Team No. 43

C.A. No. 11-1245

IN THE UNITED STATES COURT OF APPEALS
FOR THE TWELFTH CIRCUIT

STATE OF NEW UNION,

Appellant and Cross-Appellee,

v.

UNITED STATES,

Appellee and Cross-Appellant,

v.

STATE OF NEW PROGRESS,

Appellee and Cross-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW UNION
Honorable Romulus N. Remus

Brief for UNITED STATES - Appellee and Cross Appellant

ORAL ARGUMENT REQUESTED

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STATEMENT OF JURISDICTION

The State of New Union sued the U.S. Army Corps of Engineers (COE) and the U.S. Environmental Protection Agency (EPA) (collectively "United States") in the district court for the District of New Union. The district court had jurisdiction under Article III, Section 2, Clause 1 of the Constitution because the United States was a party to the case. The district court also had jurisdiction under 28 U.S.C. § 1331 (West 2011).

The district court granted the United States's motion for summary judgment on June 2, 2011, holding New Union lacked standing to bring the case. This appeal arises from the final judgment that disposes of the parties' claims, and this Court's jurisdiction to hear the appeal arises from 28 U.S.C. § 1291 (West 2011).

STATEMENT OF THE ISSUES

I. Whether the State of New Union lacks standing to bring suit against the United States in New Union's sovereign capacity or in its *parens patriae* capacity.

II. Whether Lake Temp falls under the definition of navigable waters under the Clean Water Act providing the Corps of Engineers with jurisdiction to issue a section 404 permit.

III. Whether a permit to discharge slurry into Lake Temp should come from the Corps of Engineers under section 404 rather than from the Environmental Protection Agency under section 402 of the Clean Water Act.

IV. Whether the Office of Management and Budget acted within the limits of the Clean Water Act when it resolved a dispute between the Corps of Engineers and the Environmental Protection Agency about which agency had jurisdiction over permits to discharge slurry.

STATEMENT OF THE CASE

The State of New Union sought judicial review under section 702 of the Administrative Procedure Act (APA), 5 U.S.C. § 702 (West 2011), and 28 U.S.C. § 1331 (2011), of an individual permit issued by COE to the Department of Defense (DOD) under section 404 of the

Clean Water Act (CWA), 33 U.S.C. § 1344 (West 2011), for the discharge of slurry into Lake Temp. New Union alleged the permit was invalid because EPA should have issued the permit under section 402 of the CWA, 33 U.S.C. § 1342 (West 2011). The State of Progress intervened.

The United States filed a motion for summary judgment and the district court rendered its decision on June 2, 2011. In its decision, the court held: 1) New Union lacked standing to bring the suit; 2) COE had jurisdiction to issue a section 404 permit for the addition of fill material to Lake Temp; and 3) the Office of Management and Budget (OMB) did not violate the CWA by resolving the dispute. New Union and Progress filed timely notices of appeal, which this Court granted on September 15, 2011.

STATEMENT OF THE FACTS

In an arid region of the State of Progress, the United States owns and operates a military reservation surrounding a body of water called Lake Temp. (R. at 3-4.) During the rainy season, waters flow down the mountains from the eight hundred square miles around the lake, and when full, Lake Temp stretches nine miles long and three miles wide (R. at 3-4.) In those rainy years, ducks migrating from the Arctic use the intermittent waters of Lake Temp as a stopover, and for at least the last century, attracting hunters and birdwatchers from Progress and the surrounding states have traveled there. (R. at 4.) During the dry seasons, the lake recedes, completely drying out once every five years. *Id.*

When the United States added the lake to the military reservation in 1952, it posted signs every one hundred yards noting entry was illegal and warning of danger, but the area remains unfenced. *Id*. The ground between Lake Temp and the nearest state highway shows proof of the continuing public use. Hunters and birdwatchers dragging canoes and rowboats leave visible trails from the highway down to the edge of the lake. *Id.*

The Imhoff Aquifer lies beneath Lake Temp, buried under nearly a thousand feet of alluvial fill. (R. at 4.) The military reservation covers ninety-five percent of the aquifer, but a small arm reaches under the border of Progress into New Union. *Id*. Otherwise, little is known about the shape or size of this subterranean, sulfur-filled aquifer. (R. at 5-6.) The sulfur makes the water non-potable and unfit for agricultural use without treatment. (R. at 6.) New Union law requires a permit before withdrawing any water from the aquifer but, the state has no record of anyone receiving one. (R. at 4.)

DOD announced plans to build a facility on Lake Temp to treat spent munitions. (R. at 4, 6.) DOD's plan involves emptying munitions of their contents, mixing the contents with chemicals, pulverizing any remaining solids, and adding water to create a slurry. (R. at 4.) DOD plans to spray the slurry evenly along the desiccated lake bed where it will quickly dry out. *Id*. Over the life of the project, the treated fill will raise the elevation of the lake bottom by roughly six feet. *Id.*

In 2002, DOD completed an Environmental Impact Statement (EIS) for the project under the guidelines of the National Environmental Policy Act (NEPA). New Union did not comment or object during the process. (R. at 6.) Before COE could issue the permit, a disagreement over jurisdiction arose between EPA and COE. (R. at 9.)

Neither side was moved by the other's arguments. In order to resolve the dispute, COE and EPA separately briefed OMB. (R. at 9, n.1.) After a meeting, OMB settled the dispute by an oral directive indicating the project fell within COE's jurisdiction. (R. at 9.) Consistent with OMB's position, EPA took no further actions. (R. at 9-10.)

SUMMARY OF THE ARGUMENT

New Union does not have standing to bring suit against the United States either in its *parens patriae* capacity or in its sovereign capacity. New Union lacks *parens patriae* standing because the United States is the opposing party and because it fails to show a concrete injury to its citizens. New Union is not entitled to relaxed standing in its sovereign capacity because it failed to assert a procedural right under the CWA. New Union also failed to show sufficient injury to meet relaxed standing.

COE has jurisdiction to issue a permit for DOD's project under the CWA because Lake Temp meets the definitions of both "waters of the United States" and "navigable waters" through its connection to interstate commerce. COE also has jurisdiction to issue a permit under section 404 of the CWA because DOD plans to discharge a fill material. Contrary to New Union's argument, COE's position within DOD does not create a conflict of interest.

Finally, the district court correctly found that participation by OMB had no impact on the permit's validity. Under both the Constitution and federal law, OMB has authority to resolve disputes between executive agencies. Further, OMB's directive on agency jurisdiction had no bearing on EPA's decision to take no further action regarding the permit.

