant of summary judgment, the appellate court reviews the grant de novo. *Jackson v. Finnegan et. al*, 101 F.3d 145, 150 (D.C. Cir. 1996). A motion for summary judgment shall be granted "if the pleadings, affidavits, depositions, admissions… show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed.R.Civ.P. 56(c). It is the burden of the moving party to show the court that there is "an absence of evidence to support the nonmoving party's case." *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986). A party opposing a motion for summary judgment must point to "affirmative evidence" that a genuine issue of material fact remains in the case. *Anderson v. Liberty Lobby*, 477 U.S. 242, 256-67 (1986).

ARGUMENT

I. NEW UNION HAS STANDING TO CHALLENGE THE PERMIT ISSUED BY THE COE TO THE DOD PURSUANT TO SECTION 404 OF THE CWA, 33 U.S.C. § 1344.

The Grant of Summary Judgment for the United States should be reversed. Jurisdiction should be granted when a State has an interest in its sovereign capacity as owner and regulator of the ground water or in its *parens patriae* capacity as protector of its citizens who have an interest in the groundwater of the state. *Satsky v. Paramount Communications, Inc.*, 7 F.3d 1464, 1469 (10th Cir. 1993) (citing 17 Charles A. Wright, Arthur R. Miller & Edward H. Cooper, Federal Practice and Procedure: Jurisdiction 2d § 4047 at 223 (1988)). Here, New Union is the owner and regulator of the groundwater in the state. R. at 5-7. New Union also has a right to protect its citizens from potential harm caused by damage to the New Union aquifer. New Union has standing in this case because New Union is the owner and regulator of the groundwater and has a duty to protect its citizens under its *parens patriae* capacity. Additionally, New Union has a special interest as an affected state, subjecting it to a more favorable test for standing. *Massachusetts v. EPA*, 549 U.S. 497, 518-20 (2007).

A. <u>New Union is the owner and regulator of ground water within its state.</u>

i. Determining ownership of groundwater is a matter of state law.

When a state is the owner of groundwater, as determined by state law, they may bring a claim under the CWA.33 U.S.C.A. § 1369. Determination of who owns the groundwater is a fact-specific determination under state law. *New Mexico v. General Electric*, 335 F.Supp.2d 1185, 1201 (D. New Mexico. 2004). In *General Electric*, the State sued the electric company for damages to the groundwater. The State claimed jurisdiction to bring the tort action on the grounds that "unappropriated water of every natural stream, perennial or torrential, within the

State of New Mexico, is . . . declared to belong to the public . . . ." *General Electric* at 1201 (citing N.M. Const. art. XVI, § 2). The Court held that "belonging to the public" did illustrate state ownership and therefore did not provide the requisite standing and that New Mexico was unable to provide any evidence showing that they retained direct ownership of the water. *Id.* at 1205. Here, unlike in New Mexico, New Union asserts *direct* ownership of the water and not solely ownership as the "protector" of the water. R. at 5. The United States does not contest the fact that New Union is the direct owner of the groundwater at issue. R. at 6. As the owner of the groundwater according to the state law of New Union, New Union may bring a claim under the CWA.

ii. As owner of its groundwater New Union has standing to protect that interest.

As the owner and regulator of the groundwater in its borders New Union has standing to protect that groundwater. By entering the union of the United States, a state surrenders "certain sovereign prerogatives," and in exchange is granted fundamental rights to protect its citizens. *Massachusetts v. EPA*, 549 U.S. 497, 519. New Union has a right to protect its quasi-sovereign interests and therefore challenge the decision of the United States made by EPA as arbitrary and capricious. *See id.* at 519 –520; 33 U.S.C. § 1369(a)(1).

In *Massachusetts v. EPA* States claimed EPA must regulate greenhouse gas emissions from new motor vehicles if it judges these emissions contribute to global warming and therefore will cause actual harm to the States. *Massachusetts v. EPA.* At 549 U.S. 498. The States had standing to challenge EPA's denial of their rulemaking petition. The Court explained Congress had authorized precisely this type of challenge, wherein the state is questioning the proper construction of a congressional statute. *Id*. EPA did not dispute the existence of a causal connection between manmade greenhouse gas emissions and climate change, yet failed to

regulate such emissions under the Clean Air Act. This failure gave the States standing to dispute EPA's decision not to regulate greenhouse gas emissions from new cars. *Id.* at 499.

Here, as in *Massachusetts*, petitioners have a right to protect their citizens from inaction by a government agency. EPA violated the CWA by delegating its decision making power to the OMB. R. at 9. New Union asserts EPA had a duty to look at the facts of this case and make a decision based upon its judgment. EPA does not dispute the possibility that the groundwater in New Union may become contaminated by the DOD. R. at 6. New Union asserts EPA must follow the CWA and judge whether there is a likely contamination of the groundwater. EPA needs to judge for itself whether it has jurisdiction over the permit in question (New Union asserts that it does). Alternatively, if the COE has jurisdiction and the groundwater contamination is likely then EPA has a duty to veto the section 404 permit.

iii. New Union has standing under the relaxed requirement of Massachusetts v. EPA.

When Congress gives a litigant a procedural right to protect his interests they do not have to meet heightened standards but "can assert that right without meeting all the normal standards for redressability and immediacy." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 572, n. 7 (1992). Generally, a litigant must demonstrate that it has suffered a concrete and particularized injury that is either actual or imminent, that the injury is fairly traceable to the defendant, and that it is likely that a favorable decision will redress that injury in order to bring a claim. *Id.* at 560–561. A litigant who is vested with a procedural right has standing if there is some possibility that the requested relief will "prompt the injury-causing party to reconsider the decision that allegedly harmed the litigant." *Massachusetts v. EPA*, 549 U.S. 552; see also *Sugar Cane Growers Cooperative of Fla. v. Veneman*, 289 F.3d 89, 94–95 (C.A.D.C.2002) ("A [litigant] who alleges a deprivation of a procedural protection to which he is entitled never has to

prove that if he had received the procedure the substantive result would have been altered. All that is necessary is to show that the procedural step was connected to the substantive result.")

Here, the right to challenge agency action was unlawfully withheld. New Union has a right to redress injury under the CWA. 33 U.S.C.A. § 1369. There is a significant possibility that relief requested in New Union's Motion for Summary Judgment will cause the United States to reconsider their action. Due to this vested right and the likelihood of reconsideration, New Union does not have to demonstrate the heightened standard established in *Lujan*.

