Team 15

C.A. No. 11-1245

UNITED STATES COURT OF APPEALS
FOR THE TWELFTH CIRCUIT

STATE OF NEW UNION,

Appellant, Cross-Appellee

v.

UNITED STATES,

Appellee, Cross-Appellant

v.

STATE OF PROGRESS,

Appellee, Cross-Appellant

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

APPELLATE BRIEF OF NEW UNION

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JURISDICTIONAL STATEMENT

Federal district courts have original jurisdiction over any civil action arising under the laws of the United States, including the Clean Water Act (CWA), 33 U.S.C. § 1251 *et seq.* (2006). 28 U.S.C. § 1331 (2006). The United States Court of Appeals for the Twelfth Circuit has jurisdiction to hear appeals from any final decision of the United States District Court for the District of New Union. *Id.* § 1291.

STATEMENT OF THE ISSUES

1. Whether New Union has standing to challenge a Section 404 permit issued by the Army Corps of Engineers (COE) to the Department of Defense (DOD) for the discharge of munitions slurry that threatens New Union's groundwater and the economic interests of its citizens.

2. Whether Lake Temp is a navigable water under CWA Sections 301(a), 404(a), and 502(7), 33 U.S.C. §§ 1311(a), 1344(a), 1362(7) (2006).

3. Whether COE has jurisdiction to issue a permit under CWA Section 404 for the discharge of a slurry containing hazardous substances into Lake Temp, or instead the Environmental Protection Agency (EPA) must issue a permit under CWA Section 402.

4. Whether the Office of Management and Budget's (OMB) directive to EPA that a Section 404 permit was appropriate for Lake Temp, and EPA's acquiescence to that directive and consequent decision not to veto the Section 404 permit, violated the CWA, 33 U.S.C. §§ 1251(d), 1342, 1344 (2006).

STATEMENT OF THE CASE

The Secretary of the Army, through COE, issued a permit under Section 404 of the CWA, 33 U.S.C. § 1344 (2006), to DOD for the discharge of spent munitions slurry into Lake Temp. R. at 3. The State of New Union commenced an action in United States District Court for the District of New Union, seeking review of the Section 404 permit under 28 U.S.C. § 1331 and the Administrative Procedure Act (APA), 5 U.S.C. § 702 (2006). R. at 3. New Union

asserted that COE did not have jurisdiction to issue the Section 404 permit, because the munitions slurry is a pollutant and therefore required an EPA-issued permit under Section 402 of CWA. 33 U.S.C. § 1342 (2006); R. at 3. Additionally, New Union argued that OMB violated the CWA in resolving the conflict between COE and EPA regarding which agency had jurisdiction to issue the permit. R. at 9. New Union also argued that DOD cannot proceed without a permit under the Resource Conservation and Recovery Act, 42 U.S.C. §§ 6901–7000 (2006), but that challenge was not at issue in the motion for summary judgment in the district court. R. at 3. The State of Progress intervened on behalf of the United States. *Id.*

The United States filed a motion for summary judgment, to which New Union and Progress each responded with cross-motions. R. at 5. The district court held that: (1) New Union lacked standing to challenge the Section 404 permit; (2) Lake Temp is a navigable body of water; (3) COE had jurisdiction to issue the Section 404 permit because the slurry is a fill material; and (4) OMB did not violate the CWA in resolving the dispute between EPA and COE. R. at 10–11.

New Union timely appeals the district court's holdings as to all but the navigability issue, and Progress and the United States both cross-appeal. R. at 1. Progress also appeals the district court's determination the Lake Temp is a navigable body of water and therefore requires some form of CWA permit; New Union and United States agree with the district court that Lake Temp is a navigable body of water. *Id.*

STATEMENT OF THE FACTS

Lake Temp is an oval-shaped lake located in a United States military reservation in the State of Progress, near the border with New Union. R. at 4. The lake, which has no outflow, is oval-shaped and three miles wide by nine miles during the rainy season in wet years. R. at 4–5.

Because the lake is located in an arid region, it contracts during the dry season, and becomes wholly dry approximately once every five years. R. at 4. However, the lake is extensive enough that it has been used for at least the last 100 years by hundreds or thousands of duck hunters from several states, who have rowed across the lake to hunt ducks from the far shore, or from boats on the lake. R. at 4, 7. Lake Temp is also a popular bird watching destination. R. at 4.

Lake Temp sits on unconsolidated alluvial fill less than one thousand feet above the Imhoff Aquifer, which is larger, by an unknown amount, than the footprint of the Lake at its largest. R. at 4, 5. Indeed, approximately five percent of the Imhoff Aquifer is under New Union, where it underlies the ranch of New Union resident Dale Bompers. R. at 4. Although sulfur is naturally present in the Imhoff Aquifer, the waters can be used for agriculture and drinking if treated. R. at 4. A New Union statute requires a state permit to withdraw water from the aquifer, to ensure that groundwater levels will not deplete over a period of twenty years. *Id*.

The Department of Defense proposes to build a munitions disposal facility on the shore of Lake Temp, which will take a wide variety of munitions containing many chemicals on the Clean Water Act Section 311 list of hazardous substances; mix the liquid, semi-solid and granular contents of the munitions with chemicals to assure they are not explosive; and then grind and pulverize the metallic munitions shells. R. at 4. Without any further treatment or decontamination, the facility will add water to both these sets of waste to form a slurry, and will deposit a several-feet-deep layer of this slurry evenly over the entire three-mile by nine-mile dry bed of the lake. R. at 4. Although COE will grade the edges of the new lakebed to allow alluvial runoff deposits to eventually cover the lakebed again, DOD does not propose to conduct any further purification, treatment, or decontamination of Lake Temp water following the disposal of the slurry into the Lake. R. at 4–5.

In 2002, the DOD prepared an Environmental Impact Statement (EIS) for the proposed project under the National Environmental Policy Act, 42 U.S.C. §§ 4321–4370H (2009). R. at 6. Although New Union did not comment on the EIS for NEPA purposes almost ten years ago, under the CWA it is concerned about the impact that DOD's discharge of spent munitions into Lake Temp would have on the portion of Imhoff Aquifer within its boundaries, and in turn the impact of that pollution on groundwater integrity and property values. R. at 6–7. New Union has offered to fund studies to determine the timing and potency of the pollution from the slurry that will reach the groundwater beneath its land, but is unable to do so without the permission of DOD. R. at 6.

The Corps of Engineers issued a Section 404 permit to DOD for discharge of the slurry into Lake Temp. R. at 7. The Environmental Protection Agency initially planned to veto this permit, concluding that at least the non-fill liquid and semi-solid portion of the munitions slurry required a permit under Section 402 of the CWA. R. at 9. However, before EPA could exercise its veto authority, OMB intervened in the matter, ordering EPA and COE to submit briefing papers on the issue and attend a meeting with OMB. R. at 9 n.1. At the conclusion of this meeting, OMB rejected EPA's reasoning and instructed EPA not to veto the Section 404 permit. *Id.* Acquiescing to OMB's directive, EPA took no further action. R. at 10.

STANDARD OF REVIEW

Summary judgment is appropriate if "there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). This Court reviews question of law *de novo*. *Pierce v. Underwood*, 487 U.S. 552, 558 (1988). Thus, the issues of New Union's standing, the proper interpretation of the CWA, and the legality of OMB's intervention must be reviewed *de novo*.

SUMMARY OF THE ARGUMENT

The District Court erred in denying New Union standing to challenge the Section 404 permit. New Union will suffer an injury in fact as a sovereign landowner of groundwater in the portion of the Imhoff Aquifer within New Union's boundary that is threatened with pollution from DOD's slurry discharge. This injury is fairly traceable, and therefore causally related, to COE's issuance of a Section 404 permit and DOD's discharge of munitions waste slurry into Lake Temp. Moreover, this Court can redress New Union's injury by invalidating DOD's Section 404 permit. Additionally, New Union has standing to bring a *parens patriae* action on behalf of the interests of its citizens, under either of two theories: (1) New Union's citizens are facing threats to their economic well-being; and (2) New Union's citizens are being denied the full protection of the CWA. This Court should therefore grant standing to New Union in either its sovereign or *parens patriae* capacity.

