Team 42

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.

BRIEF FOR APPELLANT STATE OF NEW UNION

Attorneys for the State of New Union,
Appellant and Cross Appellee

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES:

OTHER AUTHORITIES:

STATEMENT OF THE ISSUES

I. Whether the State of New Union has standing in its sovereign capacity as owner and regulator of the groundwater in the state or in its *parens patriae* capacity as protector of its citizens who have an interest in the groundwater in the state.

II. Whether the COE has jurisdiction to issue a permit under CWA Section 404, 33 U.S.C. § 1344, because Lake Temp is navigable water under CWA Sections 301(a), 404(a), and 502(7), 33 U.S.C. §§ 1311(a), 1344(a), 1362(7).

III. Whether the COE has jurisdiction to issue a permit under CWA Section 404, 33 U.S.C. § 1344, or the EPA has jurisdiction to issue a permit under CWA Section 402, 33 U.S.C. § 1342, for the discharge of slurry into Lake Temp.

IV. Whether the decision by OMB that the COE had jurisdiction under CWA Section 404, 33 U.S.C. § 1344, and that EPA did not have jurisdiction under CWA Section 402, 33 U.S.C. § 1342, to issue a permit for DOD to discharge slurry into Lake Temp and EPA's acquiescence in OMB's decision violated the CWA.

STATEMENT OF THE CASE

I. Statement of Facts

The U.S. Department of Defense (DOD) proposes to discharge a "slurry" of munitions waste containing many hazardous substances into Lake Temp, a body of water that lies within the State of Progress and near the border of New Union. *State of New Union v. U.S.*, C.A. No. 11-1245. slip op. at 3-4 (D. N.U. June 2, 2011). The slurry would raise the lake's bottom elevation by approximately six feet. *Id.* at 4. The lake is roughly nine miles long and three miles wide during wet years, and only dries once every five years. *Id.*

Lake Temp is the terminal point for 800 square miles of watershed in an otherwise arid climate, creating an oasis for migrating ducks as well as hundreds or thousands of duck hunters

in the past one hundred years, approximately 25 percent of whom are from out of state. *Id*. Several of New Union's roads connect directly to the state highway that borders Lake Temp and it is clear that rowboats and canoes are regularly dragged from the road to the lake. *Id*. Though the DOD has posted signs warning against entry, it has never enforced this prohibition. *Id.*

The Imhoff Aquifer lies below Lake Temp and generally follows the lake's contours, but extends into New Union. *Id.* The aquifer already contains sulfur and requires treatment to make it potable. *Id.* Lake Temp and the aquifer are separated only by a porous sediment known as "alluvial fill." *Id.* Finally, residents of New Union, such as Dale Bompers, reside directly above the Imhoff Aquifer in New Union. *Id*. at 2-4.

II. Proceedings and Disposition of the Court Below

The State of New Union filed suit against the United States seeking a ruling that the § 404 permit issued by the U.S. Army Corps of Engineers (COE) to the DOD was invalid. *Id*. at 3. New Union sought review under 28 U.S.C. § 1331 and the Administrative Procedure Act (APA), arguing that a permit for the discharge of slurry from spent munitions into Lake Temp must be issued by the U.S. Environmental Protection Agency (EPA) under § 402 of the CWA, rather than by the COE under § 404. *Id*. Additionally, New Union argued that the Office of Management and Budget (OMB) did not have authority to determine whether EPA or the COE had jurisdiction to issue the permit. *Id*. The State of Progress intervened in the suit. *Id*. All three parties filed motions for summary judgment, and the District Court granted summary judgment in favor of the United States and the State of Progress. *Id*. at 10-11. Specifically, the District Court held that New Union 1) did not have standing, 2) that the COE had jurisdiction to issue the permit under § 404 because slurry is a "fill material," and 3) that the OMB's dispute resolution between EPA and the COE was proper, and did not violate the CWA. *Id*.

III. Standard of Review

On appeal, a "district court's grant of summary judgment upholding an agency decision is reviewed *de novo*." *E.g. Southwest Ctr. for Biological Diversity v. U.S. Forest Serv.*, 100 F.3d 1443, 1447 (9th Cir. 1996). In reviewing an agency's interpretation of its own regulations, courts must defer to the agency interpretation unless "it is plainly erroneous or inconsistent with the regulation." *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410, 414 (1945).

SUMMARY OF THE ARGUMENT

New Union has standing in its *parens patriae* capacity because it has a quasi-sovereign interest in avoiding the negative health and economic consequences of the contamination of its portion of the Imhoff Aquifer on behalf of all of its citizens. New Union also has standing in its sovereign and proprietary capacities because the DOD's discharge of slurry into Lake Temp threatens its portion of the aquifer and results in the loss of the recreational and aesthetic uses of Lake Temp. The COE's determination that Lake Temp is navigable was reasonable and is entitled to deference. Lake Temp's physical characteristics and potential to impact interstate commerce render it the type of water Congress intended to reach under the CWA. A § 404 permit for the discharge of slurry was not appropriate, however, because the slurry to be discharged is not fill material within the meaning of the CWA or pursuant to *Coeur Alaska*. DOD's slurry mixture is therefore subject to § 402 of the CWA instead. Finally, the EPA acted arbitrarily and capriciously by failing to veto the COE's § 404 permit because it relied upon improper factors to make its decision – namely the irrelevant opinion of the OMB, which has no statutory authority to render legal decisions between disputing agencies.

ARGUMENT

I. NEW UNION HAS STANDING IN ITS SOVEREIGN CAPACITY AS OWNER AND REGULATOR OF THE GROUNDWATER AND IN ITS *PARENS PATRIAE* CAPACITY AS PROTECTOR OF ITS CITIZENS WHO HAVE AN INTEREST IN THE GROUNDWATER IN THE STATE

Standing is an essential part of the case-or-controversy requirement of Article III. *Lujan v. Defenders of Wildlife*, 504 U.S 555, 560 (1992). The question of standing is whether the litigant has such a personal stake in the outcome of the controversy that it is both entitled to have the court decide the issue and can assure the concrete adverseness on which the court depends to sharpen the presentation of issues. *Warth v. Sedin*, 422 U.S. 490, 498 (1975); *Baker v. Carr*, 369 U.S. 186 (1962). There is no question that a state may sue in its quasi-sovereign capacity as *parens patriae* in order to protect the land and water of its citizens and to prevent interstate pollution. *Alfred L. Snapp & Son Inc. v. Puerto Rico ex rel., Barez*, 458 U.S. 592, 609-10 (1982).

A. New Union may properly bring suit against the United States as *parens patriae* in order to contest contamination of its share of the Imhoff Aquifer

A state may bring suit against the United States as *parens patriae* to assert its rights under federal law. *Massachusetts v. EPA,* 549 U.S. 497, 520 (2007); *Nebraska v. Wyoming,* 515 U.S. 1, 20 (1995). *Parens patriae* suits against the federal government are only limited insofar as they seek to protect citizens from the operation of federal statutes. *Mass. v. EPA,* 549 U.S. at 520.

In *Massachusetts v. Mellon,* 262 U.S. 447, 485 (1923), petitioner states sought to enjoin the enforcement of an allegedly unconstitutional law. The Court held that the states did not have standing because they were seeking to represent interests already represented by the federal government. *Id.* Thus, the states' *parens patriae* interests were in conflict with the federal government's own *parens patriae* interest. *Id.* Courts have made clear, however, that *Mellon*

does not prohibit a state from bringing an action against the federal government or its agencies to assert rights under federal law. *Mass. v. EPA*, 549 U.S. at 520; *Nebraska*, 515 U.S. at 20.

