TEAM # 32

C.A. No. 11-1245
UNITED STATES COURT OF APPEALS
FOR THE TWELFTH CIRCUIT

STATE OF NEW UNION,
Appellant and Cross-Appellee,

v.

UNITED STATES,
Appellee and Cross-Appellant,

v.

STATE OF PROGRESS,
Appellee and Cross-Appellant.

On Appeal from the United States District Court for the District of New Union

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Brief for STATE OF NEW UNION
Appellant and Cross-Appellee

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Jurisdictional Statement

Appellant State of New Union filed a complaint in the United States District Court for the District of New Union, seeking review of an individual permit under 28 U.S.C. § 1331 and the Administrative Procedure Act ("APA"), 5 U.S.C. § 702.

This appeal is from a final judgment entered by the District Court on June 2, 2011. Pursuant to 28 U.S.C. § 1291, this Court has jurisdiction over all appeals from final judgments.

Statement of the Issues

I. Whether a state, as the guardian, owner, and regulator of its natural resources, has standing when the government's proposed discharge of hazardous substances will likely pollute the state's groundwater.

II. Whether Lake Temp is a "navigable water" under the Clean Water Act ("CWA"), when it is used as a highway for interstate commerce.

III. Whether the Environmental Protection Agency ("EPA") has jurisdiction to issue a permit under CWA Section 402, when the discharge of toxic slurry does not fall under the CWA Section 404 exceptions to EPA's permitting authority.

IV. Whether the Office of Management and Budget has authority to direct the EPA not to veto a U.S. Army Corps of Engineers permit under CWA Section 404, when the EPA has statutory authority under the CWA to determine when a Section 402 permit is required.

Statement of the Case

This is an appeal from a final Order of the District Court for the District of New Union, which granted the Government's motion for summary judgment, and found that the State of New Union ("New Union") did not have standing to contest the issuance of a permit. (Order at 2).

The Secretary of the Army, acting through the U.S. Army Corps of Engineers ("COE"), under the authority of Section 404 of the Clean Water Act ("CWA"), 33 U.S.C. § 1344, issued a permit to the U.S. Department of Defense ("DOD") to allow for discharge of a slurry of spent munitions containing CWA § 311 toxic pollutants, into Lake Temp. (R. at 3, 8). New Union seeks review of the issued CWA § 404 permit under 28 U.S.C. § 1331 and the Administrative Procedure Act ("APA"), 5 U.S.C. § 702. *Id.* at 3. New Union argues the CWA § 404 is invalid, because any permit for the discharge of a toxic pollutant must be issued by the Administrator of the Environmental Protection Agency ("EPA") under CWA § 402, 33 U.S.C. § 1342, rather than by the COE under CWA § 404. *Id.* The State of Progress ("Progress") has also intervened and argues, *inter alia*, that New Union should have standing to contest the permit. *Id.* at 3, 5.

Statement of the Facts

Although Lake Temp has been part of a military reservation since 1952, the DOD admits it has taken no measures to restrict known public access, other than occasional signs indicating that entry is not allowed. (R. at 4). Because the lake is openly accessible, it has been and is currently used for recreational and hunting purposes, and is viewed as a highway of interstate commerce. *Id.* at 4, 7. It is estimated that over the last one hundred years, thousands of hunters, consisting of both state and non-state residents, have used the lake for hunting purposes. *Id.* at 4. Further, the lake is known to attract bird watchers. *Id.* There are clearly visible trails, believed to be drag marks of boats and canoes, leading from the Progress highway to the lake. *Id*. The highway runs along the side of Lake Temp, and intersects with several roads leading into New Union. *Id.*

Lake Temp spans up to three miles wide and nine miles long during the rainy season, and approximately one out of five years, dries out. *Id.* at 4. While the lake is wholly intrastate within

Progress, the Imhoff Aquifer, located one thousand feet under Lake Temp, is more expansive and extends five percent into New Union. *Id.* at 4, 7. The groundwater from the Aquifer is managed by New Union, and requires normal treatment to remove the naturally occurring sulfur. *Id.* at 6. Even though there is currently one known New Union resident that lives above the Aquifer, New Union allows all of its residents access to the water subject to a permit from the state. *Id.* at 4, 6. Thus, even though a resident might not currently use the water, he would merely need to apply for a permit with the State to use it. *Id.* at 6.

In 2002, the DOD completed an Environmental Impact Statement ("EIS"), proposing to construct a facility on the shore of Lake Temp. *Id.* at 4, 6. Nearly ten years later, without any known movement toward construction, the DOD wants to now move forward with the project. *Id.* at 4. The purpose of the facility is to discharge a variety of munitions waste, a toxic pollutant, into the lake. *Id.* at 4, 8. "Preparation will begin by emptying munitions of liquid, semi-solid and granular contents, which include many chemicals on the CWA § 311 list of hazardous substances, mixed with chemicals to assure that they are not explosive." *Id.* at 4. The remaining metallic solids will be ground and pulverized, and the total wastes will be combined with water to form a slurry. *Id.* The slurry will then be sprayed on the dry portions of the lake, to dry out, raising the entire lakebed by several feet over the course of *several years* of discharge. *Id*. The DOD alleges that over time, the slurry coating the lakebed will be covered naturally, raising the bottom level but returning it to its "pre-operation condition." *Id.* at 4-5.

New Union did not object to the EIS, because it did not take issue with the DOD's procedures in how it completed the EIS. *Id.* at 6. Rather, New Union argued the COE does not have jurisdiction to issue a CWA § 404 permit for the discharge. *Id.* at 5. New Union also argued that the Office of Management and Budget ("OMB") improperly intervened in the permit

issuance process. (Order at 2). The EPA had prepared to exercise its authority to issue a CWA § 402 permit, and veto the COE's CWA § 404 permit. (R. at 9). Because it found the discharge here to be significantly different than in *Coeur Alaska*, the EPA stated a CWA § 402 was proper for the "non-fill liquid and semi-solid portion of the material before discharge to navigable waters." *Id.* Despite this, the OMB instructed the EPA not to exercise its authority and instead, made its own final determination regarding the permit. *Id.* at 9-10.

The District Court found that New Union did not have standing to contest the permit in question, and thus the DOD could move forward with its project. *Id.* at 5-6. However, following the issuance of the District Court's order dated June 2, 2011, on September 15, 2011, this Court ordered all of the parties to brief the aforementioned four issues. (Order at 1-2).

Summary of the Argument

The District Court erred in finding that New Union did not have standing to challenge the permit issued by the COE, pursuant to the CWA. The Supreme Court explicitly stated in *Mass v. EPA*, that if a state correctly asserts its *parens patriae* capacity in protecting its natural resources, it does not have to meet the rigid Article III standing requirements of: injury in fact, causal connection, and redressability. Here, the State of New Union has standing in its *parens patriae* capacity because: (1) the DOD's proposed discharge of hazardous substances will affect a significant portion of the New Union's ground water, and cause injury to the state's residents, because they will no longer be able to use the water; (2) New Union has articulated an interest in all of its residents, and not just the interests of particular private parties; and (3) it is well established that a state has a quasi-sovereign interest in protecting its natural resources.

Alternatively, in its sovereign capacity, New Union also meets the Article III standing requirements, because a risk of real harm from the DOD's toxic pollutant discharge is enough to

establish an injury in fact. This discharge is planned to take place over several years. New Union's ground water is currently usable with normal treatment, but once the pollutants are discharged, it will no longer be usable without large remediation efforts. If the DOD is no longer permitted to discharge their pollutants in the water, New Union's problem will be redressed. Therefore, New Union has standing either in its *parens patriae* or sovereign capacity.