The district court correctly determined that Lake Temp is a navigable water of the United States and therefore subject to the CWA. Lake Temp is navigable because it is navigable-in-fact, because it is a relatively permanent body of water, and because it supports interstate commerce as a recreational destination for out-of-state hunters and birdwatchers. The district court erred, however, in finding that COE had jurisdiction to issue a Section 404 permit to DOD, as the munitions slurry that DOD wishes to discharge is not fill material. Rather, because the material contains hazardous substances, and DOD is proposing to use Lake Temp as a final disposal site, the court should have instead found that EPA was required to issue a Section 402 permit.

Finally, the district court erred in holding that OMB's intervention in the Lake Temp permitting decision, and EPA's acquiescence to that intervention, did not violate the CWA. The Clean Water Act delegates no authority to OMB; therefore, OMB contravened the statute when it interfered with the permitting decision and directed a substantive outcome, exceeding its

conflict-resolution role under Executive Order 12,088. Its interpretation of the CWA, as manifested in its directive to EPA, does not merit judicial deference. Moreover, EPA's decision not to veto the permit, which is subject to judicial review, was arbitrary, capricious, and an abuse of discretion, because EPA relied on factors Congress did not intend for it to consider in yielding to OMB's dictate. The President's constitutional authority does not salvage EPA's actions; on the contrary, EPA's acquiescence to OMB affronted the norms of separation of powers.

ARGUMENT

I. NEW UNION HAS STANDING TO CHALLENGE THE SECTION 404 PERMIT.

New Union has standing to bring this action under two theories: (1) in its sovereign capacity as a landowner; and (2) in its *parens patriae* capacity to represent its citizens' interests.

The Constitution confers judicial authority over "cases" arising under the laws of the United States and "controversies" between two or more States. U.S. Const. art. III, § 2, cl. 1. To satisfy the Article III standing requirement, a plaintiff must demonstrate: (1) a concrete "injury in fact" that is actual or imminent; (2) the cause of the injury is "fairly traceable" to the activity in question; and (3) the injury is subject to redress by the court. *Lujan v. Defenders of Wildlife,* 504 U.S. 555, 561–62 (1992).

The proof required to satisfy the standing inquiry is less than that which is necessary to prevail on the merits. *Warth v. Seldin*, 422 U.S. 490, 500 (1975)*; see also Ecological Rights Found. v. Pac. Lumber Co.*, 230 F.3d 1141, 1151 (9th Cir. 2000) (requiring the plaintiff to show actual environmental harm as a condition for standing would confuse the jurisdictional inquiry with the merits inquiry). At the summary judgment stage, plaintiffs must set forth, but need not prove, facts that, if true, establish that plaintiffs meet the constitutional standing requirements. *Lujan*, 504 U.S. at 560–61; Fed. R. Civ. P. 56. To establish that a plaintiff lacks standing, a

defendant must demonstrate that plaintiffs' evidence is a "sham and raise[s] no genuine issue of fact." *United States v. Students Challenging Regulatory Agency Procedures* (*SCRAP*), 412 U.S. 669, 689 (1973). Because New Union has offered evidence that it will likely suffer injury as a result of the slurry discharge, which could be redressed by a favorable decision, this Court should determine that New Union has satisfied the Article III standing requirements. Conversely, because the United States cannot demonstrate that New Union's evidence is a "sham," where at the very least further study is needed to determine the toxicity and timing of the discharge entering the Imhoff Aquifer beneath New Union, the United States cannot defeat New Union's standing at the summary judgment stage. *See SCRAP*, 412 U.S. at 689; R. at 6.

Additionally, the Supreme Court in *Massachusetts v. E.P.A.* held that States receive "special solicitude" in the standing inquiry where they are afforded procedural rights, in that case under the Clean Air Act. 549 U.S. at 517 (2007). In enacting the CWA, Congress included a citizen suit provision allowing any citizen or State governor to bring an action challenging CWA violations in another State that adversely affect public welfare or violate a water quality standard in the plaintiff's State. 33 U.S.C. §§ 1251, 1365(h) (2006). New Union has a right under the CWA to bring an action against COE and DOD, where DOD's slurry discharge would adversely affect the groundwater, and therefore the welfare, of New Union. Thus, New Union faces a reduced standing barrier in challenging the validity of the Section 404 permit. *Massachusetts v. E.P.A.*, 549 U.S. at 517. Although New Union's claim satisfies the traditional standing requirements, the relaxed standard of *Massachusetts v. E.P.A.* adds certainty to this conclusion.

A. New Union Has Standing as a Sovereign Landowner above the Imhoff Aquifer to Challenge COE's Section 404 Permit.

The Department of Defense's untreated slurry discharge into the Imhoff Aquifer is a tangible and imminent threat to New Union's groundwater. There is no dispute that DOD is the

source of the discharge, and this Court can redress the injury by invalidating the Section 404 permit. Therefore, New Union has standing to challenge COE's Section 404 permit.

1. The Increased Risk of Harm from the Slurry Discharge Entering the Portion of the Imhoff Aquifer in New Union is an Injury in Fact to New Union's Interest in its Groundwater.

To attain standing, a petitioner must allege an injury in fact that is (1) concrete and (2) actual or imminent. *Lujan*, 504 U.S. at 561. In the context of environmental claims, the Supreme Court has made clear that "the relevant showing for purposes of Article III standing . . . is not injury to the environment but injury to the plaintiff," *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 181 (2000), and the injury can exist where there is a threat or increased risk of harm. *Massachusetts v. E.P.A.*, 549 U.S. 497, 521–22 (2007) (emphasizing the future harm and increased risk that climate change poses to Massachusetts as the injury in fact); *Gladstone Realtors v. Village of Bellwood*, 441 U.S. 91, 99 (1979) (holding that that a "threatened injury" will satisfy the "injury in fact" requirement for standing). Furthermore, where the threat is water pollution, evidence of a specific degree or amount of pollution is not required. *See Ecological Rights Found. v. Pac. Lumber Co.*, 230 F.3d 1141, 1151 n.12 (9th Cir. 2000) ("It is not necessary for a plaintiff challenging violations of rules designed to reduce the risk of pollution to show the presence of actual pollution in order to obtain standing"); *cf. Maine People's Alliance v. Mallinckrodt, Inc.*, 471 F.3d 277, 283–84 (1st Cir. 2006) (finding cognizable injury where further studies were needed to determine the level of mercury defendant discharged into body of water). In the context of water supplies, injury exists where petitioners allege, without providing specific facts, that defendant's activity would diminish available water supply, thereby adversely affecting the petitioners. *Bennett v. Spears*, 520 U.S. 154, 168 (1997).

In this case, New Union has alleged an injury in fact that is both concrete and imminent. New Union has a concrete interest in preserving and protecting its groundwater, as evidenced by its statue designed to prevent groundwater depletion. R. at 6. As in *Bennett*, where petitioners merely alleged that defendant's irrigation project would affect their water supply, here New Union has presented evidence that contaminated water from DOD's discharge will enter the Imhoff Aquifer, a source of groundwater for New Union. *See Bennett*, 520 U.S. at 168; R. at 5. Furthermore, the threat of pollution is imminent; DOD intends to begin discharging slurry before further studies can determine the severity of the pollution. R. at 6. That the timing and degree of pollution reaching the aquifer is presently unknown is immaterial to the standing inquiry. *See Friends of the Earth, Inc. v. Gaston Copper Recycling Corp.*, 204 F.3d 149, 162 (4th Cir. 2000) (finding that evidence of change in chemical content and increase in salinity from upstream pollution is not necessary to establish standing). Likewise, that further studies could provide more certain evidence of the timing and severity of the discharge pollutants in the aquifer beneath New Union is inconsequential to establishing injury in fact. *See Mallinckrodt*, 471 F.3d at 283–84 (finding cognizable injury although further studies were needed to determine amount of pollution in water); *cf. Monsanto Co. v. Geertson Seed Farms*, 130 S. Ct. 2743, 2755 (2010) (finding that the *risk* of contamination made necessary studies on the extent of crop contamination, and that the cost of the studies constituted an injury). This Court should therefore recognize the discharge threat to New Union's groundwater as an injury in fact.