STANDARD OF REVIEW

This Court considers questions of law on appeal *de novo*. *Theriot, Inc. v. United States*, 245 F.3d 388, 395 (5th Cir. 1998). Review of a federal agency's action falls under the APA, 5 U.S.C. § 702 (2011), and should only be reversed if the agency "relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency." *Motor Vehicle Mfrs. Ass'n of the U.S., Inc. v. State Farm Mut. Auto Ins. Co.*, 463 U.S.

29, 43 (1983). The standard of review is highly deferential, and courts have recognized they should review agency decisions to ensure "a certain minimal standard of rationality." *Gulf Restoration Network v. U.S. Dep't of Transp.*, 452 F.3d 362, 368 (5th Cir. 2006).

ARGUMENT

I. NEW UNION DOES NOT HAVE STANDING TO BRING SUIT AGAINST THE UNITED STATES EITHER IN ITS *PARENS PATRIAE* CAPACITY OR IN ITS SOVEREIGN CAPACITY.

There are two standing doctrines available solely to state litigants. First, a state may act as *parens patriae*, guardian of its citizens, when some harm threatens their health, comfort, or safety. *Louisiana v. Texas*, 176 U.S. 1, 19 (1900); *Broselow v. Fisher*, 319 F.3d 605, 608 (3d Cir. 2003). A state has standing under the doctrine of *parens patriae* if it can meet two conditions: 1) the state asserts a quasi-sovereign interest in the well-being of its citizens; and 2) the interest at stake is "sufficiently concrete to create an actual controversy." *Snapp v. Puerto Rico*, 458 U.S. 592, 600-01, 607 (1982). Second, a state litigant has standing under the relaxed test articulated by the Supreme Court in *Massachusetts v. EPA* if: 1) the state has a specific procedural right to challenge the exercise of a sovereign prerogative; 2) the state asserts an interest in protecting its sovereign territory; and 3) the injury to the state's interest is sufficiently concrete. 549 U.S. 497, 517-20 (2007). In this case, New Union lacks standing in either its capacity as *parens patriae* or in its sovereign capacity.

A. New Union lacks *parens patriae* standing.

New Union cannot claim *parens patriae* standing in this case for two reasons. First, a state cannot stand as *parens patriae* when the United States is the opposing party, and second, New Union's citizens have not suffered a concrete injury.

1. New Union cannot stand as *parens patriae* on behalf of its citizens against the United States.

New Union's citizens are also citizens of the United States, and "no state has the duty or power to enforce its citizens rights regarding their relationship with the federal government." *Massachusetts v. Mellon*, 262 U.S. 447, 485-86 (1923). As the Supreme Court held in *Mellon*, a state may not sue the federal government in its *parens patriae* capacity "to protect citizens of the United States from the operation of the statutes thereof." *Id.*; *Snapp*, 458 U.S. at 609 n.16 ("A State does not have standing as *parens patriae* to bring an action against the Federal Government."). When a state citizen alleges injury from the operation of a federal statute "it is the United States, and not the state, which represents them as *parens patriae*." *Snapp*, 458 U.S. at 600. Therefore, because New Union claims only an injury to its citizen, Mr. Dale Bompers, the state cannot properly claim *parens patriae* against the United States.

2. New Union cannot prove injury to its citizens.

Even if New Union could assert *parens patriae* standing against the United States, New Union cannot prevail in showing a concrete injury to its citizens. A state has *parens patriae* standing when it asserts an injury arising from harm to the state's land, air, or water. *See Missouri v. Illinois*, 180 U.S. 208 (1900); s*ee also Georgia v. Tennessee Copper Co.*, 206 U.S. 130 (1907). A state can prove injury by showing: 1) an interest in the alleged injury "sufficiently concrete to create an actual controversy between the State and the defendant"; and 2) an "alleged injury to a sufficiently substantial segment of its population." *Snapp*, 458 U.S. at 602, 607. New Union's claim fails in both respects.

First, New Union has not shown a concrete injury to its citizens sufficient to create an actual controversy with the United States. New Union failed to show DOD's project at Lake Temp would harm its citizens either economically or by endangering their health. Mr. Bompers

claims the ranch he owns and operates will lose value if the aquifer below his land is contaminated but fails to offer any proof. (R. at 6.) Additionally, New Union offered no evidence proving Mr. Bompers or anyone else ever used the aquifer, or that Mr. Bompers has any plans to use the aquifer in the future. *Id.* Also, Imhoff Aquifer is already contaminated by high levels of naturally-occurring sulfur, making it non-potable and unfit for agricultural use without treatment. *Id.* Further, New Union failed to provide any evidence proving the likelihood of further contamination. (R. at 5-6.)

Furthermore, Mr. Bompers could not be injured because he does not have a right to use the water in the aquifer. Under state law, anyone pumping water out of an aquifer must first receive a permit from New Union's Department of Natural Resources. (R. at 6-7.) Until the state approves the permit, no citizen has a right to draw water out of the ground. Without the right to draw the water, there can be no injury. *Id.*

Second, New Union failed to show a sufficient portion of its population would potentially suffer harm from the project. New Union only points to one citizen in need of protection, Mr. Bompers. Even if other citizens live above the aquifer, only five percent of the aquifer extends into New Union making it unlikely to impact a large portion of the state's population. (R. at 4.) Because New Union failed to show either a concrete injury to its citizens or an injury to a substantial number of its citizens, this Court should affirm the district court's decision that New Union lacks standing.

B. New Union does not have standing to sue in its sovereign capacity.

Massachusetts v. EPA establishes the threshold question to determine when a state is entitled to a relaxed standing analysis. 549 U.S. 497 (2007). First, the state must assert a specific procedural right to seek judicial review of a "sovereign prerogative." *Id.* at 519-20. Second, the

state must assert a "stake in protecting its quasi-sovereign interests." *Id.* If the threshold question is met, a state succeeds by proving a concrete injury to its quasi-sovereign interests. *Id.* at 518. New Union's claim fails on both the threshold question and the merits. First, New Union is not entitled to a relaxed test under *Massachusetts* because it did not seek review under a specific provision of the Clean Water Act. Second, New Union failed to prove a sufficient injury to its quasi-sovereign interests.

1. The relaxed standing test under *Massachusetts v. EPA* does not apply because New Union does not have a procedural right under the Clean Water Act.