B. The citizens of New Union have an interest in the groundwater of the state and New Union has a right under its *parens patriae* capacity to protect its citizens.

To file a *parens patriae* action a state must articulate an interest apart from the interests of particular private parties and must express a quasi-sovereign interest. States do not have standing to "assert the rights of private individuals." *Satsky v. Paramount Communications, Inc.*, 7 F.3d 1464, 1469 (10th Cir.1993). While the Supreme Court has not spoken directly on what these state interests might be, "it is clear that a state may sue to protect its citizens against 'the pollution of the air over its territory; or of interstate waters in which the state has rights.'" *Id.* at 1469 (citing 12 Moore's Federal Practice ¶ 350.02[3] at 3–20 (1993)).

For *parens patriae* standing, the plaintiff must allege the following three elements: "(1) 'injury to a sufficiently substantial segment of its population;' (2) 'interest apart from the interests of particular private parties;' and (3) 'quasi-sovereign interest'." *Quapaw Tribe of Oklahoma v. Blue Tee Corp.*, 653 F.Supp.2d 1166, 1179 (N.D. Okla. 2009). A state has a quasi-sovereign interest in two categories: first, a state has a quasi-sovereign interest in the health and well-being—both physical and economic—of its residents in general; and, second, in not being

discriminatorily denied its rightful status within the federal system. *Alfred L. Snapp & Son, Inc. v. Puerto Rico, ex rel., Barez,* 458 U.S. 592, 607 (U.S. 1982).

In *Snapp*, Puerto Rico alleged petitioners discriminated against Puerto Ricans in favor of foreign laborers. This concern fell within the Commonwealth's quasi-sovereign interest in the general well-being of its citizens. The Court explained "a State's interest in the well-being of its residents, which extends beyond mere physical interests to economic and commercial interests, also includes the State's substantial interest in securing its residents from the harmful effects of discrimination," *Alfred L. Snapp & Son, Inc. v. Puerto Rico, ex rel., Barez,* 458 U.S. 593.

In *Quapaw* a Native American Indian tribe sued for its members against mining companies and railway, and alleged natural resources damages relating to mining. *Quapaw Tribe of Oklahoma v. Blue Tee Corp.,* 653 F.Supp.2d 1179. The Tribe sought recovery for natural resources damages for three types of property within its former reservation: (1) all land "within the [former] Quapaw Reservation on restricted lands of the members of the Tribe;" (2) "on lands held in trust for the Tribe;" and (3) "on lands owned in fee simple by the Tribe." *Quapaw* at 1180 (N.D.Okla.,2009). The court held that the Tribe was the appropriate entity to bring these claims because private landowners could not recover those damages.

Although New Union does bring this action to protect its residents, it is not merely attempting to assert the claim of its private citizens such as Dale Bompers. New Union has its own quasi-sovereign interest in bringing the claim. The case here is most like *Quapaw* in that New Union is attempting to protect a natural resource which it owns and which will also affect the rights of the citizens. Like the private landowners in *Quapaw*, private landowners here cannot bring the claim on their own. Dale Bompers has no vested right to the groundwater but does have an expectation that he will be able to use it with approval from New Union. R. at 6. Despite this

expectation, Dale Bompers would be unable to bring a claim. New Union must therefore bring the claim on his behalf in its capacity as the *parens patriae*.

When applying the three *Snapp* elements, New Union has *parens patriae* standing. (1) New Union has alleged injury to a significant part of its population. Although the population for the area is very small, all that live there may be affected. In regards to the proportion of the population that must be affected for standing, the Court has not established a bright-line rule. One important factor in making a determination is whether the injury is one that the state, if it could, would attempt to address through its sovereign lawmaking process. See *Quapaw* at 1179. It is evident from the record that New Union would prohibit the potential contamination if it were within the state's legislative purview. (2) New Union has articulated an interest apart from that of its citizens individually; as the owner of the groundwater New Union has its own personal interest. (3) New Union has a quasi-sovereign interest under both categories described by the Court in *Snapp*. First, although Lake Temp is not currently being used, future development may make the Lake critical to economic growth in that region. For example, it may be used for drinking water with some treatment to remove the sulfur. Second, New Union has an interest in not being discriminatorily denied its rightful status within the federal system.

C. New Union may bring a claim *parens patriae* to vindicate the will of Congress.

A state may bring an action *parens patriae* to force an administrative agency to adhere to a federal statute. In doing so, the state is merely "vindicating the Congressional will," *Washington Utilities & Transportation Commission v. Federal Communications Commission*, 513 F.2d 1142 (9th Cir.1975), *cert. denied.* The Supreme Court held in *Massachusetts v. Mellon* that *parens patriae* may not be used by a state government to "protect citizens of the United States from the operation of the statutes thereof," 262 U.S. 447, 479 (1923). The Court reasoned

that the state had no right to protect the citizen from a law of the United States since it was the role of the United States to serve that very citizen. In *Washington Utilities*, however, the 9th Circuit clarified *Mellon* and held that while a state may not sue against the operation of a Federal statute, it may indeed sue for the enforcement of such statute. *Massachusetts v. Mellon*, 263 U.S. 447 (1923). See also *Connecticut ex rel. Blumenthal v. U.S.*, 369 F. Supp. 2d 237 (D. Conn. 2005) (Typically, a state may only represent its citizens *parens patriae* when the challenge to federal authority is seeking federal agency enforcement of, or compliance with, federal laws or regulations.)

In *Mellon*, the State sought to challenge the constitutionality of a federal statute commonly called the Maternity Act. The statute provided for appropriations to be apportioned among the states that comply with the statute's provisions. The purpose of the statute was to reduce maternal and infant mortality and protect the health of mothers and infants. *Massachusetts v. Mellon* 263 U.S. 279 (interpreting 67 P.L. 97). The State argued that the statute was a way to induce states to yield a portion of their sovereign rights. It was further alleged that the act was a usurpation of power not granted to Congress by the Constitution. The State thus disputed the validity of the statute.

In *Washington Utilities* the State sought review of an order of the Federal Communications Commission (FCC) determining that general policy in favor of entry of new carriers in specialized communications field would serve public interest. The State did not contest the validity of the statute in question, but challenged the administrative decision made by the FCC. There the 9th Circuit held that the State had standing to bring the *parens patriae* challenge against the FCC because the State had not challenged the constitutionality of the Act but rather relied upon the Act and "sought to vindicate congressional will by preventing what it

asserted to be a violation of the Act by the Commission." *Washington Utilities & Transportation Commission v. Federal Communications Commission,* 513 F.2d 1153.