2. New Union's Injury is Fairly Traceable to DOD's Slurry Discharge Under its Section 404 Permit.

The causation prong of the standing inquiry requires that the alleged injury be fairly traceable to the defendant. *Lujan*, 504 U.S. at 561. In the context of discharges into water, to show causation a plaintiff must "merely show that a defendant discharges a pollutant that causes

or contributes to the kinds of injuries alleged." *Natural Res. Def. Council v. Watkins*, 954 F.2d 974, 980 (4th Cir. 1992) (internal quotation marks omitted). As with injury, scientific proof, including specific chemical content of a discharge, is not required to show causation. *Friends of the Earth, Inc. v. Gaston Copper Recycling Corp.*, 204 F.3d 149, 162 (4th Cir. 2000). In *Gaston Copper*, the Fourth Circuit persuasively reasoned that because Congress conferred standing under the CWA on any person with an interest which may be affected by water pollution, requiring scientific proof would confound Congress' intent. *See* 33 U.S.C. § 1365(g) (2006); 204 F.3d at 162.

All that New Union must do to establish causation, then, is show that the risk posed by the slurry discharge is fairly traceable to COE's issuance of a 404 permit to DOD to discharge slurry materials. The Section 404 permit allows DOD to discharge slurry material without treatment, whereas a 402 permit would incorporate an EPA treatment standard, as discussed in Section III, thereby reducing the hazardous nature of the slurry, and the subsequent risk that it will harm New Union's groundwater. DOD does not deny that the discharge of slurry materials will enter Lake Temp, and although the timing and severity are unknown, New Union has presented evidence that those contaminated lake waters will enter the Imhoff Aquifer. *Id* at 5–6. Therefore, DOD's planned discharge is the direct source of New Union's injury—the increased threat to its groundwater. As a result, DOD's slurry discharge satisfies the causation element.

3. Invalidation of the Section 404 Permit by this Court would Reduce the Likelihood of the Harm to New Union.

To establish redressability, there must be a substantial likelihood that a favorable judicial decision will redress the injury. *Laidlaw*, 528 U.S. at 181. Redress need not be guaranteed, however, nor must the redress sought address every one of the plaintiff's injuries. *Larson v. Valente*, 456 U.S. 228, 244 n.15 (1982); *see also Sugar Cane Growers Coop. of Fla. v. Veneman*,

289 F.3d 89, 94–95 (D.C. Cir. 2002) (holding that there is no requirement to prove that procedural protection would have altered result, just that procedure was connected to result).

New Union's request for this Court to invalidate the COE's issuance of a Section 404 permit satisfies the redressability requirement. Should this Court invalidate the permit, it would either decrease the likelihood that DOD will discharge munitions slurry into Lake Temp, which in turn will eliminate the likelihood that the Imhoff Aquifer and New Union's groundwater will become polluted from munitions slurry, or it would result in EPA instead issuing a Section 402 permit, which encompasses strict environmental standards that would reduce the adverse impact of the munitions slurry. *See* 33 U.S.C. § 1316 (2006). Likewise, the preexistence of sulfur in the aquifer does not impact the redressability issue, insofar as a favorable decision need not cure *every* injury. *Valente*, 456 U.S. at 243 n.15; R. at 4. Because an invalidation of the Section 404 permit would address the injury alleged here, New Union's requested relief satisfies the requirements for redressability. All three Article III standing elements are satisfied; therefore, this Court should therefore grant standing to New Union to challenge the Section 404 permit.

B. New Union has Standing in its *Parens Patriae* Capacity to Ensure that its Citizens' Interests and Rights Under the CWA are Protected.

In addition to its sovereign interest in protecting its groundwater, New Union asserts standing to challenge the validity of the Section 404 permit in its *parens patriae* capacity for the interests of its citizens. In order to bring a *parens patriae* action, a State must articulate a quasi-sovereign interest, which generally falls into one of two distinct categories: (1) an interest in the health and well-being, both physical and economic, of its citizens, or (2) an interest in not having its citizens denied their rightful status in the federal system. *Alfred L. Snapp & Son, Inc. v. Puerto Rico, ex rel., Barez*, 458 U.S. 592, 607 (1982). In determining whether a State has the authority to bring a *parens patriae* action, courts are more likely to find such authority where

"the injury is one that the State, if it could, would likely attempt to address through its sovereign lawmaking powers." *Snapp*, 458 U.S. at 607. Furthermore, while a State must articulate an interest separate from the interest of its citizens, a State's interests in promoting the public well-being and the ensuring procedural protection for its citizens constitute a recognized separate interest. *Id*. at 608 (holding that a State has an independent interest in assuring that the benefits of the federal system are not denied to its general population); *Connecticut v. Am. Elec. Power Co., Inc.*, 582 F.3d 309, 338 (2d Cir. 2009), *rev'd on other grounds*, 131 S. Ct. 2527 (2011) (holding that Connecticut's interest in safeguarding the public health and their resources is an interest apart from any interest held by individual private entities).

1. New Union has an interest in protecting the property values of its citizens and ensuring they receive the full protection of the CWA.

New Union has a quasi-sovereign interest in both the health and economic well being of its citizens, including those whose property values will diminish as a result of the pollution of the aquifer. This is precisely the type of economic interest that federal courts seek to protect. *See Laidlaw*, 528 U.S. at 182–83 (allegation of lowered home value caused by pollutant discharges sufficient to confer standing); *Barnum Timber Co. v. E.P.A.*, 633 F.3d 894, 898 (9th Cir. 2011) (specific, concrete, particularized allegation of loss of property value satisfies injury in fact). New Union also has an interest in ensuring that its citizens receive the protection that the CWA is intended to provide. 33 U.S.C. § 1251 (2006). Specifically, Section 505 of the CWA provides that a State may bring an action for a violation that is "occurring in another State and is causing an adverse effect on the public health or welfare in his State." 33 U.S.C. § 1365(h) (2006).

In this case, one adverse effect of the slurry discharge on the public welfare in New Union is exemplified by Dale Bompers, a citizen of New Union, who alleges that the value of his ranch, which sits directly above the Imhoff Aquifer, will decrease as a result of DOD's discharge

pollution. R. at 6. It is not necessary that Bompers prove that his ranch has already depreciated in value; his allegation, if true, is sufficient. *Lujan*, 505 U.S. at 560-61. In fact, it is entirely reasonable that the mere rumor of discharge pollution would dissuade potential buyers and diminish the ranch's value. *See* Maxwell L. Stearns, *From Lujan to Laidlaw: A Preliminary Model of Environmental Standing*, 11 Duke Envtl. L. & Pol'y F. 321, 383 (2001) (contending that the Supreme Court in *Laidlaw* would find injury where mercury discharge caused perception of harm to the market value of property near affected waterway).

Bompers' economic injury is also the kind that New Union "would likely attempt to address through its sovereign lawmaking powers," *Snapp*, 458 U.S. at 607, as evidenced by the legislation that New Union has already passed to protect groundwater within the State. *See* R. at 6–7. Additionally, New Union's interests in its public welfare and ensuring CWA protection for its citizens are independent of the economic interests of its citizens. *See Connecticut*, 582 F.3d at 338; *Snapp*, 458 U.S. at 608. Because it has in independent, quasi-sovereign interest in protecting its citizens, New Union has standing to bring a *parens patriae* action.

2. New Union, not the United States, is the Appropriate Party to Bring the *Parens Patriae* Action, Where it Seeks to Ensure that CWA Protection is Administered Properly.

New Union, not the United States, is the appropriate party to bring the *parens patriae* action on behalf of its citizens. New Union has an interest in ensuring that Bompers and citizens like him are afforded the full protection of the CWA. The Supreme Court in *Massachusetts v. E.P.A.* made clear that, although States lack *parens patriae* standing to bring an action "to protect citizens of the United States from the operation of [federal] statutes," States *do* have standing to demand that its residents be provided the benefits of federal law. 549 U.S. at 520 n.17 (citations omitted). Here, the invalid Section 404 permit is denying the citizens of New

Union who have an interest in the Imhoff Aquifer their rightful protections under the Clean Water Act. Since New Union is asserting those rights on behalf of its citizens, then, it is the appropriate party to bring this *parens patriae* action.