The Supreme Court held in *Massachusetts* "a litigant to whom Congress has 'accorded a procedural right to protect his concrete interests … can assert that right without meeting all the normal standards for redressability and immediacy.'" 549 U.S. at 517-18 (*quoting Lujan v. Defenders of Wildlife*, 504 U.S. 555, 572 n.7 (1992)). The litigant need only show "some possibility that the requested relief will prompt the injury-causing party to reconsider the decision that allegedly harmed the litigant." *Id.* at 518. States asserting a specific procedural right to challenge the United States based on a "sovereign prerogative" are entitled to relaxed standards. *Id.* at 519. New Union is not entitled to these relaxed standards because it asserted only a general procedural right under the APA and not a specific right under the CWA to challenge an exercise of a sovereign prerogative. In addition, New Union failed to show that an order invalidating the permit will cause the United States to reconsider the project at Lake Temp.

In *Massachusetts*, the state petitioned EPA to regulate greenhouse gases under section 202 of the Clean Air Act. 549 U.S. at 510. EPA denied the petition. Id. at 517. The state sought judicial review under section 307 of the Clean Air Act. *Id.* Section 307 specifically authorizes challenges to section 202. *Id.*; *see also* 42 U.S.C. § 7607(b)(1) (West 2011). The Court noted the

state's challenge was specifically authorized by Congress and emphasized its "critical importance to the standing inquiry." 549 U.S. at 516. Additionally, the Court expressed that the state challenged a "sovereign prerogative" preempted by the federal government. *Id.* at 519. A state cedes some sovereign powers to the federal government when it joins the Union, including the power to regulate air pollution. *Id.* When Congress exercised this sovereign prerogative by ordering EPA to create emissions standards, it also created a specific, concomitant procedural right to challenge the exercise. *Id.* Because Congress created a specific procedural right to challenge a sovereign prerogative preempted by the federal government, the Court held the state was entitled to "special solicitude." *Id.* at 519-20.

In this case, New Union challenged a permit issued under section 404 of the CWA. However, unlike the statute authorizing review in *Massachusetts*, New Union did not assert a specific, concomitant right to judicial review under the CWA. Rather, New Union sought review under the more general section 702 of the APA. (R. at 3.) Section 702 provides a general procedural right; relaxed standing under *Massachusetts* requires a specific procedural right. Section 404 is a sovereign prerogative under the CWA. Unlike the state in *Massachusetts*, Congress did not grant a specific, concomitant right under section 404 of the CWA. Because New Union is not asserting a specific procedural right to challenge a sovereign prerogative under the Clean Water Act, New Union is not entitled to special solicitude in a standing analysis.

Additionally, New Union failed to show any possibility that the requested relief will prevent the alleged harm to Imhoff Aquifer. New Union asks this Court to invalidate COE's permit by finding EPA had jurisdiction to issue a valid permit. (R. at 7-9.) A valid permit from EPA is just as likely to cause the alleged harm to the aquifer. Additionally, New Union asks this Court to find EPA intended to issue a permit. (R. at 9.) Therefore, New Union asks this Court to

find a valid permit for the project is both possible and probable, and offers no evidence that the requested relief will prevent the project from continuing and causing the alleged harm.

2. New Union cannot succeed on the merits under a relaxed standing test because it cannot prove injury.

In *Massachusetts*, the Supreme Court held a state receives "special solicitude in [a court's] standing analysis" when a state asserts an injury to its sovereign interests, including an interest "independent of and behind the titles of its citizens, in all the earth and air within its domain." *Id.* at 519-20 (quoting *Georgia v. Tennessee Copper Co.,* 206 U.S. 230, 237 (1907)). The Court found that the "special position and interest" of a state is "of considerable relevance" in a standing analysis, distinguishing the treatment of state parties from normal standing requirements under *Lujan v. Defenders of Wildlife*. 549 U.S. at 518 (distinguishing *Lujan v. Defenders of Wildlife,* 504 U.S. 555 (1992)). However, the Court did not overrule the traditional requirement that to prove standing, a party must show "it has suffered a concrete and particularized injury that is either actual or imminent." *Id.* at 517 (quoting *Lujan*, 504 U.S. at 560-61). Because New Union cannot demonstrate an actual or imminent injury to its sovereign interests, it does not have standing even with special consideration for its state status.

Massachusetts claimed EPA's failure to regulate greenhouse gases caused injury because such gases contribute to rising sea levels and the loss of land on the state's coast. 549 U.S. at 508-9, 521-23. In finding the state suffered injury, the Court relied on independent scientific reports that confirmed current and future rising sea levels. *Id.* at 521. The state proved a present injury through evidence that rising sea levels "have already begun to swallow Massachusetts's coastal land." *Id.* at 522. The state also demonstrated a future injury by presenting evidence that sea levels will continue to rise. *Id.* at 522-23. The Court found that because Massachusetts owned "a substantial portion of the state's coastal property, it ha[d] alleged a particularized injury in its

capacity as a landowner" and the "severity of that injury will only increase." *Id.* at 522-23 (internal citations omitted).

While the state in *Massachusetts* offered evidence of both present and future injury, New Union has no evidence of a present injury and only speculation about a future injury. (R. at 5, 6.) Unlike the state's scientific evidence in *Massachusetts*, New Union offers only circumstantial evidence that contaminated water from the lake may reach the aquifer if it seeps through the alluvial fill. (R. at 5.) Moreover, New Union offers no evidence that lake water ever seeps down far enough to join the aquifer. (R. at 5, 6.) In fact, the only scientific evidence in the record is the EIS for this project, which indicates only that the lake's effects on the aquifer remain unknown. (R. at 6.)

New Union claims monitoring wells could provide conclusive scientific evidence. However, New Union did not comment or object to the EIS based on the unknowns or on the failure to install monitoring wells. *Id.* New Union is now time-barred from doing so. *Id.* The Supreme Court held a party challenging agency action under the National Environmental Policy Act (NEPA) for its "failure properly to consider possible alternatives to the proposed action" must first raise the issue to the agency or the objections will be forfeited. *Dep't of Transp. v. Pub. Citizen*, 541 U.S. 752, 764 (2004). Because the EIS could have addressed New Union's alleged injury, New Union forfeited its objections to the project's effects on the aquifer. Additionally, New Union took no steps to develop evidence on its own. (R. at 6.) New Union never requested permission from DOD to install monitoring wells, nor has it taken any other action to provide this Court with factual support of its alleged injury. (R. at 6.)

Without a factual record or scientific evidence, New Union has not "satisfied the most demanding standards of the adversarial process" as required by *Massachusetts v. EPA*. 497 U.S.

at 521. By claiming only speculative future injury without support of independent scientific evidence or showing of present injury, New Union does not have standing under the Supreme Court's analysis in *Massachusetts*.