"[I]f by means of its suit the state seeks to enforce, rather than overturn or avoid, a federal statute, the *parens patriae* doctrine is triggered to drive the action forward," *Puerto Rico Pub. Hous. Admin. v. U.S. Dept. of Hous. & Urban Dev.*, 59 F. Supp. 2d 310, 326 (D.P.R. 1999). The District of Puerto Rico makes a convincing argument; states play an important role as protectors of the rights of their citizens when it comes to the enforcement of certain federal statutes. *See also Alabama v. Tennessee Valley Authority,* 467 F.Supp. 791, 793–94 (N.D.Ala.1979) (The Court allowed *parens patriae* standing since the State only sought to vindicate the will of Congress, finding *Mellon* inapplicable to a lawsuit alleging that the TVA itself had violated the Tennessee Valley Authority Act); *City of New York v. Heckler,* 578 F.Supp. 1109 at 1123–25 (E.D.N.Y.1984) (The District Court upheld New York State's *parens patriae* standing to sue over the Secretary's failure to adhere to her own regulations); and *Carey v. Klutznick,* 637 F.2d 834 (2d Cir.1980) (upholding New York's *parens patriae* standing to sue Census Bureau without discussing *Mellon*).

Here, New Union does not dispute the validity of the CWA. New Union asserts that the CWA is valid, but EPA violated the CWA by abdicating its decision-making authority to the OMB and by not making a reasonable judgment as to whether the 404 permit issued by the COE should be vetoed. This case is distinct from *Mellon*, where the State's argument was instead premised on the invalidity of the statute at issue. Here, New Union asks that EPA follow the will of Congress. New Union's argument is thus analogous to that of the State in *Washington Utilities* in asking the Court to "vindicate congressional will."

New Union has standing for a *parens patriae* claim because it is asking EPA to adhere to the will of Congress and thus to abide by the CWA. New Union does not challenge the validity of the CWA in this case. Furthermore, New Union meets the test established in *Snapp* because it has an interest apart from the interests of a particular party and it has a quasi-sovereign interest in the health and well- being of its residents and an interest in not being denied its rightful standing in the federal system.

D. New Union has standing despite the US's argument that there is no evidence of harm.

In any judicial proceeding brought under subsection (b) of 33 U.S.C. § 1369, a party may request more leave to gather additional evidence. A court should allow this additional evidence if the party shows that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the proceeding before the Administrator. The court may order additional evidence to be considered by the Administrator. 33 U.S.C. § 1369(c).

New Union seeks additional evidence through drilling and subsequent sampling of a grid of monitoring wells throughout the aquifer. R. at 6. There is an urgent interest that this evidence be gathered before Lake Temp is filled with pollutants. New Union will install and operate the wells and collect the data, however as the DOD concedes, the DOD will not grant New Union permission to be on the property. The United States asserts that there is no evidence that pollution of groundwater owned or regulated by New Union is imminent or even possible. They further assert that New Union has not carried the burden that it will be injured by the discharge of pollutants into Lake Temp. R. at 6. However the additional evidence requested is needed before New Union can sufficiently understand the effects of the discharge on Lake Temp and thus its injury. This Court should grant New Union access to the land in question so that it may

gather the additional evidence. This order may be given under the authority of this court granted in 33 U.S.C. § 1369(c).

II. LAKE TEMP IS NAVIGABLE WATER AND UNDER CWA JURISDICTION.

A. Intrastate lakes are traditionally navigable water.

Questions of CWA jurisdiction focuses on navigability when the body of water in question is a pond or a wetland. Traditionally navigable waters include interstate rivers and lake systems, and intrastate lakes. *Rapanos v. United States*, 547 U.S. 715 (2006).

i. CWA jurisdiction over wetlands is unclear, but with lakes it's generally assumed.

In *Rapanos*, Justice Scalia describes traditionally navigable waters as bodies of water "forming geographic features that are described in ordinary parlance as streams…oceans, rivers [and] lakes." *Rapanos v. United States*, 547 U.S. 739. As with oceans and rivers, whose interstate nature is apparent, lakes are also subject to federal jurisdiction as waters of the United States. Lakes are often large, span multiple states, or serve as destinations for citizens of different states. EPA and the COE acknowledge lakes as waters of the United States and list intrastate lakes as navigable waters. See 33 CFR 328.3. Lake Temp, as an intrastate lake, is a traditional water of the United States and thus subject to federal jurisdiction under the CWA.

While there is no bright-line rule regarding actual navigability and surface area, even small lakes are navigable under the CWA. In *Coeur* the lake in question was smaller than Lake Temp and was navigable for purposes of the CWA. *Coeur Alaska, Inc. v. Southeast Alaska Conservation Council*, 557 U.S. 261 (U.S. 2009). At its peak during rainy season Lake Temp is up to three miles wide and nine miles long. R. at 5. Recent case law has clarified CWA jurisdiction for section 402 and 404 permits. Specifically, the Court has addressed jurisdiction over small ponds and wetlands. The Court is unwilling to extend jurisdiction to small and

intermittent bodies of water. The Court has not addressed large permanent bodies of water such as Lake Temp. Jurisdiction over wetlands and ponds is litigated because jurisdiction is unclear; however, lakes are generally assumed to be navigable.

ii. The CWA includes jurisdiction over lakes as a matter of public policy.

Congress intended CWA jurisdiction to be as broad as the Constitution allows. *NRDC v. Callaway*, 32 F. Supp. 685 (D.D.C 1975). The CWA was written in a way that "navigable waters" means more than merely traditionally navigable waters. *Rapanos v. United States*, 547 U.S. 715, 731 (2006). In *United States v. Riverside Bayview Homes, Inc.* the Court recognized that Congress intended the CWA to apply broadly to meet the goal of maintaining and improving water quality in the United States. 474 U.S. 121, 132-133 (1985). When determining the navigability of a body of water, or whether the body of water is a "water of the United States" for purposes of the CWA, the Court should defer to agency interpretation. In such a scenario, courts are not to favor "a judicial construction over a reasonable administrative agency construction." *Hernandez-Carrera v. Carlson*, 547 F.3d 1237, 1246 (10th Cir. 2008) (citing *Chevron).* For a court to do so "would be ignoring Congress' choice to empower an agency, rather than the courts, to resolve this kind of statutory ambiguity." *Id* at 1246.

