TEAM 30

UNITED STATE COURT OF APPEALS
FOR THE TWELFTH CIRCUIT

C.A. No. 11-1245

STATE OF NEW UNION

Petitioner-Appellant-Cross-Appellant

v.

UNITED STATES

Respondent-Appellee-Cross-Appellant

v.

STATE OF PROGRESS

Intervenor-Appellee-Cross-Appellant

On Appeal from the Order of the United States District Court for the District of New Union
Civ. No. 148-2011, Dated June 2, 2011

BRIEF OF THE RESPONDENT-APPELLEE-CROSS-APPELLANT

TEAM 30

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes, Rules, and Regulations

Miscellaneous

JURISDICTIONAL STATEMENT

I. Jurisdiction Below

The district court had jurisdiction pursuant to § 702 of the Administrative Procedure Act (APA), 5 U.S.C. § 702, and 28 U.S.C. § 1331 (2006). The district court in granting summary judgment on behalf of defendant, United States, found that plaintiff, New Union, lacked standing, that the Corps of Engineers (COE) had jurisdiction to issue a § 404 permit because Lake Temp is a navigable water and the slurry is a fill material, and that the Office of Management and Budget (OMB) did not violate the Clean Water Act (CWA) by resolving a dispute between the Environment Protection Agency (EPA) and the COE. This appeal seeks review of that decision.

II. Jurisdiction on Appeal

On June 2, 2011, the district court granted the United States' motion for summary judgment on all claims. The district court's order is, therefore, a final decision, and this Court has jurisdiction pursuant to 28 U.S.C. § 1291 (2006).

STATEMENT OF THE ISSUES PRESENTED FOR APPEAL

This appeal presents the following issues:

I. Whether the lower court's grant of summary judgment was correct that New Union lacked standing because New Union did not sufficiently establish that the discharge authorized by the permit issued by the COE to DOD pursuant to CWA Section 404, 33 U.S.C. § 1344 to fill Lake Temp will cause injury to it or its citizens.

II. Whether the lower court's grant of summary judgment on COE's jurisdiction was correct because Lake Temp is navigable water under CWA §§ 301(a), 404(a), and 502(7), 33 U.S.C. §§ 1331(a), 1344(a), and 1362(7).

III. Whether COE has jurisdiction to issue a discharge permit to the DOD under CWA § 404 because the slurry is fill material or the EPA has jurisdiction to issue a permit under CWA § 402 because the slurry is strictly a pollutant.

IV. Whether EPA's acquiescence to OMB's determination that COE had jurisdiction under CWA § 404, 33 U.S.C § 1344, to issue a permit for DOD to discharge slurry into Lake Temp violated the CWA.

STATEMENT OF THE CASE

I. Procedural Background

The State of New Union challenged the COE's issuance of an individual CWA § 404 permit, 33 U.S.C. § 1344, to the Department of Defense (DOD) authorizing discharge fill, composed of neutralized spent munitions, into Lake Temp. The State of Progress, the state in which the DOD facility at issue is located, intervened.

The District Court, on June 2, 2011, in Civ. 148-2011, found that New Union does not have standing on the *parens patriae* theory because Dale Bompers does not have an actionable injury. Further, the Court determined that Lake Temp is navigable waters within the definition of the CWA because it is used by interstate travelers. The Court then found that COE's issuance of a § 404 permit was proper because the material is fill, which means the EPA did not have jurisdiction to issue a § 402 permit, as was clarified in *Coeur Alaska v. Se. Alaska Conservation Council*, 129 S. Ct. 2458, 2467 (2009). Finally, the Court found nothing improper with OMB's participation in resolving the jurisdictional dispute between COE and EPA and that OMB's involvement did not render the COE's decision to issue the § 404 permit, the terms of that permit, or the EPA's decision not to veto that permit arbitrary or capricious under the APA. The State of New Union and the State of Progress have appealed the District Court's well-reasoned decision. This court should affirm the lower court's ruling for the reasons set forth below.

II. Factual Background

Lake Temp is an intermittent body of water located entirely within the State of Progress. The lake stretches three miles wide by nine miles long during the rainy season of wet years. Lake

Temp recedes during the dry season and reaches periods of complete dryness approximately one out of five years. Progress contains most of the lake's eight hundred mile watershed, with a small portion located in the neighboring State of New Union. No water flows out of the lake.

Located nearly one thousand feet below Lake Temp is the Imhoff Aquifer. The aquifer expands beyond the boundaries of the lake above. Ninety-five percent of the aquifer sits within Progress. Five percent lies in New Union. Dale Bompers lives on a ranch above the tiny portion of the aquifer in New Union. The Imhoff Aquifer's water is neither potable nor suitable for agricultural use without treatment because it contains a high level of sulfur. New Union requires a permit to withdrawal aquifer water. Lake Temp rests entirely within a military reservation owned by the United States. Additionally, a Progress state highway runs near the southern shore of Lake Temp at the edge of the military reservation. The DOD posted signs along the highway warning that entry to the military reservation is illegal. Nonetheless, DOD has knowledge of the lake's continued use for hunting and bird watching. As part of its military reservation, DOD now seeks to build a lakeside facility to receive and prepare munitions for disposal.

At the facility, the munitions will first be emptied of liquid, semi-solid, and granular contents and chemically treated to ensure they are not explosive. These contents include chemicals on the CWA § 311 list of hazardous substances. The remaining solids, primarily metals, will be ground and pulverized. Lastly, water will be added to both groups of materials to form a slurry. This slurry will be evenly sprayed from a movable pipe over the entire dry bed of the lake. As a result, DOD estimates that when the operation is finished, the lake's top water elevation will be approximately six feet higher, and the lake's surface area will expand by two square miles. Runoff from the surrounding mountains will continue to flow unimpeded into the lake.

The Secretary of the Army, acting through the COE, granted DOD a permit to discharge the slurry of spent munitions into Lake Temp. With the OMB's support, COE issued the permit under § 404 of the CWA. The EPA chose not to exercise its veto authority under the CWA. As a result of this permit, the State of New Union filed suit in the United States District Court for the District of New Union seeking review under the APA. New Union argued at trial that any permit for discharge must be issued by the EPA under CWA § 402, rather than by the COE under section 404. Progress, the state in whose boundaries the permitted activities would take place, intervened. The District Court granted summary judgment for the United States. The State of New Union and the State of Progress now appeal.

SUMMARY OF THE ARGUMENT

The State of New Union has no standing to bring this suit. New Union does not have standing to maintain a *parens patriae* action because it did not sufficiently establish that the discharge would cause injury to New Union or its citizens, since New Union has offered only circumstantial evidence to support its claim of injury. Additionally, New Union has not alleged injury to a significantly substantial segment of its population, and has set forth only a single individual to establish its *parens patriae* standing. However, the individual does not have any injury of his own to assert standing, thereby precluding New Union from having derivative standing under a *parens patriae* theory.

