Team No. 25

C.A. No. 11-1245

IN THE UNITED STATES
COURT OF APPEALS FOR THE TWELFTH CIRCUIT

STATE OF NEW UNION,
Appellant and Cross-Appellee,

v.

UNITED STATES,
Appellee and Cross-Appellant,

v.

STATE OF PROGRESS,
Appellee and Cross-Appellant.

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

Brief for STATE OF NEW UNION,
Appellant and Cross-Appellee

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JURISDICTIONAL STATEMENT

Federal district courts have original jurisdiction over "all civil actions arising under [the] . . . laws . . . of the United States[,]" including the Clean Water Act ("CWA"), 33 U.S.C. §§ 1301 *et. seq*. (2010) and the Administrative Procedure Act ("APA"), 5 U.S.C. §§ 701 *et seq*. (2010); 28 U.S.C. § 1331 (2010). 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. 28 U.S.C §§ 1291, 1294(1) (2010).

STATEMENT OF ISSUES

I. Whether New Union, as a parens patriae, has demonstrated standing under both Article III and the APA by asserting concrete regulatory and groundwater injuries directly traceable to COE's issuance of a section 404 permit.

II. Whether the district court properly deferred to COE's interpretation that Lake Temp, an intermittent and interstate lake, is waters of the United States subject to federal jurisdiction under the CWA.

III. Whether hazardous munitions waste is lawfully discharged under the CWA's section 402 National Pollutant Discharge Elimination System or under the section 404 dredge and fill permitting scheme.

IV. Whether OMB's interference with the section 404 permitting process and EPA's unsubstantiated acquiescence to OMB's order violated the CWA.

STATEMENT OF THE CASE

The State of New Union ("New Union") filed a complaint against the United States ("U.S.") in the United States District Court for the District of New Union. (R. at 3.) New Union ("Appellant" and "Cross-Appellee") alleged that the U.S. ("Appellee" and "Cross-Appellant") or Secretary of the Army, acting through the U.S. Army Corps of Engineers ("COE") unlawfully issued a section 404 permit to the Department of Defense ("DOD"). (R. at 3.) The section 404 permit authorizes DOD to discharge spent munitions slurry into Lake Temp, which is located

within a United States military reservation. (R. at 3.) New Union argued that the discharge required issuance of a section 402 permit by the Environmental Protection Agency ("EPA") not a section 404 permit by the COE. (R. at 3.) The State of Progress ("Progress"), within whose boundaries the permitted activities will take place, intervened and comes before this court as "Appellee" and "Cross-Appellant." (R. at 1, 3.)

On June 2, 2011, the district court issued an order granting U.S.' motion for summary judgment on all but one ground. (R. at 11.) The district court held that: (1) New Union lacked standing; (2) the COE had jurisdiction to issue a section 404 permit because Lake Temp is navigable; (3) the COE had jurisdiction to issue a section 404 permit because the slurry is fill material; and (4) Office of Management and Budget's ("OMB") role in dispute resolution between the EPA and COE did not violate the CWA. (R. at 11.)

New Union and Progress each filed timely Notice of Appeal from the district court's decision (R. at 1.) New Union and Progress appeal the district court's finding that New Union lacked standing. (R. at 1, 5-7.) Further, New Union appeals the district court's grant of summary judgment on the question of COE's jurisdiction, asking this court to declare that the COE did not have jurisdiction to issue a section 404 permit under the CWA. (R. at 1.) Progress also appeals the district court's grant of summary judgment on the question of the COE's jurisdiction, asking this court to find that Lake Temp is not navigable water. (R. at 1.) Lastly, New Union appeals the district court's grant of summary judgment on the question of whether the OMB violated the CWA, when it resolved the issue of whether the COE had jurisdiction to issue a section 404 permit or the EPA had jurisdiction to issue a section 402 permit. (R. at 1.) This court granted review on September 15, 2011. (R. at 2.)

Statement of the facts

DOD plans to construct a munitions discharge facility on the shore of Lake Temp. (R. at 4.) First, emptied munitions content composed of liquid, semi-solid and granular matter, which contain many chemicals on the CWA section 311 list of hazardous substances, will be mixed with other chemicals to ensure it is not explosive. (R. at 4.) Second, any remaining solids, primarily metals, will be ground and pulverized. (R. at 4.) Lastly, water will be mixed with both sets of waste to form a slurry before being evenly sprayed from a movable multi-port pipe over the entire lakebed. (R. at 4.)

Lake Temp is the low point in the drainage basin for surface water runoff from a surrounding eight hundred square mile mountain watershed located in Progress and New Union. (R. at 4.) The lake currently ranges from three miles wide and nine miles long during the rainy season in wet years, to much smaller during the dry season, to totally dry approximately one out of every five years. (R. at 3-4.) The lake is entirely located within Progress. (R. at 4.) The lake has no outflow, but sits above the Imhoff Aquifer, which generally follows the contours of the lake. (R. at 4.) Five percent of the Imhoff Aquifer lies below New Union and sits, in part, directly beneath land owned by New Union resident, Dale Bompers. (R. at 4.)

In 1952, Lake Temp became part of a military reservation and the DOD posted signs warning of danger and illegal entry. (R. at 4.) Lake Temp, when holding water, has historically been used by migrating ducks. (R. at 4.) Consequently, for over the past one hundred years, hundreds, if not thousands of hunters from Progress and other states have used the lake for hunting. (R. at 4.) The lake is also used by bird watchers. (R. at 4.) A highway runs along the southern border of Lake Temp and when the lake is filled to its historic high comes within one hundred feet of the lake's shore. (R. at 4.) There is no fence and clearly visible trails evidence

rowboats and canoes being dragged from the highway to the lake. (R. at 4.) DOD has knowledge that hunters and bird watchers continue to use the lake. (R. at 4.)

DOD estimates that the discharge will raise the lakebed several feet, resulting in a water elevation level six feet higher and a surface area two square mile larger. (R. at 4.) The COE will continually grade the new edges of the lakebed. (R. at 4.) In doing so, alluvial deposit runoff from the surrounding mountain watershed will flow unimpeded and restore the lakebed to pre-discharge condition. (R. at 4-5.)

STANDARD OF REVIEW

The district court rendered summary judgment in favor of the U.S. Summary judgment is proper if "there is no genuine issue as to any material fact and . . . the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). The court reviews the district court's grant of summary judgment *de novo*. *Pierce v. Underwood,* 487 U.S. 552, 558 (1988). COE's issuance of the section 404 permit is reviewed under the APA. 5 U.S.C. § 706(2)(A) (2010). The court has the authority to "hold unlawful and set aside" an agency action that is "arbitrary, capricious, an abuse of discretion, or not otherwise in accordance with law." *Id*.

SUMMARY OF ARGUMENT

The district court erred in holding that New Union did not have standing to challenge the COE's issuance of a section 404 permit. The *Massachusetts v. EPA* relaxed standing approach is applicable because New Union sues in its *parens patriae* capacity. New Union suffers an injury-in-fact to its sovereign and quasi-sovereign interests in healthy groundwater, as required by Article III standing. New Union's injuries are concrete, particular, and directly traceable to DOD's permitted discharge of hazardous substances, authorized by COE. DOD's permitted discharge of hazardous substances into surface waters, above the Imhoff Aquifer, injures New

Union's ability to regulate harmful activities to its groundwater and threatens New Union citizens' groundwater with contamination. Furthermore, New Union has standing under the APA. As prescribed by the APA, New Union seeks to review a final agency action and it asserts interests in clean groundwater, which are protected and regulated within the zone of interest of the CWA.

The district court correctly deferred to the COE's reasonable interpretation and held that Lake Temp is navigable water. Lake Temp at its highest level reaches 17,280 acres in surface area. It is subject to federal jurisdiction under the CWA, as a water of the United States, because: (1) DOD's proposed action will affect the chemical, physical, and biological integrity of the lake; and (2) it is a relatively permanent body of water forming a geographic feature. Additionally, the lake has been used by hunters, including interstate hunters, for over one hundred years. Thus, the lake became, and continues to be, a highway of interstate commerce, or at the very least is susceptible of becoming so.