EPA and the COE specifically enumerated intrastate lakes in their interpretation of "waters of the United States," 40 CFR 230.3. Intrastate lakes are listed along with waters used for interstate commerce and other interstate waters in the regulation defining navigable waters of the CWA. *Id.* This inclusion is exemplary of federal interest in environmental protection of intrastate lakes. Lakes are important sources of drinking water and are often the source of food and employment for United States citizens. There is also a federal interest in preserving the

diverse ecosystems of lakes. Similar to national parks, which may also be purely intrastate, lakes are subject to federal preservation interests and therefore.

B. Lake Temp is used for hunting and other recreational activities.

Congress defined navigable water as "waters of the United States." The term "waters of the United States" does little to illustrate a clear definition of "navigable." Instead, the term creates an intentional statutory gap, to be defined by EPA and COE. To determine CWA jurisdiction courts should defer to agency interpretation. *United States v. Mead Corp*., 533 U.S. 218 (2001). EPA and the COE define 'waters of the United States' to include those that are "currently used, or were used in the past, or may be susceptible to use in interstate commerce," or "which are used or could be used by interstate or foreign travelers for recreational or other purposes." 33 CFR 328.3.

Lake Temp is used by interstate travelers for recreation. There are paths on the ground leading to the lake from an adjacent highway. These paths are used for migratory bird watching and for the transportation of rowboats and canoes. When the water level is up, the highway is directly adjacent to the Lake. Up to one fourth of travelers using Lake Temp for hunting purposes are out of state residents. R. at 4. Hunting and bird watching are uses which are enumerated by EPA and the COE in their discussion of CWA jurisdiction. 33 CFR 328.3.

C. Lake Temp satisfies the *Rapanos* test.

In the plurality opinion of *Rapanos* two test were given to determine jurisdiction of the CWA. Justice Scalia established the *relatively permanent standard* where navigable waters only includes "those relatively permanent, standing or flowing bodies of water 'forming geographic features' that are described in ordinary parlance as streams,…oceans, rivers [and] lakes.'" *Rapanos v. United States*, 547 U.S. 739. Scalia said relatively permanent does not "necessarily

exclude streams, rivers, or lakes that might dry up in extraordinary circumstance such as drought…or seasonal rivers" which do not flow continuously. *Id.* at 735 n.5. Justice Kennedy established a *requisite nexus standard*. He said wetlands must have a requisite nexus with navigable waters.

The *Rapanos* Court did not decide which test controls and lower courts have a diversity of views. *Rapanos v. United States*, 547 U.S. 739. Some circuits have held CWA jurisdiction exists when a body of water meets either test. *United States v. Johnson*, 467 F. 3d 56, 66 (1st. Cir. 2006), cert denied, 552 U.S. 948 (2007); *United States v. Bailey*, 571 F.3d 791, 798-99 (8th Cir. 2009). Still other courts decline to choose just one controlling standard, holding that jurisdiction exists when both standards are met. *United States v. Lucas*, 516 F. 3d 316, 326-27 (5th Cir.) *cert. denied*, 129 S. Ct. 116 (2008) (Jury instructions included factors to consider when determining whether a nexus was sufficient, such as: flow rate, contamination attributable to the discharge at issue, potential effects of the discharge, etc.); *United States v. Cundiff*, 555 F.3d 200, 210-13 (6th Cir), cert. denied, 130 S Ct.74 (2009). Other courts hold the facts of the case determine the standard to be applied. *Northern California River Watch v. City of Healdsburg*, 496 F. 3d 993, 999-1000 (9th Cir. 2007), *cert denied*, 552 U.S. 1180 (2008) (Waste water dumped into a small pond and the surrounding wetlands later polluted a connected river and thus created a requisite nexus for CWA jurisdiction); Lastly, the 11th Circuit held that only the "requisite nexus" standard determines jurisdiction. *United States v. McWane*, 505 F.3d 1208 (11th Cir. 2007) *cert. denied*, 129 S. Ct. 630 (2008).

i. Lake Temp is a permanent body of water.

Lake Temp is permanent and present year round. It is dry a small percentage of the time, however not due to seasonal changes. R. at 4. This occasional dryness does not preclude Lake

Temp from being a water of the United States. Scalia explains that *relatively permanent* does not "necessarily exclude streams, rivers, or lakes that might dry up in extraordinary circumstance such as drought . . . or seasonal rivers" or which do not flow continuously. *Rapanos* at 735 n.5. Scalia further emphasized that the "permanency" test was intended to disqualify transient bodies of water from federal jurisdiction and address the concern that CWA may include "storm drains, roadside ditches, ripples of sand in the desert that may contain water once a year, and lands that are covered by floodwaters once every 100 years." *Rapanos v. United States*, 547 U.S. 722. However, Lake Temp is not an insignificant or rarely occurring body of water. The Lake is a large, year-round body of water and is part of the local ecosystem.

ii. Here a "sufficient nexus" to traditionally navigable water is not required.

Lake Temp is not a wetland and is therefore not the type of water contemplated by the *requisite nexus* test. Justice Kennedy set forth the *requisite nexus* test to determine whether the pollution would affect a traditional water of the United States. In the instant case, however, the pollution effects on Lake Temp are considerable in their own right. The munitions are not only toxic, but will have a permanent place on a body of water used by citizens of various states for recreational purposes and a food source.

iii. In the alternate, the aquifer located under Lake Temp is navigable water for purposes of the CWA and provides the requisite nexus for Lake Temp to be considered a "water of the United States."

The aquifer under Lake Temp is in both Progress and New Union. R. at 5. Under EPA and COE definition, waters of the United States include "[a]ll interstate waters including interstate wetlands." 33 CFR 328.3. The aquifer falls under this definition. Moreover, the aquifer, in its potential to be used for drinking water in both states, has a significant role in interstate

commerce. Lake Temp's proximity to the aquifer is therefore sufficient to satisfy the "requisite nexus" standard under the test set forth by Justice Kennedy in *Rapanos*.

