Team # 48

No. 11-1245

UNITED STATES COURT OF APPEALS
FOR THE TWELFTH CIRCUIT

STATE OF NEW UNION,

Appellant and Cross-Appellee,

v.

UNITED STATES,

Appellee and Cross-Appellant,

v.

STATE OF PROGRESS,

Appellee and Cross-Appellant.

On Appeal From The United States District Court
For The District Of New Union
Honorable Romulus N. Remus, Judge
Civ. No. 148-2011

BRIEF FOR THE UNITED STATES, APPELLEES

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Regulations

Statutes

Other Authorities

Constitutional Provisions

ABBREVIATIONS

Administrative Procedure Act (APA)

Clean Water Act (CWA)

Dale Bompers (Bompers)

Department of Defense (DOD)

Environmental Protection Agency (EPA)

Executive Order (EO)

New Union Department of Natural Resources (DNR)

Office of Management and Budget (OMB)

State of New Union (New Union)

State of Progress (Progress)

U.S. Army Corps of Engineers (the Corps)

JURISDICTIONAL STATEMENT

The U.S. Army Corps of Engineers' (the Corps) issuance of the discharge permit to the Department of Defense (DOD) was a final agency action that is subject to judicial review under the Administrative Procedure Act (APA). 5 U.S.C. § 702 (2011). The District Court had jurisdiction to hear this case pursuant to 28 U.S.C. § 1331 (2011) because the dispute arose under a federal statute, the Clean Water Act (CWA). The District Court entered a final judgment by granting the United States' motion for summary judgment and dismissed the case. This Court has jurisdiction over Petitioners' timely appeal of this final decision. 28 U.S.C. § 1291 (2011).

STATEMENT OF THE ISSUES

1. Whether the hypothetical and speculative contamination of a portion of New Union's groundwater from the permitted discharge into Lake Temp gives New Union standing to sue in either its sovereign capacity or *parens patriae* capacity.
2. Whether Lake Temp is subject to the jurisdiction of the CWA as a navigable water or a water of the United States.
3. Whether the discharge of fill material is subject to the exclusive permitting authority of the Corps under Section 404 of the CWA.
4. Whether the Office of Management and Budget's (OMB) exercise of its executive dispute resolution authority to resolve a disagreement between the Corps and the Environmental Protection Agency (EPA) was permissible under the CWA and whether EPA's decision not to veto the Corps' permit was proper under the CWA.

STATEMENT OF THE CASE

This case is on appeal from an order issued by the United States District Court for the District of New Union granting the United States' motion for summary judgment. *New Union v.*

United States, Civ. No. 148-2011, at 3 (D.N.U. June 2, 2011).[1] The State of New Union (New Union) brought suit against the United States for the Corps' issuance of an individual permit to the DOD for the discharge of slurry into Lake Temp, a lake located wholly within State of Progress (Progress). *Id.* at 3. New Union argued that EPA should have issued the permit pursuant to section 402 of the CWA, rather than the Corps pursuant to section 404. *Id.* All of the permitted activities will take place in Progress and Progress has intervened. *Id.*

On June 2, 2011, the District Court granted the Corps' motion for summary judgment by ruling on the threshold issue that New Union did not have standing to bring suit. *Id.* at 10. The District Court went on to address the merits of the case solely for judicial economy and held that Lake Temp is a navigable water and the slurry is fill material, so this activity fits squarely within the Corps' jurisdiction under section 404 of the CWA. *Id.* Finally, the District Court found that OMB properly utilized its dispute resolution powers assigned by the President of the United States and did not violate the CWA. *Id.* New Union and Progress appealed.

STATEMENT OF FACTS

The Corps issued a permit to the DOD for the discharge of fill material into a lake located on DOD's property. *New Union*, at 3. The lake, Lake Temp, is located entirely within DOD's military reservation, which are both fully within Progress near the border of New Union. *Id.* at 4.

Lake Temp is fed by runoff from the surrounding hills in Progress and New Union. *Id.* Due to the arid climate of the region, Lake Temp's water volume varies seasonally. *Id.* Most of the seasons are considered "wet years" and during these times the lake can be up to three miles wide and nine miles long. *Id.* Approximately once every five years, the lake may temporarily dry

[1] *New Union v. United States*, Civ. No. 148-2011 (D.N.U. June 2, 2011) refers to the record. Hereinafter, the record of the District Court will be cited as *New Union*, at X.

up. *Id.* Nevertheless, it is a significant water body in the region, serving as habitat for migratory ducks. *Id.* Interstate travelers regularly come to Lake Temp to hunt, bird watch, and boat. *Id.*

Lake Temp is easily accessible for recreational uses because it is located within walking distance of a state highway. *Id.* There are no fences preventing access from the highway, and use from this location is so pervasive that well-worn trails are clearly visible between the highway and the lakeshore. *Id.* DOD is aware that Lake Temp is used for recreational purposes. *Id.* While DOD has placed signs warning against entry, it has not taken any steps to restrict access. *Id.* As a result, Lake Temp continues to be a destination for up to thousands of duck hunters. *Id*.