Even if New Union does have standing, COE has jurisdiction to issue the permit for the discharge of spent munitions under § 404 because Lake Temp is a navigable water. The COE's definition of navigable waters under the CWA includes waters used for interstate commerce and this definition is entitled to deference. Lake Temp is used for interstate commerce because hundreds of duck hunters have used it over the last century, a quarter of them from out of state.

Furthermore, even if COE's definition is not granted *Chevron* deference, it should still be upheld because it does not stretch constitutional limits. Navigable waters have always been broadly defined, since the Congressional intent is for the protection of said waters, and that intent aligns with the determination that Lake Temp is a navigable water.

Moreover, the COE properly issued the permit under § 404 because the slurry of spent munitions is fill material. Supreme Court case law dictates that if a substance to be discharged is fill material, even if the substance also contains pollutants, then a § 404 permit is proper. Here, the slurry of spent munitions is fill material because it will raise the elevation of Lake Temp by several feet. Since the slurry is fill material, it is not subject to the regulatory regime of § 402 which authorizes permits for the discharge of pollutants. However, both the COE and the EPA still consider environmental impacts in § 404 permitting decisions. By choosing not to veto the permit, the EPA represented that the slurry of spent munitions will not pose unacceptable adverse effects.

EPA's decision not to veto the § 404 permit is unreviewable because the decision is committed to agency discretion by law. 5 U.S.C. § 701(a)(2). EPA has complete discretion to veto or decline to veto a COE permit issued under § 404 and chose not to here. Nothing in the CWA requires EPA to veto the permit and the standard for EPA's decision is so broad they are committed to Agency discretion as a matter of law.

Finally, OMB acted properly as an arbitrator of an executive agency jurisdictional dispute. Intra-executive branch communications provide an important avenue for executive policy coordination and serve as a means for the President to exercise his "take care" responsibilities. OMB's involvement in this matter did not contravene any congressional mandate and thus did not create a separation of powers problem.

STANDARD OF REVIEW

The Twelfth Circuit should review the District Court's grant of summary judgment *de novo*. *See, e.g., Plumley v. S. Container, Inc.*, 303 F.3d 364, 369 (1st Cir. 2002). The grant of summary judgment is appropriate where "there is no genuine issue as to any material fact and [] the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c)(2); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-48 (1986). Agency actions are reviewed by federal courts in accordance with the Administrative Procedures Act, 5 U.S.C. § 701 *et seq*. The actions in this case are unreviewable under § 701(a)(2), or if the Agency actions are reviewable, then they must be reviewed with the deferential arbitrary and capricious standard of § 706(2)(A). 5 U.S.C. § 701 *et seq.*; *Motor Vehicle Mfrs. Ass'n of the U.S., Inc. v. State Farm Mut. Auto. Ins. Co.,* 463 U.S. 29, 43 (1983).

ARGUMENT

I. NEW UNION LACKED STANDING TO CHALLENGE THE PERMIT BECAUSE NEW UNION DID NOT SUFFICIENTLY ESTABLISH THAT THE DISCHARGE AUTHORIZED BY THE § 404 PERMIT TO FILL LAKE TEMP WOULD CAUSE INJURY TO IT OR ITS CITIZENS.

New Union did not have standing to maintain a *parens patriae* action because it did not sufficiently establish that the discharge would cause injury to New Union or its citizens, and New Union did not articulate an interest apart from the interests of particular private parties. To maintain a *parens patriae* action,

> [A] State must articulate an interest apart from the interest of particular private parties, that is, the State must be more than a nominal party. The state must express a 'quasi-sovereign' interest, such as its interest into the health and well-being – both physical and economic – of its residents in general. Although more must be alleged than injury to an identifiable group of individual residents, the indirect effects of the injury must be considered as well in determining whether the state has alleged injury to a sufficiently substantial segment of its population.

Alfred L. Snapp & Son v. Puerto Rico, 458 U.S. 592, 593 (1982). New Union has not met the requirements because it has not alleged injury to a significantly substantial segment of its population and because New Union cannot sufficiently establish that the discharge authorized by the permit will cause injury to it or its citizens. Furthermore, under the APA, a plaintiff must show that it is both within the zone of interests the statute aims to protect, and threatened with actual injury. *See Sierra Club v. Morton*, 405 U.S. 727 (1972); *Data Processing Service v. Camp*, 397 U.S. 150 (1970). New Union has not shown that it is threatened with actual injury.

A. New Union has presented no evidence as to whether pollution will reach the aquifer, and no evidence on the strength of the pollution if it ever were to reach the aquifer, and has therefore not sufficiently established that the permitted activity will cause actual injury.

New Union has offered only circumstantial evidence to support its claim of injury. (R. at 5). According to the APA, a plaintiff has standing to seek judicial review only if it can show that it has suffered or will suffer injury. *Sierra Club,* 405 U.S. at 727. The injury that New Union alleges is merely speculative, and is neither actual in fact nor substantiated in the future. (R. at 5).

New Union presented no evidence with regard to when the pollution will reach the Imhoff Aquifer, the strength of the alleged pollution, or whether the pollution will even reach the aquifer. (R. at 5-6). New Union did not deny these facts, and only offered the excuse that in order to establish the alleged pollution, there must be drilling and sampling from a grid of monitoring wells through the aquifer, and if installation of such a grid had begun at the time the case was in the district court, the results might not have been available until after the permitted activity had begun. (R. at 6). New Union claimed that it was willing to install and operate the wells and to collect the data, but it would not have been able to gain permission from the DOD to do that. (R. at 6). However, New Union never filed an application with the DOD for access to install the

monitoring wells. (R. at 6). Therefore, not only has New Union not demonstrated any actual injury, but it has also made no attempts to substantiate its allegations of injury.

B. New Union has not alleged injury to a significantly substantial segment of its population.

The district court in *Snapp* held that while Puerto Rico was capable of asserting *parens patriae* interests in general, the action could not be maintained because of the relatively small number of individuals involved. *See Snapp*, 458 U.S. at 599. In *Snapp*, there were approximately 787 individuals involved out of Puerto Rico's 3 million citizens. *Id*. New Union attempted to assert its *parens patriae* interest on behalf of a sole individual, Dale Bompers. (R. at 6). Though New Union's population is unknown, one individual does not typically make up a substantial segment of a population. Furthermore, even if the presumed population were to extend to potential future users of the aquifer, because of the volume, un-potability, and small area of access, the number of potential future users could not be very large.

The Supreme Court in *Snapp* went on to say that indirect effects of the alleged injury must also be considered in determining whether the State has alleged injury to a sufficiently substantial segment of its population. *See Snapp*, 458 U.S. at 607. This does not assist New Union's assertion of *parens patriae* standing because only five percent of the Imhoff Aquifer is located within the New Union. (R. at 4). Even with a stretch of the imagination, a potential effect on such a small portion of the aquifer would not have foreseeable substantial indirect effects on New Union or its citizens. Additionally, Bompers does not have a sufficient claim of actual injury, as discussed below.

