Team No. 20

Civ. App. No. 11-1245

UNITED STATES COURT OF APPEALS
FOR THE TWELFTH CIRCUIT

State of New Union,
Appellant and Cross-Appellee,

v.

United States,
Appellee and Cross-Appellant,

and

State of Progress,
Appellee and Cross-Appellant,

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

BRIEF FOR THE UNITED STATES

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STATEMENT OF JURISDICTION

The District Court's jurisdiction was based on 28 U.S.C. § 1331 and judgment was entered on June 2, 2011. Civ. 148-2011. The State of New Union and the State of Progress each filed a Notice of Appeal. The jurisdiction of the United States District Court for the Twelfth Circuit is invoked because of the federal questions raised under the United States Constitution, art. 3 §2, art. 1 § 8; the Clean Water Act, 33 U.S.C. §§ 1251-1387 (2006); and the Administrative Procedure Act, 5 U.S.C. § 702.

ISSUES PRESENTED

1. **Whether the State of New Union has standing to sue the United States as *Parens Patriae* on behalf of its citizens who do not currently, but may, in the future, use groundwater underlying the state which could potentially be contaminated as a result of an activity permitted by the United States.**

2. **Whether the Corps of Engineers has jurisdiction under § 404 of the Clean Water Act to grant a permit to the Department of Defense to discharge fill material into Lake Temp, because Lake Temp is a navigable water.**

3. **Whether Corps of Engineers has jurisdiction to issue a permit for the discharge of slurry into Lake Temp under the Clean Water Act § 404, because the slurry is "fill" or whether EPA has jurisdiction to regulate the slurry as a "pollutant" under Clean Water Act § 402.**

4. **Whether the decision by the Office of Management and Budget affirming the Corps of Engineers' jurisdiction under § 404 of the Clean Water Act, and the Environmental Protection Agency's subsequent decision not to veto the § 404 permit violated the Clean Water Act.**

STATEMENT OF CASE

Appellant the State of New Union (hereinafter "New Union") brought suit against the United States and the State of Progress (hereinafter "Progress"), pursuant with the § 402 and § 404 permitting provisions of the Clean Water Act (hereinafter "CWA" or "Act"). R. at 3. New

Union, a neighboring state, argues that under the authority of the CWA § 402, 33 U.S.C. § 1342, the Administrator of the U.S. Environmental Protection Agency (hereinafter "EPA") must issue discharge permits to the Department of Defense (hereinafter "DOD"), and not the Corps of Engineers (hereinafter "COE") under authority provided by § 404. *Id.* Specifically, New Union claims that Lake Temp is navigable, and that the slurry discharge is a pollutant, thereby subject to a § 402 permit issued by EPA. R. at 2.

COE issued a CWA § 404 permit, 33 U.S.C. § 1344, to DOD to discharge the slurry solution at issue, consisting of old munitions into Lake Temp. R. at 2-4. Lake Temp is an isolated, intrastate lake used for interstate hunting purposes. R. at 4. The lake is located within the external boundaries of a military reserve and also entirely with the state of Progress. *Id.* The State of Progress has intervened because Lake Temp is located wholly within the State boundary. R. at 3. All three parties filed motions for summary judgment. *Id.* The court granted the United States motion for summary judgment on three separate issues. R. at 2. First, New Union failed to show that it had standing. R. at 2. Second, COE had the proper jurisdiction to issue a § 404 because: (a) Lake Temp is a navigable water; and (b) prior Supreme Court decisions support COE's authority to issue the § 404 permit. R. at 2. Finally, participation by the Office of Management and Budget (hereinafter "OMB") in the decision granting the § 404 permit did not violate the CWA. R. at 5.

The State of Progress and New Union appeal the standing issue. Progress appeals the classification of Lake Temp as navigable. New Union appeals COE's jurisdiction to issue a § 404 permit. New Union appeals OMB's authority to grant COE jurisdiction over the permit process.

STATEMENT OF FACTS

Lake Temp is an isolated, semi-permanent water body which occupies an alluvial lake bed in the State of Progress. R. at 3-4. The lake is located in an eight hundred square mile hydrologically isolated, arid basin and has no outlet. R. at 4. The lake is up to 3 miles wide and 9 miles long during the rainy season of wet years, and goes completely dry approximately one out of five years. R. at 4. Lake Temp is located wholly within the bounds of a military reservation administered by the Department of Defense. R. at 4. The military reservation is entirely within the State of Progress, but both the lake and the reservation are near the border of the State of New Union. R. at 4.

Underlying the lake, and covering an area larger than the lake itself, is the Imhoff Aquifer. R. at 4. The Aquifer is almost one-thousand feet below ground with approximately 95% of the aquifer located within the State of Progress and the remainder underlying the State of New Union. R. at 4. As an underground aquifer, the water has potential to migrate within the geologic strata it occupies, but no data supports any migration or movement of water within the aquifer. R. at 4. Dale Bompers owns and operates a ranch in New Union that is directly above the aquifer, but due to the high sulfur content the aquifer is not potable and Mr. Bompers does not use the aquifer water for agriculture.

The Department of Defense proposes to use the lake to dispose of spent munitions. R. at 4. The munitions are composed of liquid, granular, and semi-solid materials which will be mixed with ground metals and chemicals to neutralize any explosive characteristics. R. at 4. The inert slurry solution will then be discharged evenly along the lake bed through a series of movable multi-port pipes. R. at 4. When the process is finished, the entire lakebed will be raised by several feet, the water elevation will be approximately six feet higher, and the lake surface

area will be two square miles larger. R. at 4. Eventually, sediment from the surrounding watershed will deposit on top of the material and cover the lakebed again. R. at 4.

Lake Temp has been part of the military reservation since 1952. R. at 4. Prior to the designation of the military reserve, and into the present day, Lake Temp has been used by thousands of hunters for duck hunting. R. at 4. Over one-quarter of the hunters travel from out-of-state to hunt on Lake Temp. R. at 4. Lake Temp is easily accessed from a state highway that runs along the southern side of the lake and at certain points there are clearly visible boat trails leading from the road to the lake. R. at 4. Since 1952 DOD has posted and maintained no trespassing signs along the highway, at one-hundred yard intervals and twenty-five feet from the highway. R. at. 4. The public has disregarded these warnings, and DOD has knowledge that recreationists use the lake for hunting and bird watching, but has not attempted to enforce restricted access to the Lake. R. at 4.

SUMMARY OF THE ARGUMENT

The United States District Court for the District of New Union's grant of summary judgment on all issues brought by the United States should be affirmed. The district court correctly concluded that New Union lacked standing because New Union failed to show injury, either individually as a state or as *parens patriae* on behalf of its citizens. The Clean Water Act grants COE the authority to classify Lake Temp, a large, isolated, intrastate lake with interstate hunting use, as a navigable water of the United States and COE properly exercised this jurisdiction. COE retains the jurisdiction over any § 404 permits, superseding the authority of § 402 permits. Finally, OMB's decision affirming COE's jurisdiction under § 404, over that of EPA, and EPA's acquiescence to OMB's decision did not violate the CWA.