III. ONLY EPA HAS JURISDICTION TO ISSUE A PERMIT FOR THE DISCHARGE OF SLURRY INTO LAKE TEMP.

EPA has jurisdiction over the DOD discharge under section 402 of the CWA. Under the CWA, permits for discharge into waters of the United States are authorized under both section 402 and section 404. Section 402 grants jurisdiction to EPA to grant permits concerning pollutants into a water of the United States. 33 U.S.C. § 1342. Section 404 grants jurisdiction to COE to permit "the discharge of dredged or fill material." 33 U.S.C. § 1344. The parties do not dispute that the munitions are discharged from a point source for purposes of jurisdiction under the CWA. The United States, joined by Progress in the alternate, argue that the munitions being discharged by DOD into Lake Temp are "fill material" under the definition set forth in the CWA and are thus subject to COE jurisdiction. R. at 5. However, the munitions are not fill material, but pollutants, and thus require a permit from EPA in accordance with section 402.

A. The CWA defines munitions as a pollutant.

Congress included munitions under types of fill under the purview of EPA and therefore intended munitions to be excluded under section 404. 33 U.S.C. §1362. New Union concedes that the munitions may raise the water level. R. at 5. The COE defines fill material as "material placed in waters of the United States where the material has the effect of: (i) Replacing any portion of a water of the United States with dry land; or (ii) Changing the bottom elevation of any portion of a water of the United States. 33 C.F.R. § 323.2. The United States and Progress asserts that the DOD munitions are "fill material" under this definition. R. at 5. However, munitions are listed as pollutants under EPA regulations. 40 C.F.R. § 401.11(f). Although

munitions may have the effect of "changing the bottom elevation" it does not mean they are intended to be defined as fill. Congress intended EPA to have jurisdiction over the discharge of munitions in waters of the United States. 33 U.S.C. §1362. To declare that munitions should be subject to jurisdiction under the COE would frustrate the intent of Congress.

Moreover, munitions are not the only pollutant listed under section 402 that, when discharged into a water of the United States, would have the overall effect of changing the bottom of elevation of a body of water. Section 402 also lists "dredged spoil, solid waste, incinerator residue, sewage, garbage . . . wrecked or discarded equipment, rock, sand, cellar dirt and industrial, municipal, and agricultural waste" as pollutants for purposes of section 402. 33 U.S.C. § 1362. Each of these materials is a solid that would change the elevation of a body of water if discharged to any extent therein. Congress did not intend for these substances, when discharged to the extent of changing the elevation of a body of water, to be subject to COE regulation under section 404. *See Res. Investments, Inc. v. U.S. Army Corps of Engineers*, 151 F.3d 1162, 1169 (9th Cir. 1998) (It is not in the "best interests of Government for EPA to work… under one policy and Army to operate a 404 permit program for garbage disposal on a different basis… It strains reason to have the Army Corps of Engineers, with its primary military and navigation missions, to lead this garbage disposal regulation.").

The COE and EPA have acknowledged Congress' intent in sections 402 and 404. The two sections, according to the agencies, are intended to regulate different types of discharges and thus equip the agencies with different regulations. "The section 402 program is focused on [although not limited to] discharges such as wastewater discharges from industrial operations and sewage treatment plants, storm water and the like. . . . There are no statutory or regulatory provisions under the section 402 program designed to address discharges that convert waters of

the U.S. to dry land." 65 FR 21292. 402 and 404 explicitly carves out agency roles concerning discharge. Section 402 regulation leaves off where section 404 regulations begin, with discharges that effectively bodies of water to dry land. *Id.*

B. Fill material fills in a water body and converts it to dry land or changes the elevation.

In 2000, EPA and the COE addressed litigation arising under the CWA, specifically sections 402 and 404. At issue was the overbroad application of "fill material" and in turn, the over inclusive COE jurisdiction. 65 FR 21292. The agencies agreed "the term 'fill material' clearly contemplates material that fills in a water body, and thereby converts it to dry land or changes the bottom elevation. Fill material differs fundamentally from the types of pollutants covered by section 402 because the principal environmental concern is the loss of a portion of the water body itself." *Id*. The agencies explained diverse interpretations of "the term 'fill material' have resulted in inconsistencies which impede the fair and effective implementation of the CWA." 65 FR 21292, 21294. The agencies were particularly concerned with the "primary purpose test" employed by courts to determine whether a discharge was "fill material." *Id.* The agencies criticized the "primary purpose test" for the problems it presents when a discharge has multiple purposes. "The 'primary purpose test' also allows any prospective discharger or project proponent to seek to affect which regulatory regime would apply by simply asserting a purported purpose." *Id*. The issue is the subjective nature of the test; jurisdiction was dependent on the subjective intent of whoever asserted the purpose of the discharged material, e.g. the project manager or other private entity. The agencies worried materials whose "very purpose [was] raising the elevation of an area (i.e., of filling a water of the U.S.)" would be subject to section 402 instead of section 404 when they could be alleged to have a different "primary purpose." *Id.*

The 9th Circuit Court of Appeals applied the "primary purpose test" in *Resource Investments Inc. v. U.S. Army Corps of Engineers*, 151 F.3d 1162 (9th Cir. 1998). In *Resources Investments Inc.*, the 9th Circuit was faced with an appeal from the lower court's decision to uphold the COE's denial of a permit for a solid waste landfill. In determining whether the permit was subject to section 404 or section 402, the Court applied the "primary purpose test," and concluded the primary purpose of the fill was to dispose of waste and not to fill a water of the United States, so the permit was not subject to COE jurisdiction under 404. *Id.* The Court reasoned that the discharge "[did] not constitute fill material because their primary purpose [was] not to replace an aquatic area with dry land or to change the bottom elevation of a water body," *Id*. at 1168. The COE and EPA criticized the holding for inhibiting the regulatory power of section 404 and the ability of the COE to protect the aquatic environment and public interest. *Id*. The "primary purpose test" acted as a vehicle to deprive the COE of jurisdiction entirely.

The agencies proposed a new test. Instead of subjective inquiry into the primary purpose of the discharge, they take an objective look at the *effect* of the discharge. Thus the COE test for fill material discussed above, "[M]aterial placed in waters of the United States where the material has the effect of . . . [r]eplacing any portion of a water of the United States with dry land . . . or [c]hanging the bottom elevation of any portion of a water of the United States," see *infra* part II.A. The agencies looked at a 5th Circuit Court of Appeals decision to guide their reasoning. See *Avoyelles Sportsmen League v. Marsh*, 715 F. 2d. 897 (5th Cir. 1983). In *Avoyelles*, the Court used the "primary purpose test" but instead of a subjective inquiry, it assessed the overall effect of the fill material. The COE and EPA favored this "effects test" because it afforded the COE jurisdiction when materials should have been under the purview of section 404, i.e. when they replaced an "aquatic area with dry land."