Though there have been environmental cases that granted standing to a litigant who did not meet the *Lujan* factors of demonstrating a concrete and particularized injury that is actual or imminent and that the injury is traceable to the defendant and is redressable, this case cannot be

afforded the same grant. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 593 (1992). In *Massachusetts v. EPA*, the Supreme Court granted standing to the state of Massachusetts because Massachusetts had a special position and interest: "It is a sovereign State… it actually owns a great deal of the territory alleged to be affected." *Massachusetts v. EPA*, 549 U.S. 497, 498 (2007). This is distinguishable from the case at hand, because New Union does not own a great deal of the Imhoff Aquifer; in fact, only five percent of the aquifer lies within New Union and unlike in *Massachusetts v. EPA*, there is no identifiable injury here.

C. New Union does not have derivative standing under a *parens patriae* theory because Dale Bompers has no injury to establish standing to challenge the permit issuance.

In order to maintain a *parens patriae* action, "a State must articulate an interest apart from the interests of particular private parties." *Snapp*, 458 U.S. at 593. As established earlier, Dale Bompers does not make up a significant portion of the population of New Union. However, even if he did, Bompers does not have any injury of his own to assert standing to challenge the issuance of the permit, thereby precluding New Union from having derivative standing under a *parens patriae* theory.

In *Massachusetts v. EPA*, the Supreme Court made a distinction between *parens patriae* standing and an allegation of direct injury. *Massachusetts*, 549 U.S. at 538. A *parens patriae* action requires the articulation of a "quasi-sovereign interest" apart from the interests of particular private parties. *Massachusetts*, 549 U.S. at 538. "Just as an association suing on behalf of its members must show not only that it represents the members but that at least one satisfies Article III requirements, so too a State asserting quasi-sovereign interests as *parens patriae* must still show that its citizens satisfy Article III" of the Constitution: injury, causation, and redressability. *Massachusetts,* 549 U.S. at 514, 538. Furthermore, the Supreme Court in *Massachusetts* found that the EPA's refusal to regulate greenhouse gas emissions presented a

risk of harm to Massachusetts that was both "actual" and "imminent." *Massachusetts*, 549 U.S. at 499. The harm that New Union alleges is neither actual nor imminent, so *parens patriae* standing is not valid under this justification.

New Union sets forth Dale Bompers as its citizen who qualifies the state for standing. (R. at 6). However, Bompers does not satisfy Article III standing because he makes an unsubstantiated speculation that the value of his ranch will be diminished if the permitted discharge enters the Imhoff Aquifer without any proof that such discharge could or would ever reach the Aquifer. Bompers makes no use of the aquifer and has no plans to in the future, which is analogous to the situation in *Lujan* where the Supreme Court found the plaintiffs failed to demonstrate injury because they did not visit the site on a regular basis and did not have concrete plans to do so in the future. (R. at 6); *Lujan,* 504 U.S. at 579. As the plaintiffs in *Lujan* did not have a plane ticket and did not have standing, Bompers did not have a shovel and had no concrete plans to drill in the aquifer. Additionally, the aquifer is not potable or fit for agricultural use without treatment because of naturally occurring sulfur. Furthermore, even if Bompers wanted to use the water, he would first have to procure a permit from the New Union Department of Natural Resources (DNR). (R. at 6). The DNR is required to determine that permitted withdrawals will not deplete groundwater over a period of twenty years. (R. at 6). No one has rights in groundwater unless the DNR issues a withdrawal permit. (R. at 6). Therefore, Bompers does not even have a right to use the water at his own will. Since Bompers clearly does not demonstrate Article III standing, in no way does New Union derivatively obtain standing under a *parens patriae* theory.

II. THE COE HAS JURISDICTION TO ISSUE THE PERMIT UNDER § 404 OF THE CWA BECAUSE LAKE TEMP FALLS WITHIN THE DEFINITION OF NAVIGABLE WATERS.

Lake Temp is "navigable waters" pursuant to statutory and judicial interpretation of the phrase. The CWA defines navigable waters as "waters of the United States, including the territorial seas." 33 U.S.C. § 1251, § 502(7). Though the statute is somewhat ambiguous, Congress intended for the definition of "navigable waters" to be accorded its "broadest interpretation possible." 118 Cong. Rec. 33,757 (1972).

When a statute is ambiguous, agencies are given great discretion to interpret statutes through their own regulations. The EPA defines the term "navigable waters" in the Code of Federal Regulations as including all waters used or which could be used for interstate or foreign commerce; all wetlands which are adjacent to the waters of the United states; all other waters, even if intrastate, including lakes, rivers, streams (including intermittent streams, wetlands, wet meadows, or natural ponds) which "would affect or could affect" interstate or foreign commerce. 40 C.F.R. § 122.2(c). Because "Congress chose to define the waters covered by the act broadly," the phrase "navigable waters" has been subject to judicial interpretation. *United States v. Riverside Bayview Homes*, 474 U.S. 121, 133 (1985). Lake Temp falls well within the congressional intent, administrative definition, and judicial interpretation of navigable waters.

A. The COE's definition of navigable waters under the CWA includes waters used for interstate commerce and is entitled to deference.

Since the case at hand involves agency interpretation of a statute it administers, two-step *Chevron* analysis should be done. *See Chevron U.S.A. v. Natural Resources Defense Council*, 467 U.S. 837 (1984). Under the *Chevron* approach, when Congress has addressed the precise question at issue, courts give effect to the express intent of Congress. *Chevron*, 467 U.S. at 842. If the statute is silent or ambiguous, deference is given to the agency's interpretation, so long as it is permissible. *Chevron*, 467 U.S. at 843-44; *see also United States v. Hubenka,* 438 F.3d 1026 (10th Cir. 2006).

First, the COE's definition of navigable waters is permissible because Congress did not speak directly to the issue. Therefore, the COE's definition receives deference under *Chevron*. Furthermore, the COE's definition is permissible because it aligns with the Congressional intent of passing the CWA, which was to "restore and maintain the chemical, physical, and biological integrity of," 33 U.S.C. §1251(a), the "waters of the United States," which the COE defines as:

> All waters which are currently used, or were used in the past, or may be susceptible to use in interstate or foreign commerce, including all waters which are subject to the ebb and flow of the tide; [a]ll interstate waters including interstate wetlands; [a]ll other waters such as intrastate lakes, rivers, streams (including intermittent streams), ... natural ponds, the use, degradation or destruction of which could affect interstate or foreign commerce including any such waters...which are or could be used by interstate or foreign travelers for recreational or other purposes; or ... Which are used or could be used for industrial purpose by industries in interstate commerce.

33 C.F.R. § 328.3. It is apparent that Lake Temp is used for interstate commerce, as hundreds, perhaps thousands of duck hunters have used it over the last one hundred years, with approximately twenty-five percent of them travelling from out of state. (R. at 4). Furthermore, DOD has knowledge that people continue to use the lake for hunting and bird watching. (R. at 4). Lake Temp is therefore currently used, and has the future potential for use, by interstate travelers, which makes it navigable water in accordance with the definition set forth by the COE.