The district court correctly concluded that New Union lacked standing because New

Union failed to show injury, either as a state or in its *parens patriae* capacity on behalf of its citizens. A federal court may grant standing to a plaintiff who has carried the burden of showing: injury-in-fact, traceability of that injury to the defendant's actions, and redressability of the injury. New Union failed to satisfy the requisite tests. New Union also fails the modified *parens patriae* standing doctrine, developed by the U.S. Supreme Court in *Massachusetts v. EPA.*

The Clean Water Act grants COE jurisdiction to classify Lake Temp, a large, isolated, intrastate lake used for interstate hunting purposes, as a navigable water of the United States. COE properly exercised this jurisdiction for three reasons. First, using the *Chevron* analysis and absent clear statutory language to the contrary COE was within its authority to classify Lake Temp as a navigable water of the United States. Second, COE's interpretation that Lake Temp is navigable is within the scope of Congress' commerce power granted to it by art. 1, § 8 of the U.S. Constitution. Lastly, it is within COE's jurisdiction to classify Lake Temp as a navigable water because Lake Temp falls within a narrow category of intrastate, isolated lakes with interstate commerce implications, and therefore outside of the analysis put forth in the U.S. Supreme Court, *Rapanos* case. Therefore, COE's interpretation of the term "navigable waters," the statutory language of the CWA, and the U.S. Supreme Court decisions extend COE the jurisdiction to classify Lake Temp, as navigable.

The district court properly held COE had the authority to issue a § 404 permit to DOD for the discharge of slurry into Lake Temp. The Act explicitly differentiates § 402 from § 404. Here, because the slurry falls within the classification of "fill" material, the slurry munitions are within COE's § 404 jurisdiction. The Act also grants authority to both EPA and COE to issue intra-agency permits without raising conflict of interest issues, and DOD's § 404 permit is

properly within COE's jurisdiction. Therefore, the requisite § 404 permit issued by COE is within its jurisdiction and the lower court's holding should be affirmed on this issue.

OMB did not violate the CWA when it resolved a dispute between COE and EPA over which agency should process the DOD discharge permit application. OMB derived its authority to resolve the dispute from an executive order that was grounded in implied authority from the Constitution and Congress. OMB's actions in resolving the dispute did not amount to an administration of any part of the CWA and thus did not conflict with congressional intent. Other than resolving the dispute, OMB had no authority over EPA regarding its decision not to veto the § 404 permit. Additionally, EPA's decision not to veto the § 404 permit was wholly discretionary and therefore not subject to judicial review. OMB's participation was therefore not unlawful and EPA's failure to veto the permit was not unlawful and is not reviewable.

STANDARD OF REVIEW

The United States District Court for the District of New Union rendered summary judgment in the United States favor. Federal Appellate Courts review a district court's grant of summary judgment *de novo*. *Res. Ltd. v. Robertson,* 35 F.3d 1300, 1304 (9th Cir. 1994).

Federal Appellate Courts review agency decisions under the Administrative Procedure Act, 5 U.S.C. § 706(2)(A), *de novo*, "federal courts have the authority to 'hold unlawful and set aside' agency actions which are 'arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.'" *Id.*

ARGUMENT

I. NEW UNION DOES NOT HAVE STANDING TO SUE THE UNITED STATES AS A STATE OR IN ITS *PARENS PATRIAE* CAPACITY WHEN THE STATE HAS NOT SUFFERED INJURY FROM A FEDERAL ACTION, NOR IS LIKELY TO SUFFER INJURY IN THE FUTURE.

The district court was correct in holding that New Union does not have standing because it has failed to allege a legal injury, notwithstanding its special standing as a state. In order to demonstrate standing, a plaintiff must show three basic elements: injury-in-fact, causation, and redressability. A state suing the federal government in its *parens patriae* capacity may be subject to special solicitude in standing, but when a state is a plaintiff, a court cannot grant standing unless it has demonstrated all of the necessary elements of standing. New Union has failed to show that it has standing to bring suit in federal court because it has failed to show the first prong of the standing test: injury. It is unnecessary for the court to address the subsequent elements of standing if the plaintiff has not proven the first element of injury.

A. New Union does not have standing to sue in federal court because it has not demonstrated all of the elements of standing under Article III of the U.S. Constitution and the Administrative Procedures Act.

New Union has failed the traditional test for standing because it has not demonstrated an injury-in-fact sufficient to be granted standing under art. III, § 2 of the U.S. Constitution. Article III extends federal court jurisdiction to all "cases and controversies" arising under the U.S. Constitution and federal law. The Administrative Procedures Act (hereinafter "APA") may confer jurisdiction in federal court to a party suffering a "legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute." 5 U.S.C. § 702. Agency "action" includes a failure to act. 5 U.S.C. § 551(13).

When a plaintiff is suing a federal agency, the APA may provide a right to sue to any party injured by a federal action or failure to act if the plaintiff meets both the "prudential" test for standing provided in the APA and the *Laidlaw* test for standing. *Ctr. For Biological Diversity v. Lueckel*, 417 F.3d 532, 536 (6th Cir. 2005); *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 180 (2000). Each element of standing is "an indispensable part of the plaintiff's case, *each element* must be supported in the same way as any other matter on which the plaintiff bears the burden of proof." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992) (emphasis added).

Under the *Laidlaw* test for standing to sue a federal agency in federal court, a plaintiff must first show that it has suffered an injury-in-fact, which is concrete, particularized, and actual or imminent. The injury cannot be conjectural or hypothetical. *Laidlaw*, 528 U.S. at 180. The alleged injury must be "concrete in both a qualitative and temporal sense." *Whitmore v. Arkansas*, 495 U.S. 149, 155 (1990). To demonstrate standing in environmental cases, the plaintiffs must show injury to themselves, not only to the environment. *Laidlaw*, 528 U.S. at 181. Once a plaintiff has established that it has suffered an injury-in-fact, the plaintiff must show that the injury is: (1) fairly traceable to the challenged act of the defendant and (2) likely to be redressed by a favorable court decision. *Id.* at 181.

Here, New Union lacks sufficient proof of a demonstrable injury when it alleges that its citizens could be harmed in the future by water from an aquifer which may be contaminated because of DOD's proposed slurry discharge. New Union has not demonstrated a "concrete and particularized" injury as required by the *Laidlaw* test, but rather a "hypothetical" injury when it alleges that the aquifer underlying Dale Bomper's ranch might become contaminated in the future. R at 6. New Union's theory of potential contamination relies solely on the fact that the

geology underlying Lake Temp is composed primarily of alluvial fill which it believes could become a migration pathway for pollution. R. at 5. New Union only speculates that the Imhoff Aquifer might become polluted and that such pollution could migrate across the New Union state line but has not provided any evidence upon which it bases this claim. R at 5-6. New Union has not sufficiently shown that it has suffered a concrete injury which is qualitative, much less that such alleged injury is imminent or concrete in the temporal sense.

New Union contends that it could produce such evidence if it were permitted to drill a grid of monitoring wells which would be sampled to determine potential pollutant migration pathways. R. at 6. New Union admits that the results of that sampling may not be conclusive until after the permitted slurry discharge is set to begin. R. at 6. New Union alleges that it has not drilled the monitoring wells because to do so would require permission from DOD. R. at 6. DOD has countered that it has not received any request from New Union to drill the wells and has not yet made such a denial. R. at 6. Regardless of the merits of either New Union or DOD's contentions as to New Union receiving access to the military reservation for drilling monitoring wells, New Union fails the *Laidlaw* test when it concedes that it currently has no concrete proof that its waters will be contaminated, and thereby, has no "particularized injury."