The agencies did not adopt the "effects test" to avoid over inclusive COE jurisdiction in all cases of discharge. Although the discharge of munitions into Lake Temp, will affect the bottom elevation of the Lake, it should not be subject to jurisdiction under section 404. The agencies did not intend the "effects test" to lead to this result. *Avoyelles Sportsmen League v. Marsh*, 715 F. 2d. 924-925. Aware of the possible swing of the "effects test" towards too much COE jurisdiction, the agencies were careful to illustrate their understanding of the implied effects of "fill material" under section 404. "The term 'fill material' clearly contemplates material that fills in a water body, and thereby converts it to dry land or changes the bottom elevation. Fill material differs fundamentally from the types of pollutants covered by section 402 because the principal environmental concern is the loss of a portion of the water body itself." 65 FR 21292. As support, the agencies look to permitting procedures under section 404 itself. The statute requires an analysis of other possible sites and the irreparable effects to the aquatic ecosystem as a whole. 33 U.S.C. § 1364. "[B]ecause section 404 was intended by Congress to provide a vehicle for regulating materials whose effects include the physical conversion of waters to non-waters or other physical alterations of aquatic habitat, the section 404(b)(1) guidelines go beyond such a water quality based approach." 65 FR 21292. The agencies intended the "effects test" to give jurisdiction to the COE to protect the interests related to the conversion of waters to dry land. They did not intend the test to include COE jurisdiction when, as in the instant case, water-quality based standards and an NDPES under section 402 are more appropriate standards.

C. Interpretations of a statute that would produce absurd results should be avoided if there are alternative interpretations that are consistent with the legislative purpose.

"Fill material" should be read narrowly and within the context of the regulation and purpose of the statute. Instead, the defendant reads it broadly in a way that creates an absurd

result. The regulation defines "fill material" as "material placed in waters of the United States where the material has the effect of…Changing the bottom elevation of any portion of a water of the United States." 40 C.F.R. § 232.2. If read incorrectly this regulation may be misinterpreted to include spent munitions. However, statutory interpretation doctrine directs courts to read the definition in the context of the entire regulation including the purposes set by Congress. Interpretations of a statute that would produce absurd results should be avoided if there are alternative interpretations consistent with the legislative purpose. *Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564, 575 (U.S. 1982). If the definition is read in isolation it could completely negate the section 402 permitting process established by Congress. If any pollutant that also happens to raise the bottom elevation of waters of the United States would be precluded from having to obtain a 402 permit then industry would simply ensure that whatever they are discharging would raise the bottom elevation of a body of water. This reading would completely frustrate the purpose of 402 and could not have logically been intended by Congress.

Additionally, when the definition of fill material is read holistically it includes examples of what fill material includes: "rock, sand, soil, clay, plastics, construction debris, wood chips, overburden from mining or other excavation activities, and materials used to create any structure or infrastructure in the waters of the United States." 33 C.F.R. § 323.2. Although this listing does not preclude the inclusion of other materials, the general sense is that fill is meant to be a by-product or used in construction or mining. Nothing in the examples support the inclusion of industrial waste. The regulation goes on to explicitly exclude "trash or garbage." 33 C.F.R. § 323.2 (e)(3). Trash or garbage is not further defined in the statute. However, Webster's dictionary defines trash as "something worth little or nothing; something in a crumbled or broken condition or mass," Webster's Third New International Dictionary 2432 (1986). Garbage is

defined as "food waste; discarded or useless material." *Id.* at 935. Using the plain language of the definition, spent munitions being discarded for no useful purpose other than disposal, are not fill material under the CWA.

The COE and EPA are aware of the need for a consistent definition of "fill material." "Providing a clear and consistent definition for "fill material" is important to determine whether a proposed discharge of a pollutant is subject to regulation under section 404 or section 402." 65 FR 21292. Further, the agencies "believe that this definition needs clarification, because, read literally, it could subject to regulation under CWA section 404 certain pollutants that have been, are being, and should be regulated by the technology and water quality based standards used in the section 402 program." 65 FR 21292, 21295. The munitions that the DOD wishes to discharge into Lake Temp are exactly the kind of pollutants contemplated by the agencies in this explanation. They are not intended to replace water with dry land, but merely have a side effect of changing the elevation of the Lake. Instead of "fill material," they are traditional pollutants that should be regulated by the "water quality based standards" promulgated by EPA under section 402. The agencies compare such pollutants to "industrial waste or sewage," noting these "ultimately will settle to the bottom following discharge" and that "[a]lthough this would not replace waters with dry land, this could have effects on the water body's bottom elevation. 65 FR 21292, 21295. The COE and EPA cannot speak any more explicitly on the need for pollutants such as the munitions to be discharged into Lake Temp to be regulated by section 402.

D. Spent munitions are significantly different from mining slurry

In *Coeur*, the Supreme Court defined "fill material" to include mining slurry. *Coeur Alaska, Inc. v. Southeast Alaska Conservation Council*, 557 U.S. 261 (U.S. 2009). Neither party objected to the Court's determination that the slurry at issue fell within COE jurisdiction under

section 402. *Coeur* is distinguishable from the instant case for two reasons. First, the slurry at issue in *Coeur* was a mixture of fill materials created by mining processes. Mining is an activity covered specifically by section 404 and traditionally handled by the COE. See 33 U.S.C. § 1344(f)1(e) (describing COE involvement in mining activity). The slurry that DOD plans to discharge into Lake Temp, however, is waste product from manufacturing. There are different environmental concerns with munitions than with mining, and the Lake Temp slurry does not belong to a category of discharge traditionally subject to COE jurisdiction under section 404.

Second, *Coeur* is distinguishable because the COE permit there was subject to determinations regarding siting for discharge of the fill material. *Coeur Alaska, Inc. v. Southeast Alaska Conservation Council*, 557 U.S. 261. When changing the ecosystem of a body of water, such as a lake, is at issue (as it was in *Coeur*), the COE is vested with the power to determine the proper site for the discharge. See 33 U.S.C. § 1344(b). Here, there is no alternative site proposed so the permitting concerns differ from those in *Coeur*. The COE expertise is not needed in determining the best site for the munitions. The opposite is true. Given the environmental concerns inherent in the toxic munitions, EPA expertise is needed.