The plain language of the CWA prohibits DOD from discharging munitions slurry containing section 311 hazardous substances without a section 402 permit. Proper regulation of DOD's hazardous point source discharge under section 402 is consistent with the EPA's authority to regulate similar material under the Resource Conservation and Recovery Act ("RCRA"). The COE's determination that the hazardous munitions slurry constituted fill material, regulated under section 404, was an illegal and unreasonable interpretation of the CWA. The interpretation was also inconsistent with the purpose of the CWA to restore and maintain waters of the United States, and with both the EPA's and COE's previous interpretations of the fill material regulation.

Moreover, OMB, who has no basis to grant or deny permits under the CWA, acted beyond the scope of its authority by ignoring EPA's recommendation that DOD's hazardous discharge required a section 402 permit. EPA, the ultimate administrator of the CWA, was prevented from exercising its congressionally delegated veto power under section 404. OMB's interference resulted in violations of sections 311 and 404 of the CWA, which is an unsustainable exercise of OMB's authority under Executive Order 12,088. Finally, EPA's acquiescence to OMB's order was arbitrary. EPA offered no explanation for yielding to OMB's ungrounded authority, particularly in light of their previous finding that a section 402 permit was required for DOD's hazardous discharge. Thus, the issuance of the section 404 permit to COE was an unlawful and arbitrary decision.

ARGUMENT

I. NEW UNION HAS STANDING UNDER ARTICLE III AND THE APA.

Federal courts are courts of limited jurisdiction, therefore they may only adjudicate those "cases and controversies" authorized under the United States Constitution or by Congress. U.S. CONST. art. III § 2; *see* 28 U.S.C. § 1331 (2010). Generally, the *Lujan* standing test requires three constitutional Article III elements: (1) an injury in fact; (2) that is fairly traceable to the challenged action of the defendant; and (3) likely to be redressed by a favorable decision. *Friends of the Earth, Inc. v. Laidlaw Envtl. Serv. (TOC), Inc.*, 528 U.S. 167, 181 (2000) (citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992) ("*Lujan*"). A state-plaintiff suing as a *parens patriae*, however, is entitled special solicitude in an Article III standing analysis. *Massachusetts v. EPA*, 549 U.S. 497, 519-20 (2007); *see also Connecticut v. Am. Elec. Power Co.*, 582 F.3d 309, 337-38 (2d Cir. 2009), *rev'd on other grounds*, 131 S. Ct. 2527 (2011). There are additional requirements for review under the APA, which substantially overlaps with the

Article III standing elements. *Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871, 883 (1990). The court's review under the APA is limited to final agency actions in which the party has exhausted its administrative remedies. 5 U.S.C. § 704 (2010). Further, a party seeking review under section 702 of the APA, *id*. § 702 (2010), must demonstrate that the complaint relates to an agency action, and that the party suffered either a legal wrong or is "adversely affected or aggrieved" by that action "within the meaning of a relevant statute." *Nat'l Wildlife Fed'n*, 497 U.S. at 882-83.

A. New Union, Suing In Its Parens Patriae Capacity, Is Entitled Special Solicitude Under the Massachusetts v. EPA Article III Standing Analysis Because It Asserts an Injury to Its Sovereign and Quasi-Sovereign Interests.

1. New Union has standing as a *parens patriae*, protecting its sovereign and quasi-sovereign interests in healthy groundwater.

Standing under the *parens patriae* doctrine requires a state to assert an injury to a sovereign or quasi-sovereign interest. *Alfred L. Snapp & Son, Inc. v. Puerto Rico*, 458 U.S. 592, 600-01 (1982) ("*Snapp*"). First, a state may protect its sovereign interest "to create and enforce a legal code" over individuals and entities within its jurisdiction and demand for recognition from other sovereigns. *Id.* at 601. Second, a state may litigate on behalf its residents to protect a quasi-sovereign interest such as the general physical and economic health and wellbeing of its citizens. *Id.* at 607-08. An injury to quasi-sovereign interest, which may include indirect effects, must affect the populace and be independent of individual private interests. *Id.* at 602. Here, New Union is a sovereign state bringing this suit into federal court in two sovereign standing capacities: (1) as regulator of groundwater in its territory; and (2) as protector of its citizens' interest in healthy groundwater.

In *Massachusetts v. EPA,* the State of Massachusetts had Article III standing under a blended *parens patriae* and *Lujan* 3-part standing analysis. *Massachusetts v. EPA,* 549 U.S. at

517-19. The Supreme Court emphasized that sovereign states are not "normal litigants for the purposes of invoking federal jurisdiction." *Id.* at 518. Consistent with *parens patriae* standing, Massachusetts had a unique, "well-founded desire to preserve its sovereign territory" and protect its citizens from greenhouse emissions. *Id*. As a condition of federalism, states have surrendered, to the federal government, some of their sovereign abilities to protect and regulate the environment. *Id*. at 520-21. The Supreme Court suggests that states may assert a right to judicial review when its regulatory interests diverge from the federal government. *Id.* at 516-21. In light of Massachusetts' quasi-sovereign interest at stake, it was entitled to special solicitude, which relaxed the *Lujan* standing test requirements. *Id.* at 518. *Massachusetts v. EPA* held that Massachusetts had standing to challenge the EPA's failure to promulgate rules regulating greenhouse emissions. Accordingly, New Union, suing in its *parens patriae* capacity, is entitled to the same relaxed standing regime as Massachusetts received, so long as New Union is exercising its authority to preserve and protect an important sovereign interest.

First, New Union has an inherent sovereign interest to create and enforce its regulations. *Maine v. Taylor*, 477 U.S. 137 (1986); *see also Snapp*, 458 U.S. at 601. Congress may preserve a state's sovereign interests by statute. Here the relevant statute is the CWA. *See Illinois v. City of Milwaukee*, 366 F. Supp. 298 (N.D. Ill. 1973) (interpreting the purpose of the CWA, which is not to preempt, but to amplify preexisting remedies of the state to protect interstate waters). The CWA expressly ensures that states retain a residual regulatory power over the groundwater within its territory stating that "it is the policy of the Congress to *recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution*, to . . . *water resources* . . . ." 33 U.S.C. § 1251(b) (2010) (emphasis added). Section 510 of the CWA prescribes that, except as expressly provided, nothing in the CWA is to "be

construed as impairing or in any manner *affecting any right or jurisdiction of the States with respect to the waters* (including boundary waters) of such States." Clean Water Act § 510, 33 U.S.C. § 1370 (2010) (emphasis added). These provisions apply to a state's right to regulate groundwater. *N. Plains Res. Council v. Fidelity Exploration and Dev. Co*., 325 F.3d 1155, 1164 (9th Cir. 2003). As such, the CWA preserves a state's authority and jurisdiction to regulate state groundwater resources without the need for federal interference. Thus, the state of New Union has an important sovereign interest in regulating its own resources.

Second, a state has a quasi-sovereign interest on behalf of its citizenry to protect the groundwater within its borders. *Sporhase v. Nebraska,* 458 U.S. 941, 963 (1982). Further, states may protect quasi-sovereign interests from pollution regardless of the rights of individual private appropriators or users of the water. *See Georgia v. Tennessee Cooper Co.*, 206 U.S. 230, 237 (1907) (protecting quasi-sovereign interest from air pollution); *Missouri v. Illinois*, 180 U.S. 208, 241 (1901) (protecting quasi-sovereign interests from water pollution); *California v. United States*, 180 F.2d 596, 601 (1950); *see also Hudson Water Co. v. McCarter*, 209 U.S. 349, 355 (1908). New Union's quasi-sovereign interest, in protecting its residents' health and wellbeing from groundwater contamination, stands apart from the private interests of its residents. The New Union Department of Natural Resources ("DNR") grants residents the right to withdraw groundwater if they obtain a DNR permit. (R. at 6-7.) DNR, however, has not yet issued any permits. (R. at 7.) As a result, New Union citizens are deprived from obtaining standing in an individual capacity because no citizen has a legal interest to challenge the issuance of the section 404 permit. Clean Water Act § 404, 33 U.S.C. § 1344 (2010). New Union, as the trustee of the populace's groundwater, is the only party that may obtain complete relief for the groundwater.