Furthermore, even if any contamination from DOD's proposed application of slurry did enter into the aquifer underlying New Union, the water itself is most likely unusable and therefore, the contamination would have no impact on New Union's citizens. The water in the Imhoff Aquifer is high in sulfur and, as a result, unusable for human consumption, crops, or livestock. R. at 4. Dale Bompers, New Union's primary citizen-plaintiff alleges that, should the water in the Imhoff Aquifer become contaminated, the value of his property would diminish. R. at 6. However, Mr. Bompers does not currently withdraw or in any manner make use of water

from the aquifer. R. at 6. New Union state law requires that ground water withdraws be permitted through the state's Department of Natural Resources, but Mr. Bompers has not applied for any withdraw permit which would indicate his intent to use water from the aquifer. R. at 7. As the Court held in *Laidlaw*, the injury alleged must occur to the plaintiff New Union on behalf of Dale Bompers, not generally to the environment. Therefore, New Union cannot claim an injury-in-fact for water which its citizens will, most likely, never use.

The "prudential test," which is specific to standing under the APA when the defendant is a federal agency, is applied after the plaintiff demonstrates the *Laidlaw* test is satisfied. *Ctr. for Biological Diversity*, 417 F.3d. at 536. First, the complaint must relate to an agency action, and here the first part of the test is satisfied because New Union's complaint relates to COE's agency action. *Id.* Second, the plaintiff must have suffered either a legal wrong or an injury which falls within the "zone of interests" meant to be protected under the statute upon which plaintiffs have based their claim. *Id.* Here, New Union has failed to satisfy the first element of the conjunctive test relating to injury, and therefore fails to establish standing as required by the APA.

Finally, New Union argues that other circuits have recognized injuries that may occur in the future. For example, in *Nuclear Energy Institute v. EPA*, the plaintiffs sued EPA because of potential contamination of their groundwater from radiation, which may take thousands of years reach the plaintiffs' water supply. 373 F.3d 1251, 1266 (D.C. Cir. 2004). The D.C. Court of Appeals held that such alleged injuries were neither hypothetical nor conjectural because EPA had admitted that such spread of radiation was anticipated to the specific water supplies of the plaintiffs, regardless of the length of time required for that injury to occur. The court's holding in in *Nuclear Energy Institute* is distinguishable because New Union's groundwater pollution claim is not based upon sufficient data, whereas the plaintiffs' alleged injury in *Nuclear Energy*

Institute was actual, even if not imminent. Therefore, without concrete proof that actual injury may occur in the future, New Union again fails to establish the future injury requirements.

B. New Union has failed to demonstrate an injury-in-fact which would allow it special consideration in the court's standing analysis as *parens patriae* on behalf of its citizens.

Claims of standing by states may be subject to a special but essentially unchanged version of the traditional test for standing. States must still meet the criteria of the *Laidlaw* test, but are entitled to a special consideration under the *parens patriae* doctrine.

In *Massachusetts v. E.P.A.*, the State of Massachusetts alleged that EPA had failed in its duty to implement the Clean Air Act when denying the state's petition that EPA regulate greenhouse gas emissions contributing to global climate change. 549 U.S. 497, 510 (2007). The Court held that Massachusetts had surrendered to the federal government part of its inherent state sovereignty through which it otherwise could have addressed potential injuries to its citizens. *Id.* at 519.

The U.S. Supreme Court held that states may be entitled to a "special solicitude" in analysis of standing because of a quasi-sovereign interest in protecting the health and environment of its citizens. *Id.* at 520. Applying the *Laidlaw* test, the Court held that when a state sues the federal government, federal government inaction may still constitute an ongoing injury to a state's citizens if those injuries are concrete and particularized to the plaintiff, even though the injuries may be widely shared. *Id.* at 522. The Court also held that, even if the government's failure to act wasn't the sole source of a state's injuries, if it is a contributor to the injuries, it may still be a traceable cause of the injury. *Id.* at 523. The Court also held that, even though a favorable court decision for the plaintiffs could not entirely remedy an injury, like

global warming, the government still had a duty to take steps which would "slow or reduce" that injury. *Id.* at 525.

New Union's reliance on *Massachusetts* in seeking different requirements for standing because of its quasi-sovereign status as a state is misplaced. The Court's test in *Massachusetts* requires that standing be analyzed in terms of a concrete and particularized injury, albeit viewed through a different lens when states challenge a federal action. The court's holding in *Massachusetts* is distinguishable because the injury alleged by Massachusetts was one which the Court held to be a well-documented threat to the citizens of Massachusetts. Here, New Union has alleged an injury for which it has presented no concrete proof of injury. According to the Court in *Massachusetts*, global warming is a generally accepted theory in much of the world's scientific community, which, even EPA implicitly accepted as an impending worldwide disaster. However, New Union's allegations of potential contamination reaching the Imhoff Aquifer has neither been studied by science, nor documented with any specificity to determine whether such contamination is even possible. Even the more relaxed standard applied to states by the Supreme Court in *Massachusetts* cannot overcome New Union's failure to meet the injury requirement of standing. Thus, the lower court's grant of summary judgment should be affirmed on this issue.

II. THE CORPS OF ENGINEERS HAS JURISDICTION TO ISSUE A § 404 PERMIT TO THE DEPARTMENT OF DEFENSE TO DISCHARGE FILL MATERIAL INTO LAKE TEMP, BECAUSE BOTH STATUTORY AND JUDICIAL INTERPRETATION OF THE CLEAN WATER ACT CLASSIFY LAKE TEMP AS A NAVIGABLE WATER.

COE has jurisdiction to issue a § 404 permit to DOD pursuant to the CWA, 33 U.S.C. § 1344, and the lower court was correct in granting summary judgment on this issue. COE authority to issue permits for the "discharge of dredged or fill material" extends to only those

waters that are navigable. 33 U.S.C. § 1344(a). Here, COE properly classified Lake Temp as navigable.

The CWA grants COE the authority to classify Lake Temp, a large, isolated, intrastate lake as a navigable water of the United States and COE properly exercised this jurisdiction for three reasons. First, COE's interpretation of the term "navigable waters" meets the two part analysis as used in *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc*., 467 U.S. 837, 842-43, (1984). Second, COE authority to classify a Lake Temp as navigable, because it supports interstate hunting, falls within the scope of Congress' commerce power. Lastly, the U.S. Supreme Court's limitations on COE's jurisdiction over navigable waters does not extend to Lake Temp.

A. It is within the Corps of Engineers discretion to classify Lake Temp as a navigable water.

COE has the authority to define the term "navigable waters" because the CWA fails to clearly define the term. The *Chevron* decision clearly establishes that agencies should only interpret Congressional language if the statute "unambiguously expressed the intent of Congress." *Id.* at 842-43 (1984). If the statute is silent or ambiguous with respect to the specific issue, the agency's interpretation must be based on a permissible construction of the statute that is not plainly erroneous or inconsistent with the regulation. *Id.* at 842-44. In such a case, the agency rule has controlling weight and the court should defer to the agency's interpretation, unless "[it is] arbitrary, capricious, or manifestly contrary to the statute." *Chevron,* 467 at 844.