II. COE HAS JURISDICTION OVER LAKE TEMP BECAUSE IT IS BOTH A WATER OF THE UNITED STATES AND A NAVIGABLE WATER THROUGH ITS CONNECTION TO INTERSTATE COMMERCE.

DOD's project requires a permit under the CWA because Lake Temp meets the definitions of both "waters of the United States" and "navigable waters."

A. Lake Temp is a navigable water because hunters and birdwatchers use it in interstate commerce.

While no statute explicitly defines "waters of the United States," the regulatory definition includes intrastate lakes used by interstate travelers "for recreational or other purposes" when such use effects interstate commerce. 40 C.F.R. § 232.2 (2011). For over one hundred years, hundreds perhaps thousands of duck hunters and bird watchers travel to the lake for hunting and recreation (R. at 4.) At least twenty-five percent of the hunters and bird watchers come from out of state. *Id.* Therefore, Lake Temp is a water of the United States.

In order to determine navigability, courts consider three characteristics. 33 C.F.R. § 329.5 (2011). First, the presence of interstate commerce; second, the physical capabilities for use in commerce; and third, defined geographic limits. *Id.* Lake temp is navigable because it meets all three characteristics.

A lake's navigability is based on its presence in interstate commerce when it is, has, or may be used in interstate commerce. 33 C.F.R. § 329.4 (2011). Additionally, the presence of interstate commerce can be established through the historical use of canoes and boats. 33 C.F.R. § 329.6(a) (2011). Lake Temp's presence in interstate commerce is established by the use of recreational crafts on the lake. The hunters and bird watchers use rowboats and canoes on the

lake, leaving a clearly visible trail from dragging the boats from the highway. (R. at 4.) The boats are part of interstate commerce because they allow the hunters to collect the ducks they kill for transport across state lines. Even though seventy-five percent of the hunters are traveling intrastate, the fact that goods collected from their hunting excursions may enter into interstate commerce is enough of a connection to establish navigability, regardless of whether or not they ever do enter interstate commerce. *See Wickard v. Filburn*, 317 U.S. 111 (1942) (holding wholly intrastate activities may be regulated if they would have a substantial effect on interstate commerce). Although DOD has posted signs restricting entry, DOD has not put up a fence or taken any other measures to restrict public use of the lake even though DOD is aware of the public's continued presence. (R. at 4).

Lake Temp is also navigable because it has the physical capability for use in interstate commerce. A lake is still navigable even when it is "not presently used for commerce, or is presently incapable of such use." 33 C.F.R. § 329.9(a) (2011). Once a body of water is deemed a navigable water, the entire surface of the body of water is considered a navigable and the delineation cannot be extinguished. 33 C.F.R. § 329.6(a) (2011). Additionally, courts have held a waterbody to be navigable even when it is intermittent and occasionally wholly dry. *United States v. Moses*, 496 F. 3d 984, 985-86 (9th Cir. 2007). The historical presence of hunters and bird-watchers and the evidence of boats and canoes demonstrate that Lake Temp is physically capable of use in interstate commerce. Regardless of the fact that Lake Temp is dry one out of every five years, Lake Temp's navigability cannot be extinguished on that basis.

Lake Temp is also navigable because it has defined geographic limits. The limits of a waterbody "may be entirely within a state, yet still be capable of carrying interstate commerce." 33 C.F.R. § 329.7 (2011). Lake Temp has a defined geographic limit maintaining its presence

entirely within the State of Progress, reaching up to three miles wide and nine mile long. (R. at 3-4.) Therefore, Lake Temp meets all the characteristics of a navigable body of water.

Additionally, the state highway that runs alongside of Lake Temp is a channel of interstate commerce. (R. at 4.) The state highway intersects with roads leading to New Union, providing transportation for interstate travelers using the lake. *Id.* The Supreme Court held that state highways shall be open to interstate commerce. *George W. Bush & Sons Co. v. Malloy*, 267 U.S. 317 (1925). Therefore, the lake's close proximity to a state highway connects it to interstate commerce and its status as a navigable water of the United States.

Lake Temp is also navigable because of the connection with interstate commerce resulting from migratory ducks, not just their mere presence. In 2001, the Supreme Court addressed the issue of COE's migratory bird rule. *Solid Waste Agency of N. Cook County v. U.S. Army Corps of Eng'rs*, 531 U.S. 159 (2001) [hereinafter *SWANCC*]. *SWANCC* involved a scattering of permanent and seasonal ponds of varying size that provided a habitat for migratory birds. *Id.* at 162-63. COE denied the section 404 permit to fill in the ponds because of the migratory bird rule protecting habitats, such as intrastate waters, used by migratory birds crossing state lines. *Id.* at 164. The Supreme Court held the migratory bird rule exceeded COE's authority because no significant connection existed between the intrastate activities and interstate commerce. *Id.* at 173-74. The Court held COE could not deny the section 404 permit based solely on the presence of migratory birds. *Id.*

Lake Temp is distinguishable from *SWANCC* in several ways. In *SWANCC*, the Court found the presence of migratory birds was not enough to make the permanent and seasonal ponds navigable waters. However, in this case, the ducks do provide a significant connection between intrastate activities and interstate commerce making the lake a navigable water. Lake Temp is

navigable based on its connection to interstate commerce arising when the hunters and birdwatchers utilize the lake. Furthermore, Lake Temp is considerably larger than the small ponds present in *SWANCC*. Lake Temp is up to three miles wide and nine miles long, and the addition of slurry will increase the surface area by two miles. (R. at 3-4.) Lake Temp is navigable based on its size and connection to interstate travelers, thus it falls under the jurisdiction of COE.

B. Although Lake Temp is intermittent, it is still navigable.

This Court should rely on the decision in *United States v. Moses* to determine this case because an intermittent waterbody may still be navigable. 496 F. 3d 984 (9th Cir. 2007). The court in *Moses* found intermittent creeks that were dry all but two months out of the year were navigable waters. *Id.* at 985-86. The court determined that when flowing, the creek made a substantial impact to connecting navigable rivers. *Id. Moses* is controlling in this case because, similar to *Moses*, Lake Temp is dry one out of five years. (R. at 4.) Similar to the substantial impact in Moses, this case is analogous because Lake Temp has a substantial impact on interstate commerce. Therefore, Lake Temp is navigable despite being intermittent.