Thus, New Union has standing to protect its quasi-sovereign interest in its groundwater resources, which are threatened by DOD's permitted discharge of hazardous substances.

The U.S.' contention that *Massachusetts v. EPA* does not apply is unfounded. The *Massachusetts v. EPA* dissent, which the U.S. relies upon, found that Massachusetts' particularized injury, in its capacity as a landowner, is a non-sovereign interest and a purely private interest. *Massachusetts v. EPA,* 549 U.S. at 537-38. Further, the dissent asserted that *Massachusetts v. Mellon,* barred Massachusetts' *parens patriae* action against the federal government, who has the superior role in protecting the general welfare. 262 U.S. 447, 485-86 (1923). These concerns of the *Massachusetts v. EPA* dissent are not present.

In this case, New Union is not suing in its capacity as a landowner, but in its sovereign capacities as regulator and protector of its citizenry's groundwater. The *Mellon* bar does not apply. *Mellon* involved a state defending its citizens from the operations of a federal statute. *Id.* at 485-86. New Union does not dispute the applicability of a federal statute; rather, it seeks to protect its sovereign regulatory power provided by the CWA and ensure that its quasi-sovereign interest is safeguarded by the proper CWA provision, section 402. Further, this case falls within the *Mellon* exception. The exception applies to states asserting *parens patriae* standing when vindicating a threatened quasi-sovereign interest, such as that in *Missouri v. Illinois*, 180 U.S. at 241. *Massachusetts v. Mellon*, 262 at 485-86; *see also Massachusetts v. EPA*, 549 U.S. at 520-21. In *Missouri v. Illinois,* a state defended "the health and comfort of [its] inhabitants" threatened by an out-of-state defendant's sewage discharge into an interstate waterway, the Mississippi River. *Missouri v. Illinois*, 180 U.S. at 241. Similarly, New Union is protecting the health and comfort of its inhabitant's groundwater, which is threatened by DOD's permitted discharge of hazardous substances. Lastly, the Supreme Court recently issued a plurality

affirmation of the *Massachusetts v. EPA* standing approach. *Am. Elec. Power Co. v. Connecticut*, 131 S. Ct. 2527, 2535 (2011). Accordingly, *Massachusetts v. EPA*'s relaxed standing approach is the law and applicable to New Union's sovereign and quasi-sovereign interest injuries under the *Lujan*-injury-causation-resdressability test.

2. New Union Sufficiently Alleges an Injury-In-Fact to Its Sovereign and Quasi-Sovereign Interest to Confer Standing Because New Union Is Unable to Regulate Polluters and Groundwater Contamination Is Inevitable.

New Union has standing because its sovereign interest suffers an injury-in-fact. An "injury in fact" invades a legally protected interest and must be concrete, particularized and actual or imminent. *Friends of the Earth, Inc. v. Laidlaw Envtl. Serv. (TOC)*, 528 U.S. 167, 181 (2000) ("*Laidlaw*"). The relevant injury is to the plaintiff, not the environment. *Id.* Thus, New Union adequately asserts an injury-in-fact to its sovereign and quasi-sovereign interests.

New Union and its citizenry have a concrete and particular stake in this controversy because five percent of the Imhoff Aquifer is located within New Union. Although five percent appears minimal, given that the aquifer is more extensive than Lake Temp at its greatest extent, roughly more than 864 acres of the aquifer is located within New Union. (R. at 4.) Further, New Union's injuries are imminent and actual.

First, New Union's concrete and particular injury to its sovereign interest is actual. In *West Virginia v. EPA*, two states had standing to protect their sovereign interests in reducing air pollution through state implementation plans as directed by the Clean Air Act. 362 F.3d 861, 868 (2004). In that case, EPA's lower emissions budget made it difficult and onerous for states to regulate air pollution. *West Virginia v. EPA*, 362 F.3d at 868. Similar to *West Virginia v. EPA*, DOD's proposed discharge exposes New Union's groundwater to hazardous substances,

which makes it difficult, if not impossible, for New Union to regulate activities that contaminate its groundwater.

Second, New Union's concrete and particular quasi-sovereign interest is imminent. Imminence does not impose a strict temporal proximity that the injury will occur in a particular time period. *Lujan,* 504 U.S. at 564; *see also Connecticut v. Am. Elec. Power Co.*, 582 F.3d at 343. (applying the *Lujan* injury-causation-redressability standing test). Rather, it requires that the averred injury is *certainly* impeding in the future. *Id.* The U.S. asserts that New Union presents insufficient evidence "as to when the pollution will reach the edge of the aquifer beneath New Union, the strength of the pollution when it reaches that edge, or even if it will ever reach that edge." (R. at 5-6.) These temporal variables, however, are superfluous to the imminence requirement. In *Lujan*, plaintiffs alleged that the agency action at issue caused the extinction of animals and injured their hopes to observe wildlife abroad. The Supreme Court, concerned with deciding the case on an injury that may never occur, held that this indefinite injury was not sufficiently imminent because it was contingent, in part, on the plaintiff acting in particular way. *Lujan*, 504 U.S. at 564.

Distinguishable from the injury alleged in *Lujan*, contamination of New Union's groundwater is not dependent on New Union acting in a particular way. New Union's injury is similar to plaintiff's injury in *United States v. Hardage,* a case in which toxic pollutants discharged at the surface seeped through the alluvial subsoil to the aquifer below and posed an imminent and substantial endangerment to the plaintiffs. 761 F. Supp. 1501, 1510-11 (1990). In this case, it is undisputed that DOD is permitted to discharge hazardous pollutants onto Lake Temp's lakebed and the Imhoff Aquifer is located directly below. Further, given that land between the lakebed and the aquifer is primarily unconsolidated alluvial fill—extremely porous

material—surface water will easily flow into the aquifer and become groundwater. Therefore, contamination to New Union's groundwater is imminent because surface water containing hazardous pollutants will *certainly* flow into the Imhoff Aquifer.

Laidlaw involved a citizen suit under the CWA against the owner of a hazardous waste incinerator company that violated its permitted mercury limits. *Laidlaw*, 528 U.S. at 175. As a result of the company's excess discharge, the plaintiffs residing near a river did not use the river area for recreational purposes because of "reasonable concerns" about pollution. *Id.* at 183-84. The Supreme Court found that the plaintiffs adequately alleged an injury-in-fact to confer standing based on affidavits and testimony that averred reasonable aesthetic and recreational values, lost as a direct affect of defendant's challenged activities. *Id.* Consistent with *Laidlaw,* New Union suffers a sufficient injury-in-fact to its quasi-sovereign interest. Similar to the plaintiffs in *Laidlaw*, New Union asserts that its citizenry will suffer a diminution of value in the area subject to contamination. This is exemplified by Dale Bompers' reasonable concern that his property, located directly above the aquifer, will lose value as result of DOD's permitted contamination. (R. at 6.) Thus, DOD's permitted hazardous discharge presents an imminent threat of contamination to the Imhoff Aquifer and New Union's groundwater.

3. New Union Suffers a Cognizable Injury-In-Fact Directly Traceable to COE's Issuance of a Section 404 Permit.

A plaintiff must demonstrate that it suffered, or will suffer, an injury that is fairly traceable to, or caused by, the defendant's challenged actions. *Lujan*, 504 U.S. at 560. The COE issued a section 404 permit that authorized DOD to discharge onto Lake Temp's lakebed. The discharge contains pollutants and hazardous substances that will eventually flow, via surface water, into the Imhoff Aquifer below and contaminate the groundwater. Thus, COE's issuance

of a section 404 permit caused New Union to suffer an injury-in-fact to its sovereign interest and threatens an-injury-in-fact to New Union's quasi-sovereign interest.