The legislative history shows that Congress intended to be clear in its statutory language, which would alleviate the agency from trying to clarify language through its rulemaking

process.[1] However, Congress' failure to clearly define the term "navigable waters" in the CWA has forced COE to define the term. The CWA defines "navigable waters" as "the waters of the United States…." 33 U.S.C. § 1362(7). COE regulations define the statutory term "waters of the United States" to include: "[a]ll waters which are currently used, or were used in the past, or may be susceptible to use in interstate or foreign commerce." 33 C.F.R. § 328.3(a)(1) (2011). This includes interstate lakes and playa lakes which are used for "interstate or foreign travelers for recreational or other purposes," the "degradation or destruction of which could affect interstate or foreign commerce." 33 C.F.R. § 328.3(a)(3). The regulations further include in the definition of the term "lake" to include "a standing body of open water that…occurs in an isolated natural depression that is not a part of a surface river or stream." 33 C.F.R. § 323.2.

COE's interpretation of the CWA's ambiguous language with respect to "navigable waters" has withstood judicial scrutiny in the past. Indeed, COE's definition of "navigable waters" has withstood the *Chevron* test and been given deference many times. See *U.S. v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 135 (1985), (the Court upheld COE's definition of "waters of the United States" to include "all wetlands adjacent to other bodies of water over which the Corps has jurisdiction"); *Alaska v. Ahtna, Inc.*, 891 F.2d 1401, 1405 (9th Cir. 1989) (commercial recreational boating is sufficient evidence of the water's capacity to carry waterborne commerce at the time that Alaska became a state); *FPL Energy Marine Hydro L.L.C. v. FERC*, 287 F.3d 1151, 1157 (D.C. Cir. 2002), (both physical characteristics and test canoe trips provide sufficient evidence that the water is navigable); *P & V Enterprises v. U.S. Army Corps of Engineers*, 516 F.3d 1021 (D.C. Cir. 2008), (Motion to dismiss granted,

[1] Senator Randolph, the Chairman of the Senate Committee, explained, "We have written into law precise standards and definite guidelines on how the environment should be protected. We have done more than just provide broad directives [for] administrators to follow." 117 Cong. Rec. 38805 (Nov. 2, 1971).

upholding COE jurisdiction over isolated, intrastate river). Similar to the recreational boating in *Ahtna, Inc.* and the canoe trips in *FPL Energy Marine Hydro L.L.C.*, regular and historic recreational hunting and boat use occur on Lake Temp which is, like the river in *P & V Enterprises*, entirely intrastate and isolated.

Under the *Chevron* doctrine COE should be given deference because Congress was silent with respect to defining the 'waters of the United States,' thereby leaving COE to interpret the term. Past cases have upheld COE's jurisdiction and application of agency rules defining the term. COE's regulations are not arbitrary or capricious and should be given controlling weight. Absent clear statutory language to the contrary COE was within its authority to classify Lake Temp as a navigable water of the United States.

B. It is within Congress' Commerce Clause power to classify Lake Temp as a navigable water.

COE's interpretation that Lake Temp, which supports interstate hunting, is navigable, is within the scope of Congress' commerce power granted to it by art. 1, § 8 of the U.S. Constitution. The Commerce Clause allows Congress to regulate commerce among the states and within states; however, to regulate an intrastate activity, the activity must be economic in nature. *Gibbons v. Ogden*, 22 U.S. 1, 194 (1824); *U.S. v. Morrison*, 529 U.S. 598, (2000). Under the *U.S. v. Lopez* three part analysis, Congress' regulation power extends to: (1) channels of interstate commerce; (2) instrumentalities of interstate commerce; or (3) those activities that have a substantial effect on interstate commerce. 514 U.S. 549, 558-59 (1995). Lake Temp is entirely intrastate and thus is neither a channel nor an instrumentality of interstate commerce; however, the recreational hunting that occurs on Lake Temp has a substantial effect on interstate commerce.

There must be some economic endeavor to have a substantial effect on interstate commerce. The Court in *Lopez* found the "Gun-Free School Zone Act" unconstitutional, holding that the relationship to interstate commerce was too attenuated and uncertain to uphold the law as a valid exercise of Congress' commerce power. 514 U.S. at 567. The defendant's possession of a firearm alone did not have a direct enough impact on interstate commerce to invoke commerce power. *Id*. *Morrison,* decided five years after *Lopez,* again narrowed Congress' Commerce Clause power by limiting its ability to regulate a noneconomic activity when the activity does not have a cumulative substantial effect on interstate commerce. *Morrison,* 529 U.S. 598.

In *Solid Waste Agency of Northern Cook County v. U.S. Army* (hereinafter "*SWANCC*"), the Court was unwilling to use the Commerce Clause to uphold COE's definition of 'navigable waters' to include intrastate waters solely because they were used as habitat by "migratory birds which cross state lines." 531 U.S. 159, 164 (2001). Generally when a statute is susceptible to two constructions, one of which gives rise to constitutional questions and by the other of which, those questions are avoided; it is the court's duty is to adopt the latter. *Jones v. U.S.*, 529 U.S. 848, 857-58 (2000). This rule is articulated in the *SWANCC* opinion when the Court avoided a significant constitutional Commerce Clause question by concluding that the "Migratory Bird Rule," 51 Fed. Reg. 41217 (1986), exceeded COE's authority under the CWA. However, the Court in *SWANCC* agreed that significant constitutional questions are raised by the fact that billions of dollars are spent each year on recreational pursuits relating to migratory birds. *Id.* at 173.

Congress' broad constitutional interpretation of the CWA's statutory term 'navigable waters'[2] gives COE the authority to classify Lake Temp as a "navigable water" pursuant to the

[2] See S. Conf. Rep. No. 1236, 92d Cong., 2d Sess. 144 (1972). "The conferees fully intend that the term "navigable waters" be given the broadest possible constitutional interpretation

Commerce Clause. In *SWANCC* the small, less than several acres in size, intrastate gravel-pit ponds were man made, and due to their location on private land had only an attenuated relationship to hunting and recreational purposes. *SWANCC* at 163. By contrast Lake Temp is, at its fullest, up to three miles wide and nine miles long and has a one-hundred year history of interstate use for recreational hunting. R. at 4.

Unlike the attenuated relationship between guns near a school and interstate commerce in *Lopez*, the recreational hunting use on Lake Temp is not attenuated; rather it has a direct relationship to interstate commerce. See *Hughes v. Oklahoma*, 441 U.S. 322, 338-39 (1979), (wild game can be "an article of commerce" implicating the Commerce Clause); and *Conservation Force, Inc. v. Manning*, 301 F.3d 985, 995 (9th Cir. 2002), (recreational hunting can substantially affect interstate commerce and is within the reach of the Commerce Clause). Similar to the Commerce Clause connections in *Manning* and *Hughes,* the recreational hunting on Lake Temp brings thousands hunters to the Lake each year and over one-quarter of those are from out-of-state. R. at 4. The mere fact that Lake Temp occasionally goes completely dry does not negate the commerce activity that occurs when it is used by duck hunters, and thus does not preclude Lake Temp being navigable-in-fact. Finally, unlike *SWANCC* where the filling pond could destroy all water storage capacity, the slurry fill in Lake Temp would only raise the bed of Lake Temp a few feet and Lake Temp would continue to hold water, allowing duck hunters to continue using the lake and bringing economic commerce into the state.[3] R. at 4.