IV. THE OFFICE OF MANAGEMENT AND BUDGETS (OMB) DOES NOT HAVE THE AUTHORITY TO DECIDE WHO HAS JURISDICTION BETWEEN EPA AND COE UNDER THE CWA

A. Congress gave the power to grant section 402 permits to EPA, not the OMB

EPA improperly delegated the jurisdictional decision to the OMB against the will of Congress. Congress expressly designated EPA with permitting authority for the discharge of pollutants. Although Congress reserved permits for the discharge of fill material to the COE, Congress gave no authority for any permitting to the OMB. 33 U.S.C. § 1342.

i. Although the executive power is with the President generally and the OMB may be authorized to resolve some disputes, the jurisdictional dispute for permitting here is not authorized by any executive orders.

EPA violated the CWA by delegating its decision making authority to the OMB. EPA misinterpreted Executive Order No. 12,088 (E.O. 12088) and as a result violated the CWA. 43 Fed. Reg. 47,707 (Oct. 17, 1978). E.O. 12088 states "[e]ach executive agency shall consult with the Administrator (of EPA) and with state, interstate, and local agencies concerning the best techniques and methods available for the prevention, control, and abatement of environmental pollution." *Id.* The Executive Order directs agencies to solicit technical advice from EPA and submit a Pollution Control Plan to the OMB. *Id.* §§ 1-3 and 1-4. The Executive Order directs EPA to request the OMB to resolve conflicts between EPA and executive agencies when the two cannot resolve them on their own. However E.O. 12088 does not give sweeping authority over all conflicts which may arise between EPA and an executive agency. Instead, the E.O. 12088 says that "*such conflicts*" shall be decided by the OMB (emphasis added). "*Such conflicts*" refers specifically to the conflicts described in section 1-601, when an executive agency is in violation of an applicable pollution control standard. Nothing in the E.O. 12088 directs a jurisdictional dispute between agencies to be delegated to the OMB.

In this case, EPA, COE, and OMB misinterpreted the E.O. 12088. The Executive Order does not give authority to delegate jurisdictional disputes to OMB. The dispute is between EPA and the COE over who has jurisdiction to issue a permit. The dispute is not about the violation of an applicable pollution control standard. The E.O. 12088 is not relevant to this case and the EPA improperly used E.O. 12088 as authority to delegate power assigned it by Congress. Moreover, there is no precedent for an agency to delegate its jurisdictional decision-making authority to the OMB.

ii. Even if an executive order did authorize review by the OMB, the OMB may not prevent an agency from complying with statutory requirements

The OMB improperly prevented EPA from complying with the statutory requirements of the CWA by deciding who has jurisdiction and whether a veto of the section 404 should be issued. There is little judicial authority on the constitutionality of the OMB's involvement in rulemaking generally. *Public Citizen Health Research Group v. Tyson*, 796 F.2d 1479, 1507 (C.A.D.C.,1986) (OMB's participation in rulemaking presents difficult constitutional questions concerning the executive's role and the scope of executive agencies power; courts "do not reach out to decide such questions.") However, it is accepted that the OMB cannot prevent an agency from complying with statutory requirements. *Environmental Defense Fund v. Thomas*, 627 F.Supp. 566, 571-72 (D.D.C. 1986). In *Environmental Defense Fund,* the OMB delayed EPA regulations which were subject to deadline. EPA was required by Congress to promulgate regulations from the 1984 Amendments to RCRA by a certain date; however they failed to meet that deadline because of an OMB review. The court held that the OMB has no authority to delay regulations which are subject to deadlines imposed by Congress. *Id*.

Similarly with regard to Lake Temp, the OMB may not make a decision on behalf of EPA when doing so would violate the CWA. Even if an executive order allowed some OMB involvement, the OMB may not be involved to such a degree as to violate a congressional statute. EPA violated the CWA by not deciding jurisdiction and by not making the judgment whether to veto or not. R. at 9. Although this may place some limit on flexibility of EPA, it is the agency's responsibility to follow the will of Congress and it is therefore proper for this court to direct EPA to follow that will. See *NRDC v. Gorsuch*, 685 F.2d 718 (D.D.C.1982).

iii. The proper authority to resolve a jurisdictional dispute in this case is the Attorney General (AG). However, this case is still ripe for judicial review.

Executive Order 12,146, Management of Federal Legal Resources (E.O. 12146) is more relevant than E.O. 12088 to the dispute over permit jurisdiction in this case. Section 1-401 says that when Executive agencies are unable to resolve legal disputes, 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, 44 Fed. Reg. 42,657 (July 18, 1979). When a jurisdictional dispute should have been decided by the AG, failure to submit it to the AG does not preclude judicial review. *Tennessee Valley Authority v. U.S. EPA*, 278 F.3d 1184, 1201 (C.A.11, 2002). In *TVA v. EPA*, the two agencies disagreed over potential Clean Air Act violations by TVA. The Court held that E.O. 12146 applied and the dispute could be put before the AG. The Court went on to say however that E.O. 12146 does not deprive agencies of judicial review. *Tennessee Valley Authority v. U.S. EPA*, 278 F.3d 1202.

Here, the COE concedes that if the jurisdiction decision here had not been made by the OMB, then it would have had to be made by the Attorney General of the United States. R. at 10. The dispute in this case more appropriately applies under E.O. 12146 since it is a dispute over who has jurisdiction to administer a permit under the CWA, a "particular program" as described in E.O. 12146. Although the jurisdiction dispute was not properly decided by the AG, the question is still ripe for judicial decision since E.O. 12146 does not preclude justiciability. Tennessee Valley Authority, 278 F.3d at 1202.

B. <u>Congress gave only EPA the power to veto 404 permits and since EPA is the only entity vested with that right a dispute cannot actually exist since no other entity is vested with veto power.</u>

EPA is the sole agency vested with veto power over section 404 permits. 33 U.S.C. § 1344 (c). Although the COE has the authority to *grant* section 404 permits for fill, they do not have the authority to *block* a section (c) veto by EPA. Here, the OMB inappropriately asserted control over a decision that is solely EPA's to make. R. at 9-10. Although New Union concedes that the OMB has authority to resolve some disputes that is not the case here. In this case only one agency had authority to veto and therefore a dispute among varying powers was impossible. Here, the Appellees argue that the executive power is vested in the President generally and therefore OMB's actions were appropriate. U.S. CONST. art. II. Although New Union agrees that the executive power is vested in the President generally, it asserts that this generality cannot be taken to mean that any agency may involve itself in any laws it wishes. The defense asserts that it is the duty of the President to "take Care that the Laws be faithfully executed," and New Union completely agrees. R. at 3 (citing U.S. CONST. art. II, § 3). The Law, as written by Congress, vests the veto power over section 404 permits with EPA and no one else. In executing the law, the President should therefore ensure EPA is the only agency deciding whether to exercise the veto power. If Congress was willing to permit EPA to abdicate its authority to another agency it would have said so in the statute. Congress, in its silence, has already spoken to the point and does not allow EPA to cede its authority to the OMB.