In *Massachusetts v. E.P.A.*, the Supreme Court articulated a pragmatic approach to standing: "At bottom, the gist of the question of standing is whether petitioners have such a personal stake in the outcome of the controversy as to assure [a] concrete adverseness." 549 U.S. at 517. New Union, in both its sovereign and *parens patriae* capacities, has a concrete interest in avoiding a slurry discharge that will pollute its groundwater. Given that New Union' legislation to avoid groundwater depletion, preserving groundwater is a demonstrably legitimate concern to New Union. Furthermore, New Union has legitimate interests in ensuring that Dale Bompers does not suffer economic hardship when his ranch depreciates in value, as well as protecting his rights under the CWA. This Court should therefore allow its challenge to proceed.

II. LAKE TEMP IS A NAVIGABLE WATER OF THE UNITED STATES AND THEREFORE SUBJECT TO CWA REGULATIONS.

The district court correctly determined that Lake Temp is a navigable water under the Clean Water Act, 33 U.S.C. §§ 1311(a), 1344(a), 1362(7) (2006). The Clean Water Act prohibits, except as authorized by certain sections, the discharge of pollutants into "navigable waters," which it defines as "waters of the United States, including the territorial seas." *Id.* §§ 1311(a), 1342, 1344, 1362(7). The Corps of Engineers and EPA define "waters of the United States" to include both traditionally navigable waters that are "used in interstate or foreign commerce," as well as those "waters such as intrastate lakes . . . which are or could be used by interstate or foreign travelers for recreational or other purposes." 33 C.F.R. §§ 328.3(a)(1), (a)(3)(i) (2010); 40 C.F.R. § 230.3(s)(1), (s)(3)(i) (2010). Waters are "navigable in fact," for the

purposes of federal law, when "they are used . . . as highways for commerce, over which trade and travel are or may be conducted . . . ." *The Daniel Ball*, 77 U.S. 557, 563 (1870).

Lake Temp is a navigable water, because it is navigable in fact, because it is a "relatively permanent" body of water described as a lake, and because it is used by interstate travelers for recreational purpose and its degradation "could affect interstate or foreign commerce." *See Rapanos v. United States*, 547 U.S. 715, 739 (2006) (plurality opinion); 33 C.F.R. § 328.3(a)(3).

A. Lake Temp is "Navigable in Fact" and Therefore Subject to the CWA.

Under federal law bodies of water that are navigable in fact are also navigable in law. *The Daniel Ball*, 77 U.S. at 563. The Supreme Court has noted that the use of the term "navigable" in the CWA invoked Congress's "traditional jurisdiction over waters that were or had been navigable in fact." *Solid Waste Agency of N. Cook County v. U.S. Army Corps of Eng'rs* (*SWANCC*), 531 U.S. 159, 172 (2001). The plurality in *Rapanos* also acknowledged that the term "navigable" "retained something of its traditional import." *Rapanos*, 547 U.S. at 739, 731. Justice Kennedy's concurring opinion further emphasizes that CWA jurisdiction depends on whether bodies of water "significantly affect . . . waters more readily understood as 'navigable.'" *Id.* at 780 (Kennedy, J., concurring). The logical conclusion then is that the CWA controls waters that are themselves navigable in fact. *See United States v. Fabian*, 522 F. Supp. 2d 1078, 1092 (N.D. Ind. 2007) ("If the [body of water] is navigable-in-fact, Justice Kennedy would find as a matter of law that jurisdiction exists.").

In *United States v. Fabian*, a district court found that a river no deeper than forty-five inches was navigable in fact, where a hydrologist "easily canoed through the Little Calumet River with no need for any portaging." 522 F. Supp. 2d at 1092. Likewise, in *FPL Energy Maine Hydro LLC v. F.E.R.C.* (*Maine Hydro*), the D.C. Circuit found a stream to be navigable

for purposes of the Federal Power Act based solely on the success of several "experimental" test canoe trips up and down the stream. 287 F.3d 1151, 1154, 1159 (D.C. Cir. 2002).

In this case, Lake Temp is navigable in fact, as demonstrated by the rowing and paddling activities of hunters on and across the lake. R. at 7. As with the Little Calumet River in *Fabian*, which was as shallow as nine inches in some places but nonetheless could be "easily canoed," here Lake Temp has been used by hunters who have "hunted from boats and canoes on the lake and have rowed or paddled across the lake . . . ." *See Fabian*, 522 F. Supp. at 1092; R. at 7. This regular use of Lake Temp for almost 100 years far exceeds the small number of test canoe trips that were sufficient to establish navigability in fact for the D.C. Circuit in *Maine Hydro*. *See* 522 F. Supp. 2d at 1092. As recreational hunting by out-of-state travelers using boats on Lake Temp is a form of interstate commerce, Lake Temp meets the *Daniel Ball* definition of navigability in fact, in that it is used "as [a] highway[] for commerce over which trade and travel is conducted." *The Daniel Ball*, 77 U.S. at 563. Because Lake Temp is navigable in fact, it is a "water of the United States" subject to the CWA.

B. Lake Temp is a Relatively Permanent Body of Water and Therefore Subject to the Clean Water Act as a Water of the United States.

In addition to being navigable in fact, as a "relatively permanent . . . bod[y] of water . . . described in ordinary parlance as . . . [a] lake[]," Lake Temp also meets the definition of "waters of the United States" under the plurality opinion in *Rapanos*. 547 U.S. at 739. Although bodies of water "through which water flows intermittently or ephemerally" are not navigable for purposes of the CWA, water bodies that "might dry up in extraordinary circumstances" or that are seasonal can still be considered navigable. *Rapanos*, 547 U.S. at 733 n.5.

In *Rapanos*, the Supreme Court remanded the Sixth Circuit's finding that COE had jurisdiction over several wetlands, where "[i]t was not clear whether . . . nearby drains and

ditches contain continuous or merely occasional flows of water." *Id*. at 729. The plurality decision focused narrowly on the terms "ephemeral streams . . . man-made drainage ditches, and dry arroyos" in the COE regulations, finding that the inclusion of such terms stepped beyond the bounds of the CWA. *Id*. at 734, 739.

While the plurality in *Rapanos* declined "to decide exactly when the drying-up of a streambed is continuous and frequent enough to disqualify the channel," other courts have touched on this issue. *Id* at 732 n.5. For example, in *United States v. Moses*, the Ninth Circuit found that a portion of Teton Creek through which water only flowed two months each year was a water of the United States under the *Rapanos* plurality opinion, and upheld a defendant's conviction under the CWA for recontouring this "often-dry" portion of the creek. 496 F.3d 984, 985, 991 (9th Cir. 2007). The portion of Teton Creek on which pollutants were deposited remained a water of the United States subject to CWA jurisdiction even when it was dry. *Id*. at 991. *See also United States v. Vierstra*, 1:10-CR-204-REB, 2011 WL 1064526 at *2, *6 (D. Idaho Mar. 18, 2011) (finding that the Low Line Canal, which only carried water for six to eight months each year, met the *Rapanos* plurality opinion standard of "relatively permanent," and was subject to the CWA even when pollutants were discharged into the canal's dry bed); *United States v. Brink*, CIV.A. C-10-243, 2011 WL 2412577 at *10 (S.D. Tex. June 6, 2011) (holding that a creek that may have "frequently held little or insubstantial amounts of water and was seldom 'flowing,'" nonetheless met the "relatively permanent" test of the *Rapanos* plurality).

Here, Lake Temp falls well within the plurality's definition of waters of the United States as "relatively permanent" bodies of water. *See Rapanos*, 547 U.S. at 739. Lake Temp becomes "wholly dry" far less frequently than did the Teton Creek in *Moses*, which was dry ten months out of each year, the Low Line Canal in *Vierstra*, which was dry between four to six months of

each year, and the creek in *Brink*, which "frequently held little or insubstantial amounts of water." *See Moses*, 496 F.3d at 985; *Vierstra*, 2011 WL 1064526 at *2; *Brink*, 2011 WL 2412577 at *10. Although Lake Temp dries completely approximately once every five years, it is not "typically dry" like "channels through which water flows intermittently or ephemerally" or "transitory puddles or ephemeral flows of water," and therefore is distinguishable from the situations described in *Rapanos*. 547 U.S. at 733, 739; R. at 4.