New Union, as *parens patriae*, may properly bring suit against the United States to challenge the permit issuance. In *Mass. v. EPA*, the Court recognized Massachusetts' standing as *parens patriae* when the EPA declined to assert its authority to regulate carbon dioxide emissions under the Clean Air Act's. 549 U.S. at 517-19. The Court held that Massachusetts could bring suit against the EPA, a federal agency, because certain sovereign prerogatives of the state were lodged within the federal government, thus the federal government was charged with protecting those sovereign prerogatives. *Id*. at 519. Additionally, Massachusetts had a procedural right to review of the EPA's denial under the Clean Air Act, a fact the Court found exemplary of the federal duty to protect a state's sovereign powers. *Id*.

Unlike petitioner states in *Mellon*, New Union is not attempting to lodge a political fight in a federal forum by challenging a Congressional policy applicable to its citizens with which it disagrees. Instead, New Union seeks to challenge the issuance of a § 404 permit in order to protect natural resources within its territory, making New Union like Massachusetts in *Mass. v. EPA*. This is precisely the type of suit a state may bring against the federal government in its *parens patriae* capacity. Here, New Union's suit raises none of the underlying federalism issues that compelled the *Mellon* ruling. New Union is not attempting to use a federal court to adjust the relationship between states and the federal government. Instead, New Union, like Massachusetts, is seeking to protect its sovereign interests by invoking a statutory right to judicial review of an agency action. In doing so, it has presented a controversy between two states—each desiring opposite outcomes as to how a body of water might be used. Conflicts between states are categorically appropriate for *parens patriae* standing. *New Jersey v. New*

York, 73 S. Ct. 689, 374 (1953). Thus, New Union may sue in its *parens patriae* capacity. The conflict over whether one state can jeopardize a natural resource belonging in part to another raises no political or federalism issues.

B. New Union has *parens patriae* standing because (1) New Union is not a nominal party; (2) it has a quasi-sovereign interest in the integrity of its water resources, in the economic potential in its equitable share of the Imhoff Aquifer, and in protecting its citizens from exposure to various toxic chemicals; and (3) because harm to the aquifer threatens to injure all of New Union's citizens

To ensure that a state suing on behalf of its citizens properly asserts an Article III case or controversy, the Supreme Court has formulated a three-part test. A state: (1) must express a quasi-sovereign interest, (2) which stands apart from the interests of particular private parties, i.e., the State must be more than a nominal party, and (3) the State must have alleged injury to a sufficiently substantial segment of its population." *Snapp*, 458 U.S. at 102. Under the *parens patriae* doctrine, a state's quasi-sovereign interests consist of a set of interests in the well-being of its populace. *Id*. Classical quasi-sovereign interests sufficient for *parens patriae* standing include the protection of natural resources and the ability to contest interstate pollution. *Georgia v. Tenn. Copper,* 206 U.S. 230, 237 (1907). Additionally, injury to a state's economy—or its citizens based on general economic effect—also gives rise to a quasi-sovereign interest in relief that justifies representative action by the state. *Mass v. EPA*, 549 U.S. at 519; *Pennsylvania v. West Virginia*, 257 U.S. 620, 674 (1923).

A threatened injury to a natural resource—like a state's equitable share of interstate water, however large or small—that could affect the health or economic well-being of a state's citizens, is a sufficient quasi-sovereign interest. In *South Carolina v. North Carolina*, 130 S. Ct. 854, 867 (2010), the Court found that South Carolina's interest in ensuring access to its equitable share of an interstate river that was being dammed by North Carolina was an unequivocal *parens*

patriae interest. *Id*. In *Georgia*, Georgia requested that the Court enjoin Tennessee copper companies from discharging noxious gases that were destroying some of the State's nearby orchards and crops. 206 U.S. at 236. The Court determined that the potential injury could impact the health and well-being of Georgia's citizens, thus creating *parens patriae* standing, even though the physical amount of territory threatened was minimal. *Id.* In *Pennsylvania v. West Virginia*, the Court found that petitioner states had a quasi-sovereign interest in maintaining an existing natural gas supply arrangement with producer states where a-proposed production change would have resulted in increased gas prices for citizens. 43 S. Ct. at 584. The court found that these generalized economic effects were sufficient for *parens patriae* standing. *Id*.

New Union's quasi-sovereign interest parallels South Carolina's unequivocal *parens patriae* interest because New Union also wishes to preserve its equitable share of an interstate water source that is being taken by its neighbor state. Furthermore, New Union's interest in protecting its citizens from the negative health and economic consequences of corrupting a clean ground water source with hazardous chemicals also falls into the most traditional categories of quasi-sovereign interests. Here, as in *Georgia*, the threatened territory is proportionally small. In *Georgia*, some crops and orchards near Georgia's border were threatened by noxious gases; here, one of New Union's shared aquifers is threatened by toxic chemicals. However, because that injury could still negatively impact the well-being of New Union's citizens by poisoning water useable for drinking or agriculture, the size of the territory at stake is irrelevant under *Georgia*. In any event, were any of New Union's citizens to ultimately use the contaminated water for ranching or agricultural purposes, the physical scope of the injury would be large.

Finally, New Union's interest is similar to that of petitioner states in *Pennsylvania*, where the threatened injury could have an economic impact that would reach all or most of its citizens.

In the event that Imhoff becomes contaminated, the aquifer could become either impossible or prohibitively expensive to utilize, an expense that would be borne by all New Union citizens as9 shareholders of that state resource. The fact that the water in the aquifer contains sulfur and already requires treatment for use is immaterial; sulfur is generally treatable and innocuous.[1] The presence of a harmless and naturally-occurring compound cannot justify introducing an array of toxic chemicals to a potentially valuable ground water resource. Similarly meaningless is the fact that New Union's citizens are not currently pumping the aquifer— it is within New Union's purview to create preservationist licensing requirements for its waters. If anything, the fact that New Union has perfectly preserved Imhoff demonstrates how strong, not how weak, its interest is. The fact that New Union has not allowed withdrawal from Imhoff fails to change the interest of its citizens in harvestable water. Thus, New Union's quasi-sovereign interests are those which categorically require *parens patriae* standing.

C. New Union is entitled to special solicitude in this Court's standing analysis because it holds a procedural right to review and is acting in its *parens patriae* capacity

When a state is vested with a procedural right, it has standing if there is some possibility that the requested relief will prompt the injury-causing party to reconsider the decision that allegedly harmed the litigant. *Mass. v. EPA*, 549 U.S. at 518. A state protecting its quasi-sovereign interests is entitled to special solicitude in the standing analysis, especially when holding a procedural right to protection. *Id*.

New Union is entitled to special solicitude in this Court's injury analysis. The court below misread *Mass. v. EPA* as creating a new standard for standing and erred in finding that its ruling does not apply here. Instead of creating a new standard, *Mass. v. EPA* recognized that the

[1] *See* USGS Water-Quality Information, http://water.usgs.gov/owq/FAQ.htm#Q27 (last visited November 27, 2011).

concurrence of two factors weighs in favor of finding state standing. First, states are granted additional consideration when acting as *parens patriae* because of their special stake in the matter and their unique ability to defend the interest of their citizens. See *Georgia,* 206 U.S. at 230. When pursuing a quasi-sovereign interest *and* holding a statutory right to protection, states are entitled to special solicitude. *Mass. v. EPA*, 549 U.S. at 518.

Thus, New Union is entitled to special solicitude under *Mass. v. EPA*. Like Massachusetts, New Union is pursuing protection of its quasi-sovereign interests on behalf of its citizenry, and is holding a statutory right to judicial review of an agency action. See *West Virginia v. EPA*, 362 F.3d 861, 868 (D.C. Cir. 2004) (states may challenge agency actions under 5 U.S.C. § 702 APA).

The contamination or loss of New Union's portion of the Imhoff Aquifer are classical quasi-sovereign interests which stand independently from the interest of private parties. Damage to the aquifer would reach a substantial segment, if not all, of its population. Beyond having satisfied the *Snapp* test for *parens patriae* standing, New Union is entitled to special solicitude in this Court's standing analysis.