4. New Union's Injury Will Be Redressed By a Favorable Decision.

The likelihood that a favorable decision will be able to address a plaintiff's injury must be more than just speculative. *Laidlaw,* 528 U.S. at 181. The redressability requirement is satisfied by merely showing that a favorable decision will likely relieve a discrete injury, not *every* injury. *Larson v. Valente*, 456 U.S. 228, 244 (1982). COE has authorized the discharge of spent munitions slurry into Lake Temp, which is hydrologically connected to the aquifer, threatening to contaminate the state's groundwater resources. Harm to New Union's portion of the aquifer and to its regulatory power will be addressed by a favorable decision—vacating the issuance of the section 404 permit and enjoining DOD's spent munitions discharge; or alternatively, vacating the section 404 permit and remanding for proper section 402 permit proceedings.

B. New Union Satisfies the APA's Standing Requirements.

Standing under the APA requires a plaintiff to show: (1) that it challenges a final agency action; 33 U.S.C. § 704; (2) there is no adequate alternative remedy; *Nat'l Wildlife Fed'n*, 497 U.S. at 885; and (3) it is "adversely affected or aggrieved . . . within the meaning of a relevant statute." 5 U.S.C. § 702. New Union satisfies each element.

First, New Union seeks equitable relief from a final agency action, the issuance of a section 404 permit to DOD. *See* 33 U.S.C. § 704. Second, Congress has not provided New Union "special and adequate review procedures" under the CWA to challenge COE's issuance of a section 404 permit. *Bowen v. Massachusetts*, 487 U.S. 879, 910 (1988). The CWA citizen suit provision provides that any citizen, including states, with an interest that is or may be adversely

affected, may commence a civil action against the United States when it is in violation of an effluent standard or limitation. 33 U.S.C. §§ 1365(a), (g), §1362(5) (2010). Effluent standard and limitation violations apply to permits issued under section 402, Clean Water Act § 402, 33 U.S.C. § 1342 (2010), not section 404 permits. New Union, however, challenges COE's issuance of a section 404 permit, for which the CWA's citizen suit provision does not provide an adequate remedy. Thus, the court has proper jurisdiction pursuant to the APA.

Third, New Union is aggrieved within the meaning of the CWA. A plaintiff's aggrieved interests must be protected and regulated within the "zone of interests" of a relevant statute. *Nat'l Wildlife Fed'n*, 497 U.S. at 883. Here, COE's issuance of the section 404 permit authorizes DOD to discharge hazardous substances. This threatens New Union's sovereign and quasi-sovereign interests in regulating and protecting its citizen's interest in the groundwater. The relevant statute is the CWA. Healthy groundwater is, without a doubt, the sort of interest the CWA intends to protect. *See* 33 U.S.C. § 1254(a) (2010) (EPA must "establish national programs for the prevention . . . of pollution . . . in cooperation with the States . . . for the purpose of monitoring the quality of . . . *ground waters* . . ."). The CWA clearly does not authorize hazardous substances, which are causing New Union's injury, to be discharged into waters of the United States under a section 404 permit. *Id*. § 1321 (2010).

II. LAKE TEMP IS A TRADITIONALLY NAVIGABLE WATER OF THE UNITED STATES UNDER THE CWA.

The purpose of the CWA, as amended in 1972, is "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a) (2010). Earlier interpretations of "navigable" were too narrow and failed to recognize tributaries, territorial seas, and Great Lakes. S. Rep. No. 92-414, at 77 (1972), *reprinted in* 1972 U.S.C.C.A.N. 3668, 3742. Furthermore, these narrow interpretations ignored the fact that "water moves in hydrologic

cycles and it is essential that discharge pollutants be controlled at the source." *Id*. Also, in the 1972 amendments, the Committee on Public Works stated, "[t]he Committee fully intends that the term 'navigable waters' be given the broadest possible constitutional interpretation unencumbered by agency determinations . . . ." *Id*. As a result of Congress' desire for a broad interpretation of the "Nation's waters," it replaced the term "navigable water" with "waters of the United States." 33 U.S.C. § 1362(7) (2010). In order to effectuate Congress' intent under the CWA, the EPA may "prescribe regulations as are necessary to carry out [its] functions under [the CWA]." 33 U.S.C. § 1361 (2010). The EPA defines waters of the United States in part as, "[a]ll waters which are currently used, were used in the past, or may be susceptible to use in interstate . . . commerce" and ". . . intrastate lakes . . . which would affect or could affect interstate . . . commerce . . . ." 40 C.F.R. § 122.2 (2002).

In this case, Progress challenges the COE's interpretation that Lake Temp is navigable or waters of the United States. The court applies the framework enunciated in *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc*., when reviewing an agency's interpretation of a statute it administers. 467 U.S. 837 (1984). First, under *Chevron,* the court must examine whether Congress has spoken directly to the question at issue. *Id*. If the court finds that Congress has spoken expressly and unambiguously, the court, as well as the agency, must give effect to Congress' intent. *Id*. at 842-43. If a court, however, finds Congress has not "directly spoken to the precise question at issue," the court must defer to the administering agency's interpretation so long as it is "based on a permissible construction of the statute." *Auer v. Robbins*, 519 U.S. 452, 457 (1997) (citing *Chevron*, 467 U.S. at 842-43).

In light of the COE's interpretation that Lake Temp is a water of the United States, the *Chevron* framework is applicable in this case. If this court finds the term "waters of the United

States" to be ambiguous as applied to Lake Temp, then in light of Congress' intent for the CWA to be interpreted broadly, the COE's reasonable interpretation is entitled *Chevron* deference. The COE reasonably found Lake Temp to be waters of the United States because it is a lake with a surface area of three miles in width by nine miles in length, or 17,280 acres, at its highest level. (R. at 3-4.) If this court chooses not to defer to the COE's interpretation on waters of the United States, the lake must be protected based on the Supreme Court's decision in *Rapanos v. United States*, 547 U.S. 715 (2006).

A. Lake Temp Satisfies Both Rapanos Tests Used to Distinguish Waters of the United States.

Rapanos construed the extent of federal protection under the CWA and set forth two tests to distinguish waters of the United States. 547 U.S. 715. The Supreme Court Justices unanimously agreed that the term "waters of the United States" even "includes something more than traditional navigable waters." *Rapanos*, 547 U.S. at 730-731 (plurality opinion); *Id.* at 767 (Kennedy, J., concurring); *Id.* at 788 (Stevens, J., dissenting). The Justices, however, disagreed on the scope of waters of the United States. As a result, *Rapanos* set forth two standards, neither holding the majority of the court, for distinguishing waters of the United States: (1) Justice Kennedy's "significant nexus" test; and (2) the plurality's "relatively permanent" test. *Id*. at 739, 780. Lake Temp falls within the scope of waters of the United States under both the significant nexus and relatively permanent tests.

1. Under the significant nexus test, Lake Temp is a waters of the United States because DOD's proposed discharge will significantly affect its chemical, physical, and biological integrity.

Lake Temp satisfies the standard for "waters of the United States" articulated by Justice Kennedy in his separate concurring opinion in *Rapanos*. Justice Kennedy opined that the plurality's standard was "inconsistent with the Act's text, structure and purpose" in part because

"the plurality forecloses jurisdiction over wetlands that abut navigable-in-fact waters even though such navigable waters were traditionally subject to federal authority." *Id.* at 776. In view of the wetland issue in *Rapanos*, Justice Kennedy developed two distinct standards based on whether the wetlands were adjacent to navigable-in-fact waters or non-navigable tributaries. First, the U.S. may exercise jurisdiction over wetlands adjacent to navigable waters by "showing adjacency alone." *Id.* at 780. Second, wetlands adjacent to non-navigable tributaries fall under the CWA if the "wetlands, alone, or in combination with similarly situated lands" have a "significant nexus" or significant affect on the "the chemical, physical, and biological integrity of other covered waters [to be] understood as navigable in the traditional sense." *Id*. The latter standard is relevant to this case because DOD's proposed discharge will take place when the lake is dry. (R. at 4.) The discharge, however, will significantly affect the chemical, physical, and biological integrity of Lake Temp.