Additionally, the Court should find that Lake Temp is a navigable water. The term navigable water has been broadly defined by the Supreme Court, Congress, and related statutes and regulations such as the CWA. A water is navigable if it is currently used, has been used, or, with reasonable efforts could be made to be a highway of commerce. Even if the water is not capable of interstate navigation, it is considered a navigable water if it is used to foster interstate commerce, by allowing recreational opportunities such as fishing for intra and interstate travelers. Here, Lake Temp is navigable, because it has been used throughout the past century by hunters and visitors on boats and canoes. Further, the Lake provides recreational opportunities for both the residents of Progress and New Union. Because of Lake Temp's past and present activities in fostering interstate commerce, it is a navigable water, per the definitions set forth by the Supreme Court.

The CWA authorizes the EPA to issue § 402 permits for the discharge of pollutants into the navigable waters of the United States. Because Lake Temp is a navigable water, a permit must be issued under either CWA §§ 402 or 404(a) for the discharge of any pollutants. The discharge of toxic munitions slurry does not fall under the CWA § 404 exceptions to the EPA's CWA § 402 permitting authority. Therefore, the COE had no authority to issue a CWA § 404 permit for the toxic munitions slurry, making the agency's decision to issue a permit arbitrary

and capricious. The CWA § 404 permit must be overruled because a CWA § 402 permit is required for the discharge of toxic slurry into Lake Temp.

Congress authorizes the EPA to administer the CWA, and only the EPA and the COE may issue Section 402 and 404 permits for discharge, respectively. The OMB impermissibly usurped the EPA's delegated discretion when it interceded prior to the EPA's decision to veto the COE's jurisdiction to issue a Section 404 permit. The EPA, and not the OMB, has veto authority pursuant to Section 404(c). The OMB was not acting under the authority of Exec. Order 12,866 – to review rulemaking and resolve duplicative regulations – when it usurped the EPA's decision making authority pursuant to the CWA. This Court should enjoin the OMB from interfering with the EPA's statutory authority pursuant to the CWA.

For the reasons set forth, this Court should find New Union has standing to contest the permit, and that the EPA, not the COE, had jurisdiction to issue the permit for the discharge of pollutants under CWA § 402.

Argument

I. The District Court erred in holding appellant lacked standing, because it incorrectly construed the standing test under *Massachusetts v. EPA*

This Court should reverse the District Court's holding, and find that New Union has standing to challenge the permit issued by the COE. This Court reviews a denial of standing *de novo*. *NRDC v. United States EPA*, 542 F.3d 1235 (9th Cir. 2008). The court assesses whether the moving party has satisfied the Article III standing requirements. *Hollywood Mobile Estates Ltd. v. Seminole Tribe of Fla.*, 641 F.3d 1259 (11th Cir. 2011)

Pursuant to Section 1365(a) of the CWA, a citizen suit may be brought against the government. 33 U.S.C. § 1365(a). A state may commence a civil action under this statute if the

state can assert *parens patriae* standing. *See United States EPA v. Green Forest*, 921 F.2d 1394, 1404 (8th Cir. 1990); *Kelley on behalf of Michigan v. United States*, 618 F. Supp. 1103, 1109 (D. Mich. 1985). Alternatively, a state that is injured in its sovereign capacity may assert standing if it meets the formal elements of Article III: injury in fact, causal connection, and redressability. *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992); U.S. CONST. art. III, § 2, cl. 1.

As discussed more fully below, here, New Union has standing in its *parens patriae* capacity, because the anticipated injury will affect a substantial segment of the state, and the state's interests are both quasi-sovereign and apart from the interests of particular private parties. Alternatively, the state has standing in its sovereign capacity, because it satisfies the Article III elements. Further, New Union is not time-barred from asserting these claims, because it is contesting a permit issuance issue, and not the government's procedural compliance in completing the EIS. For these reasons, this Court should find New Union has standing to contest the COE permit.

a. New Union satisfies Article III standing in its *parens patriae* capacity, because it is well established that a state may sue as a guardian of its natural resources

New Union has standing under Article III, because in order to protect the health and well-being of its citizens, it can act in the *parens patriae* capacity. Traditionally, to assert Article III standing, a party must assert the following elements: injury in fact, causal connection, and redressibility. *Lujan*, 504 U.S. 555. However, the Supreme Court relaxed the formal Article III requirements for parties who act in the the *parens patriae* capacity. *Massachusetts v. EPA*, 549 U.S. 497 (2007) ("*Mass v. EPA*"). It found that a litigant who is "accorded a procedural right to protect [its] concrete interests . . . can assert that right without meeting all the normal standards for redressability and immediacy." *Id.* (internal citations omitted).

In order to pursue an action as a *parens patriae*, the state must: (1) allege injury to a sufficiently substantial segment of its population; (2) articulate an interest apart from the interests of particular private parties; and (3) express a quasi-sovereign interest. *Alfred L. Snapp & Son, Inc. v. Puerto Rico*, 458 U.S. 592 (1982) *("Snapp")*; *Quapaw Tribe of Okla. v. Blue Tee Corp.*, 653 F. Supp. 2d 1166, 1178 (N.D. Okla. 2009).

Thus, once a state demonstrates it can act in the *parens patriae* capacity, the state will qualify for the relaxed standing test under *Mass v. EPA*, and satisfy standing under Article III.

i. The DOD's proposed discharge of hazardous substances will affect a substantial segment of the population

The proposed discharge of pollution will likely affect a substantial segment of New Union's population, because it will affect a significant portion of the state's groundwater. The Supreme Court has not drawn any limits on the number of people within the state who must be adversely impacted by the challenged action. *Snapp*, 458 U.S. 592. Rather, both injury to an identifiable group and the indirect effects of the injury must be considered to determine whether the alleged injury will substantially impact the state's population. *Id.* Further, the amount of the overall territory owned is not indicative of determining standing. In *Georgia v. Tennessee Copper Co.*, the Court found that even though the State owned very little of the affected territory, the State still had standing because of its interest "in all the earth and air within its domain." 206 U.S. 230, 237 (1907); *see also Douglas County v. Babbitt*, 48 F.3d 1495, 1501 (9th Cir. 1995) (finding a state's proprietary interest in its natural resources may be affected by actions on adjacent land).

Here, the DOD's project will substantially impact a significant portion of New Union's groundwater, and will likely affect the states' residents. Per *Snapp*, it does not matter that there is only one resident who is currently located above the aquifer, and that he does not presently use

it. What matters are the indirect effects the discharge of pollutants will have. It is foreseeable that there will be new residents who will reside above the aquifer and/or will have a need to use it in the future. But, if the groundwater is no longer usable as a natural resource, it will be a detriment to the people of New Union. Opposing Counsel may argue that this case differs from *Mass v. EPA* because there, the state owned a "great deal" of the alleged territory to be affected. However, like the affected territory in *Tennessee Copper*, New Union also owns a small percentage of the territory to be affected. Thus, percentage of ownership is not a determinative factor for standing.

Further, New Union has control over regulating the use of the groundwater, and does not limit withdrawals to owners of the land above the groundwater. The water is presently usable with treatment and with a permit from the state; however, once the DOD's discharge of pollution reaches the State's groundwater, it will no longer be usable without large and costly remediation efforts. *See Remediation/Cleanup Technologies*, http://www.epa.gov/OUST/cat/REMEDIAL.HTM. Therefore, New Union is able to demonstrate that a substantial segment of the population will be affected by the DOD's proposed discharge of pollutants into Lake Temp.

ii. New Union has a quasi-sovereign interest in protecting its citizens health and well-being, which is apart from the interest of any particular parties

New Union has expressed a quasi-sovereign interest because it wants to protect its natural resources. A state expresses a quasi-sovereign interest when its interest is "independent of and behind the titles of its citizens, in all the earth and air within its domain." *Snapp,* 458 U.S. at 607; *Tennessee Copper,* 206 U.S. at 237. As quasi-sovereigns, a state has the right to represent the interests of their citizens, because of the state's interest in "the health and well-being – both physical and economic – of its residents in general," and in protecting its natural resources.