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unencumbered by agency determinations which have been made or may be made for administrative purposes."

[3] *SWANCC* footnote 2, quoting, *Hoffman Homes Inc. v. EPA*, 999 F.2d 256 (C.A.7 1993), documenting the economic impact of hunting birds: "approximately 3.1 million Americans spent $1.3 billion to hunt migratory birds (with 11 percent crossing state lines to do so) as another 17.7 million Americans observed migratory birds (with 9.5 million traveling for the purpose of observing shorebirds). See 191 F.3d, at 850"

The interstate hunting activities that occur on Lake Temp are distinguishable from *SWANCC* due to the historic use and the direct and economic implication of the Commerce Clause. Therefore, it is within the scope of Congress' commerce power for COE to classify Lake Temp, a large, isolated, intrastate lake used by interstate hunters, as navigable.

C. The U.S. Supreme Court's recent limitations on the Corps of Engineers jurisdiction over navigable waters do not extend to Lake Temp.

The Supreme Court's interpretation of the term "navigable waters" allows COE jurisdiction to classify large, intrastate, isolated waters with interstate hunting use, as navigable. Recently, the Supreme Court has limited the scope of COE jurisdiction with respect to classifying "navigable waters" as navigable. See *SWANCC supra*; and *Rapanos v. U.S.*, 547 U.S. 715 (2006), (plurality opinion outlining two interpretations of the term 'navigable waters'). As discussed in *SWANCC*, Congress' Commerce Clause power allows for COE to classify Lake Temp as navigable. The *Rapanos* opinion is silent when dealing with isolated, intrastate lakes with interstate hunting use, allowing for COE to retain the authority to classify Lake Temp as navigable.

The *Rapanos* Court was split in its interpretation of the CWA statutory phrase "waters of the United States." COE defines "waters of the United States" to include: "[a]ll waters such as intrastate lakes . . . the use degradation or destruction of which would affect or could affect interstate or foreign commerce" including "[a]ll waters which are currently used, or were used in the past, or may be susceptible to use in interstate or foreign commerce." 33 C.F.R. § 328.3(a)(1). Justice Scalia's plurality opinion interprets the term "navigable waters" to include waters that are "relatively permanent, standing or continuously flowing bodies of water forming 'geographic features'" such as streams and lakes. *Rapanos* 547 U.S. at 716. The plurality limits

COE's jurisdiction over "navigable waters" to "only those wetlands with a continuous surface connection to bodies that are 'waters of the United States' in their own right, so that there is no clear demarcation between 'waters' and wetlands, are 'adjacent to' such waters and covered by the Act." *Id.* at 742.

In his concurring opinion Justice Kennedy disagreed with the plurality, rejecting the 'continuous surface connection' argument, and instead proposed a different test. Kenney's test extends jurisdiction over "navigable waters" that "possess a significant nexus to similarly situated lands in the region" and that "significantly affect the chemical, physical, and biological integrity of other covered waters more readily understood as navigable." *Id* at 780 (Kennedy, J., concurring). When the effect of water quality on other navigable-in-fact waters is speculative or insubstantial it would fall outside the zone fairly encompassed by the statutory term 'navigable waters.'" *Id* at 780.

Under Justice Scalia's plurality opinion, Lake Temp, is isolated and has no surface connection to other 'waters of the United States,' therefore under this test Lake Temp non-navigable. Under Justice Kennedy's 'significant nexus' test, Lake Temp would fall outside of the zone of "navigable waters," because like the wetlands in *Rapanos* which were 11 to 20 miles from the nearest body of navigable water, Lake Temp is wholly isolated. There is no evidence of a "significant nexus" to other "navigable waters," and thereby Lake Temp could not affect the chemical, physical, or biological integrity of other waters. However, neither of these opinions precludes COE from classifying Lake Temp as navigable.

Notwithstanding *SWANCC* and *Rapanos,* COE retains jurisdiction over intrastate lakes that are wholly separated from other navigable waters because of the Commerce Clause implications. COE's "intrastate lake" definition is not dependent on whether it is adjacent to and

therefore has a "significant nexus," but rather whether the lake is susceptible to use in interstate or foreign commerce. 33 C.F.R. § 328.3(a)(1), (3). The unique characteristics of Lake Temp fall outside both the *Rapanos* plurality and the concurrence, leaving COE the jurisdiction to classify Lake Temp as a "navigable water." Chief Justice Roberts notes in his concurring opinion in *Rapanos* that "Lower courts…will now have to feel their way on a case-by-case basis," when determining the issue of navigability. *Rapanos,* 547 U.S. at 758 (Roberts, C.J., concurring).

It is within COE's jurisdiction to classify Lake Temp, a large, isolate, intrastate lake as a navigable water of the United States pursuant to the CWA. Lake Temp is a unique case: it is isolated and intrastate; it is not adjacent to and has no significant nexus to other navigable waterways; it has a long history of interstate commerce. Therefore, Lake Temp is outside the scope of *Rapanos* and COE continues to retain jurisdiction to classify as navigable, because Lake Temp falls within a narrow category of intrastate, isolated lakes with interstate commerce implications. The lower court correctly extended deference to COE's classification of Lake Temp as a navigable water, therefore the summary judgment ruling on this issue should be affirmed.

III. THE § 404 FILL PERMIT ISSUED BY THE CORPS OF ENGINEERS TO THE DEPARTMENT OF DEFENSE FOR DISPOSAL OF MUNITIONS INTO LAKE TEMP, AS A FILL MATERIAL, WAS A PROPER EXERCISE OF THE CORPS OF ENGINEERS AUTHORITY UNDER THE ACT.

The CWA supports a judgment affirming the district court's holding that COE had the authority to issue a § 404 permit to DOD for the discharge of slurry into Lake Temp. First, the Act explicitly differentiates § 402 from § 404 by stating "the discharge of any pollutant by any person shall be unlawful" except in compliance with sections "1342 [CWA § 402] and 1344 [CWA § 404]." 33 U.S.C. § 1311. Second, a permit issued under § 404 cannot be governed under § 402. Finally, the CWA grants authority to both EPA and COE to issue intra-agency

permits without raising conflict of interest issues. The permit at issue falls squarely within § 404 and was therefore within COE's jurisdiction to issue. Therefore, the Lower Court's grant of summary judgment should be affirmed.

D. The slurry discharge into Lake Temp is properly classified as "fill" falling within the scope of § 404 and superseding § 402.

The lower court's holding that the slurry at issue here is most properly regulated as fill material rather than a pollutant under the language of the Act was correct. Sections 402 and 404 are two distinct provisions of the CWA allowing materials to be deposited into waters of the United States under two general permitting schemes: the National Pollutant Discharge Elimination System ("NPDES"), CWA § 402, administered under EPA authority, 33 U.S.C. § 1342; and the discharge of fill material provision, CWA § 404, administered under COE authority, 33 U.S.C. § 1344. In 2002, COE and EPA issued a joint "fill rule" which classifies fill as material placed in waters of the United States which has the effect of "replacing any portion of a water of the United States with dry land" or "changing the bottom elevation of any portion of a water of the United States." 40 C.F.R. § 232.2.