D. New Union has standing both in its sovereign and proprietary capacities as regulator and owner of the Imhoff Aquifer

It is well settled that a state may bring suit for adjudication of water rights in its capacity as a sovereign. *Rhode Island v. Massachusetts*, 37 U.S. 657, 711 (1838). Additionally, a state, like any institution, may sue for legal injuries to its proprietary interests. *South Dakota v. North Carolina*, 192 U.S. 286, 312 (1904*).* A plaintiff has standing when there is a tight connection between the fundamental goals of the statutes at hand and the type of harm alleged. *Ass'n of Data Processing Serv. Orgs. v. Camp*, 397 U.S. 150, 153 (1970). That interest may reflect conservational, recreational, economic, and even aesthetic values. *Id.* at 154. To have standing, a

state must demonstrate that it has suffered an injury in fact which is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical; (2) that the injury is traceable to the challenged action of the defendant; and (3) that a favorable decision will likely redress that injury. *Lujan*, 504 U.S at 560-61. Because it is clear that the discharge of pollutants into Lake Temp is the direct cause of injury and a favorable outcome would prevent that injury, only the injury-in-fact requirement of Article III standing is at issue here.

In the environmental context, the relevant injury is not injury to the environment but injury to the plaintiff. *Friends of the Earth v. Laidlaw*, 528 U.S. 167, 169 (2000). Supreme Court precedent stands for the proposition that an enhanced risk of harm satisfies the injury-in-fact standing requirement. *See Mass. v. EPA*, 549 U.S at 519 (holding that although Massachusetts had not yet experienced carbon-dioxide related harm, the risk itself was injurious); *Missouri v. Illinois*, 180 U.S. 208 (1901), (holding that Missouri had standing to sue in advance of actual injury where Illinois's activities threatened a portion of the Mississippi river, river bed, and soil within its territory). Additionally, a majority of circuits have recognized that environmental harm is probabilistic by nature, and therefore an enhanced risk of harm constitutes sufficient injury-in-fact. *E.g.*, *Friends of the Earth, Inc. v. Gaston Copper Recycling Corp.*, 204 F.3d 149, 160 (4th Cir. 2000); *Baur v. Veneman*, 352 F.3d 625, 633, 637 (2nd Cir. 2003). Because adopting a more stringent view of the injury-in-fact requirement in environmental cases would essentially collapse the standing inquiry into the merits, general factual allegations of injury resulting from the defendant's conduct suffice to support the claim. *Lujan*, 504 U.S at 561.

Degradation or loss of water resources to which a state is entitled is the quintessential type of injury that gives rise to state sovereign and proprietary standing. *Rhode Island*, 37 U.S. at 711. Water resources need not be affected before injury occurs; instead, the threat of loss is

sufficient. *North Carolina*, 130 S.Ct at 854. In *New Mexico ex rel. Richardson v. BLM*, 565 F.3d 683 (10th Cir. 2009), New Mexico asserted a sufficiently cognizable injury under *Lujan* when a land management program for developing fluid minerals threatened to contaminate a state aquifer with pollutants. *Id.* In *Gaston*, the court found a sufficient injury in plaintiff's reduced use of a lake due to a reasonable fear that a nearby plant was polluting it. *Id.* at 156. In *Laidlaw*, the court found standing where plaintiffs sued a wastewater treatment plant for discharging excessive metals because they could no longer fish, swim, camp, live, picnic, or bird-watch in or near the river and the river looked and smelled polluted. *Id*. at 182.

Here, the addition of pollutants to Lake Temp threatens to contaminate the Imhoff Aquifer. As the above cases make clear, the fact that the aquifer is not yet contaminated, and even the uncertainty as to future contamination, is inconsequential. Rather, the threat of losing the portion of the aquifer to which it is entitled is a cognizable injury-in-fact sufficient for standing. Here, New Union is like New Mexico because its sole concern is that a federal project jeopardizes the integrity of its aquifer, and therefore its useable groundwater. Additionally, though Lake Temp is wholly within the State of Progress, New Union's interests mirror those of plaintiffs in *Laidlaw* and *Gaston* because pollution will impair the lake's aesthetic and recreational value. New Union residents routinely utilize the lake for activities such as bird-hunting, and citizens will not enjoy those benefits during or after the project because of reasonable fears of pollution. Moreover, because interstate roads traverse New Union and Progress, it is presumable that many of Lake Temp's visitors spend tourism dollars in New Union for lodging or otherwise, creating a second economic injury.

The U.S. claims that New Union is estopped here for failure to comment on the EIS. It further criticizes New Union for not completing a time intensive study which would conclusively

establish that the discharged pollutants will contaminate the aquifer. Neither of these claims are availing. Though NEPA is designed to encourage participation, it places no affirmative duty on a party to comment on the adequacy of an EIS in order to seek its review. NEPA does place a "light" participatory burden on an intervener, but an intervener need only participate to the extent necessary to "alert" the agency of its "position and contentions." *Vermont Yankee Nuc. Power Corp. v. NRDC*, 435 U.S. 519, 553 (1978). New Union is not an intervener, but nevertheless met the light burden by alerting DOD to its need to access the property to gather information about the lake's relationship to the aquifer, a request that the DOD informally denied.

Similarly, the fact that New Union has not completed a comprehensive and expensive drilling study does not nullify the threatened injury or make it conjectural or speculative. New Union has already shown that the threat of harm alone is the cognizable injury. Although the threat to the aquifer and loss of recreational and aesthetic properties is sufficient, New Union also presents compelling evidence that the aquifer is likely to be polluted by the discharge. Not only does Imhoff follow the contours of the lake, suggesting a direct hydrological connection, but it is separated from the lake only by unconsolidated alluvial fill, suggesting a high probability that transient chemicals will reach the aquifer.

In any event, New Union never executed the drill tests because the DOD refused New Union access to the lake, effectively prohibiting it from conducting the tests it faults New Union for not completing. The DOD further criticizes New Union for not formally filing a permit request, even though the reason New Union did not do so is clear—to have done so would have been pointless. Even if testing commenced immediately, results would not have been obtained until after the project began, rendering the tests moot. The fact that the injury will occur in spite of completing drilling tests demonstrates the immanency of the injury.

New Union has standing in its *parens patriae*, sovereign, and proprietary capacity. New Union has quasi-sovereign interests in both the economic potential of its share of the Imhoff Aquifer and in protecting its citizens from exposure to toxic chemicals. New Union has a two-fold injury in the loss of recreational and aesthetic uses of Lake Temp and the derivative economic loss from a decline in tourism. Finally, the threatened contamination and correlated loss of its part of Imhoff constitutes a cognizable injury-in-fact under the three-part *Lujan* test for standing. Thus, New Union is also entitled to sovereign and proprietary standing.

II. LAKE TEMP IS A NAVIGABLE WATER, AND THEREFORE SUBJECT TO CWA JURISDICTION, BOTH BECAUSE OF ITS PHYSICAL CHARACTERISTICS AND ITS IMPACT ON INTERSTATE COMMERCE

The Clean Water Act (CWA) prohibits "the discharge of any pollutant," without a permit, 33 U.S.C. § 1311(a), into "navigable waters." § 1362(12). The term "navigable waters," is defined in the CWA as "the waters of the United States, including the territorial seas," § 1362(7), and the Supreme Court has explained that under the CWA, the term includes "something more than traditional navigable waters." *Rapanos v. U.S.*, 547 U.S. 715, 730 (2006) (plurality opinion).[2] Further, such waters need not be either "navigable in fact, or susceptible of being rendered so." *Id*. at 730-31. However, the term must be interpreted consistent with Congressional intent, and in a manner that does not exceed Congress's authority under the Commerce Clause. *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Eng'rs*, 531 U.S. 159, 162 (2001) (*SWANCC*). Thus, the test for whether a body of water is navigable under the CWA is three-fold and must consider: 1) the physical characteristics of the body of water, 2) whether the body of water is properly subject to Commerce Clause authority, and 3) whether it is the type of water that Congress intended to reach under the CWA. *See Rapanos*, 547 U.S. at 724-32;

[2] Note that both Justice Scalia's plurality opinion and Justice Kennedy's concurring opinion agree that the term is not synonymous with traditional notions of navigability.