Snapp, 458 U.S. at 607; *see also New York v. New Jersey*, 256 U.S. 296 (1921) (protecting against sewage discharge); *Tennessee Copper*, 206 U.S. 230 (protecting against noxious gasses).

Here, New Union's interest is protecting its citizens from polluted groundwater resulting from the discharge of hazardous substances. New Union is not just advocating for the one resident who currently resides there, but for all current and future residents. If the discharge is permitted, the groundwater will no longer be usable to anyone, and will be a huge detriment to the state. Because New Union is able to establish the necessary elements for *parens patriae*, the court should grant standing under this capacity.

b. Even if this Court denies *parens patriae* standing, New Union has standing in its sovereign capacity as the owner and regulator of the groundwater in its state

New Union satisfies all three elements to establish Article III standing. The requirements are: (1) the party must suffer an actual or imminent "injury in fact;" (2) there must be a causal connection between the injury and the conduct complained of; and (3) it must be likely that the injury will be redressed by a favorable decision. *Lujan*, 504 U.S. at 560; *see also Friends of the Earth, Inc. v. Laidlaw Envtl. Servs.*, 528 U.S. 167, 180-81 (2000).

An "injury in fact [is] an invasion of a legally protected interest." *Id.* The injury does not need to be one that has already happened, but can be one that is projected. *Mass v. EPA*, 549 U.S. at 515. Further, the Supreme Court found that even though the risk of catastrophic harm from the proposed activity may be remote, it is nevertheless real. *Id.* at 526; *see also City of Davis v. Coleman*, 521 F.2d 661, 671 (9th Cir. 1975) (finding if there is a sufficient geographical nexus, it may be expected that the project will suffer environmental consequences).

Here, first, the DOD proposes to discharge hazardous substances over the course of *several years*. Once pollutants enter the water, especially for an extended period of time, it will likely cause damage. In 2010, the EPA issued a communication that contamination with military

munitions "may potentially have soil, ground water and surface water contamination from munitions residues." *Military Munitions/Unexploded Ordnance*, http://www.epa.gov/fedfac/documents/munitions.htm. Further, "[f]atalities and severe injuries have resulted from citizens accidentally being exposed to military munitions…[and] [a] number of chemical exposures with associated health effects have also been reported." *Id.* Even though New Union does not know exactly when the groundwater will be affected, the chance that it will be affected is real. Therefore, comparable to the findings of *Mass v. EPA*, New Union is able to demonstrate an injury in fact as a result of the proposed activity.

Second, the aforementioned injury is causally connected to the DOD's proposed discharge. The DOD has not acted on the EIS they completed ten years ago, and thus, the groundwater in the state is still usable with normal treatment. However, once the pollutants are dumped in the water by the DOD, the water will become unsafe for the state to manage and use.

Third, the injury will be redressed by a favorable decision, because either the DOD will no longer be able to dump the hazardous substances into the lake, or there will be a reduction in what materials can be dumped and/or a reduction in dumping time.

Therefore, this Court should find New Union has standing in its sovereign capacity.

c. Further, New Union is not time barred from raising issues, because it is contesting the validity of a permit, and not the agency's procedural compliance under NEPA

Because New Union is challenging the validity of the DOD's permit, the state can still assert its claims even though it did not comment or object to the scoping of the DOD's EIS. The EIS is a requirement under the National Environmental Policy Act ("NEPA"), to ensure agencies consider the environmental impacts of major federal actions. *Kleppe v. Sierra Club*, 427 U.S. 390, 409 (1976); 42 U.S.C. § 4332. A party who does not object to an EIS during the time it is under consideration may be barred only from asserting NEPA related violations. *High Sierra*

Hikers Ass'n v. United States Forest Serv., 436 F. Supp. 2d 1117, 1147 (E.D. Cal. 2006) (internal citations omitted) (finding a court may waive a party's right to raise an objection on the grounds of a NEPA violation if the party failed to challenge the violation during the scoping process.)

Here, the state is not objecting to the government's procedural error during the NEPA process. Rather, the state is objecting to the validity of the permit that was granted. Thus, because New Union is not estopped from contesting the issue of the permit, this Court should grant standing for New Union. New Union has sufficiently plead that it has standing in its *parens patriae* capacity, or alternatively, in its sovereign capacity.

II. Lake Temp is a water of the United States under the CWA, because it is a navigable water and used in interstate commerce

This Court should affirm the District Court's holding that Lake Temp is a navigable water. The Supreme Court and Congress have observed that navigable waters are waters of the United States, and therefore fall under the jurisdiction of the CWA.

The District Court determines navigability as a question of fact. *United States v. Davis*, 339 F.3d 1223, 1227 (10th Cir. 2003). Findings of fact by the district court are subject to a clearly erroneous standard of review. *Leslie Salt Co. v. United States*, 896 F.2d 354, 357 (9th Cir. 1990). Issues of both fact and law involving legal concepts beyond primarily factual inquiries, are reviewable *de novo*. *Id*. Courts reviewing the COE's interpretation of the CWA will defer to the agency's analysis only if it is "reasonable and not in conflict with the expressed intent of Congress." *United States v. Riverside Bayview Homes*, 474 U.S. 121, 131 (1985); *Chevron U.S.A., Inc. v. NRDC*, 467 U.S. 837 (1984), *see infra*.

a. Lake Temp is a navigable water per the Supreme Court's definition, and because it is a highway of interstate commerce for interstate hunters and other recreation

The Court should find that Lake Temp is navigable according to the Supreme Court's interpretation of navigable waters. The regulatory powers of Congress extend to jurisdiction over navigable waters, as waters of the United States, under the CWA. The Supreme Court initially addressed navigability as it applied to admiralty common law concepts and Congress' regulatory authority under the Interstate Commerce Clause. *See, e. g., United States v. Appalachian Elec. Power Co.*, 311 U.S. 377 (1940); *The Montello*, 87 U.S. 430 (1874); *The Daniel Ball*, 77 U.S. 557 (1870). The Supreme Court has defined as navigable "every stream or body of water, susceptible of being made [into] a highway for commerce, even though that trade be nothing more than the floating of lumber in rafts or logs." *The Daniel Ball*, 77 U.S. at 560.[1]

The CWA defines "navigable waters" as "waters of the United States, including the territorial seas." 33 U.S.C. § 1362. Congress intended to broaden the scope of jurisdictional waters under the CWA by expanding the definition of "navigable waters." The Conference Committee explained: "[t]he Conferees fully intend that the term 'navigable waters' be given the

[1] *Gilman v. Philadelphia* states:

> Commerce includes navigation. The power to regulate commerce comprehends the control for that purpose, and to the extent necessary, of all the navigable waters of the United States 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.

3 Wall. 713, 724 (1866). As explained above, navigability has been expanded for purposes under the Commerce Clause authority to include waterways no longer navigable, and waterways that could be made navigable by reasonable measures. *Boone v. United States*, 944 F.2d 1489, 1495 (9th Cir. 1991) (citing *Appalachian Elec. Power Co.*, 311 U.S. at 406 (1940)).