The distinct statutory permitting schemes and the recent U.S. Supreme Court decision in *Coeur Alaska, Inc. v. Southeast Alaska Conservation Council*, confirm that COE has proper authority to issue the fill permit. 129 S.Ct. 2458 (2009). Section 402 of the CWA states that "*except* as provided in § 1344 [CWA § 404] . . . the Administrator may issue . . . permit for the discharge of a pollutant." 33 U.S.C. § 1342(a) (emphasis added). The term "pollutant" is defined by the CWA to include "dredged spoil, solid waste . . . munitions, chemical wastes . . . discarded equipment, rock, sand, cellar dirt and industrial . . . waste." 33 U.S.C. § 1362(6).

Regardless of whether a "pollutant" is included in the discharged slurry, a proper interpretation of the statute mandates that § 404 supersede § 402 when the discharge is classified as "fill." Section 404 of the CWA states that "the [COE] may issue permits . . . for the discharge of dredged or fill material into navigable waters at specified disposal sites." 33 U.S.C. § 1344. *Coeur Alaska* alleviates any further statutory confusion stating simply, "[s]ection 402 gives the EPA authority to issue permit[s] for the discharge of any pollutant, with one important exception: EPA may not issue permits for fill material that fall under the Corps' § 404 permitting authority." at 2467 quoting 33 U.S.C. 1342 (emphasis added).

Coeur Alaska is the defining case resolving confusion between § 402 and § 404 permits. In *Coeur Alaska,* environmental groups sued COE and EPA alleging that COE improperly issued a § 404 permit to a proposed gold mining operation. The permit authorized Coeur Alaska Inc. to discharge mining waste, combined with chemicals used to separate the valuable ore from the rock, into a navigable lake. *Coeur Alaska,* 129 S.Ct. 2458. The Court held that the plain text of the CWA divides the CWA's permitting process into either EPA-administered programs pursuant to § 402 or COE-administered programs pursuant to § 404. *Id.* The Court also held that Congress intended for "fill" to be defined jointly by EPA and COE and that the 2002 fill rule was a proper agency construction of the authority granted to the agencies by the CWA. *Id.* at 2468.

The facts in *Coeur Alaska* closely parallels the facts in this case. The fill material in *Coeur Alaska* was composed of a significant portion of solids and contained chemicals mixed with rock to create a slurry solution to be deposited into a navigable water. *Id.* at 2464. Similarly, the slurry solution to be discharged into Lake Temp (a navigable water), is composed of solids and metals (deactivated munitions in liquid, semi-solid, and granular form), and will be mixed with pulverized metals derived from the remaining solids of the munitions and chemicals

to ensure the waste is no longer explosive. R at 8. As in *Coeur Alaska*, the COE here classifies the slurry discharge as "fill" to be deposited onto the lake bed, raising the bed elevation. *Id.* at 2464; R. at 8. Both situations conform to the 2002 fill rule, and therefore fall squarely under COE's § 404 authority.

New Union argues that the material at issue here is distinguishable from the fill at issue in *Coeur Alaska* because the slurry to be discharged by DOD includes "toxic pollutants" pursuant to § 307 of the CWA. 33 U.S.C. § 1317. Here, it is true that the slurry to be discharged into Lake Temp may include chemicals listed as toxic pollutants under § 307 of the Act. *Id.* In fact *Coeur Alaska* addresses a similar issue stating that the CWA does not allow for toxic pollutants to enter navigable waters. *Id.* at 2474. The Court continued by stating that "[r]egulated toxic pollutants under a separate provision, § 307 of the CWA, and the EPA's § 404(b) guidelines require [COE] to deny a § 404 permit for any discharge that would violate the EPA's § 307 toxic-effluent limitations. 40 CFR § 230.10(b)(2)." *Id.* However, these standards do not apply to an initial slurry discharge, classified as "fill," but only to the "later discharge of water from the lake into the downstream creek." *Id.* Here, Lake Temp is isolated and has no outlet, so there is no discharge of water to a downstream creek. R. at 4. Therefore, because the slurry clearly falls within the classification of "fill" material, the slurry munitions are exempt from the toxic pollutant requirements of § 307, and within COE's § 404 jurisdiction.

E. The discharge permit is governed under a § 404 permit and cannot be governed under § 402.

Section 404 of the CWA governs the slurry discharge into Lake Temp by DOD, because the initial slurry discharge is classified as "fill" and not "point source" pollution (governed by § 402). A "point source" is defined as "any discernible, confined and discrete conveyance, including but not limited to any pipe ditch, channel . . . from which pollutants are or may be

discharged." 33 U.S.C. § 1362. "Fill" is not defined by its manner of discharge, but rather by the effect of the discharge on the receiving waters (analysis above).

New Union argues that the slurry to be deposited into Lake Temp will be sprayed onto the dry portions of the lake bed from a movable, "point source" multi-port pipe and requires a NPDES permit. In *Northwest Environmental Defense Center v. Brown* the court determined that the NPDES system was created to regulate point source discharges which were conveyed to waters of the U.S. through a discernible, discrete infrastructure such as a pipe. 640 F.3d 1063 (9th Cir. 2011). Here, the multi-port pipe used to fill Lake Temp would fit within this definition of "point source."

However, because each of the § 402 and § 404 regulations stand-alone without reference to the other, the failure of § 404 to mention EPA "point source" standards indicate that they are not relevant to the § 404 permit. *Coeur Alaska,* 129 S.Ct. at 2472. The plaintiffs in *Coeur Alaska* made a similar argument and the Court concluded that since "slurry" is included in the joint 2002 "fill" rule the slurry solution falls solely within § 404. Similar to *Coeur Alaska*, and distinguishable from *Brown*, the material to be deposited into Lake Temp is a "slurry" and fits squarely within the 2002 fill rule. Therefore, because the multi-port pipe is depositing fill, COE has jurisdiction to issue a § 404 permit.

F. The Corps of Engineers retains the authority granted to it by the Clean Water Act to issue intra-agency permits to Department of Defense without raising conflict of interest issues.

Neither the CWA nor case law prevent COE from issuing an intra-agency permit to DOD. The language of the CWA does not address whether COE has the authority to issue an intra-agency, § 404 permit, to DOD. Additionally, in *National Rifle Association of America, Inc. v. Reno,* the court found that Congressional intent overrides the fox-guarding-the-hen-house

argument regarding intra-agency jurisdiction. 216 F.3d 122, 132 (D.C. Cir. 2000). Courts interpret agency interpretation of statute in accord with *Chevron's* two step "highly deferential standard." *Id.* at 137.

In *Reno* the National Rifle Association argued that the Attorney General should not be given deference to interpret statutory provisions when implementing sections of the Brady Act that directly restrict the Attorney General. *Id.* at 132. The Court held that the Attorney General used an Audit Log to "accomplish the very purpose of the Gun Control and Brady Acts…which [was] to ensure that individuals not authorized to possess firearms were unable to purchase them." *Id.* As in *Reno*, COE has statutory authority to issue a permit to "accomplish the very purpose" of the CWA, *i.e.*, to issue § 404 fill permits to those who discharge fill material. Therefore COE retains its authority to regulate within the agency activities falling under the authority of § 404.