Furthermore, the fact that DOD plans to place the pollutant on the dry bed of the lake does not remove Lake Temp from CWA jurisdiction. As in *Moses* and *Vierstra*, which found that the portions of the water beds that were dry nonetheless remained "waters of the United States," here the entire bed of Lake Temp remains a "water of the United States," subject to CWA regulation. *See Moses*, 496 F.3d at 991; *Vierstra*, 2011 WL 1064526 at *2.

Lake Temp is a "relatively permanent," rather than a "transitory" or "ephemeral" body of water; therefore, the District Court ruled correctly that it was navigable for purposes of the CWA. *See Rapanos*, 547 U.S. at 739, 733.

C. Lake Temp is a Navigable Water Because it is Used by Interstate Travelers for Recreational Purposes.

The Corps of Engineers defines "waters of the United States" to include "intrastate lakes . . . used by interstate or foreign travelers for recreational or other purposes." 33 C.F.R. § 328.3(a)(3). The focus here is "on the impact the intrastate lake has or could have on interstate commerce." *Nw. Envtl. Def. Ctr. v. Grabhorn, Inc.*, CV-08-548-ST, 2009 WL 3672895 at *19 (D. Or. Oct. 30, 2009). While courts have historically recognized that a wide range of activities affect interstate commerce for purposes of the CWA, in *SWANCC* the Supreme Court clarified that such a jurisdictional finding could not rely solely on a water body's role as habitat for migratory birds (the Migratory Bird Rule). 531 U.S.at 174 (2001). Later decisions have

acknowledged that the Migratory Bird Rule is permissible as a secondary basis for assertions of CWA jurisdiction. *See, e.g., United States v. Rueth Dev. Co.*, 335 F.3d 598, 604 (7th Cir. 2003) (upholding COE's determination that wetlands were navigable based on both adjacency to navigable waters and presence of migratory birds as valid under *SWANCC*).

In *Colvin v. United States*, a district court determined that the Salton Sea, "a popular destination for out-of-state and foreign tourists," including duck hunters, was a navigable water even after *SWANCC*. *Colvin v. United States*, 181 F. Supp. 2d 1050, 1053, 1055 (C.D. Cal. 2001); *see also United States v. Zanger*, 767 F. Supp. 1030, 1034 (N.D. Cal. 1991) ("Pacheco Creek and Pajaro River fall within the scope of [COE's definition of navigable waters] in that . . . they are used or could be used by interstate or foreign travelers for 'recreational' purposes.").

Here, Lake Temp is a water of the United States because it "affect[s] interstate or foreign commerce," as evidenced by its use by interstate duck hunters and birdwatchers for "recreational or other purposes." *See* 33 C.F.R. § 328.3(a)(3). As the record indicates, "[h]undreds, perhaps thousands" of duck hunters, at least one-quarter of whom were from out-of-state, have used Lake Temp for at least a century, hunting "from boats and canoes on the lake," or from the shore opposite the highway after rowing or paddling across the lake. R. at 7. As in *Colvin*, where the Salton Sea served as a recreational destination for out-of-state tourists, including duck hunters, and *Zanger*, where the Pacheco Creek and Pajaro River were navigable because they were used by interstate travelers for recreational purposes, here Lake Temp serves as a recreational destination for out-of-state duck hunters and birdwatchers. *See Colvin*, 181 F. Supp. 2d at 1055; *Zanger*, 767 F. Supp. at 1034.

Furthermore, unlike in *SWANCC*, where the Migratory Bird Rule was COE's sole basis for determining that isolated, intrastate ponds fell within their jurisdiction, here the district

court's basis for finding Lake Temp to be navigable is its use by interstate travelers, not the presence of migratory birds. *See* 531 U.S. at 171; R. at 7. Even if the COE was invoking the Migratory Bird Rule as a *secondary* basis for asserting jurisdiction, such a basis would be permissible post-*SWANCC*. *See Rueth Dev. Co.*, 335 F.3d at 604 (7th Cir. 2003).

This court should uphold the district court's decision that Lake Temp is a "water of the United States" for purposes of the CWA, because it is navigable in fact, a "relatively permanent" body of water, and used in interstate commerce.

III. BECAUSE IT CONTAINS HAZARDOUS SUBSTANCES, THE MUNITIONS SLURRY WHICH DOD PLANS TO DISCHARGE IS NOT A FILL MATERIAL; THEREFORE, DOD IMPROPERLY OBTAINED A SECTION 404 PERMIT FROM COE, RATHER THAN A SECTION 402 FROM EPA.

The munitions that DOD plans to discharge contain hazardous chemicals, thus the discharge does not fit within the definition of fill material used by EPA and COE, and the district court erred in finding that COE had jurisdiction to issue a Section 404 permit for the disposal of this pollutant material. The plain language of the CWA, and the current regulations and past practices of both EPA and COE, preclude the classification of a pollutant containing hazardous chemicals as "fill material." Therefore, this Court should reverse the district court's finding that COE has jurisdiction to issue a Section 404 permit for the slurry discharge into Lake Temp.

In pursuit of the goal to eliminate entirely "the discharge of pollutants into the navigable waters," the CWA sets up a dual-permit system administered by EPA and COE. 33 U.S.C. § 1251(a) (2006). The intent of Congress was to charge EPA with primary responsibility for regulating the discharge of pollutants and ensuring that discharges into water had minimal environmental impact, while continuing to recognize COE's traditional role in regulating physical changes that could affect the actual navigability of waters of the United States. *See Coeur Alaska, Inc. v. Se. Alaska Conservation Council*, 129 S. Ct. 2458, 2483 (2009) ("Leaving

pollution-related decisions to EPA, moreover, is consistent with Congress' delegation to that agency of primary responsibility to administer the Act.") (Ginsburg, J., dissenting).

Under Section 402 of the CWA, EPA may "issue a permit for the discharge of any pollutant," 33 U.S.C. § 1342(a)(1) (2006); these permitted discharges must meet a performance standard that "reflects the greatest degree of effluent reduction . . . achievable through application of the best available demonstrated control technology." 33 U.S.C. § 1316 (2006). Under Section 404 of the Act, the COE may issue a permit "for the discharge of dredged or fill material" into navigable waters. 33 U.S.C. § 1344(a) (2006). When issuing a Section 404 permit, COE does not require discharges to meet technology-based performance standards, but instead applies EPA-developed guidelines to consider the environmental impact of the discharge. *See id*. The classification as fill material of munitions slurry containing chemicals on the Section 311 list of hazardous pollutants goes well beyond the limits of COE's latitude under Section 404.

A. The Munitions Slurry is not "Fill Material" Because it Contains Hazardous Pollutants.

Under the CWA, COE has jurisdiction to issue permits "for the discharge of . . . fill material." 33 U.S.C. §1344(a). Although the CWA does not provide a definition, COE and EPA define "fill material" as "material placed in waters of the United States [that] has the effect of. . . [c]hanging the bottom elevation of any portion of a water of the United States." 33 C.F.R. § 323.2(e)(1) (2010); 40 C.F.R. § 232.2 (2010).

While this definition encompasses a broad range of material, the classification of fill material is subject to several constraints. First, "material that has the 'effect of . . . [c]hanging the bottom elevation' of the body of water" is not "automatically subject to § 404, not § 402." *Coeur Alaska,* 129 S. Ct. at 2478 (2009) (Breyer, J., concurring) (internal citations omitted). The

classification of material as fill on this basis is not meant to "authorize[e] the discharges of other solids that are now restricted by EPA standards . . . ." *Coeur Alaska*, 129 S. Ct. at 2468.

Second, the classification of mining waste as fill material subject to Section 404 permits, instead of as a pollutant subject to Section 402 permits, reflects the particular history and practice of agencies administering the CWA that cannot be extended wholesale to waste from other industries without violating the CWA. *See, e.g.*, 33 U.S.C. § 1321(b)(3) (2006) (prohibiting "[t]he discharge of . . . hazardous substances into or upon the navigable waters of the United States"); *Kentuckians for Commonwealth Inc. v. Rivenburgh*, 317 F.3d 425, 448 (4th Cir. 2003) (allowing COE issuance of a Section 404 permit for valley fills in connection with mountaintop coal mining);. Third, because EPA has traditionally had jurisdiction over hazardous and highly toxic materials, allowing the disposal of military munitions that contain Section 311 hazardous substances would permit "whole categories of regulated industries [to] gain immunity from a variety of pollution-control standards," simply by mixing their pollution with sufficient quantities of solid material to give it the effect of raising the bottom elevation of a body of water. *Coeur Alaska*, 129 S. Ct. at 2483 (Ginsburg, J., dissenting).