SWANCC, 531 U.S. at 682-84. Finally, while an administrative agency may not exceed its "statutory jurisdiction [or] authority" in administering a statute, 5 U.S.C. § 706(2)(C), considerable deference is given to an agency's "reasonable interpretation." *Chevron v. NRDC*, 467 U.S. 837, 844 (1984).

A. Lake Temp is a navigable water under the CWA because, although it is wholly intrastate, it falls within the guidelines promulgated by *Rapanos*, and has a significant impact on interstate commerce, both through its recreational uses and its potential to degrade interstate resources

The term "navigable waters," as used in the CWA, has been the subject of significant judicial interpretation, and although there is not a clear test, case law provides some concrete guidelines. *See U.S. v. Riverside Bayview Homes, Inc.*, 474 U.S. 121 (1985); *SWANCC*, 531 U.S. 159 (2001); *Rapanos*, 547 U.S. at 730. Under *Rapanos*, the term "navigable waters" encompasses "relatively permanent, standing or continuously flowing bodies of water 'forming geographic features' that are described in ordinary parlance as 'streams, oceans, rivers and lakes.'" *Id.* at 739 (alteration in original) (quoting Webster's New International Dictionary 2882 (2d ed. 1954). Although a body of water must be "relatively permanent," the *Rapanos* Court explained that it did not necessarily intend to "exclude streams, rivers, or lakes that might dry up in extraordinary circumstances, such as drought," nor did it intend to exclude "*seasonal* rivers, which contain continuous flow during some months of the year but no flow during dry months." *Id.* at 733 n.5. By contrast, waters that would not be covered include "channels through which water flows intermittently or ephemerally, or channels that periodically provide drainage for rainfall." *Id.* at 739. These definitions remain consistent with the Supreme Court's previous acknowledgement that the CWA "applies to virtually all surface water in the country." *Int'l Paper Co. v. Ouellette*, 479 U.S. 481, 486 (1987).

Where a body of water is wholly intrastate, CWA jurisdiction attaches only if the body of water has a "substantial relation to interstate commerce." *U.S. v. Lopez*, 514 U.S. 549, 558-59 (1995); *SWANCC*, 531 U.S. at 677-78, 684. Under *Lopez*, a regulation will not exceed Congress's Commerce Clause authority where it addresses economic activities that "substantially affect[] interstate commerce" when "viewed in the aggregate." *Id*. at 561. Further, the analysis considers whether "the regulatory scheme could be undercut unless the intrastate activity w[as] regulated." *Id.* Thus, the COE promulgated regulations that extend to wholly intrastate bodies of water only where their "use, degradation or destruction…could affect interstate or foreign commerce." 33 C.F.R. § 328.3(a)(3)(i). Indeed, the Supreme Court has recognized that Commerce Clause power is "broad enough to permit congressional regulation of activities causing air or water pollution, or other environmental hazards that may have effects in more than one State." *Hodel v. Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. 264, 282 (1981). In addition, intrastate bodies of water are subject to the CWA where, for example, they "are or could be used by interstate or foreign travelers for recreational or other purposes," or for "industrial purpose by industries in interstate commerce." 33 C.F.R. § 328.3(a)(3)(iii).

In *SWANCC*, the Court determined that "an abandoned sand and gravel pit," which had filled with water and formed a "scattering of permanent and seasonal ponds," was not navigable under the CWA. 531 U.S. at 162-63. The ponds ranged from "several inches to several feet" deep, were located wholly within the state of Illinois, and were described as "isolated." *Id*. at 163, 170. Ultimately, the Court treated the ponds as wetlands for the purpose of applying the rule articulated in *Riverside Bayview Homes*. *See Id.* at 167-68. The Court explained that because the ponds were "not adjacent to open water," nor was there any "significant nexus" to open water, they could not be considered navigable under the CWA. *Id.* Further, although the COE had

asserted jurisdiction based on the fact that the ponds provided habitat for migratory birds (Migratory Bird Rule), the Court did not find this justification sufficient. *Id*. at 173-74. Although the Court did not analyze whether the Migratory Bird Rule was consistent with Congress's authority under the Commerce Clause, it did find that the COE had exceeded its statutory grant of authority. *Id*. at 173-74.

While the presence of migratory birds was not a sufficient basis for CWA jurisdiction in *SWANCC*, an intrastate lake may be subject to the CWA if it supports recreational activities and draws out-of-state visitors. *Colvin v. U.S.*, 181 F.Supp.2d 1050, 1055 (E.D. Cal. 2001). In *Colvin*, the court held that the Salton Sea, an intrastate lake located in California, was a "navigable water" under the CWA. *Id.* The court explained that the lake attracted out-of-state tourists and supported recreational activities such as water skiing, fishing, duck hunting, boating, and jet skiing, and concluded that the Salton Sea was a "water of the United States" and navigable "[u]nder most any meaning of the term." *Id.* The holding in *Colvin* is consistent with Congress's express goal of protecting recreational uses under the CWA. 33 U.S.C. § 1344(c). Finally, even activities pursued in violation of the law may have a substantial effect on interstate commerce. *See U.S. v. Romano*, 929 F.Supp. 502, 509 (D. Mass. 1996) (holding that "hunting wildlife in violation of state law is conduct that, viewed in the aggregate, may have a substantial effect on interstate commerce"); *Gonzales v. Raich*, 545 U.S. 1, 5 (2005) (holding that growing marijuana for personal use affected interstate commerce).

Case law also supports the notion that degradation and destruction of even a purely intrastate lake has an effect on interstate commerce where other natural resources, including groundwater, are affected. In *Sporhase v. Nebraska*, 458 U.S. 941, 954 (1982), the Supreme Court held that "[s]ince ground water, once withdrawn, may be freely bought and sold…ground

water is appropriately regarded as an article of commerce." *Id*. at 949-50. Subsequently, in *U.S. v. NL Industries, Inc.*, 936 F.Supp. 545 (S.D. Ill. 1996) the court explained that "groundwater…do[es] not recognize state boundaries," and "it is within Congress's commerce power to regulate activities that pollute [such] resources, 'even though the threat may come only from intrastate activities.'" (quoting *Lopez*, 514 U.S. at 558) (internal citations omitted).

Finally, waste disposal is an activity that has been held to affect interstate commerce. *See City of Philadelphia v. New Jersey*, 437 U.S. 617 (1978)*; U.S. v. Olin Corp.*, 107 F.3d 1506, 1508-510 (11th Cir. 1997). *Olin* involved a company that was disposing of commercial chemicals on its property. *Id*. at 1508. The chemicals did not migrate off company property, nor did they enter groundwater "because the company regulate[d] groundwater flow beneath its property." *Id.* Applying the *Lopez* test, the court found that even purely on-site disposal of hazardous waste, where there was "no evidence…[of] off-site damage," threatened interstate commerce. *Id*. at 1511. The court explained that "to the extent a chemical plant can dispose of its waste on-site free of regulation, it would have a market advantage over chemical companies that lack on-site disposal options." *Id*. Although *SWANCC* involved similar on-site disposal, it is important to note that the Court in *SWANCC* did not reach the Commerce Clause issue; therefore the holding in *SWANCC* is not a barrier to holding that disposal activities at Lake Temp affect interstate commerce. 531 U.S. at 173.

Lake Temp is navigable and a "water of the United States" under the guidelines promulgated by the Supreme Court in *Rapanos.* As contemplated by *Rapanos*, Lake Temp is a relatively permanent body of water, which is dry only one out of five years. Although Lake Temp dries up occasionally, the Court in *Rapanos* explained that bodies of water which dry up in circumstances like drought may be still be covered under the CWA. Further, Lake Temp is a

large body of water which, at its peak, covers an area of three by nine miles and is significantly more permanent than the seasonal water bodies that the *Rapanos* Court conceded could still be covered under the CWA. Finally, Lake Temp is large enough to form a geographic feature and is described in ordinary parlance as a lake, which makes it consistent with Justice Scalia's definition of a navigable water body in *Rapanos*.