B. <u>If COE's definition is not granted *Chevron* deference, it should still be upheld because it does not stretch constitutional limits because navigable waters have always been broadly defined, since the Congressional intent is for the protection of said waters, and that intent aligns with the determination of Lake Temp as a navigable water</u>.

COE's classification of Lake Temp as navigable water is in line with the Constitutional intent of the CWA and should be upheld. In *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers* (*SWANCC*), the Supreme Court held that 33 C.F.R. § 382.3(a)(3) as applied to the "migratory bird rule," which said that § 404 extended to intrastate waters that

provide habitat for migratory birds, exceeded the authority granted to the COE under the CWA. *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers*, 531 U.S. 159, 159 (2001). The COE's primary justification in *SWANCC* was that the abandoned gravel mining depressions located at the proposed site qualified as waters of the United States because they were used as habitat by migratory birds which crossed state lines. *See SWANCC*, 531 U.S. at 164-65. The Court struck down the migratory bird rule because the text of the CWA did not contemplate such expansive federal jurisdiction, and the rule invoked the outer limits of Congressional power. *SWANCC,* 531 U.S. at 174. Similarly, in *Rapanos v. United States*, the Court was concerned that the ditch at issue only had intermittent flow, and the lake here is distinguishable because it contains substantial amounts of water most of the time, rather than small flows occasionally. *Rapanos v. United States*, 547 U.S. 715, 720 (2006). Lake Temp is "relatively permanent, standing or continuously flowing bod[y] of water 'forming geographic feature[]' that [is] described in ordinary parlance as [a] 'lake[].'" *Id.* at 739.

In the case at hand, there is no such expansive interpretation of jurisdiction. *SWANCC* is distinguishable because the determination that Lake Temp is navigable water does not stretch the constitutional limits of Congress' intent because it is not only used as migratory bird habitat, but also as a hunting and recreation ground for interstate travelers, thus contributing to interstate commerce in ways beyond a bird habitat.

Though the Court had previously recognized that Congress intended the phrase "navigable waters" to include "at least some waters that would not be deemed 'navigable' under the classical understanding of that term," the Court held that the migratory bird rule stretched the definition of navigable waters past its constitutional limits. *SWANCC*, 531 U.S. at 171 (citing *United States v. Riverside Bayview Homes*, 474 U.S. 121, 133 (1985)). The facts surrounding this

case are distinguishable from those in *SWANCC*. Lake Temp is a body of water that is three miles wide and nine miles long. (R. at 3-4). It is dry only one year out of every five, and it has been in existence for at least a century. (R. at 4). In *SWANCC*, the parcel at issue was "an abandoned sand and gravel pit with excavation trenches that had evolved into permanent and seasonal ponds." *SWANCC*, 531 U.S. at 159. Lake Temp, in contrast, has been in existence for at least one hundred years, since it has been used for that long by local and out-of-state duck hunters. (R. at 4). Therefore, the COE has jurisdiction to issue the permit under § 404 of the CWA because Lake Temp falls within the definition of navigable waters.

III. COE HAS JURISDICTION TO ISSUE A PERMIT UNDER CWA § 404, 33 U.S.C. § 1344, BECAUSE THE SLURRY IS A FILL MATERIAL.

The CWA seeks to broadly prohibit the discharge of pollutants into the nation's waterways. However, there are two exceptions to this broad scheme: § 402 for pollutants and § 404 for dredged and fill material. Section 402, 33 U.S.C. § 1342, allows the EPA to issue permits for the discharge of "any pollutant or combinations of pollutants" while § 404, 33 U.S.C. § 1344, grants the COE authority to issue permits for the discharge of "dredged or fill material." These two provisions have an uneasy relationship as some materials can be considered both a pollutant and fill material. This leads to a dialogue between the EPA and COE to prevent and resolve issues of overlapping jurisdiction. Thankfully, the Supreme Court's decision in *Coeur Alaska, Inc. v. Se. Alaska Conversation Council*, 129 S. Ct. 2458 (2009) [hereinafter *Coeur Alaska*], clarified how these two sections function.

COE has the authority to issue a permit to the DOD under § 404 because the slurry is a fill material which is regulated exclusively by § 404. In *Coeur Alaska*, the Supreme Court found that, "if the [COE] has the authority to issue a permit for a discharge under § 404, then EPA lacks the authority to do so under § 402." *Coeur Alaska*, 129 S. Ct. at 2467. The Court clarified

how this process works, writing:

> As the regulatory regime stands now, a discharger must ask a simple question—is the substance to be discharged fill material or not? . . . [T]hat answer decides the matter—if the discharge is fill, the discharger must seek a § 404 permit from the Corps; if not, only then must the discharger consider whether . . . the discharge[] requires a § 402 permit from the EPA.

Coeur Alaska, 129 S. Ct. at 2469. Thus, the first and most critical question is whether the slurry of spent munitions is fill material. Here, the slurry of spent munitions meets the regulatory definition of fill material because it changes the bottom elevation of Lake Temp and is not trash or garbage. Furthermore, even though the slurry contains pollutants, § 306 performance standards do not apply. Since the slurry is fill material, COE has exclusive jurisdiction to issue a permit for its discharge under § 404.

A. The slurry of spent munitions is fill material because it changes the bottom elevation of Lake Temp.

The slurry of spent munitions is fill material because it will raise the bottom of Lake Temp by several feet. The regulatory definition of fill material employs an effects-based test. Promulgated jointly by EPA and COE, the regulations define "fill material" as any "material [that] has the effect of: (i) [r]eplacing any portion of a water of the United States with dry land; or (ii) [c]hanging the bottom elevation of any portion of a water of the United States." 40 C.F.R. § 232.2. In this case, the slurry satisfies the second prong of the fill material definition. The slurry will, without question, raise the bottom elevation of the entire lake by several feet. When all the slurry is dispersed, Lake Temp will be six feet higher and two square miles larger. (R. at 4). These facts are uncontested. Thus, the slurry of spent munitions is a fill material regulated by COE under § 404.

Furthermore, the slurry of spent munitions serves the sole purpose of elevating the bottom of Lake Temp. The Regas Memorandum, an EPA memorandum given *Auer* deference by

the Supreme Court in *Coeur Alaska*, states that discharges that only have an "incidental filling effect," unlike the discharges here, will be regulated under § 402. *See* Memorandum from Diane Regas, Director, Office of Wetlands, Oceans and Watersheds, to Randy Smith, Director of Water, Region X 3 (May 17, 2004) [hereinafter Regas Memorandum]; *Coeur Alaska*, 129 S. Ct. at 2473, 2460 (explaining that the memorandum was given *Auer* deference because it "is not 'plainly erroneous or inconsistent with the regulation[s]'" (*quoting Auer v. Robbins,* 519 U.S. 452, 461 (1997))).