In *Coeur Alaska*, the Supreme Court found that COE had jurisdiction to issue a Section 404 permit for the release of slurry from a gold mining operation into a natural lake instead of a tailings pond, as part of its larger waste disposal operation for the mixture of crushed rock, water, and chemicals left behind after its "froth flotation" mining operation. 129 S. Ct. at 2464, 2469. This waste disposal process also entailed sealing off the natural lake into which the slurry was being discharged, treating the water in the lake and ensuring that the purified water that was then released from the lake complied with a separate EPA New Source Performance Standard permit embodied in a Section 402 permit. *Id*. at 2465.

The Court found that the COE properly exercised jurisdiction over the initial discharge of the mining slurry, noting that the slurry fit the definition of fill material, was the least environmentally damaging practicable way to dispose of the tailings, and was being issued together with a separate EPA Section 402 permit for the discharge of treated water from the lake. *Id.* at 2463, 2465. The Court noted, however, that this interpretation of the CWA should not lead to Section 404 "authorizing the discharges of other solids that are now restricted by EPA standards." *Id*. at 2468. The Court distinguished such "extreme instances" and noted that such a hypothetical decision could be challenged as an unlawful interpretation of the fill regulation, or as an unreasonable interpretation of Section 404. *Id*.

Environmental Protection Agency regulations governing Section 404 permits further indicate that an effects-based definition of "fill material" is not so broad as to include anything that has the effect of raising the elevation of a body of water; these regulations counsel against the discharge of fill material that have "an unacceptable adverse impact . . . affecting the ecosystems of concern." 40 C.F.R. § 230.1(c) (2010).

The recognition in *Coeur Alaska* that gold mining slurry fit the definition of fill material also reflects the administering agencies' long-held conclusion, upheld by various court decisions, that mining activity may generate material that is appropriately classified as waste but should be permitted for use as fill material. For example, the EPA and COE definitions of fill specifically lists "overburden from mining" as an example of fill material, and defines "discharge of fill material" to include "placement of overburden, slurry, or tailings or similar mining-related materials." 40 C.F.R. § 232.2 (2010); *see also Kentuckians for Commonwealth Inc. v. Rivenburgh*, 317 F.3d 425, 448 (4th Cir. 2003) (allowing COE issuance of a Section 404 permit for valley fills in connection with mountaintop coal mining).

In this case, DOD seeks a permit to regulate the disposal of "a wide variety of munitions . . . [with contents that] include many chemicals on the Clean Water Act § 311 list of hazardous substances." R. at 4. Even though the slurry will have the effect of raising the bottom elevation of Lake Temp, the fact that it contains Section 311 hazardous substances, which are substances that "present an imminent and substantial danger to the public health or welfare," makes the slurry precisely the "extreme instance" recognized by the plurality in *Coeur Alaska* as not reasonably classified as "fill material." 33 U.S.C. § 1321(b)(2)(A) (2006); 129 S. Ct. at 2468.

Furthermore, the material in this case is unlike the mining slurry at issue in *Coeur Alaska*, which fell within the broad umbrella of CWA interpreting regulations recognizing "overburden, slurry, or tailings or similar mining-related materials," as fill material. *See* 129 S. Ct. at 2476; 40 C.F.R. § 232.2. In contrast, nothing in the regulations or history of CWA administration indicates that military munitions may properly be classified as a fill material. The classification of slurry containing Section 311 hazardous chemicals as "fill material" violates the spirit, if not the letter, of the CWA prohibition on "[t]he discharge of . . . hazardous substances into or upon the navigable waters of the United States . . . ." 33 U.S.C. § 1321(b)(3).

Other statutes have recognized that military munitions, unlike waste from mining activities, may qualify as "hazardous." *See, e.g.*, Resource Conservation and Recovery Act (RCRA), 42 U.S.C. § 6924 (2006) (requiring EPA to promulgate "regulations identifying when military munitions become hazardous waste."). Indeed, this issue gives rise to a separate contention, not addressed in this motion, that DOD requires an additional permit under RCRA, and under RCRA regulations relating to military munitions, the slurry here likely meets the definition of hazardous waste. *See* 40 C.F.R. §§ 261.2–261.3, 266.202; R. at 3.

Because COE's interpretation of the fill regulation to include as fill a slurry that includes Section 311 hazardous chemicals is an unlawful interpretation of the CWA, this court should find that EPA, and not COE, has jurisdiction under the CWA to issue a permit.

B. The Corps of Engineers Does Not Have Jurisdiction Because, Unlike in *Coeur Alaska,* DOD Plans to Use Lake Temp as a Disposal Facility Rather than a Treatment Pond.

Given the potential overlap between EPA and COE jurisdiction over material that meets the definition of both "pollutant" and "fill material," these agencies occasionally act in concert to issue more than one permit for complex operations that involve a combination of disposal of fill material and wastewater treatment or effluent discharge. For example, in *Coeur Alaska*, the defendant mining company sought to use a natural lake in lieu of an artificially constructed tailings pond to treat and dispose of its mining waste. 129 S. Ct. at 2464. The company planned to divert waters around the lake during the time of operation and seal off and purify the lake water in accordance with a separate Section 402 permit issued by EPA, allowing it to meet an applicable new source performance standard and the ultimate goal of the CWA of eliminating entirely "the discharge of pollutants into the navigable waters" of the United States. 33 U.S.C. § 1251(a); *Coeur Alaska*, 129 S. Ct. at 2464.

In this case, DOD plans to dispose of a slurry containing hazardous pollutants into Lake Temp. Unlike in *Coeur Alaska*, where the mining company was disposing of waste that ultimately was subject to an EPA-issued performance standard, administered through a section 402 permit, under the current scenario Lake Temp will be the final resting place for the hazardous slurry, with no additional treatment. *See* R. at 4. In *Coeur Alaska*, the lake was being used as part of a larger treatment program rather than as a final disposal site for untreated waste material, as the DOD proposes for Lake Temp. 129 S. Ct. at 2464. Because the munitions slurry

is being discharged onto the dry bed of Lake Temp, which will then recharge with water that will remain untreated, the hazardous substances contained in the slurry will remain in Lake Temp indefinitely, eventually percolating down into the Imhoff Aquifer or evaporating into the atmosphere. Allowing hazardous substances to remain permanently in a water of the United States and disrupt the broader ecological cycle would be contrary to both the spirit and letter of the CWA; therefore, this Court should reverse the district court's conclusion that COE, rather than EPA, had jurisdiction to issue a permit for the slurry discharge.

IV. THE OFFICE OF MANAGEMENT AND BUDGET'S INTERFERENCE IN THE LAKE TEMP PERMITTING DECISION VIOLATED THE CWA, AND EPA'S ACQUIESCENCE TO THAT INTERFERENCE WAS ARBITRARY, CAPRICIOUS, AND AN ABUSE OF DISCRETION.

The Office of Management and Budget violated the CWA, a statute it has no authority to administer, when it intervened in the Lake Temp permitting decision and directed EPA not to veto the Section 404 permit. Because the relevant sections of the CWA delegate no authority to OMB, its interpretation of those sections does not warrant judicial deference. Moreover, EPA's acquiescence to OMB was arbitrary, capricious, and an abuse of discretion: its decision not to veto the Section 404 permit is subject to judicial review, and that decision relied on factors Congress did not intend for it to consider and skirted the limits of separation of powers.

A. Because the CWA Delegates Administrative Authority to EPA and COE, OMB Violated the Statute When it Intervened in the Permitting Process.