Although *SWANCC* analyzed whether wholly intrastate ponds could be considered navigable under the CWA, the situation in *SWANCC* was different from the case at hand, and the analysis is inapplicable. Unlike the ponds in *SWANCC*, which were wholly seasonal and ranged from only several inches to several feet deep, Lake Temp is large enough and deep enough to support canoes and rowboats on a regular basis. Further, as observed by the District Court, "Lake Temp is several square miles, while the largest pond in *SWANCC* was only several acres." *State of New Union*, slip op. at 7. In *SWANCC*, the Court described the ponds at issue as "isolated." In this case, although Lake Temp is located wholly within the State of Progress, it is not isolated in the same sense as the ponds in *SWANCC*. Instead, Lake Temp lies near the border with New Union, atop an aquifer that crosses into New Union, and is part of a substantial watershed, part of which is located in New Union. Unlike the ponds in *SWANCC*, Lake Temp lies at the lowest point in the watershed, and all of the otherwise uncontaminated surface water in the eight-hundred-square-mile area will flow into Lake Temp and become contaminated as well. Finally, while the presence of migratory birds in *SWANCC* may not have had a substantial effect on interstate commerce, Lake Temp is more than just a stopover for migratory birds—it supports activities that do impact interstate commerce in ways that have traditionally been upheld under the Congress's Commerce Clause authority.

Lake Temp, like the Salton Sea in *Colvin*, supports recreational activities that draw out-of-state visitors and affect interstate commerce. Both Lake Temp and the Salton Sea are lakes located wholly within the boundaries of one state; however, in both cases, the lakes support recreational activities such as duck-hunting, boating, and bird-watching that draw out-of-state tourists. Lake Temp has been used by duck hunters for at least one hundred years, and around one quarter of the hunters are from out-of-state. While it is true that entry to Lake Temp is passively prohibited by the DOD, courts have held that even illegal activities, including illegal hunting, can have an impact on interstate commerce.

Furthermore, the degradation of Lake Temp could substantially affect interstate commerce through the destruction of natural resources such as groundwater. In this case, the Imhoff Aquifer lies directly below Lake Temp, and the boundaries of the aquifer cross into New Union. Any degradation of Lake Temp would likely affect groundwater in the Imhoff Aquifer. Thus, since groundwater is an article of commerce under *Sporhase v. Nebraska*, the degradation of Lake Temp could affect interstate commerce. This is especially true because, as recognized in *NL Industries, Inc.*, groundwater does not respect state boundaries, and contaminated groundwater could cross into the New Union portion of the aquifer.

Finally, the discharge of waste from spent munitions into Lake Temp is an activity that affects interstate commerce under *Olin*. Although the disposal activities at Lake Temp will be wholly intrastate, the impact on interstate commerce is similar to the impact in *Olin* because the DOD will not have to arrange for off-site disposal of its waste. In fact, the potential to impact interstate commerce is even greater in this case because here there is also a potential to degrade interstate resources. While the Olin Corporation regulated groundwater flow below its property, there is no similar regulation here, leaving the Imhoff Aquifer vulnerable to contamination.

B. The COE's determination that Lake Temp is navigable was reasonable because it is consistent with Congress's intent, as well as applicable case law, and is therefore entitled to deference

Where an agency is charged with administering a statute, the agency's interpretation of statutory language "is entitled to considerable deference," and "a court may not substitute its own construction of a statutory provision for a reasonable interpretation made by the…agency." *Chem. Mfrs. Ass'n v. NRDC*, 470 U.S. 116, 125 (1985). The CWA expressly seeks to maintain water quality that will "provide[] for the protection and propagation of fish, shellfish, and wildlife," as well as protect "recreation in and on the water." 33 U.S.C. § 1251(a)(2). In light of this purpose, it was reasonable for the COE to interpret the term "navigable waters" to extend to waters, like Lake Temp. The COE's decision is reasonable, even in light of *SWANCC*, because that case involved a very different set of facts. There was no evidence that the ponds at issue in *SWANCC* supported recreational activities, other than their tangential relation to bird-watching. The discharge of waste into Lake Temp, on the other hand, will have a substantial effect on recreational activities, as well as the potential to degrade interstate resources. Finally, the disposal activity itself is an economic activity, which is subject to Congress's Commerce Clause authority. Under the facts in this case, the COE's determination that Lake Temp is navigable was reasonable and should be afforded deference.

III. THE CORPS DID NOT HAVE JURISDICTION TO ISSUE A § 404 PERMIT BECAUSE THE SLURRY IN THIS CASE IS NEITHER THE TYPE OF MATERIAL INTENDED TO BE REGULATED AS "FILL," NOR DOES IT SATIFSY THE CORPS' OWN "EFFECTS-BASED" TEST FOR DETERMINING WHEN A MATERIAL IS FILL

Congress enacted the CWA with the express objective of "restor[ing] and maintain[ing] the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a). In furtherance of that purpose, § 402 of the CWA authorizes the EPA to "issue a permit for the discharge of any pollutant" into "navigable waters." 33 U.S.C. § 1342(a). The term "pollutant" is

defined broadly, and includes, but is not limited to "solid waste, incinerator residue, sewage, garbage, sewage sludge, munitions, chemical wastes…rock, sand, cellar dirt and industrial [waste]." § 1362(6). However, in some cases, a pollutant is also a "fill material," and the COE, rather than the EPA, has authority to issue the permit under § 404, which governs the "discharge of dredge and fill materials." § 1344(a), (d). The term "fill material" includes materials such as "rock, sand, soil, clay, plastics, construction debris, wood chips," as well as "slurry, or tailings or similar mining-related materials," but does not include "trash or garbage." 40 C.F.R. § 232.2. A material is also considered "fill" where it is placed into and "chang[es] the bottom elevation of…a water of the United States." 40 C.F.R. § 232.2. However, the term "fill material" does not encompass all materials simply because they have the effect of changing the bottom elevation of water. *See* 40 C.F.R. § 232.2; *Coeur Alaska, Inc. v. Southeast Alaska Conservation Council*, 129 S.Ct. 2458, 2468 (2009). The discharge of pollutants that have merely an incidental filling effect, such as the discharge of "suspended or settleable solids" which may "over time…rais[e] the bottom elevation of a water due to settling of waterborne pollutants," are regulated under § 402, rather than § 404. 67 Fed. Reg. 31129, 31135 (May 9, 2002); *see also Coeur Alaska*, 129 S.Ct. at 2473.

A. The District Court erred in holding that the slurry in this case constitutes fill material under *Coeur Alaska*, because the facts in that case were substantially different, rendering it inapplicable here

In *Coeur Alaska*, the Supreme Court held that a slurry consisting of crushed rock and water, which was discharged into a navigable lake, and was expected to substantially raise the lakebed, was a fill material under § 404. 129 S.Ct. at 2464. *Coeur Alaska* involved a mining company that proposed to dispose of leftover mining slurry, consisting of thirty percent crushed rock and approximately seventy percent water, in a nearby lake. *Id.* In approving a permit for the

discharge, the COE determined that the slurry constituted a "fill material" in part because it was expected to raise the lakebed by approximately fifty feet. *Id.* at 2464-65. All parties agreed that the slurry mixture would contain only trace amounts of metals or other substances normally regulated by the EPA's performance standards for hazardous substances. Brief for Respondents at 4, *Coeur Alaska, Inc. v. Southeast Alaska Conservation Council*, 129 S.Ct. 2458, 2468 (2009) (Nos. 07-984, 07-990). In a concurring opinion, Justice Breyer noted that applying the EPA's performance standards to a fill material that contained only trace amounts of hazardous substances would "undermine the objective of § 404." *Id*. at 2477-78. Finally, in upholding jurisdiction under § 404, the Court noted that the situation presented in *Coeur Alaska* was not that of a discharger "attempt[ing] to evade the requirements of the EPA's performance standard[s]" by "smuggl[ing] a discharge of EPA-regulated pollutants into [fill material]." *Id.* at 2473 (citing Memorandum from Diane Regas, Director, Office of Wetlands, Oceans and Watersheds, U.S. Environmental Protection Agency to Randy Smith, Director, Office of Water, Region X (May 17, 2004).