The Rivers and Harbors Act of 1899 also defines navigable waters of the United States, requiring an interstate linkage of the navigable water itself, to act as an interstate highway. *Economy Light & Power Co. v. United States*, 256 U.S. 113 (1921); *United States v. Utah*, 283 U.S. 64 (1931); Rivers and Harbors Act, § 10, 30 Stat. 1151 (Mar. 3, 1899), codified at 33 U.S.C. § 403.

broadest possible constitutional interpretation. . . .” 118 Cong. Rec. 33699 (1972) (emphasis added). Congress acknowledged that navigability should not be strictly construed, in order to address the dual purposes of the Act – reducing water pollution and improving water quality. *Id*. In an effort to define and expand *waters of the United States* under the CWA, the COE and EPA developed matching regulatory definitions:

> (1) All waters which are currently used, or were used in the past, or may be susceptible to use in interstate or foreign commerce;
> (3) All other waters such as intrastate lakes, rivers, streams, . . . or natural ponds, the use, degradation or destruction of which could affect interstate or foreign commerce including any such waters: (i) *Which are or could be used by interstate or foreign travelers for recreational or other purposes*….

33 C.F.R. § 328.3; 40 C.F.R. § 232.2 (emphasis added). The COE further defines navigable waters as having: “[p]ast, present, or potential presence of interstate or foreign commerce; [p]hysical capabilities for use by commerce . . . and [d]efined geographic limits of the waterbody.” 33 C.F.R. § 329.5.

The term “navigable waters” has been broadly interpreted under the CWA. *See Riverside Bayview Homes, Inc.*, 474 U.S. 121 (upholding regulations adopted by the COE, that include wetlands within the CWA's scope of “navigable waters”); *Rapanos v. United States* 547 U.S. 715, 731 (2006). Justice Scalia’s plurality opinion in *Rapanos* included “relatively permanent, standing or flowing bodies of water . . . forming geographical features,” and excluded mere “transitory puddles or ephemeral flows”[2] as navigable waters of the United States. *Id*. The connectivity analysis in *Rapanos* tests whether a connection, or “nexus,” exists between a

[2] The use of the definite article (“the”) and the plural number (“waters”) shows plainly that § 1362(7) does not refer to water in general. In this form, “the waters” refers more narrowly to water “[a]s found in streams and bodies forming geographical features such as oceans, rivers, [and] lakes,” . . . “the waters of the United States” include only relatively permanent, standing or flowing bodies of water . . . forming geographical features.” *Rapanos*, 547 U.S. at 732.

waterbody and a navigable water. *Id.* Here, however, there is no need to determine whether Lake Temp meets the nexus test because Lake Temp *is itself navigable*.

Further, Courts have found that *intrastate* lakes may be regulated under the CWA, even where "the waters of the lake are not capable of bearing interstate navigation but are otherwise used to sustain and foster interstate commerce." *State of Utah By & Through Div. of Parks & Recreation v. Marsh*, 740 F.2d 799 (10th Cir. 1984) (emphasis added) *("Utah v. Marsh")*; *see also Minnehaha Creek Watershed Dist. v. Hoffman*, 597 F.2d 617 (8th Cir. 1979) (COE did not have jurisdiction for obstructions under the Rivers and Harbors Act's definition of *interstate navigability*, but did have jurisdiction under the more expansive CWA definition).

In *Utah v. Marsh*, the Division of Parks and Recreation installed boats ramps on the shore of Utah Lake. The Division was notified that pursuant to the CWA, they needed a permit. 740 F.2d at 801. The State argued that because the lake is entirely *intrastate*, it is not an *interstate* lake that provides a navigable connection for interstate commerce. *Id*. at 803. The court found that the lake provides, *inter alia*, recreational and commercial opportunities such as fishing, hunting, and boating, to both intra- *and* inter- state travelers, and therefore has a "substantial economic effect on interstate commerce." *Id*. at 803.[3] The court held that due to such an effect on interstate commerce, the body of water was subject to CWA jurisdiction. *Id*.

Navigability may also be determined by federal agencies based on the water's characteristics and test canoe trips. *See FPL Energy Maine Hydro LLC v. F.E.R.C.*, 287 F.3d

[3] *See Wickard v. Fillburn*, 317 U.S. 111, 125 (1942) ("even if appellee's activity be local and though it may be regarded as commerce, it may still, whatever its nature, be reached by Congress if it exerts a substantial economic effect on interstate commerce….").

1151, 1156 (D.C. Cir. 2002)[4]; *Washington Water Power Co. v. F.E.R.C.*, 775 F.2d 305, 332 (D.C.Cir.1985). In *FPL Energy*, the D.C. Circuit Court of Appeals upheld an agency's determination of navigability based on three canoe trips made to test navigability for the purpose of litigation. 287 F.3d at 1156.

Here, Lake Temp is a water of the United States under the CWA, because it is itself navigable, and supports interstate commerce, since it has been used over the past century by hunters and visitors on boats and canoes.[5] The economic opportunities affecting interstate commerce in *Utah v. Marsh* are analogous to the recreational and commercial uses of Lake Temp, because Lake Temp provides recreational and commercial opportunities for both residents of the State of Progress and interstate travelers. Hunting has gone on for over one hundred years, and guided hunting and bird-watching trips are conducted regularly on the lake. Such recreational and commercial enterprises have a substantial economic effect on interstate commerce. Moreover, the lake is close to the state border, and the adjacent state highway intersects with several interstate roads that lead into New Union. Such proximity affords interstate travelers easy access to the lake. The past and present use of canoes and boats in Lake Temp, like in *FPL Energy*, also passes the determination of navigability. Therefore, this Court

[4] Cited in: U.S. Army Corps of Engineers, National Notices and Program Initiatives, *Draft Guidance on Identifying Waters Protected by the Clean Water Act* (May 2, 2011), http://www.usace.army.mil/CECW/Documents/cecwo/reg/nwp/cwa_wous_guide.pdf.

[5] "[T]he public interest in free navigation predominates, and [if] restrictions on access are warranted, they should be accomplished through the auspices of the Army Corps of Engineers." *Vaughn v. Vermilion Corp.*, 444 U.S. 206, 210 (1979); *Kaiser Aetna v. U.S.*, 444 U.S. 164, 175 (1979) (the "national servitude" requires consideration of public interest when restricting access to navigable waters). Despite signs posted to deter access to Lake Temp, no other actions were taken by the DOD since it acquired control of the lake in 1952. This lack of DOD control, despite its knowledge of decades of public use of the lake, should not affect the court's analysis of navigability.

should find that Lake Temp supports interstate commerce, and per the congressional and statutory definitions discussed, is therefore a navigable water.

b. Lake Temp is a navigable water due to its substantial size and relative permanence

Lake Temp is of a sufficient size to support navigation and is therefore a navigable water of the United States. Courts have found lakes and large ponds ranging from over twenty square miles to under five square miles to be navigable waters of the United States under the CWA. *Davis*, 339 F.3d at 1225; *Utah v. Marsh*, 740 F.2d 799; *Minnehaha Creek*, 597 F.2d 617; *United States v. Byrd*, 609 F.2d 1204 (7th Cir. 1979). An intrastate lake's use in interstate commerce determines whether it is navigable under the CWA, regardless of small size. *Byrd*, 609 F.2d 1204. In *Byrd*, a developer sought to convert wetlands bordering a 2500 to 3000 acre fresh water lake in Indiana. *Id*. at 1205. The court noted that "recreational use of inland lakes has a significant impact on interstate commerce, as is testified to by the number of out-of-state visitors to Lake Wawasee in particular." *Id*. at 1210.[6] The court found that the CWA's jurisdiction extended to navigable waters, including "*intrastate lakes*…utilized by *interstate travelers* for water-related recreational purposes." *Id*. at 1206 (emphasis added).