The introductory section of the CWA states that, except where expressly provided, "the Administrator of the Environmental Protection Agency . . . shall administer this chapter." 33 U.S.C. § 1251(d) (2006). Clean Water Act Section 402 empowers EPA to "issue a permit for the discharge of any pollutant," except as provided for in Section 404. *Id.* § 1342(a)(1) (2006). Although Section 404, in turn, authorizes COE to issue permits "for the discharge of dredged or

fill material," the statute preserves EPA's veto power to ensure that the ultimate decision reflects its environmental expertise. *Id.* §§ 1344(a), (c) (2006).

The Office of Management and Budget violated these provisions of the CWA when it commandeered the roles that Congress delegated to EPA and COE in the permitting and veto process. Furthermore, its interpretation as to which permit was appropriate under the CWA merits no judicial deference.

1. Congress' Delegation of Authority to the EPA to Administer the CWA Precedes any Dispute-Resolution Authority Conferred on OMB by Executive Order 12,088.

The Office of Management and Budget violated the CWA when it intervened in the Lake Temp permitting matter, because it exceeded its authority under Executive Order 12,088 and failed to act pursuant to the procedures of that order. *See* Exec. Order No. 12,088, 43 Fed. Reg. 47,707, 47,708–09 (Oct. 13, 1978).

Executive Order 12,088 (hereinafter "Order") concerns federal compliance with pollution control standards; it requires COE to comply with environmental legislation, including the CWA, and "cooperate with" EPA in its compliance efforts. *Id.* at 47,707–08. Primary responsibility to resolve compliance-related conflicts between executive agencies resides with EPA; only when EPA "cannot resolve a conflict" must it request the assistance of OMB. *Id.* at 47,708. In mediating conflicts at EPA's request, OMB's role is to resolve the dispute, not administer the relevant statute, and OMB must "seek [EPA's] technological judgment and determination with regard to the applicability of statutes and regulations." *Id.*

The Constitution vests all legislative power in Congress, and the President must "take Care that the Laws be faithfully executed." U.S. Const. art. I, § 1, art. II, § 3. Therefore, presidential executive orders cannot trump statutes enacted by Congress. Indeed, the Order

confirms that its conflict resolution procedure is "in addition to, not in lieu of, other procedures . . . for the enforcement of applicable pollution control standards." 43 Fed. Reg. at 47,709. Moreover, OMB may not "prevent an agency from complying with statutory requirements." *See Envtl. Def. Fund v. Thomas*, 627 F. Supp. 566, 571–72 (D.D.C. 1986).

In *Environmental Defense Fund v. Thomas*, the court held that OMB's unlawful interference prevented EPA from promulgating regulations within the deadlines required by RCRA, and foreclosed OMB from any further participation in the delayed rulemaking. 627 F. Supp. at 567, 571. Under the guise of regulatory review pursuant to Executive Order 12,291, OMB made multiple revisions which significantly delayed promulgation of the final rules. *Id.* at 568–69. The court held that OMB's actions contravened Congress' will, raised "constitutional concerns," and were not "a valid exercise of the President's Article II powers." *Id.* at 570.

Here, OMB violated the CWA when it rendered a verdict on the Lake Temp permits; as in *Thomas*, this action prevented EPA from "complying with statutory requirements." *See* 627 F. Supp. at 572; R. at 9–10. The Clean Water Act explicitly designates EPA as primary administrator of the chapter. 33 U.S.C. §§ 1251(d), 1342(a)(1). While Section 404 provides an exception to EPA's primacy in allowing COE to issue permits, the statute clearly contemplates the permitting process as a *pas de deux* between EPA and COE. *See id.* § 1344 (stating that COE shall grant permits by applying "guidelines developed by the Administrator, in conjunction with the Secretary," and that "the Administrator shall consult with the Secretary" before vetoing a permit). By contrast, the CWA is completely silent with regards to OMB. As in *Thomas*, where OMB had no authority to delay the promulgation of regulations beyond a statutory deadline, here OMB's order to EPA not to veto the Section 404 permit was not pursuant to any congressional delegation of authority, and thus OMB violated the CWA. *See* 627 F. Supp. at 567; R. at 9.

Executive Order 12,088 is inapposite here. Under the Order, OMB's conflict-resolution role is "in addition to, not in lieu of, other procedures" for enforcing the CWA, primary responsibility for which resides with EPA. 33 U.S.C. § 1251(d); 43 Fed. Reg. at 47,709. Clean Water Act Section 404(c) provides one such procedure: it grants EPA authority to veto a COE-issued permit when it determines that "the discharge . . . will have an unacceptable adverse effect." 33 U.S.C. § 1344(c). The Office of Management and Budget impermissibly acted "in lieu of," not "in addition to" the Section 404(c) procedure when it instructed EPA not to veto a Section 404 permit and issue a Section 402 permit instead. R. at 9.

Although OMB inappropriately invoked the Order here, even if it were pertinent, OMB failed to follow its procedures. First, EPA has primary authority for resolving interagency conflicts, and must "request" that OMB intervene. 43 Fed. Reg. at 47,708. Here, there is no evidence that EPA made such a request; in fact, EPA was prepared to veto the Lake Temp permit before OMB intervened. *See* R. at 9. Second, in resolving conflicts at EPA's request, OMB must "seek [EPA's] technological judgment and determination." 43 Fed. Reg. at 47,708. By forestalling EPA's planned veto, however, OMB effectively disregarded EPA's technological judgment and prevented EPA from complying with its statutory requirements. *See Thomas*, 627 F. Supp. at 572. The Office of Management and Budget violated the CWA by inserting itself into a regulatory process that Congress delegated to EPA and COE, both exceeding its authority under the Order and failing even to act pursuant to the Order's procedures.

2. Because OMB has no Authority to Administer the CWA, its Conclusion that a Section 404 Permit was Appropriate for Lake Temp Does not Merit *Chevron* Deference.

When a statute delegates authority to an agency, *Chevron* directs reviewing courts to defer to that agency's reasonable interpretation where the statute is ambiguous. *Chevron U.S.A.*,

Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 842–43 (1984). However, the agency's views are only entitled to deference when it is interpreting "a statutory scheme it is entrusted to administer." *Id.* at 844. By overriding EPA's veto, OMB made the substantive decision of how to resolve the Lake Temp matter. Therefore, OMB's interpretation of the CWA is before this Court, and not the interpretation of EPA, which is the primary administrator of the statute. 33 U.S.C. § 1251(d); R. at 9. Because OMB is not "entrusted to administer" the CWA, however, its interpretation of the statute does not merit *Chevron* deference. *Id.*

Chevron deference flows from agencies' expertise. *See id.* at 865–66. The Office of Management and Budget possess none of EPA's expertise regarding the CWA, however; deferring to its interpretation would thus be incompatible with the purpose of *Chevron*. With OMB's interpretation alone before it, this Court cannot meaningfully interpret the statute. Consequently, it should reverse the district court's effective deference to OMB's conclusion that a Section 404 permit was suitable for Lake Temp.

B. The Environmental Protection Agency's Failure to Veto the Section 404 Permit was Arbitrary, Capricious, and an Abuse of Discretion.

The Administrative Procedure Act directs reviewing courts to "hold unlawful and set aside agency action, findings, and conclusions found to be . . . arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law . . . ." 5 U.S.C. § 706(2)(A) (2006). All agency actions are reviewable under this standard, except those actions "committed to agency discretion by law." *Id.* § 701(a)(2) (2006).

Here, because EPA's veto authority under Section 404(c) is not discretionary, its decision not to veto the Section 404 permit for Lake Temp is subject to judicial review. Such review reveals that EPA acted arbitrarily and capriciously and abused its discretion when it acquiesced to OMB's directive, because EPA disregarded its own factual conclusions and relied on factors

that Congress did not intend for it to consider in making its decision. *See Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983). Moreover, the district court erred in holding that EPA's acquiescence was mandated by the Constitution. R. at 10. On the contrary, EPA's assent to OMB contravened the norms of separation of powers.

1. The Decision Not to Veto a Section 404 Permit is Reviewable Under the APA, Because it Was Not a Wholly Discretionary Agency Action.

The district court erred in holding that EPA's decision not to veto the Section 404 permit was immune from judicial review, because EPA's veto power is not entirely discretionary.