The slurry mixtures that DOD proposes to discharge into Lake Temp are substantially different from the slurry mixture at issue in *Coeur Alaska*, both in terms of their constituent parts, as well as their effect. The first slurry mixture that DOD proposes to discharge into Lake Temp consists of liquid, semi-solid and granular materials that are emptied from spent munitions and mixed with a an array of hazardous chemicals. By adding water to this mixture, the DOD proposes to make "slurry." Unlike the slurry in *Coeur Alaska*, the DOD's mixture contains not just trace amounts of hazardous substances; it is *primarily* comprised of hazardous substances, and contains no traditional fill materials. Moreover, the DOD's slurry has little, if any, filling potential, and therefore would not meet the COE's definition of material that changes the bottom

elevation of water. Instead, it is more like "suspended or settleable solids" that merely have an incidental filling effect over time and are subject to § 402. Even the EPA argued to the OMB that this mixture required pre-treatment and was subject to § 402 because it was a non-fill liquid.

The second slurry that DOD proposes to discharge consists primarily of pulverized metals. Pulverized metal is not analogous to the crushed rock used in *Coeur Alaska*, or any other material traditionally used as fill. Furthermore, while DOD's second slurry mixture may have greater filling potential than the first, it will still only raise the elevation of the lakebed by several feet—a far cry from the 50-foot elevation change in *Coeur Alaska*, and more like incidental fill. Finally, unlike *Coeur Alaska*, the situation here appears far closer to that of a discharger attempting to evade EPA performance standards by calling its hazardous pollutants "fill." In any event, because the slurry mixtures that DOD proposes to discharge are substantially different from the slurry at issue in *Coeur Alaska*, the outcome here is not bound by that decision.

B. Neither the text of the CWA, nor the COE's own regulations support jurisdiction to issue a § 404 permit under the facts in this case

In determining whether a pollutant is considered a "fill material," the COE applies an "effects-based approach." 67 Fed. Reg. at 31129; *see also* 40 C.F.R. § 232.2. Classic examples of activities that require a § 404 permit include the construction of infrastructure or structures in water, such as road fills, dams, artificial islands, seawalls, levees, berms, and similar structures, as well as the filling activities described above. 40 C.F.R. § 232.2. While such structures are typically constructed using materials like rock and sand, in the most recent amendment to its regulations, the COE decided to include slurry, tailings and mine overburden in the definition of "fill material." 40 C.F.R. § 232.2. The rationale behind including mining waste within the scope of § 404 was that it usually "consists of material such as soil, rock and earth, that is similar to 'traditional' fill material used [for] creating fast land for development." 67 Fed. Reg. at 31133.

The materials that DOD proposes to discharge into Lake Temp are neither analogous to the materials typically subject to § 404, nor is there any indication that the COE intended to regulate such materials as "fill." Unlike rock, sand, soil, or any of the other inert materials that normally constitute fill material, the "slurry" that DOD proposes to discharge into Lake Temp contains pulverized metals and hazardous chemicals. While the COE's regulation contemplates "slurry" in its definition of fill material, this term must be read in context. The term slurry appears in a list which reads "slurry, or tailings or similar mining-related materials," indicating that the intention was to permit *mining* slurry. Even if the term is ambiguous, "administrative rules are to be construed to effectuate the intent of the enacting body." *E.g. Rucker v. Wabash Railroad Co.*, 418 F.2d 146, 149 (7th Cir. 1969). Neither the EPA nor the COE indicated that a slurry mixture containing large amounts of hazardous chemicals or other pollutants such as crushed metal would meet the definition of fill. To the contrary, both agencies have made clear that the new definition was "intended to maintain [the] existing approach to regulating pollutants under either section 402 or 404," and not to "open[] up waters of the U.S. to be filled for any waste disposal purposes." 67 Fed. Reg. at 31133, 31135. Finally, even assuming that agency intent is not clear, traditional principles of construction require that "words grouped in a list should be given related meaning." *Dole v. United Steel Workers of Am.*, 494 U.S. 26, 36 (1990). This canon of statutory construction is equally applicable to administrative regulations. *E.g. Rucker v. Wabash Railroad Co.*, 418 F.2d 146, 149 (7th Cir. 1969). Here, the fact that the word "slurry" is followed by the phrase "or similar mining-related materials" clarifies that the intent was to include mining slurry, and not just any slurry, no matter how toxic or polluting. Pulverized metal, the contents of spent munitions, and the hazardous chemicals used to render

the munitions non-explosive are far from traditional fill materials, and are far from the type of substances contemplated in either the text or the history of the COE's regulation defining fill.

IV. BY RELYING UPON AN ERRONEOUS INTERPRETATION OF *COEUR ALASKA* AND THE INAPPROPRIATE INTERFERENCE OF THE OMB, EPA'S FAILURE TO VETO THE § 404 PERMIT IS REVIEWABLE AS AN ARBITRARY AND CAPRICIOUS ABUSE OF DISCRETION

A court may "hold unlawful and set aside agency action, findings, and conclusions found to be...arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law...." 5 U.S.C. § 706(2)(A). Judicial review is presumed except where "agency action is committed to agency discretion by law." *Id.* at § 701(a)(2). This exception from reviewability is "very narrow." *Citizens to Preserve Overton Park, Inc. v. Volpe,* 401 U.S. 402, 410 (1971). An action, or failure to act, is arbitrary and capricious when the agency relies on factors that Congress did not intend for it to consider or runs counter to the evidence before the agency. *San Francisco Baykeeper Inc. v. Browner,* 147 F.Supp.2d 991, 1003 (2001).

A. OMB's involvement was improper because it has no authority to resolve this inter-agency dispute

Some agencies are concerned with what government does, but the OMB, said President Nixon when reorganizing that office into its modern form, should be "primarily concerned with *how* we do it, and *how well* we do it." Reorganization Plan No. 2 of 1970, 3 C.F.R. 939 (1966-70). Other duties included improvement of information systems, improving interagency cooperation and development of executive talent. *Id.*

In 1993, President Clinton outlined how OMB would coordinate the legislative rule-making duties of agencies. Exec. Order No. 12866, 3 C.F.R. 638 (1994). If one agency believed another was implementing a rule that would conflict with its own, it would alert OMB. *Id.* at Sec. 4(c)(F)(5). OMB's review functions were allowed only "to the extent permitted by law," and

nothing was to be "construed as displacing the agencies' authority or responsibilities, as authorized by law." *Id.* at Sec. 7, 9. Although it may make policy recommendations to agencies, the OMB does not typically regulate industries, adjudicate cases, implement substantive programs or enforce law. *U.S. v. Philip Morris USA, Inc.*, 218 F.R.D. 312, 321 (D. D.C. 2003). When an interagency dispute between two agencies "whose heads serve at the pleasure of the President" concerns legal matters or the question of which agency has regulatory jurisdiction, those conflicts must be resolved by the Attorney General. Exec. Order No. 12146, 3 C.F.R. 409 (1979).

i. Executive Order 12088 is inapplicable in this case

If one agency notifies another executive agency that it is violating a pollution standard and conflict ensues, the EPA Administrator will try to resolve the conflict; if she cannot resolve it, the Administrator may request assistance from the OMB pursuant to Exec. Order No. 12088, 3 C.F.R. 243 (1978).