Prior to the *Rapanos* decision, the Supreme Court held that "[w]hen a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest ground." *Marks v. United States*, 430 U.S. 188, 193 (1977) (citing *Gregg v. Georgia*, 428 U.S. 153, 168-69 (1976)). Relying on *Marks*, the majority of circuits hold that Justice Kennedy's significant nexus test is the ruling standard. *United States v. Gerke Excavating*, Inc., 464 F.3d 723, 724 (7th Cir. 2006); *N. California River Watch v. City of Healdsburg*, 496 F.3d 993, 995 (9th Cir. 2007); *United States v. Robison*, 505 F.3d 1208, 1221 (11th Cir. 2007).

Lake Temp meets Kennedy's significant nexus test because it is hydrologically connected to an eight hundred square mile watershed and to an underlying aquifer, which follows the lake's

contours. S. Rep. No. 92-414, at 77 (1972), *reprinted in* 1972 U.S.C.C.A.N. 3668, 3742 (Committee on Public Works stated, "navigable" failed to recognize that "water moves in hydrologic cycles and it is essential that discharge pollutants be controlled at the source."). Within these "similarly situated lands," the facts stipulate that alluvial deposits flow from the surrounding watershed to form the lakebed. (R. at 4.) These permeable alluvial deposits will allow for seepage from the lake to the aquifer and vice-versa.[1] Progress fails to acknowledge the significant affects DOD's hazardous discharge throughout the lakebed will have on the "chemical, physical, and biological integrity" of Lake Temp. *Rapanos*, 547 U.S. at 780.

DOD's discharge will alter the chemical integrity of the lake because its contents contain a wide variety of hazardous waste. (R. at 4.) These pollutants will pass between the permeable alluvial lakebed to the underlying Imhoff Aquifer and back up again. The discharge will alter the physical integrity by raising the entire lakebed by several feet. (R. at 4.) This will expand the surface area and require the lake's edges to be continuously graded by the COE. (R. at 4.) This continuous grading will block the free flow of alluvial deposits from the watershed to the lakebed. The discharge will alter the biological integrity of Lake Temp because the surface area will become two square miles larger. (R. at 4.) This combined with the COE's continuous grading of the lake's edges, will significantly affect shore habitat for wildlife. Furthermore, the hazardous pollutants contained within the discharge will be detrimental to future wildlife and human use. For these reasons, this court should defer to the COE's reasonable interpretation and find Lake Temp to be waters of the United States under the Kennedy test.

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[1] Winter, T.C. et al., *Ground Water and Surface Water a Single Resource: U.S. Geological Survey Circular 1139* (Nov. 26, 2011, 10:20 AM), http://pubs.usgs.gov/circ/circ1139/index.html (follow "Interaction of ground water and lakes" hyperlink). Study by U.S. Geological Survey stating, "[l]akes interact with ground water in three basic ways: some receive ground-water inflow throughout their entire bed; some have seepage loss to ground water throughout their entire bed; but perhaps most lakes receive ground-water inflow through part of their bed and have seepage loss to ground water through other parts."

2. Under the plurality's test, Lake Temp is a water of the United States because it is a relatively permanent body of water forming a geographic feature.

Other circuits apply the plurality's relatively permanent test. *See, e.g*., *United States v. Johnson*, 467 F.3d 56, 64-65 (1st Cir. 2006). The plurality test requires a "relatively permanent continuously flowing bodies of water forming geographic features." *Rapanos*, 547 U.S. at 739. Lake Temp satisfies the plurality's test.

Progress' argument that Lake Temp is not navigable because it is an intermittent body of water is equivocated and fails to consider the plurality opinion in its entirety. The plurality stated that a relatively permanent body of water "refers to water as found in . . . '*lakes'* . . ." *Id.* at 732-733 (emphasis added). The plurality went on to state, "[n]one of these terms encompasses transitory puddles or ephemeral flows," but did not intend to exclude "lakes that might dry up in extraordinary circumstances . . . [or] rivers, which contain continuous flow during some months of the year but no flow during dry months." *Id*. The Supreme Court previously held it is not required that a water be navigable "at all seasons . . . or at all stages of the water." *Economy Light & Power Co. v. U.S.*, 256 U.S. 113, 122 (1921).

In this case, Lake Temp, while not continuously navigable, only goes dry once every five years, not during certain months each year or seasonally. The plurality test requires not only "relative permanence" but also that waters form "geographic futures" described as ". . . ocean, rivers, [and] *lakes*. . ." *Rapanos*, 547 U.S. at 739 (emphasis added). Thus, by the plurality's own interpretation, "lakes," such as Lake Temp, are geographic features. Lake Temp satisfies the geographic feature requirement, to an even greater extent, given that it is the low point in the drainage basin for the surrounding mountain watershed. Thus, this court should defer to the

COE's reasonable interpretation and find Lake Temp to be waters of the United States under the plurality test.

B. SWANCC is Not Applicable Because Lake Temp Is Traditionally Navigable.

In a 1961 amendment to the Federal Water Pollution Control Act ("FWPCA"), precursor to the CWA, the House Committee on Public Works stated, "[t]he power to regulate commerce necessarily embraces all matters pertaining to navigation on such waters but is not limited to navigation." H.R. Rep. No. 87-306 (1961), *reprinted in* 1961 U.S.C.C.A.N. 2076, 2084. Congress' power also includes waters, "which are accessible from a State other than those in which they lie. For this purpose they are the public property of the Nation, and subject to all the requisite legislation by Congress." *Id*. This stands for the proposition that Congress has the authority to regulate navigable waters under the Commerce Clause.

Lake Temp, while entirely intrastate, is a highway of interstate commerce and has been for at least the past one hundred years. In *Solid Waste Agency of N. Cook Cnty v. U.S. Army Corps of Engineers* ("*SWANCC*"), the COE improperly found that "nonnavigable, isolated, intrastate waters" varying from one-tenth of an acre to several acres fell within the meaning of waters of the United States based upon the mere presence of birds or also known as the "Migratory Bird Rule." 531 U.S. 159, 162 (2001). The Supreme Court invalidated the Migratory Bird Rule and imported meaning to the term "navigable" in section 404 by deferring to the COE's original interpretation of navigable waters, which emphasized "transportation or commerce" as determining factors. *Id.* at 165-66, 170.

The COE defines waters "capable of carrying interstate commerce" to include purely intrastate waters if it "physically connects with a generally acknowledged avenue of interstate commerce." 33 C.F.R. § 329.7 (2011). Here, a Progress state highway runs along the lake's

southern shore. In 1952, when the lake became part of a military reservation, the DOD posted signs along the highway warning of danger and illegal entry. (R. at 4.) This action, exemplified DOD's recognition that the lake connects with "a generally acknowledged avenue of interstate commerce," namely the Progress state highway. 33 C.F.R. § 329.7.

In *Montello*, the Supreme Court stated, "[i]f [a water] is capable in its natural state for being used for purposes of commerce no matter in what mode the commerce may be conducted, it is navigable in fact, and *becomes in law a public river or highway*." *The Montello*, 87 U. S. 430 (1874) (emphasis added). This holding is supported by *U.S. v. Holt State Bank*, 270 U.S. 49, 56, finding that a navigable-in-fact lake "must be regarded as navigable in law; that they are navigable in fact when they are used, or are susceptible of being used, in their natural and ordinary condition, as highways for commerce, over which trade and travel . . ." may take place. *U.S. v. Holt State Bank*, 270 U.S. 49, 56 (1926). *Montello* held that early fur traders navigating the Fox River in canoes sufficiently showed that the river was traditionally navigable. *Montello*, 87 U.S. at 432. The COE's regulation supports this judicial analysis, stating, "[a] waterbody which was navigable in its natural or improved state, or which was susceptible of reasonable improvement . . . retains its character as 'navigable in law' even though it is not presently used for commerce . . . . " 33 C.F.R. § 329.9 (2011). In other words, "[o]nce having attained the character of 'navigable in law,' the Federal authority remains in existence, and cannot be abandoned by administrative officers or court action." *Id*.