The Supreme Court discussed the regulation of intermittent waters and wetlands in *Rapanos v. United States*. 547 U.S. 715 (2006). Rapanos owned the land in question and he intended to backfill the wetlands to develop the area. *Id.* at 720. Water saturated the soil only some of the time and the nearest navigable body of water was eleven to twenty miles away. *Id.* The divided Court issued a plurality opinion limiting the navigability of wetlands to those that are relatively permanent and have a continuous surface connection to waters of the United States. *Id.* at 742. In a concurring opinion, Justice Kennedy determined that wetlands would be considered navigable waters if they possessed a significant nexus to waters that are or were

navigable in fact. *Id.* at 759. The dissenters noted that they would uphold jurisdiction under either test. *Id.* at 810 n.14.

Since Lake Temp is not a wetland area, *Rapanos* does not apply. The lake's connection to interstate commerce sufficiently establishes navigability. It is not necessary to establish a significant nexus or continuous surface connection to other navigable bodies of water as the Court required in *Rapanos*. Although Lake Temp is intermittent, the past and future potential for interstate commerce maintain the lake's navigable status.

Rapanos is also distinguishable because Lake Temp is an intermittent intrastate lake in an arid area. (R. at 4.) COE defines wetlands as areas "inundated or saturated by surface or ground water" sufficient to support vegetation. *United States v. Bailey*, 571 F.3d 791, 800 (8th Cir. 2009) (citing 33 C.F.R. § 328.3(b)). However, the area around Lake Temp is arid. (R. at 4.) Because the military reservation is arid, the land does not likely support the typical vegetation or saturated conditions found in wetlands. Therefore, Lake Temp is navigable because it is an intrastate lake and not a wetland.

III. COE HAS PROPER JURISDICTION TO ISSUE DOD'S SECTION 404 PERMIT.

The permit is valid because slurry is fill material, and COE fairly and neutrally reviewed DOD's application. Slurry is fill material because it raises the bottom elevation of Lake Temp. Section 402 of the CWA, the National Pollutant Discharge Elimination System (NPDES), states "[e]xcept as provided in sections [section 404], the Administrator [of EPA] may… issue a permit for the discharge of any pollutant, or combination of pollutants." 33 U.S.C. § 1342(a)(1) (West 2011). Discharge of a pollutant is defined as "any addition of any 'pollutant' or combination of pollutants to 'waters of the United States' from any 'point source.'" 40 C.F.R. § 122.2 (2011). If

the discharge of the pollutant is fill material, then a section 402 permit is not required. Slurry is both a fill material and a pollutant, requiring a section 404 permit.

Section 404 of the CWA states "[t]he Secretary [of the Army] may issue permits… for the discharge of dredged or fill material into the navigable waters at specified disposal sites." 33 U.S.C. § 1344(a) (West 2011); 33 C.F.R. § 323.3(a) (2011). The statute authorizes the Administrator of EPA to deny or restrict the use of defined areas as disposal sites if she determines "the discharge of such materials into such area will have an unacceptable adverse effect on municipal water supplies, shellfish beds and fishery areas, wildlife, or recreational areas." 33 U.S.C. § 1344(c). EPA has not vetoed COE's section 404 permit because no evidence suggests any adverse effects on the environment from the discharge of slurry into Lake Temp. (R. at 10.)

Under section 502 of the CWA, the definition of pollutant includes munitions. 33 U.S.C. § 1362 (West 2011). Reading these sections together, "discharges of 'pollutants' ...are regulated by EPA, but a subset of pollution discharges - discharges of 'dredged or fill material into the navigable waters at specified disposal sites'- are instead regulated by the Corps." *Nw. Envtl. Defense Ctr. v. Envtl. Quality Comm'n*, 223 P.3d 1071, 1077 (Or. Ct. App. 2009). Because slurry can be considered a pollutant and a fill material, COE has jurisdiction to issue a section 404 permit.

A. Slurry must be regulated as a fill material and not a pollutant under the CWA.

Fill material is defined in two ways: 1) material that replaces any portion of a water of the United States with dry land; or 2) material that changes the bottom elevation of any portion of a water of the United States. 33 C.F.R. § 323.2 (e)(1) (2011); 40 C.F.R. § 232.2 (2011); *see also, Kentuckians for the Commonwealth, Inc. v. Rivenburgh*, 317 F.3d 425, 440 (4th Cir. 2003)

(noting "Congress did not define 'fill material' and left that to the agencies charged with administering § 404."). Federal regulations define "discharge of fill material" as the addition of fill material into waters of the United States including placement of overburden, slurry, or tailings. 33 C.F.R. § 323.2(f) (2011); 40 C.F.R. § 232.2 (2011). COE's permit is valid because the discharge of slurry will raise the bottom elevation of Lake Temp.

For the last twenty-five years, the Department of the Army and EPA have agreed that COE will permit discharges of slurry. The two agencies issued a Memorandum of Agreement (MOA) to clarify permitting and enforcement responsibilities under sections 402 and 404 of the CWA. *See* Water Pollution Control; Memorandum of Agreement on Solid Waste, 51 Fed. Reg. 8871 (Mar. 14, 1986). The MOA states "[i]f it becomes necessary to determine whether section 402 or 404 applies . . . the determination will be based upon criteria in the agreement . . . for certain homogeneous wastes to be regulated under the section 402 (NPDES) Program and certain heterogeneous wastes to be regulated under the section 404 Program." *Id.* at 8871. Furthermore, the MOA provides guidance in determining whether a discharge should be considered a fill material or pollutant. The regulatory language states discharges defined as discharge of fill material "remain subject to section 404 even if they occur in association with discharges of wastes meeting the criteria in the agreement for section 402 discharges." *Id.*

Although the MOA does distinguish between discharges of solid material and those that are liquid or semi-solid, the MOA states a section 404 permit is appropriate if the material is dredge or fill material. *Id.* at 8872. The slurry in this case is a heterogeneous mixture of water, chemicals, and spent munitions that has the effect of raising the bottom elevation of Lake Temp. (R. at 4.) Therefore, the discharge of slurry is a discharge of fill material. COE has jurisdiction to issue section 404 permits for discharge of fill material making its permit issued to DOD valid.

The United States does not contest the fact that the slurry, consisting of spent munitions and hazardous chemicals, is a pollutant as defined by the CWA. (R. at 4, 8-9.) But rather, the slurry is also considered a discharge of fill material falling under the jurisdiction of COE, requiring a section 404 permit. The definition of fill material is the same for both COE and EPA and includes the discharge of slurry. 33 C.F.R. § 323.2 (e)(1) (2011); 40 C.F.R. § 232.2 (2011). The discharge of slurry into Lake Temp will have the effect of raising the elevation of the lake by six feet, clearly making it a discharge of fill material under both definitions. (R. at 4.) Although the discharge may be considered a pollutant and a fill material, the discharge remains subject to section 404 because of the MOA.