The EPA and COE sought to regulate discharges that have only an "incidental filling effect" under § 402 because the agencies recognized that "some discharges (such as suspended or settleable solids) can have the associated effect, over time, of raising the bottom elevation of a water due to settling of waterborne pollutants." Final Revisions to the Clean Water Act Regulatory Definitions of "Fill Material" and "Discharge of Fill Material," 67 Fed. Reg. 31,129, 31,135 (May 9, 2002) (to be codified at 40 C.F.R. pt. 232) [hereinafter Final Revisions]. This policy seeks to prevent actors from "manipulat[ing] the outer boundaries of the definition of 'fill material' by labeling minute quantities of EPA-regulated solids as fill." *Coeur Alaska*, 129 S. Ct. at 2473. Here, the slurry of spent munitions is not a pollutant with only the incidental effect of altering Lake Temp's bottom elevation. On the contrary, the discharge of munitions is explicitly designed to raise the lakebed. The DOD facility even includes a movable pipe for slurry disbursement so that the lake is raised equally in all areas. (R. at 4). Indeed, the slurry of spent munitions is directly meant to fill Lake Temp.

B. <u>The slurry of spent munitions is fill material because it is not trash or garbage.</u>

The slurry of spent munitions is not trash or garbage but rather a mixture of water, liquid, semi-solid, and granular contents of munitions, and ground and pulverized solids. EPA and COE

regulations exclude trash and garbage from the definition of fill material. 40 C.F.R. § 232.2. Examples of trash or garbage given by the agencies include "debris, junk cars, used tires, discarded kitchen appliances, and similar materials . . . ." Final Revisions, 67 Fed. Reg. at 31,134. The DOD is not dumping such household items into Lake Temp. Rather, DOD seeks to enhance its military reservation and simultaneously enlarge Lake Temp by constructing a facility that will discharge processed and explosive-free slurry onto the bottom of the lake. This slurry is not the trash or garbage the regulations were designed to prohibit.

C. The slurry of spent munitions is fill material even if it contains pollutants.

Even though the slurry contains chemicals and spent munitions which may fall under the EPA's definition of pollutants, the slurry is still fill material regulated by § 404. Section 402 allows the EPA to issue permits for the discharge of "any pollutant or combination of pollutants." § 402, 33 U.S.C. § 1342(a)(1). Furthermore, the term "pollutant" is defined as "dredged spoil, solid waste, incinerator residue, sewage, garbage, sewage sludge, munitions, chemical wastes, biological materials, radioactive materials, heat, wrecked or discarded equipment, rock, sand, cellar dirt and industrial, municipal, and agricultural waste discharged into water." 33 U.S.C. § 1362(6). Thus, since the slurry contains processed and pulverized munitions, certain components of the slurry may be categorized as pollutants. Nonetheless, the Supreme Court's ruling in *Coeur Alaska* still mandates that the slurry is fill material regulated under § 404.

As stated in *Coeur Alaska*, § 402(a) reads, "*Except as provided in . . . [CWA § 404, 33 U.S.C. § 1344]*, the Administrator may . . . issue a permit for the discharge of any pollutant." *Coeur Alaska*, 129 S. Ct. at 2467 (*quoting* 33 U.S.C. § 1342(a)(1) (emphasis and bracketed material added by the Supreme Court)). Based on this statutory structure, the Court noted,

"Section 402 thus forbids the EPA from exercising permitting authority that is 'provided [to the Corps] in' § 404." *Coeur Alaska*, 129 S. Ct. at 2467. In other words, fill material regulated under § 404 is not subject to the pollution permitting scheme of § 402. The Court realized this interpretation of the Act entails that fill material may contain pollutants. Indeed, the slurry held to be fill material in *Coeur Alaska* was a "mixture of crushed rock and water," and "rock" is classified as a "pollutant" by the CWA. *Coeur Alaska*, 129 S. Ct. at 2464; 33 U.S.C. § 1362(6). However, the Court noted that safeguards in § 404 prevent it from being used as a loophole whereby companies can dispose of pollutants without restrictions simply because these pollutants also qualify as fill material. Notably, the EPA's power to veto any § 404 program with adverse effects prevents this from happening. Thus, *Coeur Alaska* clarified that a substance, like spent munitions, which is fill material yet also contains pollutants, is properly regulated by the § 404 program.

D. Section 306 performance standards do not apply to the discharge of fill material into Lake Temp.

The discharge of spent munitions into Lake Temp is not subject to the performance standards of CWA § 306. Section 306 empowers the EPA to establish performance regulations limiting pollution from new sources. *See* 33 U.S.C. § 1316(b). As the Supreme Court noted, "[i]f § 306 did apply [to § 404], then the Corps would be required to evaluate each permit application for compliance with § 306, and issue a permit only if it found the discharge would comply with § 306." *Coeur Alaska*, 129 S. Ct. at 2471. However, in the Regas Memorandum, which the Supreme Court deferred to in *Coeur Alaska*, the EPA stated that § 306 performance standards did not apply to new discharges of fill material into the lake at issue in that case. *See Coeur Alaska*, 129 S. Ct. at 2473. The Regas Memorandum explains, "[a]s a result [of the fact that the discharge is regulated under § 404], the regulatory regime applicable to discharges under section

402, including effluent limitations guidelines and standards . . . do[es] not apply." *Coeur Alaska*, 129 S. Ct. at 2473 (*quoting* the Regas Memorandum).

The Regas Memorandum was written in reference to the mining facility at issue in *Coeur Alaska*. However, the same policy holds true here because the five factors which caused the Court to defer to the Memorandum also apply to the discharge into Lake Temp. First, the Memorandum only applied to closed bodies of water, thereby preserving a role for EPA performance standards which still applied to moving water flowing from the lake, such as creeks and streams. *See Coeur Alaska*, 129 S. Ct. at 2473, 2478. Here, Lake Temp is also a closed body of water. (R. at 4). Second, the Memorandum recognized that the *Coeur Alaska* discharge was not an attempt to evade EPA performance standards by acquiring a § 404 permit for a substance that only had "incidental filling effect." *Id.* Likewise, the slurry of spent munitions is explicitly designed to raise the lakebed as evidenced by the movable disbursement pipe which allows the lake to be raised equally in all areas. (R. at 4). Third, the Court noted that the Memorandum maintained COE's ability to decide if a discharge is in the public interest. *Id.* There, the COE determined that putting slurry in the lake would improve it by making the lake "wider, shallower, and so more capable of sustaining aquatic life." *Id.* The slurry of spent munitions will enhance Lake Temp in a similar way. Fourth, the Memorandum preserved the EPA guideline preventing COE from issuing a permit for the discharge of toxic pollutants. *Id.*; 40 C.F.R. § 230.10(b)(2). Here, the slurry will not contain toxic materials prohibition under § 307 of the CWA. Lastly, the Court viewed the Memorandum as a sensible way of regulating §§ 306, 402, and 404 as well as the regulations implementing them. *See Coeur Alaska*, 129 S. Ct. at 2474. Thus, while the regulatory approach of the Regas Memorandum applies to mining proposals, the same policy reasons why the Supreme Court adopted such an approach apply here. Therefore, § 306

performance standards do not apply to the discharge of fill material into Lake Temp.