Unlike *SWANCC*, Lake Temp is 17,280 acres at its highest level and not just a habitat for migratory birds. For at least the past one hundred years, Lake Temp transported hundreds, if not thousands, of hunters, including interstate hunters. (R. at 4.) At its highest level, Lake Temp's southern shore sits merely one hundred feet from a Progress state highway. (R. at 4.) The

hunters and bird watchers likely search for wildlife on Lake Temp's other shores. This is evidenced by clear signs of canoes and rowboats being dragged from the highway to the lake. (R. at 4.) The COE's interpretation states in part "sufficient commerce may be shown by historical use of canoes" and"[s]imilarly, the particular items of commerce may vary widely, depending again on the region and period." 33 C.F.R. § 329.6 (2011); *see also* 40 C.F.R. § 122.2(c)(1) (2002) (defining navigable waters to include "[water] that could be used by interstate...travelers for recreational or other purposes."). Again, "[o]nce having attained the character of 'navigable in law,' the Federal authority remains in existence, and cannot be abandoned by administrative officers or court action." *Id*. § 329.9.

In the alternative, Lake Temp is capable of becoming traditionally navigable. *Montello* held that if not capable of naturally becoming navigable it was not waters of the United States. 87 U.S. at 440. The COE's current interpretation, however, extends susceptibility to waters that could become navigable by artificial means. 33 C.F.R. § 329.8 (2011) ("Navigability may also be found where artificial aids have been or may be used to make the water body suitable for use in navigation."). *SWANCC*, similarly, stated that the COE has jurisdiction over waters "which could reasonably be . . . made . . ." navigable. *SWANCC*, 531 U.S. at 172 (*See, e.g*., *United States v. Appalachian Elec. Power Co.,* 311 U.S. 377, 407-408 (1940)).

It is undisputed that Lake Temp is the low point in the drainage basin for the surrounding mountain watershed. (R. at 4.) Therefore, even if Lake Temp is currently in a dry year, it will naturally become navigable during wet years as the watershed drains into the lake. Additionally, DOD's proposed action will increase the lake's depth six feet, which is sufficient to support navigation by canoe or rowboat. (R. at 4.) This court should defer to the COE's reasonable

interpretation that Lake Temp is traditionally navigable, or at the very least capable of becoming a water of the United States.

III. DOD'S CONDUCT REQUIRES A CWA SECTION 402 PERMIT FROM THE EPA.

The goal of the CWA is "to restore and maintain the chemical, physical and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a). To meet this end the CWA prohibits the discharge of pollutants, except in compliance with a number of provisions, including the section 402 permitting program, the National Pollutant Discharge Elimination System ("NPDES"), and the section 404 dredge and fill program. *Id*. § 1311(a). The question here is whether the COE acted unlawfully when it issued a permit for the discharge of hazardous munitions waste pursuant to the section 404 dredge and fill permitting scheme. The analytical framework set forth in *Chevron* is applicable where a particular agency action is challenged, as is the case here. *Kentuckians for the Commonwealth, Inc. v. Rivenburgh*, 317 F.3d 425, 439 (2003).

Under section 402 of the CWA, the EPA may grant permits to discharge pollutants, with the exception of pollutants qualifying as fill material, which is regulated primarily by the COE under section 404. 33 U.S.C. § 1342. Pollutants are defined as, "dredge spoil, solid waste, incinerator residue, sewage, garbage, sewage sludge, munitions, chemical wastes . . . rock, [and] sand." *Id.* § 1362(6). Under section 404 the COE is authorized to regulate the discharge of dredge or fill material into waters of the United States. COE's actions however must be based on EPA guidelines, *id*. § 1344(b), and the EPA may overrule section 404 permits issued by the COE. *Id.* § 1344(c). If the COE issues a permit under section 404, the EPA may not do so under section 402. *Coeur Alaska, Inc. v. Se. Alaska Conservation Council*, 129 S. Ct. 2458, 2468 (2009). Section 404 of the CWA, however, does not give the COE authority to regulate discharge of hazardous munitions in violation of section 311.

A. The Plain Language of the CWA Requires DOD to Seek a Permit From the EPA Under Section 402 Before Discharging Hazardous Munitions Waste Into Lake Temp.

1. Section 311 prohibits the discharge of hazardous substances without a section 402 permit.

The CWA, clearly and unambiguously, prohibits the discharge of the DOD's munitions slurry without first receiving a section 402 permit from the EPA. Clean Water Act § 311, 33 U.S.C. § 1321 (2010). In section 311 of the CWA, Congress expressly declared that "there should be no discharges of . . . hazardous substances into or on upon the navigable waters of the [U.S]." *Id*. § 1321(b)(1). Congress was so serious about this prohibition on the discharge of hazardous substances, that violations carry strict civil penalties including fines of up to $25,000 each day of the violation. *Id*. § 1321(b)(7). Under Congress' definition, discharge includes "any . . . pumping, emitting, emptying or dumping," *id*. § 1321(a)(2), of hazardous substances, which are to be determined by the EPA. *Id*. § 1321(b)(2)(A). The EPA is required to designate hazardous substances, which "when discharged in any quantity into or upon the navigable waters of the [U.S.] or adjoining shorelands . . . presents an imminent and substantial danger to the public health or welfare, including, but not limited to, fish, shellfish, wildlife, shorelines, and beaches." *Id*. The CWA provides only one exception to the strict prohibition on discharge of section 311 hazardous substances—those that are regulated under the section 402 NPDES program. *Id*. § 1321(a)(2).

It is undisputed in this case that the munitions slurry that DOD proposes to discharge into Lake Temp, "includes many chemicals on the [CWA] § 311 list of hazardous substances . . . ." (R. at 4.) The hazardous sludge will then be discharged from a movable multi-port pipe over the entire lakebed. (R. at 4.) DOD's proposed discharge easily fits within the statutory definition of "point source," which is "any discernable, confined and concrete conveyance, including . . . any

pipe, ditch, [or] channel . . . from which pollutants are or may be discharged." *Id*. § 1362(14). Consequently, it is unambiguous that pursuant to section 311 of the CWA, DOD is prohibited from discharging the munitions slurry into Lake Temp, unless it applies for and receives a section 402 permit from the EPA. *Id*. § 1321(a)(2).

2. Issuance of a section 402 permit is consistent with RCRA.

In view of other congressional acts, it is clear that Congress intended for the EPA to regulate hazardous materials, like those contained in DOD's discharge. The EPA's authority to regulate hazardous substances under the CWA is consistent with its congressionally mandated responsibilities pursuant to RCRA. 42 U.S.C. §§ 6901-6992k (2010). Similar to section 311 of the CWA, RCRA requires the EPA to identify and list particular types of hazardous waste that are subject to regulation. 42 U.S.C. § 3001 (2010). RCRA's coverage extends to all "solid wastes," which includes "liquid, [and] semisolid . . . materials," unless these "solids" in the form of liquids are discharged from industrial point sources. *Id.* § 1003(27). This exclusion is logical because at the time EPA was already regulating "point source" discharges of hazardous substances under section 402 of the CWA. 33 U.S.C. § 1342.

It is illogical to suggest that Congress intended for the EPA to regulate hazardous "solid waste" under RCRA, but not to regulate the same material under the CWA. Such an interpretation would allow a discharger to circumvent stringent EPA standards by simply applying for a section 404 permit, as DOD did here. Not only is this absurd, but it is illegal. *Id*. § 1321.