When pollutants, including dredge and fill materials, are discharged in a navigable water, a permit is required regardless of whether water is present or not. The court in *United States v. Moses* recognized that pollutants need not reach bodies of water immediately or continuously to inflict serious harm on the environment. 496 F.3d 984, 989 (9th Cir. 2007). DOD's project requires a permit for the discharge of slurry regardless of the fact its slurry is sprayed on the dry areas of the lake. (R. at 4.) Most importantly, a section 404 permit is required because the discharge of slurry on the lake bed will raise the bottom elevation of the lake.

Moreover, because there is no outflow from the lake, the discharge of slurry into Lake Temp furthers the purpose of the CWA by preventing any future discharge of pollutants into other navigable waters. (R. at 4, 8.) DOD's discharge of slurry into Lake Temp will protect "waters of the United States" from becoming polluted because there is no evidence that contamination will migrate to the aquifer or otherwise.

Discharge of fill material requires a section 404 permit because the primary-purpose test no longer applies. In *West Virginia Coal Association v. Reilly*, the court ruled in favor of a

section 402 permit as opposed to a section 404 permit because the discharge had a primary-purpose other than raising the bottom elevation of a waterbody. 728 F. Supp. 1276, 1287-88 (S.D. W.Va. 1989). Notably, the primary-purpose test no longer appears in COE regulations. 33 C.F.R. § 323.2 (2011). With the effects-based test in place, as opposed to the primary purpose test, the discharge of slurry into Lake Temp will have the effect of raising the bottom elevation of the lake, thus making it fill material subject to a section 404 permit. Further, the court stated in *West Virginia Coal* "[i]t is apparent from EPA's definition that the term 'pollutant' is inclusive of fill material; however, it is a pollutant the discharge of which is exempted from EPA's permitting authority under section 402." 728 F. Supp at 1286.

Additionally, the Supreme Court held that a section 404 permit issued by COE was appropriate for discharge of slurry into a lake that was considered navigable waters. *Coeur Alaska v. Se. Alaska Conservation Council*, 129 S. Ct. 2458 (2009). Coeur Alaska wanted to reopen a gold mine using the technique of froth flotation. *Id.* at 2464. This technique would leave behind slurry, water mixed with crushed rock tailings, that would later be discharged into Lower Slate Lake. *Id.* Over the life of the mine, the lake's elevation was estimated to increase by fifty feet, and its surface area would increase from twenty-three acres to sixty acres. *Id.* The Court looked at direct language from the CWA to determine whether a section 404 or 402 permit should be issued, and held "[s]ection 402 thus forbids EPA from exercising permitting authority that is 'provided [to the Corps] in' § 404." *Id.* at 2467. The Court continued "[t]he Act is best understood to provide that if the Corps has authority to issue a permit for discharge under § 404, then EPA lacks authority to do so under § 402." *Id.* The Court deferred to COE's reasonable decision to continue its prior practice in determining whether to issue a section 404 permit. *Id.* at 2477. COE has likewise made a reasonable decision to issue a section 404 permit in this case.

The language of section 402 of the CWA clearly exempts the discharge of fill material from EPA's permitting authority. Even if EPA had an issue with COE granting a section 404 permit to DOD, EPA could have vetoed it, but it did not. (R. at 7.) Congress intended COE to be the regulator of discharges of fill materials into navigable waters, and COE has fulfilled its duty by issuing a section 404 permit to DOD. Furthermore, COE is directly in line with the Supreme Court's ruling in *Coeur* by issuing a section 404 permit. The facts of *Coeur* are similar because both cases involved a discharge of slurry into a lake, and in both cases EPA had an opportunity to veto the permit and did not. (R. at 7.) COE issuing DOD a section 404 permit for discharge of slurry into Lake Temp is directly in line with the CWA, the MOA, and the Supreme Court's holding.

In general, discharges to groundwater are not subject to NPDES requirements because groundwater is not considered a water of the United States. Office of Wastewater Management, Environmental Protection Agency, *Water Permitting 101*, http://www.epa.gov/npdes/pubs/101pape.pdf (last visited Nov. 28, 2011). Additionally, "EPA itself has never promulgated a formal regulation nor issued formal guidance interpreting the CWA to include regulation of groundwater." *Umatilla Waterquality Protective Ass'n, Inc. v. Smith Frozen Foods, Inc.*, 962 F. Supp. 1312, 1317-18 (D. Ore. 1997) (acknowledging that section 1342, which establishes the NPDES permitting system, makes no reference to groundwater). Although New Union provided no direct evidence indicating polluted water would enter Imhoff Aquifer, section 402 does not require DOD to seek a permit under the CWA because Imhoff Aquifer is groundwater, therefore not considered a water of the United States. (R. at 5.) Any pollutant that could be potentially discharged into the aquifer is not subject to the NPDES permitting program; only a section 404 permit is required.

B. COE's relationship with DOD did not create a conflict of interest.

Congress intended COE to issue permits for the discharge of fill material under section 404. In looking toward the legislative history of the CWA, the court cited Senator Jennings Randolf's statements from the legislative debates, "[w]hat we are attempting to do now is provide laws that can be administered with certainty and precision. I think that is what the American people expect we do." *Natural Res. Def. Council, Inc. v. Costle*, 568 F.2d 1369, 1375 (D.C. Cir. 1977) (citing 117 Cong. Rec. 38805 (1971)). When COE issued the permit, it administered the CWA with certainty and precision.

When drafting the CWA, Congress was aware of a potential conflicts of interest arising with COE issuing its own dredge and fill permits as Senator Edmund Muskie explained,

> The power which [the CWA] grants the Administrator of EPA is especially important in connection with Corps of Engineer's projects. In those instances, without subsection (c) of Section 404, the Corps of Engineers would, in effect, be granting itself a permit for the disposal of dredged and fill material. Subsection (c) has provided a valuable check. It has prevented the Corps from being judge in its own cause.

123 Cong. Rec. 39, 188 (1977). Congress inserted a check for EPA to balance any potential conflict of interest in section 404(c). Here, EPA had the capacity to veto the section 404 permit, but did not. (R. at 7.) Therefore, EPA expressly approved COE's section 404 permit because it did not assert its check in this case.