E. Categorization of the slurry as fill material did not preclude environmental considerations.

The CWA and regulatory guidelines required the COE to consider the environmental effects of spent munitions slurry before granting a permit. Thus, concerns about environmental degradation resulting from the discharge are unfounded. Both COE and EPA regulations require environmental considerations in permitting decisions. As noted in *Kentucky Riverkeeper, Inc. v. Midkiff*, "under the Corps' regulations, the Corps must also conduct a detailed public interest review that analyzes twenty different factors, in which '[t]he benefits which reasonably may be expected to accrue from the proposal must be balanced against its reasonably foreseeable detriments.'" *Kentucky Riverkeeper, Inc. v. Midkiff*, 2011 WL 2789086, at *2 (E.D. Ky. July 14, 2011) (*quoting* 33 C.F.R. § 320.4(a)(1)). Among the factors the COE must consider are, "conservation, economics, aesthetics, general environmental concerns, wetlands, historic properties, fish and wildlife values, flood hazards, floodplain values, land use, navigation, shore erosion and accretion, recreation, water supply and conservation, water quality . . ." 33 C.F.R. § 320.4(a)(1). Thus, even COE's own regulations require environmental sensitivity in § 404 permitting decisions.

EPA regulations impose an additional level of environmental protection on COE's permitting authority. Section 404(b) of the CWA requires COE to comply with EPA guidelines regarding § 404 permitting decisions. *See* 33 U.S.C. § 1344(b). These EPA regulations limit the COE's flexibility and require the COE to consider environmental factors. For instance, the guidelines state that, "[N]o discharge of dredged or fill material shall be permitted if there is a practicable alternative to the proposed discharge which would have less adverse impact on the aquatic ecosystem, so long as the alternative does not have other significant adverse

environmental consequences." 40 C.F.R. § 230.10(a). The guidelines further state that, "No discharge of dredged or fill material shall be permitted if it [c]auses or contributes, after consideration of disposal site dilution and dispersion, to violations of any applicable State water quality standard." 40 C.F.R. § 230.10(b)(1). Thus, both COE and EPA guidelines ensure that § 404 permitting decisions are made with careful consideration of the environmental impact. In this case, nothing about COE's decision to issue a permit for the discharge of slurry into Lake Temp indicates that the agency did not take these environmental factors into account.

IV. EPA DID NOT EXERCISE ITS POWER TO VETO COE'S PERMITTING DECISION UNDER § 404(C).

The COE has jurisdiction to issue a permit under § 404, and the EPA did not exercise its discretionary veto of this permit. Under § 404(c), the EPA has the authority to veto any permit issued by the COE for the discharge of dredged or fill material if the EPA finds the proposed discharge will have "an unacceptable adverse effect on municipal water supplies, shellfish beds and fishery areas . . ., wildlife, or recreational areas." 33 U.S.C. § 1344(c). This veto provision gives the EPA the power to stop projects that ultimately damage waterways and it allows the EPA to prevent actors from using pollutants or harmful waste products as fill material.

In *Coeur Alaska*, the Supreme Court noted that when the EPA declined to veto COE's permit for the discharge of mine tailings, "the EPA in effect deferred to the judgment of the Corps on this point." *Coeur Alaska*, 129 S. Ct. at 2465. Similarly, in this case, the EPA chose not to veto the COE's issuance of a permit. EPA deferred to COE's longstanding expertise in dredged and fill material. *See* 33 C.F.R. § 320.1 ("The U.S. Army Corps of Engineers has been involved in regulating certain activities in the nation's waters since 1890." Later stating that "[d]ischarges of dredged or fill material into waters of the United States" are among the activities regulated by the Corps.). Regardless of OMB's dispute resolution role, EPA has the statutory

authority to overrule COE's § 404 permitting decisions, and, in this case, EPA chose not do so. Thus, COE properly exercised its jurisdiction to issue a permit under § 404.

V. THE EPA'S DECISION NOT TO VETO THE COE'S § 404 PERMIT IS NOT SUBJECT TO JUDICIAL REVIEW BECAUSE IT IS COMMITTED TO AGENCY DISCRETION AS A MATTER OF LAW UNDER 5 U.S.C § 701(A)(2).

The EPA's decision not to veto the § 404 permit is discretionary and not reviewable by this court because the terms of the statute leave the agency such broad discretion that there is no law to apply. 5 U.S.C. § 701(a)(2). To determine whether a decision is committed to agency discretion as a matter of law, the court must look to the structure and intent of the statute to determine if discretion is so broadly granted that there is no law to apply. *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 410 (1971) (finding § 701(a)(2) applies "in those rare instances where 'statutes are drawn in such broad terms that in a given case there is no law to apply'"); *see, e.g., Webster v. Doe*, 486 U.S. 592, 600 (1988) (finding actions taken under § 102(c) of the NSA unreviewable because the Act allowed the director to "'deem such termination necessary or advisable,' as opposed to 'when the dismissal *is* necessary or advisable'").

In the enforcement context, courts have found that agency decisions *not* to act are generally unreviewable. *Heckler v. Chaney*, 470 U.S. 821, 831 (1985). In *Heckler*, the Court found that it could not review the Food and Drug Administration's decision not to bring an enforcement action against the use of a drug to administer the death penalty. *Id.* at 837. The decision rested on the premise that the "statute [was] drawn so that the court could not have [a] meaningful standard against which to judge the agency's exercise of discretion." *Id.* at 830. Like in *Heckler*, the relevant section of the CWA grants the administrator broad discretion to veto a § 404 permit, allowing, but not requiring that the administrator may issue a veto when there are

"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.A. § 1344(c). Like in *Heckler*, this standard does not overcome the presumption of unreviewability of EPA's enforcement decision.

Moreover, the numerous policy reasons for the presumption, laid out so clearly by the *Heckler* Court, should be respected here. *See Heckler,* 470 U.S. at 837. The EPA's enforcement discretion, like the FDA's in *Heckler*, allows the agency to "balance[e] [] a number of factors which are peculiarly within its expertise." *Id.* at 831. Because "[t]he agency is far better equipped than the courts to deal with the many variables involved in the proper ordering of its priorities," this court should respect the agency's decision, which is certainly based, in part, on "whether agency resources are best spent on this violation or another, . . . whether the . . . action [] best fits the agency's overall policies, and, indeed, whether the agency has enough resources to undertake the action at all. . . .." *Id.* at 832.