B. The COE's Interpretation of The CWA is Illegal, Inconsistent, and Contrary The Purpose of The CWA

The plain language of the statute resolves the issue in this case—DOD cannot discharge hazardous munitions waste under a section 404 permit. Because the CWA is not "silent or

ambiguous with respect to the specific issue," *Chevron*, 467 U.S. at 843, there is no need to consider "whether the agency's answer is based on a permissible construction of the statute." *Id*. at 844. Even under the second step, however, the issuance of a permit is not reasonable in light of the legislature's revealed design.

1. The issuance of a section 404 permit for the discharge of hazardous munitions waste is inconsistent with the regulations governing fill material.

When an "agency acts pursuant to a regulation, a reviewing court must determine whether the agency's action is consistent with the regulation." *Rivenburgh*, 317 F.3d at 439. A reviewing court may set aside an agency's interpretation of its own regulation if it "is plainly erroneous or inconsistent with the regulation." *Auer*, 519 U.S. at 519.

In 2002, the COE and EPA promulgated a joint definition of "fill material" as "material [that] has the effect of [c]hanging the bottom elevation" of a water of the United States. 40 C.F.R. § 232.2 (2011). Examples of fill material include "rock . . . and overburden from mining or other excavation activities . . . " and explicitly excludes trash or garbage. *Id*. The regulations further define "discharge of fill material" to include of the "placement of overburden, slurry, or tailings or similar mining-related materials." *Id*.

When the EPA and the COE proposed the section 404 regulations in 2000, they explained that "[f]ill material differs fundamentally from the types of pollutants covered by section 402 because the principal environmental concern [of 404] is the loss of a portion of the body of water itself." Proposed Revisions to the CWA Regulatory Definitions of "Fill Material" and "Discharge of Fill Material," 65 Fed. Reg. 21292, 21293 (Apr. 20, 2000). Section 402, was designed to impose treatment standards for discharge in municipal and industrial operations, but was not "designed to address discharges that convert waters of the U.S. to dry land." *Id*. The

agencies further explained that the reason for the "effects" based definition of fill material is because traditional fill material typically consists of pollutants such as soil, rock, and earth, which are the same pollutants discharged in mining operations. Final Revisions to the CWA Regulatory Definitions of "Fill Material" and "Discharge of Fill Material," 67 Fed. Reg. 31129, 31133 (May 9, 2002). For these reasons, some pollutants may be deemed fill material and regulated under section 404. *Id.* This explanation is consistent with the COE and EPA's practice of regulating mining material under section 404. *See Rivenburgh*, 317 F.3d 425 (holding that the COE could reasonably interpret section 404 to govern disposal of mining overburden).

The COE's classification of hazardous munitions waste as "fill material" is completely inconsistent with its previous interpretations. DOD's proposed discharge will elevate the bottom of Lake Temp; however, this is not the concern in this case. The primary concern is that DOD's discharge contains section 311 hazardous substances, ground metals, and other chemicals that will percolate through the lakebed and into New Union's portion of the Imhoff Aquifer below. This type of discharge requires proper treatment under the 402 NPDES program.

2. Issuance of a section 404 permit for hazardous waste is manifestly contrary to the purpose and intent of the CWA.

The COE's fill regulation as applied in this case is not only contrary to its own previous interpretations, but leads to an unreasonable and unlawful interpretation of the CWA. The central purpose of the act is to "restore and maintain the chemical, physical and biological integrity of the Nation's waters," 33 U.S.C. § 1251(a). Allowing DOD to bypass EPA's regulatory expertise, and discharge hazardous munitions into Lake Temp, undermines the foundation of the CWA.

The section 402 NPDES permit program is "central to the enforcement of the Act." *Natural Res. Def. Council v. Costle*, 568 F.2d 1369, 1374 (D.C. Cir. 1977). Section 402 permits

must incorporate effluent limitations and standards of performance, 33 U.S.C. § 1311(a), based on "quantities, rates and concentrations of chemical, physical, biological and other constituents." *Id*. § 1362(11) (2010). Permits must "contain specific terms and conditions, as well as numerical discharge limits, which govern the activities of pollutant dischargers." *Rybachek v. U.S. EPA*, 904 F.2d 1276, 1283 (9th Cir. 1990).

The section 404 permits, on the other hand, draw upon the COE's expertise in issues of navigability and construction, and are to subject guidelines based primarily on the impact of discharge on the receiving waters. *See* 33 U.S.C. § 1344(b). Unlike the section 402 permit program, activities regulated under section 404 permits are not required to comply with technology based pollution control. *Coeur*, 129 S. Ct. at 2476. This dual permitting scheme reflects Congress' view that discharge of fill material did not pose the same threats as those pollutants regulated under section 402.

In granting the COE regulatory authority over the section 404 program, the understanding was that "disposal of dredge and fill material does not involve the introduction of new pollutants . . . If polluted discharges from municipal and industrial sources are controlled as required by [the CWA], the disposal of dredge material . . . presents no significant problem." 117 Cong. Rec. 38797, 38853 (Nov. 2, 1997), *reprinted in* 2 Comm. on Public Works, 93rd Cong., A Legislative History of the Water Pollution Control Act Amendments of 1972, at 1386 (1973). The material DOD proposes to discharge, however, presents a significant problem because it contains many chemicals considered hazardous under section 311.

COE's interpretation of the term fill material in this case, is a completely unreasonable interpretation of section 404. It is unsupported by the purpose and intent of the CWA, it attempts to allow the DOD to side step pollution control standards, which is an illegal violation of section

311. As Congress explained, "the use of any river, lake, stream or ocean as a waste treatment system is unacceptable." S. Rep. No. 92-414, at 77 (1972), *reprinted in* 1972 U.S.C.C.A.N. 3668, 3742.

IV. OMB'S UNLAWFUL INTERVENTION DID NOT EXCUSE DOD FROM OBTAINING A SECTION 402 PERMIT.

Although it is enough for the court to invalidate the DOD's section 404 permit based on the unambiguous intent of the CWA or the COE's unreasonable interpretation of the CWA, OMB's interference in the issuance of the permit deprives the court of reviewing the expert interpretation of the EPA, the primary administer of the CWA.

A. Congress Delegated EPA Authority to Oversee the COE's Administration of Section 404.

Congress granted the EPA authority, "to administer the CWA generally." 33 U.S.C. §1251(d) (2010). EPA also retains extensive involvement in the section 404 permitting process. While the COE bears the primary responsibility for evaluating permit applications for the discharge of dredge and fill material it is required to comply with guidelines developed by the EPA. *Id*. § 1344(b). Recognizing EPA's "expertise and concentrated concern with environmental matters," *James County v. EPA*, 12 F.3d 1300, 1336-37 (4th Cir. 1993), Congress authorized the EPA to veto section 404 permits that have "an unacceptable adverse effect on municipal water supplies, . . . wildlife, or recreational areas. . . ." 33 U.S.C. § 1344(c).

Section 404's system of dual implementation ensures that the issuance of a section 404 permit does not violate the purpose and intent of the CWA. The check and balance system provides a safeguard against regulated industries gaining immunity from EPA pollution-control standards by simply adding sufficient solid matter to a pollutant in order to meet the regulatory definition of fill material. *Coeur,* 129 S. Ct. at 2478 (Breyer concurring). The EPA rarely finds

it appropriate to exercise its veto power, but when it does, those decisions should be upheld. *See Bersani v. Robichaud*, 850 F.2d 36 (2nd Cir. 1988) (upholding the EPA's 404(c) veto based on the EPA's interpretation of the regulatory language and consistency with the COE's past practices).

B. OMB Acted Beyond Its Authority When It Disregarded EPA's Technological Judgment and Prevented Compliance With Sections 404 and 311 of the CWA.