As in *Byrd*, where navigability under the CWA was determined by recreation-based interstate commerce, here, Lake Temp provides recreation-based interstate commerce. Further, because Lake Temp is up to 27 square miles, over 17,000 acres, it is an even clearer case for CWA jurisdiction than the lake in *Byrd*. Despite seasonal contraction, Lake Temp is relatively permanent and perennially used for recreational and commercial activities. Hunters have used

[6] The *Byrd* Court noted that the "value of these lakes depends, in part, on the purity of their water for swimming, or the abundance of fish and other wildlife inhabiting them or the surrounding wetland and land areas." 609 F.2d at 1210. The record is unclear whether Lake Temp supports aquatic habitat and wildlife. However, the lake provides hunting, bird watching and bird habitat, a strong indication of such aquatic resources.

Lake Temp for over one hundred years, and substantial contraction occurs only during extreme drought, indicating the permanence of the lake. This Court should find that Lake Temp's large size clearly affords use for both recreational and commercial purposes, thereby supporting its use in Interstate Commerce. This brings Lake Temp squarely within the jurisdiction of the CWA.

Because Lake Temp is at the bottom of the watershed, Appellants may mistakenly contest jurisdiction based on *Solid Waste Agency of N. Cook County v. United States Army Corps of Eng'rs*. 531 U.S. 159 (2001) (*"SWANCC")*. The Court in *SWANCC* found that small isolated "abandoned gravel mining depressions" were not under the COE's jurisdiction, and the COE's "Migratory Bird Rule," which created jurisdiction based on use by migratory birds, was not supported by the CWA. *Id*. at 167. In its decision, the *SWANCC* Court acknowledged that "the phrase 'navigable waters' [includes] at least some waters that would not be deemed 'navigable' under the classical understanding of that term." *Id*. at 171–72.

The small isolated and non-navigable gravel pits in *SWANNC* are distinguishable from the substantial size and uses of Lake Temp. Lake Temp, though isolated, is navigable, supports interstate commerce, and therefore is a water of the United States under the CWA. Unlike in *SWANCC*, Lake Temp is several miles wide and three times as long. It is perennially used for hunting and fishing, using water vessels such as boats and canoes, and bears no resemblance to the small gravel pits discussed in *SWANCC*. Moreover, in *SWANCC* the migratory bird rule provided a singular basis for jurisdiction. Here, Lake Temp is both of a substantial size, capable of navigation, and provides substantial recreational and commercial benefit to local and interstate users. This Court should uphold the District Court's finding that Lake Temp is a navigable water of the United States.

III. The District Court erred in holding that the COE had jurisdiction to issue a permit under CWA § 404, because the EPA has jurisdiction to issue a permit for the discharge of slurry into Lake Temp under CWA § 402

The Environmental Protection Agency has jurisdiction to issue a permit under Section 402 of the Clean Water Act (CWA), 33 U.S.C. § 1342, for the discharge of slurry into Lake Temp. The Clean Water Act ("CWA") authorizes the Environmental Protection Agency ("EPA") to issue § 402 permits for the discharge of pollutants into the navigable waters of the United States. The claims in this matter involve the COE's issuance of an individual CWA § 404(a) permit, a final agency action subject to judicial review under the Administrative Procedure Act ("APA"). 5 U.S.C. § 702.

When conducting judicial review under the APA, the court does not resolve factual issues, but instead determines "whether or not as a matter of law the evidence in the administrative record permitted the agency to make the decision it did." *Sierra Club v. Mainella*, 450 F. Supp. 2d 76, 90 (D.D.C. 2006) (quoting *Occidental Eng'g Co. v. Immigration & Naturalization Serv.*, 753 F.2d 766, 769 (9th Cir. 1985)). In issuing the challenged permit, the COE was engaged in informal ("notice and comment") rule-making, *see* 33 U.S.C. § 1344(a), reviewable under APA § 10, 5 U.S.C. § 553. Section 10 of the APA provides that the court must declare unlawful and set aside any agency action found to be "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2).

The court must consider whether the agency has "examine[d] the relevant data and articulate[d] a satisfactory explanation for its action including a 'rational connection between the facts found and the choice made.'" *Motor Vehicle Mfrs. Ass'n of the U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (quoting *Burlington Truck Lines v. United States*, 371 U.S. 156, 168 (1962)). An agency action is found arbitrary and capricious where the agency relied on factors Congress did not intend it to consider, failed to consider an essential facet of the

problem, gave a rationale for its decision that runs counter to the evidence before it, or its justification for the decision is so unconvincing that it could not simply be a difference in view or the product of agency expertise. *Id.*

When a court reviews an agency's construction of a statute that it administers, it must address two issues. *Chevron, U.S.A., Inc. v. Natural Res. Defense Council, Inc.*, 467 U.S. 837, 842 (1984). First, the court must determine whether Congress has "directly spoken to the precise question at issue." *Id.* If the answer is in the affirmative, the analysis ends, because the court and the agency must give effect to the clearly expressed intent of Congress. *Id.* at 842–43. However, if the court finds that Congress has not addressed the precise question at issue, "the question for the court is whether the agency's answer is based on a permissible construction of the statute." *Id.* at 843. If the agency's interpretation of the statute is inconsistent or plainly erroneous, deference to the agency must not be granted. *Auer v. Robbins*, 519 U.S. 452, 461 (1997).[7]

To prevail on a facial challenge, claimants "must establish that no set of circumstances exists under which the [permit] would be valid." *United States v. Salerno*, 481 U.S. 739, 745 (1987); *see also Reno v. Flores*, 507 U.S. 292, 300-01 (1993) (acknowledging that *Salerno* applies to a statutory challenge as well as a constitutional one). Here, the COE had no permitting authority to issue a CWA § 404 permit for the munitions slurry, making the agency's decision to issue the permit arbitrary and capricious. There is no set of circumstances under which the COE could have validly issued a CWA § 404 permit, so the permit must be struck down. The CWA § 404 permit must be overruled because a CWA § 402 permit is required for the discharge of toxic slurry into Lake Temp.

[7] "*Auer* deference" has been criticized as creating serious separation of powers concerns, *see Talk Am. Inc. v. Mich. Bell Tel. Co.*, 131 S.Ct. 2254, 2265–66 (2011) (Scalia, J., concurring), but it remains good law.

a. The Clean Water Act gives permitting authority for the discharge of pollutants in the navigable waters of the United States to the EPA under CWA § 402, unless a specific exception is met

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). In furtherance of this goal, the CWA prohibits the discharge of any "pollutant" into the "navigable waters" of the United States without a permit. *See* 33 U.S.C. §§ 1311(a), 1344(a).[8] The Clean Water Act and the Resource Conservation and Recovery Act (RCRA) prohibit the discharge or disposal of pollutants without a permit, assign primary authority to issue permits to the EPA, and allow the EPA to authorize a State to supplant the federal permit program with one of its own under specified circumstances. *United States Dept. of Energy v. Ohio*, 112 S.Ct. 1627, 1629 (1992), *superseded on other grounds by statute*, 42 U.S.C. § 6961, P.L. 102-386, 106 Stat. 1505, *as recognized in Crowley Marine Servs. v. FEDNAV, Ltd.*, 915 F.Supp. 218, 222 (E.D. Wa. 1995).