Further, § 404 does not *require* enforcement. The relevant section says: "(c) . . . The Administrator *is authorized to* prohibit the specification . . . of any defined area as a disposal site." 33 U.S.C.A. § 1344 (emphasis added). The phrase "is authorized to" creates a discretionary duty, *Pres. Endangered Areas of Cobb's History, Inc. v. U.S. Army Corps of Engineers*, 87 F.3d 1242, 1249 (11th Cir. 1996), the language does not say "must" or "shall" or imply a non-discretionary duty of any kind and thus can be distinguished from cases that require an agency to take enforcement action. *Int'l Union, UAW v. Dole*, 919 F.2d 753, 755-57 (D.C. Cir. 1990) (distinguishing between mandatory "must" language and discretionary "shall" language). The language of the CWA grants the Administrator broad discretion, such that its decision not to act should not be reviewed by the court. Unlike in *Ctr. for Auto Safety v. Dole*, where the agency's

"regulations direct the agency to grant the petition" when certain conditions are met, nothing in the CWA, nor in the EPA's or COE's regulations create a similar imperative here. *Ctr. for Auto Safety v. Dole*, 846 F.2d 1532, 1534 (D.C. Cir. 1988).

This court should follow the Eleventh Circuit's decision that the EPA's § 404 veto authority is entirely discretionary and should not find the decisions of other jurisdictions that permit review persuasive. *Compare Pres. Endangered Areas of Cobb's History, Inc. v. U.S. Army Corps of Engineers*, 87 F.3d 1242, 1249 (11th Cir. 1996) (finding the citizen suit provision of the CWA does not apply to the veto power because it is discretionary and "the Administrator is authorized rather than mandated to overrule the Corps"); *Ohio Valley Envtl. Coal. v. U.S. Army Corps of Eng'rs*, 2009 WL 3424174, *2 (S.D. W.V. Oct. 21, 2009) ("[r]egardless of the imposition of specific procedures, however, the statute and the regulations leave the final determination . . . at the discretion of the EPA"); *City of Olmstead Falls v. U.S. Envtl. Prot. Agency*, 266 F. Supp. 2d 718, 722 (N.D. Ohio 2003), *aff'd sub nom.,* 435 F.3d 632 (6th Cir. 2006) (finding "where a plaintiff challenges a nondiscretionary act of a federal agency, judicial review is appropriate under the [APA]," but that the § 404(c) veto authority is discretionary) (internal citations omitted); *with Alliance to Save Mattaponi v. U.S. Army Corps of Eng'rs*, 606 F. Supp. 2d 121, 139-40 (D.D.C. 2009) (finding that, while the administrator had some discretion, the decision not to veto a § 404 permit was reviewable); *Alliance to Save Mattaponi v. U.S. Army Corps of Engineers*, 515 F. Supp. 2d 1, 4 (D.D.C. 2007) (the court determined that the EPA's veto power was discretionary, but was reviewable).

The Eleventh Circuit's finding that § 404(c) is discretionary is further supported by the EPA's regulatory interpretation of its statutory authority. When a "statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is

based on a permissible construction of the statute." *Chevron v. Natural Res. Def. Council,* 467 U.S. 837, 843 (1984). Here, if congressional intent is clear in § 404(c), the veto authority is discretionary, but if it is ambiguous then the court should determine if the Agency's construction is permissible. The Agency has interpreted this section to mean that "the Administrator *may* exercise a veto over the specification by the U.S. Army Corps of Engineers," 40 C.F.R. § 231.1(a) (emphasis added), and if the Administrator "has reason to believe. . . that an 'unreasonable adverse effect' could result. . . he *may* initiate" a veto process, 40 C.F.R. § 231.3 (emphasis added). The Agency's permissible interpretation of its organic statute indicates that the veto authority is discretionary and thus, like an enforcement decision, is committed to the Agency's discretion as a matter of law.

VI. EVEN IF EPA'S DECISION IS REVIEWABLE, THE DECISION NOT TO VETO THE § 404 PERMIT SHOULD BE UPHELD BECAUSE IT WAS NOT ARBITRARY OR CAPRICIOUS.

The EPA's decision not to veto the § 404 permit was not arbitrary or capricious and should be upheld because it was supported by substantial evidence. 5 U.S.C. § 706(2)(A). Under the APA, "[t]he scope of review under the 'arbitrary and capricious' standard is narrow and a court is not to substitute its judgment for that of the agency. . . [The Court] must 'consider whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment.'" *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (internal citations omitted); *see also Norton v. S. Utah Wilderness Alliance*, 542 U.S. 55, 63 (2004) (finding that under § 706(1), "only agency action that can be compelled under the APA is action legally *required*"). While some courts have read this decision unduly narrowly, the holding implies that if agency action is not required, then that inaction cannot be compelled, and further, that it cannot be reviewed until it is action under §

706(2)(A). Here, the EPA's decision should be upheld because it was consistent with *Coeur Alaska*, well-reasoned, and supported by the evidence.

A. The technical expertise of the EPA and COE should be granted deference.

Particularly in cases where technical or scientific expertise is required to make a legal determination, courts defer to the agency's decision. *See, e.g., Marsh v. Oregon Natural Res. Council*, 490 U.S. 360, 377 (1989) ("analysis of the relevant documents requires a high level of technical expertise, we must defer to the informed discretion of the responsible federal agencies") (internal quotations omitted). COE and EPA's decision that the material was fill is exactly the kind of decision that the *Marsh* Court granted deference.

As discussed above, in this case, the COE determined that the slurry is fill material and the EPA, as it did in *Coeur*, deferred to the COE's categorization of the material as such. "The Act is best understood to provide that if the Corps has authority to issue a permit for a discharge under § 404, then the EPA lacks authority to do so under § 402." *Coeur Alaska*, 129 S. Ct. 2458, 2467 (2009). In *Coeur Alaska*, the Court granted *Auer* deference to the Agency's interpretation of its own regulations, 40 C.F.R. § 122.3, and agency documents consistent with this interpretation, further supporting the finding that §§ 404 and 402 are exclusive. *Coeur Alaska*, 129 S. Ct. at 2468 ("Because it is not 'plainly erroneous or inconsistent with the regulation,' the Court accepts the EPA's interpretation as correct." (*citing Auer v. Robbins,* 519 U.S. 452, 461 (1997))). Even without relying on the deferential standard of *Auer*, the Agency's classification should be upheld because it carefully categorized the material as fill by interpreting its own regulations and evaluating the nature of the material. (R. at 9). The operative question is then whether the DOD discharges are fill material. As discussed above, the COE and EPA's conclusion that the material was fill and fell within COE's jurisdiction. Moreover, the decision

was based on scientific findings and analysis that was neither arbitrary nor capricious.

B. The decision not to veto the permit was consistent with the Supreme Court's decision in *Coeur Alaska*.

Even if EPA could have vetoed the permit, the decision not to veto was not arbitrary or capricious because the decision was consistent with *Coeur* and supported by the agencies' reasonable interpretation of the CWA and their own regulations. Further, EPA, in conjunction with OMB and COE, made a substantive determination that a veto was not needed because the project would not have "an unacceptable adverse effect on municipal water supplies, shellfish beds and fishery areas . . ., wildlife, or recreational areas." § 404(c); (R. at 9, 10).