The APA authorizes judicial review of all agency actions, except where "agency action is committed to agency discretion by law." 5 U.S.C. § 701(a)(2). This exception is "very narrow," *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 410 (1971), precluding review only if the statute lacks a "meaningful standard against which to judge the agency's exercise of discretion." *Heckler v. Chaney*, 470 U.S. 821, 830 (1985). The only court that has applied this standard to CWA Section 404 has held that a decision by EPA not to veto a COE-issued permit was subject to judicial review. *Alliance to Save the Mattaponi v. U.S. Army Corps of Eng'rs* (*Mattaponi I*), 515 F. Supp. 2d 1, 8 (D.D.C. 2007).

In *Mattaponi I*, environmental organizations and an Indian tribe challenged EPA's decision not to veto a COE-issued Section 404 permit. *Id.* at 3. The court concluded that CWA Section 404 provided a "meaningful standard" for deciding whether EPA abused its discretion, because the statute specifies that EPA may only veto a Section 404 permit when it finds that the planned discharge "will have an unacceptable adverse effect . . . ." 33 U.S.C. § 1344(c); *Mattaponi I*, 515 F. Supp. 2d at 7–9 (quoting *Heckler*, 470 U.S. at 830) (internal quotation marks omitted). Moreover, EPA's decision not to veto "had the same impact on the parties as an

express denial of relief" and was "essentially a decision . . . to indirectly approve a permit." *Mattaponi I*, 515 F. Supp. 2d at 8, 9. Therefore, its non-veto was subject to judicial review.

Here, although OMB directed the outcome, EPA ultimately executed the decision not to veto the Lake Temp permit. Thus, as in *Mattaponi I*, EPA's actions were "essentially a decision . . . to indirectly approve a permit," and its decision effected an "express denial of relief" to New Union and caused the injuries that motivated this action. *See* 515 F. Supp. 2d at 8–9; R. at 5, 9–10. As the court *Mattaponi I* correctly concluded, EPA's decision not to veto a Section 404 permit falls well within the bounds of agency action that is subject to judicial review.

2. The Environmental Protection Agency's Decision not to Veto the Lake Temp Permit Relied on Factors that Congress did not Intend for it to Consider and Evinced no Rational Connection Between the Facts Found and the Decision Made.

EPA's non-veto was arbitrary, capricious, and an abuse of discretion, because it based its decision on the directive of OMB, and not the criteria Congress articulated in Section 404(c).

In reviewing agency actions under the arbitrary and capricious standard, the court must determine that the agency "examine[d] the relevant data and articulate[d] a satisfactory explanation for its action including a 'rational connection between the facts found and the choice made.'" *State Farm*, 463 U.S. at 43 (1983) (quoting *Burlington Truck Lines v. United States*, 371 U.S. 156, 158 (1962)). An agency's action is arbitrary and capricious if "the agency has relied on factors which Congress has not intended it to consider." *State Farm*, 463 U.S. at 43.

Congress, in CWA Section 404(c), expressed its intent that EPA may only exercise its veto "whenever [it] determines . . . that the discharge of such materials into such area will have an unacceptable adverse effect on" the environment. 33 U.S.C. § 1344(c).

In *Coeur Alaska, Inc. v. Southeast Alaska Conservation Council*, the Supreme Court upheld EPA's decision not veto a Section 404 permit, because EPA considered the factors in

Section 404(c) and issued a separate Section 402 permit for the mine tailings disposal site. 129 S. Ct. 2458, 2465; *see also James City County, Va. v. E.P.A.*, 12 F.3d 1330, 1339 (4th Cir. 1993) (upholding EPA's veto of a Section 404 permit where EPA based its decision on the Section 404(c) criteria). By contrast, the court in *Mattaponi II*, applying the standard articulated in *State Farm*, held that EPA arbitrarily and capriciously declined to veto a Section 404 permit, because EPA "relied on factors which Congress has not intended it to consider." *Alliance to Save the Mattaponi v. U.S. Army Corps of Eng'rs* (*Mattaponi II*), 606 F. Supp. 2d 121, 139–141 (D.D.C. 2009). Although the record showed that EPA believed the issuance of a Section 404 permit would have an "unacceptable adverse effect" on the environment, its decision not to veto did not reflect its technical analysis at all, but rather "reasons completely divorced from the statutory text," such as scarce agency resources, the limited value of additional process, and the likelihood of future litigation. 606 F. Supp. 2d at 139–140.

As in *Mattaponi II*, in declining to veto the Lake Temp permit EPA also "relied on factors which Congress has not intended [it] to consider"—namely, OMB's directive—rather than a consideration of the underlying facts and the likelihood that DOD's plans would have an "unacceptable adverse effect" on Lake Temp. *See* 33 U.S.C. § 1344(c); *Mattaponi II*, 606 F. Supp. 2d at 139–41; *State Farm*, 463 U.S. at 43; R. at 9. Because Section 404(c) specifies the only criteria EPA may consider in deciding whether to veto, EPA abused its discretion when it ventured outside those criteria in its Lake Temp decision. The arbitrary and capricious nature of EPA's actions is especially evident in light of the fact that here, as in *Mattaponi II*, EPA initially planned to veto the Section 404 permit. *See* 606 F. Supp. 2d at 139; R. at 9. Once OMB instructed otherwise, however, EPA arbitrarily and capriciously abandoned this conclusion and

acquiesced to OMB's directive not to veto, demonstrating no "rational connection between the facts found and the choice made." *See State Farm*, 463 U.S. at 23; R. at 9.

The substantive holding in *Coeur Alaska* is immaterial to the issue of whether EPA's acquiescence to OMB was permissible. In *Coeur Alaska*, EPA independently decided not to veto the Section 404 permit, and in fact issued a separate Section 402 permit: in short, the permitting-and-veto process worked as it should. 129 S. Ct. at 2465. Here, by contrast, that process broke down when EPA deliberately disregarded its own expert judgment and allowed the Section 404 permit for Lake Temp to stand. R. at 9. The directive from OMB, rather than an assessment of the factors Congress asked it to consider, formed the basis of EPA's decision not to veto the Lake Temp permit; therefore, this Court should find that decision arbitrary and capricious and invalidate EPA's decision not to veto the Lake Temp permit.

3. Assertions of Presidential Executive Authority do not Redeem EPA's Actions, Because the Principle of Separation of Powers Weighs Against, Not in Favor of, EPA's Acquiescence to OMB.

The district court extended the President's constitutional authority too far in holding that it confers on OMB the power to intervene in CWA permitting decisions. As Justice Jackson explained in his frequently-cited concurrence in the *Steel Seizure* case, "When the President takes measures incompatible with the expressed of implied will of Congress, his power is at its lowest ebb . . . [and] must be scrutinized with caution." *Youngstown Sheet & Tube Co. v. Sawyer* (*Steel Seizure*), 343 U.S. 579, 637–38 (1952) (Jackson, J., concurring).

Here, because OMB's directive contravened Congress' express intent for EPA to exercise the power to veto Section 404 permits, the President's power to act through OMB was at its "lowest ebb" and "must be scrutinized with caution." *See Steel Seizure*, 343 U.S. at 637–38. As noted above, EPA's acquiescence to OMB's dictate was incompatible with the express will of

Congress as expressed in Section 404(c). *See* R. at 9–10; *supra* Part IV.B.2. The President lacks the authority to resolve inter-agency disputes where, as in Section 404, Congress has spelled out procedures for resolving such disputes. *See* 33 U.S.C. § 1344(c).

In an adjudicatory proceeding such as a Section 404 permit decision, the case for deference to the President's supervisory authority is weak: EPA is not crafting forward-looking, generally applicable regulations, but rather applying existing rules to individual facts. As such, issues of policy incoherency and inter-agency inconsistency are unlikely to materialize.

Because OMB violated the CWA and EPA's acquiescence to OMB was arbitrary, capricious, and an abuse of discretion, this Court should reverse the conclusions of the district court and reject OMB's intervention in the Lake Temp matter.

CONCLUSION

For the foregoing reasons, plaintiff New Union respectfully requests that this Court uphold the district court's determination that Lake Temp is a navigable body of water, but overturn the district court's holding that New Union did not have standing; that the slurry discharge is a fill material and thus a Section 404 permit was appropriate; and that OMB and EPA did not violate the CWA in deciding not to veto the Section 404 permit.