Under the *Chevron* "highly deferential standard," COE retains the jurisdiction to issue an intra-agency permit to DOD. In *Reno* the court concluded that even if other quality control measures could be done outside the Attorney General's authority that accomplish the same goal, it is not the court's function to judge Congress' statutory requirements. *Id.* at 133. Rather, "[I]t is the agencies, not the courts, that have the technical expertise and political authority to carry out statutory mandates." *General Electric Company v. EPA*, 53 F.3d 1324, 1327 (D.C.Cir.1995). Through § 404 of the CWA, Congress expressly grants COE jurisdiction over fill permits. Similar to the holding in *Reno*, COE has authority to issue intra-agency permits to DOD. Finally, parallel to the holding in *General Electric Co.*, the court should defer to the "technical expertise and political authority" of the COE and allow the agency to carry out the § 404 statutory mandate to issue a fill permit to DOD. Therefore, the lower court's grant of summary

judgment, which agreed that the slurry is fill material and the requisite § 404 permit was correctly issued by COE, should be affirmed.

IV. THE OFFICE OF MANAGEMENT AND BUDGET ACTED UNDER VALID EXECUTIVE AUTHORITY IN DETERMINING THAT COE HAD AUTHORITY TO ISSUE A PERMIT TO DOD, THIS DETERMINATION DID NOT VIOLATE CONGRESSIONAL INTENT, AND EPA'S DECISION NOT TO VETO THE PERMIT WAS DISCRETIONARY AND THEREFORE NOT JUDICIALLY REVIEWABLE.

OMB acted properly when it determined that DOD discharge permit should be administered by COE under § 404 of the Act rather than being administered by EPA under § 402. First, OMB's authority to make the determination was granted by an Executive Order that did not exceed executive authority. Second, OMB did not violate the Act because it did not administer any part of the Act, it simply resolved a dispute between competing agency interpretations of the Act. Finally, EPA's decision not to veto the § 404 permit was made without OMB interference and was wholly discretionary and thus is not subject to judicial review under the Act or the APA. The lower court's grant of summary judgment on this issue should be affirmed.

A. The Office of Management and Budget's authority to resolve interagency disputes regarding administration of the Clean Water Act derives from a Constitutionally valid exercise of the President's Article II powers.

The Office of Management and Budget acted under permissible executive authority when it resolved a dispute between EPA and COE over administration of the CWA. New Union correctly contends that Congress conferred authority on EPA to generally administer the CWA. 33 U.S.C. § 1251(d). Congress further authorized the Secretary of the Army, acting through COE to administer permits for discharge of fill material under § 404 of the CWA. 33 U.S.C. § 1344(a). Additionally, Congress gave EPA the power (hereinafter "veto power") to deny § 404

discharge permits for certain disposal sites approved by COE, effectively vetoing the permit if the discharge would have an unacceptable adverse effect on "municipal water supplies . . . fishery areas . . . wildlife, or recreational areas." 33 U.S.C. § 1344(c).

Congress, however, did not confer upon EPA or COE any authority to resolve inter-agency disputes regarding administration of the Act. President Jimmy Carter first established procedures for resolving inter-agency disputes regarding the Act in Exec. Order No. 12,088, 43 Fed. Reg. 47,707 (Oct. 13, 1978). The order applies to the Act (*see id.* at § 1-102(b)) and states that "[t]he Administrator [of the EPA] shall make every effort to resolve conflicts regarding [violations of the CWA] between Executive agencies . . . . If the Administrator cannot resolve a conflict, the Administrator shall request the Director of the Office of Management and Budget to resolve the conflict." *Id.* at § 1-602.

The Constitution vests in the President the duty to ensure that "the Laws be faithfully executed." U.S. Const. art. II § 3. In order to accomplish this task, the President may issue orders and "the President's power, if any, to issue the order must stem either from an act of Congress or from the Constitution itself." *Youngstown Sheet and Tube Co. v. Sawyer*, 343 U.S. 579, 585 (1952). When the President acts pursuant to an express or implied authorization of Congress, his authority is at its maximum, for it includes all that he possesses in his own right plus all that Congress can delegate. *Id.* at 635 (Jackson, J., concurring).

The authority of the President to control and supervise executive policymaking is derived from the Constitution. *Myers v. U.S.*, 272 U.S. 52, 135 (1926) (*overruled* on other grounds). The desirability of such control is demonstrable from the practical realities of administrative rulemaking. *Sierra Club v. Costle*, 657 F.2d. 298, 406 (D.C. Cir. 1981). As a matter of public policy, the ability to resolve disputes between executive agencies is necessary for the President

to "faithfully execut[e]" the laws. Furthermore, the Constitution states "the executive Power shall be vested in a *President*," (not the Judiciary), lending weight to the rational premise that, absent congressional intent to the contrary, the power to resolve disputes between executive agencies should lie with the President. U.S. Const. art. II § 1 (emphasis added). The text of the Constitution thus implies that the President should have the power to resolve disputes between executive agencies as long as this resolution does not violate the law.

Additionally, Congress expressly stated that the CWA should be implemented so as to "encourage the drastic minimization of . . . interagency decision procedures . . . so as to prevent needless duplication and unnecessary delays at all levels of government." 33 U.S.C. § 1251(f). Executive Order 12,088 is a logical extension of this mandate. Absent Presidential power to grant the order, disputing agencies could be forced to resort to litigation in order to resolve disputes. The time-consuming litigation process would run contrary to Congress' express mandate to prevent unnecessary delays. Executive authority to resolve inter-agency disputes regarding the CWA is thus implied by the statutory language in § 1251(f).

OMB's participation in resolving the dispute between EPA and COE did not violate Congress' express intent. New Union cites *Environmental Defense Fund v. Thomas* as an example of OMB involvement with EPA's duties violating congressional mandate. 627 F. Supp. 566 (D.D.C. 1986). In *Thomas*, an executive order required OMB to review proposed regulations, which had been prepared by EPA in compliance with statute. *Id.* at 567-568. As a result of the lengthy review process, the regulations were promulgated three months past the deadline set by Congress. *Id.* at 569. The court found that the use of the executive order to direct OMB's participation caused significant delay, directly undermining Congress' express intent that the regulations be promulgated on a specific date. *Id.* at 570. The court declared that

such use of an executive order "is incompatible with the will of Congress and cannot be sustained as a valid exercise of the President's Article II powers." *Id*.

Thomas is distinguishable from the case at hand. Whereas in *Thomas* use of an executive order resulted in EPA violating Congress' express intent (missing a deadline for rule promulgation), in this case use of the executive order *helped* EPA and COE comply with congressional intent by avoiding unnecessary delays (i.e. inaction or litigation) as required by 33 U.S.C. § 1251(f). The facts here indicate that OMB's action was compatible with the will of Congress and should be sustained as a valid exercise of the President's Article II powers.