VII. OMB'S PARTICIPATION IN THE INTRA-EXECUTIVE BRANCH DISPUTE BETWEEN EPA AND CEO WAS PROPER AND CONSISTENT WITH THE MANDATES OF EXECUTIVE ORDER 12088.

OMB's participation in resolving the dispute between the EPA and the COE was a proper exercise of executive authority within the executive branch. *Environmental Defense Fund v. Thomas,* 627 F. Supp. 566, 570 (1986) [hereinafter *EDF*] (*citing Sierra Club v. Costle*, 657 F.2d 298, 405 (D.C.Cir. 1981)) (finding "[a] certain degree of deference must be given to the authority of the President to control and supervise executive policymaking"). The EPA and the COE are both executive agencies, because neither one is considered an independent agency. *See Sierra Club v. Costle*, 657 F.2d at 406 ("Presidential authority [over the EPA] is clear since it has never been considered an 'independent agency,' but always part of the Executive Branch.); Reorganization Plan No. 2 of 1970, Eff. July 1, 1970, 35 F.R. 7959, 84 Stat. 2085, as amended Sept. 13, 1982, Pub.L. 97-258, § 5(b), 96 Stat. 1085, 31 U.S.C.A. § 501 (establishing OMB as an office within the Executive Office of the President).

A. OMB's involvement did not lead to contravention of the CWA or any other statute.

OMB's dispute resolution assistance was correct. While "OMB itself admits that it

cannot prevent an agency from complying with statutory requirements" and "executive . . . agencies can be enjoined by this court from failing to execute laws enacted by Congress," *EDF,* 627 F. Supp. at 568, injunctive relief is inappropriate here, as it was in that case, because the EPA and COE did not fail to execute the congressional mandates of the CWA. The CWA was implemented by Congress to protect the waters of the United States, with the awareness that the COE would, from time to time, grant permits to fill areas of those waters. *See* 118 Cong. Rec. 33,757 (1972). COE grant of the permit and EPA's decision not to veto that permit fall squarely into this intent.

B. Intra-branch coordination does not create a separation of powers problem and is an important element of the President's ability to take care.

In *Sierra Club v. Costle*, the court held that, in rulemaking, "unless expressly forbidden by Congress, [] intra-executive contacts may take place, both during and after the public comment period." *Sierra Club v. Costle*, 657 F.2d at 405, 443. Similarly, in this case, intra-executive contacts are permissible. The intra-branch dispute settlement procedures set forth in Exec. Order, 43 F.R. 47707 (October 17, 1978), are intended to promote federal compliance with the CWA, as well as other acts. The contact is thus permissible because "[t]he court recognizes the basic need of the President and his White House staff to monitor the consistency of executive agency regulation with Administrative policy . . . The executive power under our Constitution, after all, is not shared it rests exclusively with the President." *Sierra Club v. Costle*, 657 F.2d at 405, 443. Further, "[o]ur form of government simply could not function effectively or rationally if key executive policy makers were isolated from each other and from the Chief Executive." *Id*. at 443-44. The ruling in *Costle* was limited in that docketing of intra-executive branch contacts may be necessary "where such conversations directly concern the outcome of adjudications or quasi-adjudicator proceedings; there is no inherent executive power to control the rights of

individuals in such settings." *Id.* at 407, 445. In this case, the role of OMB was to help clarify a jurisdictional issue between two executive agencies. It was not adjudicating the rights of an individual.

Unlike in *EDF v. Thomas*, where OMB's approval of EPA's proposed rules was required by Executive Order before those rules could be enacted, 627 F. Supp. at 569, here, OMB's participation and recommendations had no preclusive effect on EPA's veto authority. (R. at 10). Additionally, the EPA was not required to rely on OMB's dispute resolution assistance. Rather, Executive Order 12088 merely allows that *upon the request* of the Administrator of the EPA, the Director of the Office of Management and Budget "shall consider unresolved conflicts" (Para. 1-603). EPA and COE requested OMB's guidance and chose to follow it. (R. at 9).

Even if submission of the dispute to OMB had been required, the intra-executive branch process would still be proper. In *EDF*, the Court was concerned that OMB's involvement could be used to substantively impact EPA rulemaking in such a way that raised separation of powers concerns. Ultimately, the Court found only the *delay* OMB's involvement imposed on EPA, not the intra-branch discussions, contravened the law. *EDF,* 627 F. Supp. at 570, 571 (holding "OMB has no authority to use its regulatory review under EO 12291 to delay promulgation of EPA [RCRA] regulations . . . beyond the date of a statutory deadline"). In this case, there is no claim that OMB's involvement impermissibly delayed the permitting decision or process. The decision not to veto should, therefore, be upheld.

C. <u>The dispute between EPA and COE must be submitted to the Attorney General prior to litigation under Executive Order 12146, and absent that action, the Agency dispute over jurisdiction is not reviewable by this court.</u>

Management of Federal Legal Resources, Exec. Order 12146, 44 F.R. 42657 (July 18, 1979), requires that intra-executive branch disputes, when both Agency heads serve at the

pleasure of the President, be submitted to the Attorney General for resolution prior to litigation. "A court must be mindful of administrative remedies whether they be created by mandate of Congress or the President." *Tennessee Valley Auth. v. United States*, 13 Cl. Ct. 692, 700 (Cl. Ct. 1987). Exec. Order 12146 and Exec. Order 12088 are such remedies.

Even if, as the Seventh Circuit held, Exec. Order 12146 does not "extend[] to an action such as [the applicability of Agency standards to a third party] that does not involve litigation between two executive agencies," *Martin v. Great Lakes Indian Fish & Wildlife Comm'n*, 1992 WL 300841 (W.D. Wis. Oct. 7, 1992), *aff'd sub nom*, *Reich v. Great Lakes Indian Fish & Wildlife Comm'n,* 4 F.3d 490 (7th Cir. 1993), the EO would still require further intra-branch coordination, and issue that has not been challenged. Thus, OMB's involvement, or the AG's involvement in the dispute between EPA and COE was permissible.

CONCLUSION

For the above-mentioned reasons, this Court should find that (1) New Union lacked standing in its sovereign capacity or in its *parens patriae* capacity; (2) the COE has jurisdiction to issue a permit under CWA § 404 because Lake Temp is a navigable water; (3) the COE has jurisdiction to issue a permit under § 404 because the slurry is a fill material; and (4) neither OMB's dispute resolution nor EPA's acquiescence to this decision violated the CWA. If the Court does find that New Union has standing, COE's issuance of the permit was still proper because Lake Temp is navigable water, consistent with the judicial history of this phrase, and the slurry is fill material under the rule established by the Supreme Court in *Coeur Alaska*. Finally, to the extent that these agency decisions are reviewable by a court, COE, EPA, and OMB acted properly and pursuant to all controlling authority.