Moreover, Congress specifically intended COE under the Secretary of the Army to be the regulating authority of dredge and fill operations in the United States. Since 1899 the Department of the Army and COE have been charged with regulation of dredge and fill operations in the navigable waters of the United States under the Rivers and Harbors Act. H.R. Rep. No. 95-139 at 20 (1977). The Rivers and Harbors Act was later incorporated into the CWA

expressing Congress's continued support of COE's regulatory authority. *See* 33 U.S.C. § 1341 *et. seq* (2011).

New Union has no basis for its unfounded assertion that COE created a conflict of interest when it issued DOD a section. The mere fact that COE is in a subordinate relationship to DOD does not negate COE's regulatory authority or diminish its neutrality. COE must apply the same legislative and regulatory criteria to DOD as to any other applicant. (R. at 9.) Congress determined COE would issue section 404 permits, and New Union's suggestion to have EPA issue a section 402 permit impermissibly rewrites the CWA and violates the will of Congress. *Id.* EPA's vetoing authority eliminates any conflict of interest. Moreover, citizens can challenge COE permits under the citizen suit provision of the CWA. *See* 33 U.S.C. § 1365 (West 2011). Additionally, the situation of an agency issuing itself a permit is not uncommon. EPA issues permits for its own laboratories and facilities under section 402. (R. at 9.) COE's issuance of a section 404 permit to DOD furthers regulatory certainty and precision and does not create a conflict of interest.

IV. OMB'S LEGAL AND PROPER PARTICIPATION IN SETTLING THE DISPUTE BETWEEN COE AND EPA HAD NO IMPACT ON THE PERMIT'S VALIDITY.

OMB's participation in this case does not violate the Clean Water Act for two reasons. First, OMB had authority to resolve the dispute between COE and EPA regarding jurisdiction over DOD's permit application. Second, EPA's decision to take no further action regarding COE's permit was not influenced by OMB. OMB had authority under federal law and the Constitution to resolve the dispute. Further, OMB did not order EPA to consider factors outside the statute in making its decision. Therefore, this Court should find that OMB's participation in the case had no bearing on the validity of COE's permit.

A. OMB has the authority to resolve agency disputes by issuing directives.

There are two reasons why OMB had the authority to resolve the dispute concerning jurisdiction over DOD's permit between EPA and COE. First, OMB's resolution of the dispute fulfilled the President's Article II duty to faithfully execute the law. Second, OMB's participation in the dispute between COE and EPA only involved the executive branch and complied with the laws of the United States.

1. OMB exercised the President's Article II power when it resolved the jurisdictional dispute between COE and EPA.

Under Article II, Section 1, Clause 1, all power to enforce the laws of the United States vests in the President. Article II, Section 3, Clause 4 requires that the President "take care that the laws be faithfully executed." For the President to enforce the law, he must first interpret the law. Only then can the President devise ways to achieve Congress's goals.

Executive orders are one way the President has to enforce the law and once issued they have the force of law. *See Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952); *City of Albuquerque v. Dep't of Interior*, 379 F.3d 901, 923 (10th Cir. 2004). Since 1970, Presidents have used executive orders to define OMB's role as the arbitrator of disputes between executive agencies. Exec. Order No. 11,541, Prescribing The Duties Of The Office Of The Management And Budget And The Domestic Council In The Executive Office Of The President, 35 Fed. Reg. 10737 (July 1, 1970). The President's power to direct OMB to resolve disputes comes from Article II and is carried out by executive order. For example, in Executive Order 12,088 the President ordered OMB to resolve any conflicts between executive agencies about pollution control plans in federal facilities. Federal Compliance With Pollution Control Standards, 43 Fed. Reg. 47,707 (Oct. 13, 1978). In addition, Executive Order 12,866 requires OMB to review agency rulemaking to ensure that "regulations are consistent with applicable law, the President's

priorities," and consistent agency actions. Regulatory Planning and Review, 58 Fed. Reg. 51,735 (Sept. 30, 1993). Most recently, Executive Order 13,563 affirms the principles found in 12,866 and states OMB's task is part of the process of promoting predictability and reducing uncertainty in the regulatory system. Improving Regulation and Regulatory Review, 76 Fed. Reg. 3821 (Jan. 18, 2011).

OMB properly exercises its authority in cases such as the one before this Court. Agencies such as EPA can and do make mistakes about the current state of the law. Here, EPA mistakenly believed it should issue the permit for DOD's discharge into Lake Temp. (R. at 9.) COE disagreed and the dispute went to OMB for resolution. *Id*. OMB based its decision on the settled law gleaned from section 404's language, EPA's own regulations, and the Supreme Court's decision in *Coeur*.

OMB's purpose is to prevent and correct these mistakes, and courts have given their approval. As the D.C. Circuit stated in *Sierra Club v. Costle*, "[a]n overworked administrator exposed on a 24-hour basis to a dedicated but zealous staff" shows the "desirability of such [Presidential] control." *Id*. 657 F.2d at 406. The court in *Costle* recognized the "practical realities" of running an agency require direct leadership from the President. *Id*.

OMB's role in resolving disputes between agencies does not upset the holding of *Chevron, U.S.A., Inc. v. Natural Res. Def. Council*, 467 U.S. 837 (1984) as New Union argues. (R. at 9.) Under *Chevron*, courts award significant deference to agencies interpreting their own statutes unless that interpretation is arbitrary or capricious. However, even under *Chevron* deference EPA did not have jurisdiction to issue permits for discharges of fill material. Under the holding of *Coeur*, a permit to discharge fill material must come from COE. 129 S. Ct. 2458 (2009). EPA could not usurp COE's authority in light of this decision. Therefore, this Court

should find EPA had no authority to interpret section 404 contrary to the Supreme Court's decision.

2. OMB's decision affected only executive agencies and did not interfere with the rights of any parties outside the executive branch.

Regardless of Congressional intent, OMB's directive affected only COE and EPA, and did not interfere with any adjudicative processes. OMB's directive only required EPA and COE to abide by the settled law. It made no novel interpretations, nor did OMB make any determinations about whether COE should grant the permit or if EPA should veto it. OMB can act with the President's authority to resolve disputes even in the absence of specific legislation.

The President does not enjoy unlimited freedom in directing the agencies because Article II gives no authority to adjudicate the rights of individuals. In many of its decisions, the Supreme Court held that members of the executive branch cannot communicate with an agency concerning the outcome of adjudicative or quasi-adjudicative proceeding. *Meyers v. United States*, 272 U.S. 52, 135 (1926); *Sierra Club v. Costle*, 657 F.2d at 407. Here, however, OMB only issued a directive based on settled law about which agency had authority to adjudicate the permit.