C. When EPA ceded its decision making authority it violated the Due Process clause of the 5th Amendment

"No person shall…be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation. U.S. CONST. amend. V. "Due process is flexible and calls for such procedural protections as the particular situation demands." *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972). To identify the specific

dictates of due process, the court should consider three distinct factors: first, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and third the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail. *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976).

In *Mathews*, the petitioner brought action when his social security disability benefits were terminated. He challenged the constitutional validity of the administrative procedures for assessing whether disability existed. *Id*. There the procedure did not violate due process because they were "elaborate" and the only harm to the successful petitioner there was a delay in full payment. There the process included an investigation by a "team," ability to seek additional examinations, and an opportunity to rebut decisions with additional evidence. The worker then receives a final assessment from the Social Security Administration which is appealable within the Social Security Administration and then in an Article III court. *Id.* at 337-39.

In *Mathews*, there was an elaborate procedure that was followed. In this case, however, EPA did not make a decision through the statutorily prescribed procedure and instead made an arbitrary decision to allow another agency without the scientific capabilities of EPA, to make a decision on its behalf. When considering the three factors here, EPA failed to follow due process. First, the private interest affected by this action is significant; an entire aquifer and freshwater source is at risk. Second, the risk of contamination of the aquifer is significant, especially when put in juxtaposition next to the minimal precaution New Union is asking EPA and DOD to take. Finally, the additional burdens placed on EPA are minimal and by not involving the COE and OMB may cost less in the long run.

D. Judicial review of the abdication of authority is appropriate since the decision to issue a § 402 permit and to consider a veto is nondiscretionary.

The decision to delegate decision making power to the OMB is reviewable under the APA. That decision to delegate the decision was arbitrary and capricious, contrary to constitutional right, in excess of statutory jurisdiction and lacked the observance of procedure required by law. Agency action is judicially reviewable so long as the decision is not discretionary by law and is not precluded by statute. 5 U.S.C. § 701(a). Executive agencies can be enjoined by the court to execute laws enacted by Congress. *Environmental Defense Fund v. Thomas*, 627 F.Supp. 566, 568 (D.D.C.,1986). To the extent necessary, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall compel any agency action which is unlawfully withheld and shall hold unlawful and set aside agency action which is found to be: "(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; (B) contrary to constitutional right, power, privilege, or immunity; (C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right; (D) without observance of procedure required by law." § 706. Scope of review, 5 U.S.C. § 706. See also *Sierra Club v. Mainella,* 459 F.Supp.2d 76, 90 (D.D.C.2006) (quoting *Occidental Eng'g Co. v. Immigration & Naturalization Serv.*, 753 F.2d 766, 769 (9th Cir.1985)). When conducting judicial review under the APA, the court should determine "whether or not as a matter of law the evidence in the administrative record permitted the agency to make the decision it did." The court does not do a factual review.

In *Environmental Defense Fund,* the court held there was no doubt they had jurisdiction over both plaintiffs' RCRA and APA claims against the Administrator of EPA, since they were exercising inherent equitable powers to grant injunctive relief under 28 U.S.C. § 1331 and § 1361. 42 U.S.C. § 6972(a)(2) and 5 U.S.C. § 702. *Environmental Defense Fund v. Thomas*, 627 F.Supp. 568. That court also held that in compelling EPA to perform non-discretionary duties, it is "appropriate to fashion equitable relief to ensure that such duties are performed without the interference of other officials acting outside the scope of their authority in contravention of federal law." *Id.* In *Sierra Club*, the National Park Service (NPS) was allowing private companies to conduct directional drilling adjacent to and outside of park boundaries. The court held that the agency failed to adequately explain the conclusion it had come to in allowing the permits for directional drilling. *Sierra Club v. Mainella,* 459 F.Supp.2d 103.

The COE claims that judicial review is limited to whether the decision was arbitrary or capricious under 5 U.S.C. § 706(2)(A) and that EPA decision not to veto the COE permit was neither arbitrary nor capricious because it was either required by or consistent with *Coeur*. This argument fails for multiple reasons. First, the purview of this court goes beyond whether the decision was arbitrary or capricious. According to 5 U.S.C. § 706(2)(A) this court may also review whether the decision was: contrary to constitutional right, in excess of statutory jurisdiction, or without observance of procedure required by law. In this case, the decision to allow the OMB make the decision to veto is not only arbitrary and capricious, but is also in violation of due process as required by the Fifth Amendment. Second, EPA did not go so far as to make a decision about the veto; they merely decided to abdicate their decision making ability to the OMB. R. at 9-10. While New Union concedes that a final decision not to veto would be

discretionary and therefore unjusticiable, that is not the case here. Ceding the decision-making authority was not in the discretion of EPA and is therefore justiciable.

Although the decision to veto a section 404 permit is discretionary, the decision to make that judgment is not. In the administrative record EPA fails to explain why it did not make the decision to veto the section 404 permit. It merely details an account of disagreement with the COE and of quickly abdicating its power to OMB. EPA failed to make a decision based on information it had developed for the report to the OMB. R. at 9. This failure to adequately provide reasoning for their action is a violation of the APA. *Sierra Club v. Mainella*, 459 F.Supp.2d 103.

CONCLUSION

New Union has standing to bring this suit as the owner of the groundwater of the State and in its *parens patriae* capacity. Lake Temp is navigable water as defined in the CWA and as clarified by the supporting common law. EPA was the appropriate agency to grant the DOD's pollution discharge permit. Because the DOD's munitions in question are not properly categorized as fill under the CWA the COE is not the appropriate permitting authority. EPA improperly delegated its decision making authority to the OMB and should have decided for itself that it had proper jurisdiction. Additionally, EPA delegated its veto making power over section 404 permits in opposition to Congress's intent.

The potential harm to New Union's aquifer is a real and substantial threat. EPA must make a reasoned judgment to prevent harm to the State of New Union and its residents. For the foregoing reasons, New Union respectfully requests that this Court *reverse* the decision of the district court denying New Union's claims for lack of jurisdiction and *grant* New Union's Motion for Summary Judgment.