The order does not apply to the issue at bar because it is an internal rule meant to bring government facilities themselves into environmental compliance. In the lower court, defendants erroneously based the OMB's adjudicatory authority on the above order. *State of New Union*, slip op. at 10. But this order plainly applies to the polluting activities of agencies themselves and should not be invoked where one agency is concerned with another's permissiveness toward the private sector. Neither plaintiff nor the EPA has accused the COE of polluting by way of its day-to-day operations. And even if they had, the order makes clear that the EPA Administrator has the right of initial review and need not look for any overarching authority. If, *arguendo,* the EPA's desire to veto the COE permit fell within this order, the EPA has final decision-making power and would have simultaneously made the 12088 ruling by going through with the veto.

ii. The EPA is an independent agency and subject to less presidential influence

Within the Executive, there are two kinds of agencies: those that serve at the will of the President, or pure "executive" bodies, and those that are considered "independent." This distinction speaks to how much influence Congress wished the President to have on the agency. *See* Lisa Bressman, Robert Thompson, *The Future of Agency Independence*, 63 VAND. L. REV. 599, 607 (2010). Independent agencies operate with increased autonomy. *S.E.C. v. Federal Labor Relations Auth.*, 568 F.3d 990, 997 (D.C. Cir. 2009). When the EPA was created, its independence from executive interference was strongly touted by then-President Nixon. Reorganization Plan No. 3 of 1970, 3 C.F.R. xx (1970) *reprinted in* 5 U.S.C. Appendix 1.

In *Humphrey's Executor v. U.S.*, 295 U.S. 602, 619 (1935), the court found that President Roosevelt's firing of the Federal Trade Commissioner was invalid where he could be removed only for "inefficiency, neglect of duty or malfeasance in office." Unlike a postmaster, said the court, which is restricted to executive functions, the FTC was more like a "legislative aid" meant to carry out legislative policies and could not "in any proper sense be characterized as an arm or an eye of the executive." *Id.* at 628. The authority of Congress to create agencies that discharge their duties "independently of executive control cannot well be doubted . . . ." Without it, the agency could not be "depended upon to maintain an attitude of independence against the latter's will." *Id.* at 629.

If at least one agency is independent, the justiciability principle preventing a unitary executive from suing itself does not apply. *S.E.C. v. Federal Labor Relations Auth.*, 568 F.3d at 997. (Kavanaugh, J., concurring). In this case, the FLRA determined that SEC had committed unfair labor practices by increasing wages without negotiating with a union. *Id.* at 992. Although the majority dealt little with one agency suing another ostensibly within the same branch, the

concurrence dealt with that issue exclusively. *Id.* at 997. If the dispute had involved "two traditional Executive Branch agencies," said Judge Kavanaugh, it would not have been "adverse" under the case-and-controversy requirement. *Id.* However, an independent agency is "sufficiently adverse to a traditional executive agency to create a justiciable case." *Id.*

Because the EPA, like the FTC in *Humphrey's*, is an independent agency, activities that it carries out in accordance with a Congressional mandate are not meant to be controlled by the executive or his agents, such as the OMB. The proper place for resolving the appropriateness of independent agency action is the courts. If all entities technically operating within the executive branch were truly united and an extension of the President's will, they would not be able to sue one another as occurred in *S.E.C.* – a presidential decree would end the matter minus judicial hassle. Thus, even if the OMB was operating as an arm of the President, its reach would not extend to an EPA power granted explicitly and exclusively to it by Congress such as vetoing § 404 permits. Like the FTC in *Humphrey's,* the EPA is a "legislative aid" that must be "depended upon to maintain an attitude of independence."

iii. Any executive interpretation of law is tentative because it is ultimately the judicial branch that says what the law is

It is the province of the Judiciary to say what the law is. *Marbury v. Madison,* 5 U.S. 137, 177 (1803). When there is an express authorization by Congress, Presidential power is at its strongest, but without such grant, his authority exists in a realm of "twilight." *Youngstown Sheet v. Sawyer,* 343 U.S. 579, 636-38 (1952) (Jackson, J., concurring). Agency heads may submit questions of law to the Attorney General. 28 U.S.C. § 512.

Although the Attorney General, as legal representative of the Executive Branch, has authority to issue legal opinions upon which agencies may rely, that authority is overruled by judicial interpretation. *Pueblo of Taos v. Andrus,* 475 F.Supp. 359, 364 (1979). In *Pueblo of*

Taos, the AG opined on a dispute between the Departments of Interior and Agriculture as to the proper survey line marking an Indian reservation. *Id.* at 363. The court stated that harm caused via administrative action, even if relying upon an AG opinion at the time, remains challengeable under the Administrative Procedure Act (APA). *Id.* at 364, 365. The AG's opinion was held to be in error. *Id.* at 367.

In the instant case, relying upon the opinion of the OMB, even if it represented the will of the President, would not be the final word on the law. More importantly, it is the Attorney General, not the OMB, that is trained and qualified to make legal interpretations and recommendations. Because the AG never engaged this controversy at all, it cannot be said that the Executive has brought its Article II power to bear on the issue. But even if it had, it would remain the providence of this court to interpret the questions of law for itself.

Where there is a specific statutory grant of authority, an agency such as the OMB may resolve disputes. In *Electronic Data Sys. Fed. Corp. v. General Servs. Admin.*, 792 F.2d 1569 (Fed. Cir. 1986) (*Electronic Data*), the court resolved a jurisdictional dispute between the General Services Administration and the Government Printing Office by discovering statutory language that gave the OMB explicit control. *Id.* at 1573. The section read as follows: "In the absence of mutual agreement between the Administrator and the agency ... such proposed determinations shall be subject to review and decision by the Office of Management and Budget ...." *Id.* at 1578.

Even where an executive order granted it limited authority to review costs and benefits, OMB's interference with substantive actions of a an agency was held unacceptable. *Environmental Defense Fund v. Thomas*, 627 F.Supp. 566, 571 (1986). When OMB held up an EPA regulation with a statutory deadline by pressing for less regulation of waste-disposal leaks

than EPA had planned, *id.* at 569, the court said that such use of EO 12291 "raises some constitutional concerns" because Congress deliberates on a policy for years and then delegates to the expert judgment of the EPA Administrator to carry out the law. If OMB encroaches on that expertise, it would be "incompatible with the will of Congress." *Id.* at 570.

In the present case, unlike *Electronic Data,* the OMB has no statutorily granted authority and, thus, no role to play in resolving disputes under the CWA. Nowhere in the Act itself nor the agencies' regulations is it contemplated that the OMB can resolve agency jurisdiction over water pollution. Though its originating text and myriad executive orders have granted powers over procedure, efficient money management and coordination of new legislative rules, there is nothing granting a generalized adjudicatory power over controversies such as this. As discussed above, such questions are properly directed to the Attorney General or the courts.

By intimidating the EPA into abandoning its original intention to veto the § 404 permit, the OMB has effectively delayed proper agency action as occurred in *Environmental Defense Fund.* This contravenes the Congressional intent that the CWA's primary administrator, an expert on what does or does not adversely affect waters, could overrule the COE, which specializes in infrastructure, if the latter is unaware of the harm it permits. A veto decision is substantive and beyond the scope of any procedural aspect that OMB might influence while attempting to coordinate the executive. As in *Environmental Defense Fund,* any further interference should be barred.

B. EPA's decision is reviewable and not wholly discretionary

An agency may claim discretion as reason for escaping judicial review only where the guiding statute is "drawn in such broad terms that in a given case there is no law to apply." *Citizens to Preserve Overton Park* at 410 (quoting S. REP. NO. 79-752 (1945)).

Whenever, "on the basis of any information available to him," the EPA Administrator "finds that any person is ... in violation of any permit condition ... under § 404 of this Act by a State, he shall issue an order requiring such person to comply ... or he shall bring a civil action ...." 33 U.S.C.A. § 1319(a)(3). Although the Army Corp of Engineers is granted authority to manage § 404 permits, the Administrator of the EPA is "authorized" to override them if she determines they will have an "unacceptably adverse effect" on the waters involved. 33 U.S.C. § 1344(c).