B. EPA's decision to take no further action on the permit followed the law and the agency's regular practice.

Once OMB resolved the jurisdictional dispute between EPA and COE, OMB's participation in the matter ended. EPA used its own discretion to arrive at the rational conclusion that it should take no further action regarding COE's permit of DOD's Lake Temp project.

1. EPA properly exercised its discretion to take no further action on the permit.

In order for New Union to prove that EPA improperly considered OMB's directive in its decision to take no further action, it must needs to show that OMB's directive was "intended to

and did cause [EPA's] actions to be influenced by factors not relevant under the controlling statute." *Tummino v. Torti* 603 F. Supp. 2d 519, 544 (E.D. NY 2009) (quoting *Town of Orangetown v. Ruckelshaus*, 740 F.2d 185, 188 (2d Cir. 1984)). If New Union could present such proof, then EPA's decision not to veto the permit would be arbitrary and capricious. However, nothing in the record indicates that OMB ordered EPA not to exercise its veto authority under 404(c). Additionally, the facts of this case show that EPA correctly declined to take further action on the permit.

Section 404(c) of the CWA defines what EPA must consider when deciding whether to veto a COE permit. If EPA finds after a public hearing and consultation with the Secretary of the Army that an "unacceptable adverse effect" would occur to certain resources as a result of the permitted action, it can veto the permit. 33 U.S.C. § 1344(c). Those resources are: 1) municipal water supplies; 2) shellfish beds and fishery areas; 3) wildlife areas; and 4) recreational areas. EPA must exercise its veto authority when a COE permit would lead to an "unacceptable adverse effect" to one of those resources. 33 U.S.C. § 1344(c); 40 CFR § 231.2(e).

Neither of the first two resources in section 404(c) could not have been a part of EPA's decision. Lake Temp has no current connection to any municipal water supply. The evidence before this Court argues heavily against the idea that Lake Temp would ever be part of a municipal water supply. As the record shows, there is no outflow from the lake, and the lake goes dry one out of every five years. (R. at 4.) Also, Lake Temp does not support aquatic life, and nothing in the record indicates that shellfish beds or fishery areas exist there. Therefore, the second circumstance under 404(c) could not have applied either. The fact that the lake goes dry one out of every five years would argue heavily against the idea that any such activities take place on Lake Temp. (R. at 5.)

The remaining two resources included in section 404(c) at first appear more relevant to the facts in this case. However, they ultimately show that EPA properly exercised its discretion to take no further action on the permit. The record includes references to hunting and bird watching on Lake Temp, indicating a possibility that DOD's project could lead to the loss or destruction of a recreational area. (R. at 4.) But neither Progress nor EPA has designated Lake Temp for recreational use. *Id.* In fact, the warning signs placed every one hundred yards along the reservation boundary indicate that it should not in fact be considered an existing recreational lake. (R. at 4.)

The hunters trespassing onto Lake Temp cannot transform the military reservation into a recreational area. Lake Temp is not recreational even if the federal government knows the trespassing takes place and chooses not to take extraordinary measures to stop them. In *Fesmire v. United States*, the Fourth Circuit held the government's knowledge that trespassers had previously entered a beach through a broken fence did not amount to an implicit invitation to use the property. 9 Fed. Appx. 212 (4th Cir. 2001). Thus, even if the government knows of trespassing going on for many years, that does not change the status of the trespassers or the status of the land they trespass onto. Therefore, the illegal duck hunts on Lake Temp do not make the lake a recreational area. A recreational area must exist before a DOD project could damage it. Lake Temp has no such delineation. Therefore, even if DOD's project would cause damage or loss to the lake, it is not a recreational area and cannot trigger EPA's veto authority under section 404(c).

Finally, the presence of migratory ducks on the lake still does not require EPA to veto the permit. According to the record, COE followed its normal procedures at all stages of its NEPA activities. (R. at 6.) Since DOD's project is located on federal lands, COE was required to

provide the Fish and Wildlife Service (FWS) an opportunity to comment on the permit application and the statute requires COE give full consideration to FWS's recommendations. 33 U.S.C. § 1344(m); 33 CFR § 320.4(c). Therefore, since the record shows that COE followed all normal procedures, this Court should assume that COE gave FWS an opportunity to comment on the application and fully considered those recommendations. If FWS believed that the project would cause any serious harm to the migratory birds, it would have made those concerns known to COE and they would appear in the record and informed EPA's decision about whether to veto the permit. Since the record is silent about any potential harm and New Union fails to produce any evidence to the contrary, this Court should defer to EPA's decision not to exercise its veto authority.

2. EPA's actions throughout the permitting process of DOD's project comport with the agency's past practices.

New Union also notes EPA's original disagreement with COE about its jurisdiction over the permit as evidence that OMB must have directed the agency not to exercise its veto. But EPA's initial position is not determinative of anything. In *Coeur*, the Supreme Court notes that EPA did not veto the COE permit even though in EPA's view, "placing the tailings in the lake was not the 'environmentally preferable' means of disposing them." 129 S. Ct. at 2465. Mere disagreement does not by itself warrant the use of EPA's section 404(c) veto nor is an agency's initial position on an issue binding on later actions. Only the agency's final action has that effect. Here, EPA determined that no further action was necessary and it did so according to the requirements of section 404(c).

EPA's decision to take no further action is consistent with EPA's past use of section 404(c)'s veto. In the forty years since section 404(c) was passed, EPA has only vetoed thirteen COE permits. *See* Environmental Protection Agency, *Chronology of 404(c)*, Actions

http://water.epa/gov/lawsregs/guidance/ wetlands/404c.cfm (last visited November 20, 2011). By comparison, COE processes approximately 80,000 permit actions each year. Corps Permit Data 1988-2008, U.S. Army Corps of Engineers Headquarters, Regulatory Branch. As evidenced by these numbers, there is nothing arbitrary or capricious in EPA's decision to take no further action on the permit, and New Union fails to prove otherwise. Therefore, OMB properly resolved the dispute between COE and EPA, and EPA exercised its proper discretion not to take any further action.

CONCLUSION

For these reasons, the United States of America asks this Court to affirm the lower court's grant of summary judgment and dismiss New Union's claim for lack of standing. This Court should also find New Union's claims fail on the merits. The Corps of Engineers issued a valid section 404 permit to the Department of Defense because the discharge of slurry into Lake Temp is discharge of fill material into navigable water of the United States. Furthermore, the Office of Management and Budget's involvement did not violate the Clean Water Act because the executive branch retains complete authority to direct all agency action under Article II of the Constitution of the United States of America. Therefore, the Corps of Engineers's issued a valid section 404 permit as the lower court held.