In sum, executive authority to resolve a dispute between EPA and COE is implied by the Constitution (*see* U.S. Const. art. II §§ 1, 3) and Congress (*see* 33 U.S.C. § 1251(f)) and satisfies the *Youngstown* holding that executive power is valid when it is based on express or implied mandate from the Constitution or Congress (*see Thomas,* 343 U.S. at 585). Unlike the order in *Thomas,* Executive Order 12,088 does not contradict the express intent of Congress. This Court should find that OMB's participation in resolving the dispute between COE and EPA was a valid exercise of executive power.

B. Office of Management and Budget's determination that the permit should properly be administered by Corps of Engineers under § 404 did not violate the Clean Water Act.

OMB's dispute resolution did not amount to OMB administering the CWA in violation of statute. Congress did not confer authority on OMB to administer any portion of the CWA. New Union argues that OMB's participation amounted to a violation of statute by putting OMB in a position to administer the CWA, rather than EPA or COE (as directed by 33 U.S.C. §§ 1251, 1344). They argue that by deciding COE had authority to grant the discharge permit to DOD

under CWA § 404, OMB was administering the statute. This reading of the facts of OMB's participation, however, is overly broad.

OMB did not grant a permit or administer any portion of the CWA. OMB, pursuant to executive authority impliedly granted by the Constitution and Congress, resolved a dispute between EPA and COE, a task that Congress did not delegate to any agency. Having resolved the dispute, the decision whether or not to grant the § 404 permit properly belonged to COE, and indeed, it was COE that made the affirmative decision to grant the § 404 permit to DOD. OMB's participation in no way affected COE's decision-making process.

Furthermore, OMB's determination that the permit for the activity in question was under COE jurisdiction in no way affected EPA's veto power over COE's decision to grant the permit. EPA could have vetoed the permit under 33 U.S.C. § 1344(c). Its decision not to do so was not influenced by OMB. Other than Executive Order 12,088, OMB has no authority to influence the administration of the Act. EPA and COE briefed OMB as to their respective positions and then met for a meeting where OMB issued its directive that COE should be responsible for deciding whether to issue the permit. R. at 9.

The facts here demonstrate that OMB did not violate the Act by administering portions of it absent Congressional authority to do so. Rather, OMB acted under executive power to complete a task that Congress had not delegated to any agency, including EPA and COE. OMB did not affirmatively implement any portion of the Act. It left COE to determine whether or not to issue the § 404 permit, and EPA to determine whether or not to veto the § 404 permit. OMB's participation was outside the scope of the Act and did not violate Congress' intent.

C. The Environmental Protection Agency's decision not to veto the permit is not subject to judicial review and, if it were, it would not meet the arbitrary or capricious scope of review under the Administrative Procedure Act.

EPA's decision not exercise its veto power with respect to the § 404 permit was wholly discretionary and thus not subject to judicial review. In general, the United States and its agencies have sovereign immunity from civil actions unless sovereign immunity is specifically waived by statute. *U.S. v. Mitchell*, 463 U.S. 206, 212 (1983).

The CWA waives sovereign immunity from civil suit against EPA "where there is alleged a failure of the Administrator to perform to perform any act or duty *which is not discretionary with the Administrator*." 33 U.S.C. § 1365(a)(2) (emphasis added). "Nondiscretionary duties" are "mandatory under the legislation." *Kennecott Copper Corp. v. Costle*, 572 F.2d 1349, 1353 (9th Cir. 1978). The APA similarly precludes judicial review for wholly discretionary agency decisions. Agency action that is "committed to agency discretion by law" is not subject to judicial review. 5 U.S.C. § 701(a)(2).

The plain language of 33 U.S.C. § 1344(c), makes it clear that EPA's decision to exercise its veto power over COE's grant of a § 404 permit is not mandatory and, therefore, is discretionary.

> (c) Denial or restriction of use of defined areas as disposal sites.
> The Administrator *is authorized* to prohibit the specification (including the withdrawal of specification) of any defined area as a disposal site, and he *is authorized* to deny or restrict the use of any defined area for specification (including the withdrawal of specification) as a disposal site, *whenever he determines*, after notice and opportunity for public hearings, that the discharge of such materials into such area will have an unacceptable adverse effect on municipal water supplies, shellfish beds and fishery areas (including spawning and breeding areas), wildlife, or recreational areas.

33 U.S.C. § 1344 (emphasis added). Because EPA's decision not to veto COE's grant of the § 404 permit to DOD was wholly discretionary it is not subject to judicial review. The district court properly did not exercise subject matter jurisdiction over this dispute.

Additionally, § 701(a) expressly states that the APA does not apply to discretionary agency action. Section 701(a) precludes application of 5 U.S.C. § 704, which states that agency

decisions not expressly subject to judicial review may still be reviewable if they are "final." As a result, it is unnecessary to consider whether EPA's decision not to veto the § 404 grant is a "final" agency action to conclude that it is not judicially reviewable.

Assuming, *arguendo*, that EPA's decision is subject to judicial review, it nonetheless fails to meet the applicable standard for unlawfulness, that the decision be "arbitrary or capricious." 5 U.S.C. § 706(2)(A).

> "Normally, an agency rule would be arbitrary and capricious if the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise."

Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43 (1983).

Nothing indicates that EPA relied on factors that Congress did not intend it to consider in reaching its decision not to veto the § 404 permit. Congress allows EPA to consider whether the discharge allowed under the permit would have "unacceptable adverse effect on municipal water supplies, shellfish beds and fishery areas (including spawning and breeding areas), wildlife, or recreational areas." 33 U.S.C. § 1344(c). Nothing in the record gives any indication that EPA considered additional factors (e.g. economic conditions) in deciding not to veto the permit.

Similarly, nothing in the record indicates that EPA considered whether a § 402 permit was warranted. The record shows that EPA decided not to exercise its veto power over Lake Temp as a disposal site. R. at 9. This demonstrates that EPA was taking into consideration important aspects of the problem, namely the nature of the discharge; further evidence that EPA's action was not arbitrary or capricious.

The record is devoid of any indication that EPA offered any explanation for its decision, let alone an explanation that ran counter to the evidence before it or was so implausible that it

could not be ascribed to a difference in view or the product of agency expertise. Absent an explanation, this factor of the analysis fails to show that EPA's action was arbitrary or capricious.

Finally, it is important to note that EPA's decision not to veto the § 404 permit is consistent with the Court's holding in *Coeur* that "the Corps and the EPA have together defined 'fill material' to mean any 'material [that] has the effect of ... [c]hanging the bottom elevation' of water." 129 S.Ct. 2458, 2464 (quoting 33 C.F.R. § 323.2).

EPA's decision to forgo vetoing the § 404 permit is unreviewable. If it were reviewable it would not be considered "arbitrary or capricious" and thus would not be held unlawful under 5 U.S.C. § 706(2)(A).

CONCLUSION

The United States respectfully requests that this Court affirm the district court's grant of summary judgment on all issues. New Union lacks standing, precluding further review by this Court. Further, under the Commerce Clause of the U.S. Constitution and pursuant to the statutory scheme of the CWA, COE has proper jurisdiction to classify Lake Temp as navigable and issue a § 404 fill permit. Finally, pursuant to OMB's implied authority from the Constitution and Congress, the resolution of the dispute between COE and DOD did not violate the CWA. For the foregoing reasons, this Court should affirm the district court's ruling.