In 1971, the Chairman of the Senate Committee responsible for creating the Federal Water Pollution Control Act, Jennings Randolph, made it clear that little was to be left to chance when regulating pollution. "We have written into law precise standards and definite guidelines on how the environment should be protected," he said. "We have done more than just provide broad directives for administrators to follow . . . ." 117 CONG.REC. 38,805 (1971).

Authority varies on whether the EPA's veto power under § 404(c) is too discretionary for review. In *City of Olmsted Falls v. U.S. EPA,* 266 F.Supp.2d 718, 723 (N.D. Ohio 2003) the northern district of Ohio felt it was. It found "nothing mandatory on the face of the statute requiring the Administrator to exercise his veto power." *Id.* The District of Columbia, conversely, found a "degree of discretion" but did not consider it a "roving license to ignore the statutory text" where the EPA's decision had nothing to do with whether or not the permitted activity would have an "unacceptably adverse effect." *Alliance to Save the Mattaponi v. U.S. Army Corps of Eng'rs,* 606 F.Supp.2d 121, 140 (D. D.C. 2009) (*Alliance*). The court emphasized that whether a decision not to veto was arbitrary and capricious should be measured by its attention to the statutorily prescribed concern of "adverse effect" on the waters. *Id.* Instead, the EPA official had based his decision on extrinsic concerns such as the potential diversion of

resources required to have a notice and comment period, as well as the likelihood that the permit would result in litigation. Because he "relied on factors which Congress has not intended," the decision was arbitrary and capricious. *Id.* at 141.

Authority also conflicts as to whether the enforcement provisions of § 309(a)(3) are mandatory. The plaintiffs in *South Carolina Wildlife Fed. v. Alexander*, 457 F.Supp. 118 at 121, 128 (D. S.C. 1978) sought relief against the EPA which, upon being informed that water released from dams contained pollutants, did not force the COE to comply with § 309(a)(3). The court found that even if a formal finding were required prior to enforcement action, the finding itself would be non-discretionary upon awareness of a violation. *Id.* at 130; *see also Illinois v. Hoffman*, 425 F.Supp. 71 (S.D.Ill. 1977); *U.S. v. Phelps Dodge*, 391 F.Supp. 1181 (D. Ariz. 1975)). The court then held that "shall," as it appears in § 309(a)(3), imposes a duty on the EPA to, at minimum, issue a compliance order once a violation is found. *Id.* at 134. It contrasted the more-permissive use of "may" in a parallel section of the Clean Air Act to show that Congress intended no discretion when it came to water. *Id.* at 130-131 (referencing Clean Air Act, 42 U.S.C. § 7413).

Holding the other way, *Amigos Bravos v. EPA*, 324 F.3d 1166 (10th Cir. 2003) found attorney fees could not be recovered under the "catalyst theory" because plaintiffs had not forced the EPA to issue a § 402 permit halfway through the lawsuit. Although stating that the "he shall" language "does not impose a mandatory duty on the Administrator," *id.* at 1171, the court acknowledged it had a faulty fact pattern upon which to interpret § 309(a)(3). "[E]ven if § 309(a)(3) mandates certain action, it certainly did not mandate what the EPA ended up doing in this case." *Id.* at 1173. Second, no "finding" was ever made because the person identifying the pollution had no authority to declare the agency as a whole knew about the violation. *Id.* at 1172.

So pervasive and systemic is the policy of environmental protection that "law to apply" in the present case can be derived from every branch of government. The opinion of *Alliance* is more persuasive than *City of Olmstead* because it better incorporates the Senate Committee's declaration that the CWA is not meant to be a collection of "broad directives" from which an agency can pick and choose, as well as recognizing that any exception from reviewability is "very narrow" and the APA's acknowledgement that discretion can be "abused."

In contrast to *Amigos Bravos,* which comes across as insecure and doubtful about its own position, not to mention dealing with moot facts, *South Carolina* is supported by Congressional intent that expects the EPA Administrator to take action whenever and wherever an unacceptable discharge of pollution comes to her attention. It would be absurd to think that Congress simultaneously created a loophole allowing for passive acquiescence wherever the COE carelessly permits violations. The 404(c) veto power should be viewed as a continuation of the § 309 enforcement power, albeit one that had to be specifically drafted to address a sister agency rather than regulated entities.

Further, the *Alliance* court found one section of the CWA alone suffices to create applicable law, much less the government-wide mandate described above. The EPA has a non-discretionary duty to base its decision solely upon what Congress directed: the potential adverse affects upon the water. And once the proper evidence has been relied upon, if it reveals a violation, the Congressional intent on display in § 309 requires a veto. Even if *City of Olmstead* were correct as to the discretionary nature of carrying out a veto, it failed to address how the decision should be made and upon what grounds, leaving *Alliance* to fill that gap. Adverse affects are the only permissible concern.

The leading case discussing lack of agency enforcement, *Heckler v. Chaney*, 470 U.S. 821 (1985), acknowledges a presumption against reviewability for agency inaction, *Id.* at 831. That presumption does not reach situations where the agency "flatly claims that it has no statutory jurisdiction to reach certain conduct." *Id.* at 839 (J. Brennan, concurring).

The EPA's failure to veto the § 404 permit is not an issue of enforcement, for it is not directed at the non-compliance of a regulated entity. It is an agency adjudication and, had it vetoed, such action would merely have been a determination that a § 404 permit would result in "adverse harm" to the water. The prosecutorial or "enforcement" language of the CWA is contained in § 309(c) and applies where discharges are occurring minus any permit at all or outside the permissible scope of issued permits. If the lack of veto were equated to lack of enforcement, the initial preparation to veto and then retreat after consultation with the OMB mirrors the behavior of an agency that has been whipped into believing it no longer has jurisdiction to fulfill its originally contemplated action. As Justice Brennan explained above, judicial review is not withheld where an agency claims it has no jurisdiction to reach certain conduct.

Ultimately, the executive order relied on to justify the OMB's participation was inapplicable; no other statute, regulation or order grants the required authority; as an independent agency, the EPA is not subject to unmitigated control by the executive; and if EPA had deferred to any governmental entity, it should have been the Attorney General, which was never consulted. The OMB is concerned with money, logistics and presenting a consistent executive face to the public. It has no expertise concerning pollution and how it affects water bodies. The EPA, conversely, is not to be concerned with the impact on other agencies, the good graces of

the president or how much paperwork is involved. It must look to the adverse affects of the pollution. It was not proper to rely on or acquiesce to the OMB when making a veto decision.

Lastly, the evidence, as described in part-III of this brief, depicts a discharge distinguishable from that in *Coeur Alaska* that is ineligible for a § 404 permit. Thus, failing to veto was also an improper response to the facts. For the foregoing reasons, EPA's failure to veto is reviewable, as well as arbitrary and capricious.

CONCLUSION

Lake Temp is a navigable body of water under the CWA based on its physical characteristics and its impact on interstate commerce. Thus, the COE's determination that Lake Temp is navigable was reasonable and is entitled to deference. However, a § 404 permit issued by the COE is inappropriate where the pollutants involved are predominantly toxic chemicals and any resemblance to substances deemed "fill," either traditionally or as defined under *Coeur Alaska*, is minimal. How the DOD would use these materials likewise bears no resemblance to standard fill material. Here, a § 402 permit issued by EPA is required by the CWA. Because the pollutants would ruin the lake and threaten the Imhoff Aquifer, New Union has standing as *parens patriae* and in its sovereign and proprietary capacities. Because the EPA has statutory obligations to take action when adverse affects to navigable waters are brought to its attention—vetoing the COE in this case—its failure to do so out of deference to the OMB, which had no authority to substitute its decision, is an arbitrary and capricious abuse of discretion in violation of the CWA. Thus, New Union may challenge an improperly grounded agency decision and the EPA should be compelled to veto the COE and issue its own permit.