Congress created a dual-permitting scheme under the CWA, authorizing the EPA to issue permits for the discharge of pollutants into navigable waters, 33 U.S.C. § 1342, and the COE to issue permits for the discharge of "dredged or fill" material into navigable waters. 33 U.S.C. § 1344. Under CWA § 402, the EPA has authority to issue permits for the discharge of *any* pollutant, 33 U.S.C. § 1342, *unless* that authority has been specifically reserved to the Secretary of the COE under CWA § 404. 33 U.S.C. § 1344; *see generally Rapanos*, 547 U.S. 715; *United States v. Riverside Bayview Homes*, 474 U.S. 121, 123-25 (1985). The Act includes as "pollutants" in its open definition: solid waste, munitions, chemical wastes, rock, and sand. 33

[8] "The discharge of a pollutant" is defined broadly to include "any addition of any pollutant to navigable waters from any point source," 33 U.S.C. § 1362(12), and "pollutant" is defined broadly to include not only traditional contaminants but also solids such as "dredged spoil...rock, sand, [and] cellar dirt." 33 U.S.C. § 1362(6).

U.S.C. § 1362(6).[9] The Act forbids the discharge of a pollutant "[e]xcept as in compliance" with the Act. CWA § 301(a), 33 U.S.C. § 1311(a).

The COE may not issue a § 404 permit authorizing a discharge that would violate other provisions of the Clean Water Act. CWA § 306, 33 U.S.C. § 1246. Section 404(a) of the CWA empowers the COE to authorize only the discharge of "dredged or fill material," 33 U.S.C. § 1344(a), defined as any "material [that] has the effect of…[c]hanging the bottom elevation" of water. 40 C.F.R. § 232.2. The agencies have further defined the "discharge of fill material" to include "placement of…slurry, or tailings or similar mine-related materials." *Id.* The question of whether the EPA is the proper agency to regulate the slurry discharge depends on whether the COE has the authority to do so. *Coeur Alaska, Inc. v. Southeastern Alaska Conservation Council, et al.*, 129 S. Ct. 2458 (2009). If the discharge falls under one of the CWA § 404 exceptions to the EPA's § 402 permitting authority, the COE has permitting authority and the EPA may not regulate the discharge. *Coeur Alaska,* 129 S. Ct. at 2467-68. Here, the COE did not have the authority to issue a permit for the discharge of toxic slurry into Lake Temp.

b. The COE is not authorized to issue a CWA § 404 permit for the discharge of toxic fill into Lake Temp, because toxic slurry does not fall under the § 404 exceptions to the EPA's permitting authority

The District Court's reliance on *Coeur Alaska* threatens to undermine the goals of the CWA, because it opens the door for industrial actors to circumvent the stricter EPA permit requirements simply by ensuring their waste disposal contains a sufficient amount of fill. *See* 129 S.Ct. at 2478 (J. Breyer, concurrence), 2480-84 (J. Ginsburg, dissent). The majority's opinion in

[9] "The term "pollutant" means 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."

Coeur Alaska removes non-toxic fill material from the purview of all EPA-promulgated regulations. *Id.* The DOD would have the Court extend this ruling to hold, against the cautions of Justices Ginsburg and Breyer, that the "discharge of a pollutant, *otherwise prohibited* by firm statutory command, becomes lawful if it contains sufficient solid matter to raise the bottom of a water body." *Id.* at 2483 (J. Ginsburg, dissent) (emphasis added); *see* RCRA discussion *infra*. The District Court reads the *Coeur Alaska* majority opinion to mean that just because § 404 covers *some* pollutants, it somehow covers *all* pollutants properly regulated under a § 402 permit. This reading is unacceptable as it makes the language of § 402 superfluous.

The DOD is attempting to discharge CWA § 311 pollutants into Lake Temp, pollutants that require the EPA to issue a § 402 discharge permit under CWA § 306. Congress treats fill material and toxic pollution as parallel, but separate, discharges for the purpose of regulation. *See Rapanos*, 547 U.S. at 774 (J. Kennedy, concurrence) (noting that the Act's prohibition on the discharge of pollutants into navigable waters, 33 U.S.C. § 1311(a), covers the discharge of toxic materials such as sewage, chemical waste, biological material, and radioactive material *and* the discharge of dredged spoil, rock, sand, cellar dirt, and similar materials). The EPA regulates toxic pollutants under a separate provision, § 307 of the CWA. The EPA's § 404(b) guidelines require the COE to deny a § 404 permit for *any* discharge that would violate the EPA's § 307 toxic-effluent limitations. 40 C.F.R. § 230.10(b)(2). The well-established "mixture rule" provides that the mixture of a solid waste and a listed hazardous waste is itself a hazardous waste. *See* Definitions of hazardous waste, 40 C.F.R. § 261.3(a)(2)(iv); *see also American Petroleum Institute v. U.S. E.P.A.*, 216 F.3d 50, 61 (D.C. Cir. 2000).[10] Here, a fill that contains CWA § 311

[10] RCRA defines hazardous waste as "any…discarded material…resulting from industrial, commercial, mining, and agricultural operations, and from community activities." 42 U.S.C. § 6903(27); *see also* 42 U.S.C. § 6903(5). "[R]egulations define solid waste as 'any discarded

hazardous substances is itself a hazardous substance, and therefore cannot come within the 40 C.F.R. § 232.2 definition of "fill material." It is specifically outside of the authority of the COE, who are only authorized to issue permits for fill materials, to issue a CWA § 404(a) permit for this fill. The COE is authorized to permit the discharge of non-toxic dredged and fill material, *not* the discharge of toxic pollution. Only the EPA may permit the discharge of CWA § 311 pollutants.

Coeur Alaska is also distinguishable from the present case because there the fill material fell within the definition articulated by EPA and COE regulations. Here, the interpretation the DOD asks the Court to employ would authorize the discharge of other solids restricted by EPA standards, including chemicals listed in CWA § 311 as hazardous substances. The *Coeur Alaska* Court relied on an internal memorandum to interpret the division of CWA §§ 402 and 404. 129 S.Ct. at 2484. It specifically "[did] not allow toxic pollutants (as distinguished from other, less dangerous pollutants, such as slurry) to enter the navigable waters." *Id.* at 2484. The *Coeur Alaska* Court specifically declined to rule on a situation where a discharger of a solid – restricted by EPA standards – seeks a § 404 permit and stated that "the dispositive question for the agencies would be whether the solid at issue…came within the regulation's definition of fill." *Id.*

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material' and further define discarded material as that which is 'abandoned.' Materials that are abandoned have been 'disposed of.'" *Conn. Coastal Fishermen's Ass'n v. Remington Arms Co.*, 989 F.2d 1305, 1314 (2d Cir. 1993) (internal citations omitted) (quoting 40 C.F.R. § 261.2). The disposal of "munitions of liquid, semi-solid and granular contents, which include many chemicals on the [CWA] § 311 list of hazardous substances," (R. at 4), falls under this definition of "discarded material" within the meaning of the RCRA permitting regulations. *See Cordiano v. Metacon Gun Club, Inc.*, 575 F.3d 199 (2d Cir. 2009) (holding that munitions spent at a gun club that were discarded on the property during use, but not abandoned, were not "disposed of" within the meaning of RCRA). "[S]ection 404 of the CWA and the applicable provisions of the RCRA can be harmonized to give effect to each while preserving their sense and purpose." *Resource Investments, Inc. v. U.S. Army Corps of Eng'rs*, 151 F.3d 1162, 1169 (9th Cir. 1998) (quoting *Watt v. State of Alaska*, 451 U.S. 259, 267 (1981)). The discharge of hazardous substances falls under the permitting authority of the EPA, not the COE. The COE is not authorized to issue a permit for substances that fall under RCRA, nor for discharge containing CWA §311 pollutants.

at 2468. The Court noted that if, like with the slurry discharge into Lake Temp, a solid restricted by EPA standards were permitted under a § 404 permit, "then [a complainant] could challenge that decision as an unlawful interpretation of the fill regulation; or…could claim that the fill regulation as interpreted is an unreasonable interpretation of § 404." *Id.* (noting that the slurry met the regulation's definition of a non-hazardous fill).