Unlike EPA's explicit authority to determine appropriate permits and to veto section 404 permits, the OMB has no authority, from either Congress or the President, to do so under any provision of the CWA. OMB's role in ensuring federal compliance with pollution control standards is to "consider unresolved conflicts at the request of the [EPA]" and when doing so, to seek the EPA's "technological judgment and determination with regard to the applicability of the statutes and regulations." Exec. Order No.12,088, 1-603, 43 Fed. Reg. 47707 (1978).

In this case, the OMB was clearly acting outside its authority when it ordered the EPA not to veto DOD's permit for discharge of hazardous spent munitions slurry. It is unknown how OMB became involved in the issuance of DOD's 404 permit, but it is undisputed that OMB knew EPA's position that DOD's proposed discharge requires a section 402 permit. (R. at 9.) The EPA's determination is consistent with section 311 of the CWA, which makes it unlawful for anyone, including DOD, to discharge hazardous munitions waste without a section 402 permit. Nevertheless, OMB summarily ignored the EPA's determination and directed the EPA not to veto the 404 permit. (R. at 9.)

The COE argues that the executive power is vested in the President, not the EPA or COE, U.S. CONST. art. II, § 1, cl.1, and that the President is charged with the duty to "take Care that the Laws be faithfully executed." U.S. CONST. art. II, § 3. The Constitution, however, does not grant OMB the authority to override laws of the U.S. Even when OMB is acting in accordance

with an executive order, it must still ensure compliance with statutory mandates of Congress. In *Envtl. Def. Fund v. Thomas*, 627 F. Supp. 566, 567-68 (D.D.C. 1986) ("*EDF*"), the court considered the boundary of OMB's authority, pursuant to an executive order, to approve all final agency regulations. *Id.* In *EDF*, the EPA was ready to publish regulations required by RCRA, but due to a delay in OMB's approval, was prevented from doing so, resulting in a violation of RCRA's deadline. *Id.* at 570. The court granted an injunction against OMB's participation, holding that OMB cannot prevent an agency from complying with statutory requirements. *Id.* at 572.

Similar to OMB's participation in *EDF*, OMB's interference encroached "upon the independence and expertise of the EPA," *id*. at 570, resulting in the violation of a congressional mandate. OMB overstepped the bounds of its limited role under E.O. 12,088, by ignoring the judgment of the EPA, interfering with its statutory authority to veto the section 404 permit, and ultimately violating section 311 of the CWA. OMB's actions are "incompatible with the will of Congress and . . . [un]sustainable as a valid exercise of President's Article II powers," *Id.*

C. EPA's Veto Power Is Not Wholly Discretionary and Is Reviewable By the Court.

The district court improperly found that it was precluded from reviewing EPA's acquiescence to OMB's directive. The APA is generally interpreted in favor of judicial review when there is a final agency action. *See Abbot Labs v. Gardner*, 387 U.S. 136, 140-41 (1967). The APA precludes only two types of final agency actions from review: matters precluded by statute and matters committed to agency discretion. 5 U.S.C. § 701(a)(2) (2010). There is no indication, and COE does not suggest, that Congress intended to prohibit judicial review. COE does argue, however, that EPA's authority to veto DOD's section 404 permit is an "agency

action . . . committed to agency discretion by law," and is not subject to judicial review. *Id*. § 701(a)(2).

Although the Supreme Court has not yet definitively answered the question of whether the EPA's section 404 veto power is discretionary, Justice Breyer's concurring opinion in *Couer* suggests that the EPA's section 404 veto power is not precluded from judicial review. Justice Breyer reasoned that pursuant to section 706 of the APA, "EPA's decision not to apply [effluent standards] but to allow permitting to proceed under § 404 must be a reasonable decision; and court review will help assure that this is so." *Coeur* 129 S.Ct. at 2478 (Breyer concurring). EPA's silent acquiescence to OMB, despite a finding that a DOD's discharge required a section 402 permit it, is unreasonable and should be reviewed by this court.

Moreover, the "committed to agency discretion" exception COE relies on is very narrow and only applicable in "rare instances where statutes are drawn in such broad terms that in a given case there is no law to apply." *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 410 (1971) (internal citations omitted). Section 404(c), however, provides "clear and specific directives." *Id.* at 411. Section 404 authorizes the EPA "to deny or restrict the use of any defined area for specification . . . as a disposal site, whenever [it] determines, after notice and opportunity for public hearings, that the discharge of such materials . . . will have an unacceptable adverse effect on municipal water supplies, . . . wildlife, or recreational areas. . . ." 33 U.S.C. §1344(c). This language is plain and specific regarding when EPA is authorized to veto a section 404 permit. Thus, the "committed to agency action" preclusion to judicial review is inapplicable.

D. EPA's Unexplained Acquiesce to OMB Was Arbitrary and Contrary to the CWA.

Under the APA, 5 U.S.C. §706(2)(A), the court may not substitute its judgment for that of the agency. Rather, the court must determine whether the agency examined "the relevant data and articulate[d] a satisfactory explanation for its action including a rational connection between the facts found and the choice made." *Motor Vehicle Mfrs. Ass'n of United States, v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983). Finally, the propriety of an agency's actions can only be judged on the grounds on which its rests its actions at the time the decision was made. *SEC v. Chenery Corp.*, 332 U.S. 194, 196 (1947).

It is important to be clear that New Union is challenging EPA's acquiescence to OMB's directive, not an affirmative decision by EPA not to veto the permit. There never was an affirmative decision not to veto DOD's section 404 permit. (R. at 10.) EPA did not articulate any explanation, much less a satisfactory one, for substituting OMB's limited judgment in place of its own expertise. The COE's argument that EPA's acquiescence to OMB was reasonable, in light of the *Coeur* decision and the executive powers of the President, is merely a post-hoc rationalization and should not be accorded deference by this court. *IAL Aircraft Holding, Inc. v. FAA*, 206 F.3d 1042, 1045-46 (9th Cir. 2000) (refusing to extend deference to an agency's interpretation, reasoning that it was a post-hoc rationalization used to bolster its litigation position). In fact, the COE's argument regarding *Coeur* actually contradicts the only EPA pronouncement on the record. EPA takes the position that "the nature of the discharge here, [hazardous munitions waste], was significantly different from the discharge in *Coeur*." (R. at 9.) There is no evidence in the record to explain why, or even if, the EPA ever altered that opinion.

There is no rational connection between the facts surrounding this case and EPA's silent compliance with OMB's order. DOD's proposed discharge contains section 311 hazardous substances that cannot be discharged under a section 404 permit. Furthermore, as regulator of

the section 404 process, EPA was preparing to veto the permit. It was at this point that OMB ordered EPA to halt the veto process and EPA acquiesced. OMB's directive and EPA's acquiescence is not supported by law nor reason. Because EPA articulated no explanation for its acquiescence, EPA's action was arbitrary under the APA and cannot be sustained by this court. *Motor Vehicle Mfrs. Ass'n of United States, Inc.,* 463 U.S. at 43.

CONCLUSION

New Union properly brought this claim against the U.S. for its arbitrary and unlawful application of the CWA's section 404 permitting program. The 404 permit, issued by the COE, authorizing DOD to discharge hazardous munitions waste into waters of the United States is unsupported by law, in contravention to previous agency interpretations, and in direct violation of the underlying purpose and intent of the CWA. Issuance of the improper 404 permit, harmed New Union's power to regulate its groundwater resources and left its citizens with no avenue to protect their interest in clean groundwater. Additionally, OMB exceeded its delegated authority when it decided the dispute between the EPA and COE by asking the EPA not to exercise its veto power. For the foregoing reasons, New Union respectfully requests of this court injunctive and declaratory relief by AFFIRMING the district court's decision that Lake Temp is waters of the United States, and REVERSING the district court's findings that New Union lacks standing, that the COE has jurisdiction to issue a section 404 permit, and that OMB did not violate the CWA when it decided the the COE was the proper agency to regulate DOD's discharge of hazardous munitions waste.

Respectfully Submitted

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