The effect of the discharge of Lake Temp also differs from *Coeur Alaska*. Coeur Alaska's plan to use Lower Slate Lake as a tailings pond for non-toxic crushed rock and water discharge was the "least environmentally damaging practicable" way to dispose of the tailings, and the environmental damage caused by placing slurry in the lake would be temporary. *Coeur Alaska*, 129 S.Ct. at 2465. Because Coeur Alaska would "recla[im]" the lake by "[c]apping" the tailings with "native material" after mining operations completed, the COE concluded that "[t]he reclamation of the lake w[ould] result in more emergent wetlands/vegetated shallows with moderate values for fish habitat, nutrient recycling, carbon/detrital export and sediment/toxicant retention, and high values for wildlife habitat." *Id.* The Court indicated that the end result would be as hospitable, if not more so, than the present biological condition of the lake, so that "[t]he reclaimed lake will be 'more valuable to the aquatic ecosystem than a permanently filled wetland…that has lost all aquatic functions and values.'" *Id.* at 2465.

Here, the DOD has not shown that the end result of filling Lake Temp with toxic fill will be negligible, much less that it will result in a "more valuable aquatic ecosystem" the way Coeur Alaska did. The DOD has only alleged that the toxic slurry will "dry" out and someday be covered through natural processes by native material. (R. at 4). However, Lake Temp is only dry every fifth year. During the time it will take native material to cover the slurry, the slurry will be submerged often and long enough that it can be reasonably anticipated that the hazardous

substances in it will not be inert. The munitions slurry cannot be treated as non-toxic fill under a §404(a) permit, and therefore does not fall under the CWA § 404 exceptions to the EPA's § 402 permitting authority. The COE did not have jurisdiction to issue a § 404 permit for the discharge of toxic fill into Lake Temp, and its invalid permit must be overruled.

c. The EPA has not implicitly consented to the COE's CWA § 404 permit, because the COE never had the authority to issue a § 404 permit for the toxic slurry

Finally, in *Coeur Alaska*, the EPA declined its right to exercise its veto, and the Court noted that "the EPA in effect deferred to the judgment of the [COE]." 129 S. Ct. at 2465. Here, as discussed *infra*, EPA was in the process of vetoing the COE decision, when OMB made its administrative decision to allow the COE to issue the permit. However, as Justice Ginsburg noted, the EPA's veto power under § 404(c) of the Clean Water Act is not an adequate substitute for adherence to § 306. *Id.* at 2483. The fact that the EPA did not choose to or had not yet exercised that power is not sufficient to avoid responsibility to issue a § 402 permit as required by § 306. *Id.* at 2483, n. 5. "Reliance on ad hoc vetoes…undermines Congress' aim to install uniform water-pollution regulation." *Id.* The court cannot rely on the failure of the EPA to veto the permit, as the OMB made their decision before the EPA was able to veto the permit, to show that the EPA implicitly consented to the authority of the COE to issue the permit, much less that the COE had the authority to begin with. Therefore, this Court should find that the COE's decision to issue a CWA § 404 permit for the discharge of hazardous substances was arbitrary and capricious, because the COE did not have the proper authority. The EPA was the proper permitting authority to issue a CWA § 402 discharge permit.

IV. The OMB violated the CWA by improperly interceding the EPA's authority to veto the COE's permit determination

This Court should reverse the District Court's ruling that the OMB did not violate the CWA when it prevented the EPA from vetoing the COE's permit issuance. As discussed above, Chevron deference may only be given to an agency interpretation of a statute, when the statutory language is ambiguous, and the agency bases its interpretation on a permissible construction. *Chevron*, 467 U.S. 837. To examine whether an agency action was arbitrary or capricious, the Court must look to whether the agency based its decision on an expert analysis of all the relevant data. *State Farm*, 463 U.S. at 43. *Coeur Alaska* makes clear that the EPA and the COE are the only agencies that have the agency expertise and permitting authority to issue CWA permits. 129 S.Ct. at 2463, 2467-68. Therefore, this Court should find both the OMB's wrongful intervention and the EPA's forced acquiescence to the OMB arbitrary and capricious.

a. The EPA, and not the OMB, has statutory authority to veto a permit determination under CWA § 404(c)

The EPA is authorized to make CWA § 402/404 permitting decisions for discharges into navigable waters. 33 U.S.C. § 1251 *et seq*. Despite delegation to the COE for § 404 dredge and fill permits, the EPA reserves veto authority when it determines that a § 402 permit is required. 33 U.S.C. § 1344(c). As discussed above, § 402 and § 404 permits are final agency decisions, but they are not a rulemaking subject to executive review by the OMB, under the APA, 5 U.S.C. §§ 601-606.

Executive Order 12,866 grants the OMB authority to review regulations prior to promulgation and postpone regulatory deadlines, to promote "a regulatory system that protects and improves [citizens'] health, safety, environment, and well-being and improves the performance of the economy without imposing unacceptable or unreasonable costs on

society…." Exec. Order No. 12,866 § 2(b), *Regulatory Planning and Review*, 58 Fed. Reg. 51,735 (Sept. 30, 1993) ("EO 12,866"). Section 7 of EO 12,866 provides for review of rulemaking to promote uniform standards and to identify and resolve conflicting rules, subject to the policies underlying the statutes governing agencies. *Id*. The OMB reviews regulations not only for uniformity, but also with an eye toward policy considerations, including economic cost-benefits and other executive policy goals. *Id.* EO 12,866 replaced similar executive review Orders under the Reagan administration, which stressed economic policy considerations, and the Carter administration, which stressed federal compliance with pollution control standards. *See* Exec. Order No. 12,291, 46 Fed. Reg. 13,193 (Feb. 17, 1981), *revoked*; Exec. Order No. 12,088, 43 Fed. Reg. 47,707 (Oct. 13, 1978), *revoked*.

Courts have differed in determining the OMB's authority to review and intercede in agency rulemaking or regulatory actions. *See Envtl. Def. Fund v. Thomas*, 627 F. Supp. 566, 567 (D.D.C. 1986) ("*EDF v. Thomas*"); *Sierra Club v. Costle*, 657 F.2d 298, 405 (D.C. Cir.1981); *Pub. Citizen Health Research Group v. Tyson (PCHRG)*, 796 F.2d 1479 (D.C. Cir. 1986). While some deference is afforded to executive review of agency policymaking, interceding agency authority is not a "valid exercise of the President's Article II powers." *EDF v. Thomas*, 627 F. Supp. at 570.

In *EDF v. Thomas*, the 1984 Hazardous and Solid Waste Amendments (pursuant to RCRA) required EPA to issue regulations by March 1, 1985. 627 F. Supp. at 567. The OMB delayed the rulemaking, because it was unhappy with the EPA's regulatory goal of preventing "all leaks of waste disposals." *Id*. The OMB sought to narrow the scope to "[prevent] only leaks of waste that can be demonstrated by risk analysis to threaten harm to human health." *Id*. at 568-69. The Plaintiffs sought to enjoin the OMB from its unlawful interference with the EPA's duties

and similar future interference. *Id*. at 567. The court found that while some deference must be afforded to the OMB supervision and control of the regulatory process, the OMB cannot replace the deliberation of the EPA – and thereby the deliberations of Congress in drafting the RCRA – by usurping the EPA's authority. *Id*. at 570.

Here, the OMB wrongfully interfered with the agency process. The EPA found that the liquid and semi-solid munitions wastes required a CWA § 402 permit prior to discharge to a navigable water. However, before the EPA could veto or overrule the COE's CWA § 404 permitting determination, it was directed by the OMB not to act. The OMB ignored the EPA's determination, and instead made its own final determination. As with the EPA's interpretation of RCRA in *EDF v. Thomas*, here, the OMB has wrongfully interceded the EPA's discretion in interpreting the CWA. Therefore, this Court should enjoin the OMB from interfering with the EPA's statutory authority pursuant to the CWA.

b. This Court should not give deference to the OMB, because the permitting determination is discretionary with the EPA, and is not a regulatory dispute subject to the OMB's regulatory analysis authority

This Court should find the OMB unlawfully interfered by directing the EPA not to exercise its authority. The OMB is not acting under the authority of Section 7 of EO 12,866 for regulatory conflicts or the delay of a rule promulgation. Instead, it has usurped EPA's discretionary authority to choose which permit to issue under the CWA. The language of CWA § 404(c) clearly authorizes the EPA to veto any CWA § 404 permit that it determines requires a CWA § 402 permit. 33 U.S.C. § 1344(c); *Coeur Alaska*, 129 S.Ct. at 2465, 2483.

The OMB assists agencies with limited abdications of their authority when interagency regulations are duplicative. *See Food Packaging Treated with a Pesticide*, 71 Fed. Reg. 70,667 (Dec. 6, 2006) (EPA allowed the FDA to regulate food packaging treated with pesticides);

Railroad Occupational Safety and Health Standards, 43 Fed. Reg. 10,583, 10,585 (Mar. 14, 1978) (Federal Railroad Administration abandoned rulemaking for station workplace standards because they were duplicative of OSHA standards). The OMB may also assist agencies with interagency resolution through memoranda of understanding, to avoid interference or duplication. *See, e.g.*, Domestic Memoranda of Understanding, Food & Drug Admin. ("FDA"), http://www.fda.gov/AboutFDA/PartnershipsCollaborations/MemorandaofUnderstandingMOUs/DomesticMOUs/default.htm (last updated Aug. 12, 2011) (memoranda of understanding to resolve issues between the FDA, the EPA and other agencies).

The OMB may not direct EPA to make determinations contrary to the goals of the CWA without a reasoned justification. *Waterkeeper Alliance, Inc. v. U.S. E.P.A.*, 399 F.3d 486 (2d Cir. 2005). Although courts generally defer to the "agency's expertise in most cases, [courts] cannot defer when the agency simply has not exercised its expertise." *PCHRG*, 796 F.2d at 1505. Here, the OMB side-stepped the decision-making requirements of the CWA. Despite OMB's lack of scientific and engineering expertise – the requisite expertise required by the CWA for permitting decisions – the OMB to usurped the EPA's decision making responsibility, and replaced it with the judgment of the OMB.

Although the EPA must submit draft rules to the OMB, a discretionary permitting decision is at the discretion of the EPA and not the OMB. The OMB overstepped its authority when it directed the EPA to halt the veto process. *See Midwater Trawlers Co-operative v. Department of Commerce*, 282 F.3d 710, 720 (9th Cir. 2002) (regulatory action must be based on the best available science and not "the best available politics"); *see also* Executive Order 12,866 § 10 (Sept. 30, 1993) ("[n]othing in this Executive order shall affect any otherwise available judicial review of agency action").

Here, the OMB is not granting a rulemaking extension, resolving a dispute between conflicting regulations, or reviewing the final regulations prior to approval in order to avoid duplication or conflict. Instead, the OMB has usurped EPA's discretionary authority, pursuant to § 404(c), to veto the COE's § 404 permit, and make the final determination for issuance of a § 402 or § 404 permit.[11] Unlike a regulatory review under the goals of EO 12,866, the OMB has made a ruling that is contrary to the intent of Congress. *See Pub. Citizen, Inc. v. Mineta*, 340 F.3d 39, 52 (2d Cir. 2003) (the court must determine "whether the Final Rule is contrary to the intent of Congress as 'unambiguously expressed'"). The OMB is not the agency charged with administering the CWA, and its determination was made outside of the goals of the CWA. Therefore its decision should not get *Chevron* deference from a court. This Court should find that the OMB's determination was arbitrary and capricious, and that OMB usurped the EPA's discretion as an *ultra vires* abuse of executive authority, and remand to the EPA to issue a § 402 permit.

c. Even if the EPA withheld a decision during the OMB determination – a self-denial of discretionary authority – the OMB's actions are an unauthorized exercise of executive power, and therefore the Court should remand to the EPA

The EPA cannot be forced to avoid its statutory obligations, charged by Congress pursuant to the CWA, by withholding its permitting decision at the direction of the OMB. Legislative powers and discretion prescribed by Congress to an agency, cannot be avoided by that agency, voluntarily or otherwise. *Whitman v. Am. Trucking Associations*, 531 U.S. 457, 472 (2001); *see also Train v. Colorado Pub. Interest Research Group, Inc.*, 426 U.S. 1, 23 (1976)

[11] "The Administrator is authorized to prohibit [the issuance of a permit] . . . whenever he determines, after notice and opportunity for public hearings, that the discharge of such materials into such area will have an unacceptable adverse effect on municipal water supplies . . . wildlife, or recreational areas." 33 U.S.C. § 1344(c).

(finding the EPA may not abdicate its statutory obligations to regulate radioactivity, because it is a pollutant under the CWA). Courts generally frown upon delegating powers to the president where Congress has specifically conferred decision-making authority to an agency. *Whitman*, 531 U.S. at 472; *see also J.W. Hampton, Jr., & Co. v. United States*, 276 U.S. 394, 409 (1928) (Congress must "lay down by legislative act an intelligible principle to which the person or body authorized to [act] is directed to conform"). EO 12,866 is limited to regulatory review, and Congress did not give authority to the OMB for decision-making on permitting.

The OMB interference with agency rulemaking and application raises difficult constitutional issues. *PCHRG*, 796 F.2d 1479. Courts will not address a question of a "constitutional nature unless absolutely necessary to a decision of the case." *Lucas v. S. Carolina Coastal Council*, 505 U.S. 1003, 1062 (1992) (quoting *Burton v. United States*, 196 U.S. 283, 295 (1905)); *see also PCHRG*, 796 F.2d at 1507 (declining to "reach the difficult constitutional questions presented by OMB's participation in this episode"); *Ashwander v. Tennessee Valley Auth.*, 297 U.S. 288, 340 (1936) (passing upon constitutional questions where other grounds exist to decide the case).

The COE's argument that executive power over discretionary decision making may replace that of the Administrators and Secretaries of the several agencies, violates the separation of powers and the CWA. The removal of discretionary authority delegated by Congress to the EPA and the COE under the CWA, for the convenience of OMB's preference on litigative posture, cannot be sustained by this Court. The authority to resolve the dispute is clearly laid out in the CWA, and therefore lies with EPA, the agency authorized to administer the statute. 33 U.S.C. §§ 1251 *et seq.*; *see Coeur Alaska*, 129 S.Ct. at 1263, 1267-68. This Court should remand

the permitting determination to the EPA, to avoid the constitutional questions of executive authority usurping delegated agency discretion.

Conclusion

For the aforementioned reasons, this Court should find for the State of New Union on the following grounds: (1) New Union has standing to challenge the permit; (2) Lake Temp is a navigable water; (3) the EPA has jurisdiction under CWA Section 402 to address whether a permit should be issued for the discharge of pollutants; and (4) OMB's decision that the COE had jurisdiction under CWA Section 404 violated the CWA.