DOD intends to construct a facility near Lake Temp to receive and prepare munitions. *Id.* The Corps' permit allows DOD to spray a slurry of treated munitions onto dry portions of Lake Temp. *Id.* The slurry will dry immediately, and spraying will only occur for several years. *Id.* The Corps will then grade the lakebed to ensure drainage from the surrounding watershed continues to fill the lake. *Id.* Once complete, Lake Temp will be restored to its former state, with only its bed being several feet higher. *Id.*

Underlying Lake Temp is the Imhoff Aquifer. *Id.* Ninety-five percent of the aquifer lies beneath Progress and five percent lies below New Union. *Id.* The aquifer has high sulfur content and is not potable or suitable for agricultural use. *Id.* No one in Progress or New Union uses the aquifer or has any intention of using it in the future. *Id.* There is no evidence on the record that the permitted DOD activities will further degrade the already unusable water in the aquifer. *Id.*

STANDARD OF REVIEW

A district court grant of summary judgment is reviewed *de novo*. *Defenders of Wildlife v. Salazar*, 651 F.3d 112, 116 (D.C. Cir. 2011). This Court should uphold the District Court's order granting summary judgment in favor of the United States if it finds that there are no genuine

issues of material fact entitling New Union to judgment as a matter of law. *Pres. Endangered Areas of Cobb's History, Inc. v. U. S. Army Corps of Eng'rs*, 87 F.3d 1242, 1246 (11th Cir. 1996). In addition, because this is an appeal from a claim brought under the APA, the United States is entitled to "great deference" unless the Corps' permitting decision is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." *Lands Council v. McNair*, 629 F.3d 1070, 1074 (9th Cir. 2010) (quoting 5 U.S.C. § 706(2)(A)). This Court must defer to the Corps' judgment if it finds that the Corps' decision was well-informed and that the Corps committed no clear error of judgment. *Ctr. for Envtl. Law and Policy v. U.S. Bureau of Reclamation*, 655 F.3d 1000, 1005 (9th Cir. 2011). As long as the Corps satisfies these requirements, this Court must defer to its expertise and not substitute its judgment for that of the agency. *Citizens to Pres. Overton Park, Inc. v. Volpe*, 401 U.S. 402, 416 (1971).

SUMMARY OF THE ARGUMENT

New Union lacks both constitutional and prudential standing to bring this action. New Union's speculative injury to its groundwater does not fall within the "zone of interests" protected by the CWA. Furthermore, New Union does not satisfy Article III standing in either its sovereign or *parens patriae* capacity because it has failed to prove that it or a significant portion of its citizens will suffer an imminent injury from the issuance of the discharge permit. Even if this Court does not hold New Union to the stringent constitutional requirements for standing, the uncertain injury claimed by New Union is too speculative to even meet a more lenient standard.

If this Court finds that New Union has standing, this Court should find that Lake Temp is a navigable water as well as a water of the United States within the meaning of the CWA. Lake Temp is a relatively permanent, standing body of water that is navigable in fact and substantially affects interstate commerce. Further, the Corps' interpretation of "waters of the United States" is

entitled to deference under *Chevron* because it is reasonable in light of the CWA's text, structure and purpose. Even if the court concludes that Lake Temp is not navigable, it is subject to the jurisdiction of the CWA as an open water through the reach of the Commerce Clause.

Additionally, section 404 of the CWA unambiguously grants the Corps exclusive jurisdiction over permits for the discharge of fill material into U.S. waters. Further, the Corps regulations defining fill material are reasonable in light of the CWA's text, structure, and purpose and have been given deference for about thirty years. The discharge into Lake Temp is precisely the fill material defined by EPA and the Corps. Therefore, the Corps properly has jurisdiction over the permit.

Finally, OMB's participation to resolve a developing disagreement between EPA and the Corps regarding the Corps' permit was proper because OMB was acting in its capacity as the manager of executive branch agencies. OMB has authority to resolve such disputes between EPA and other agencies under Executive Order (EO) 12,088. EPA's decision to not veto the Corps' permit after participating in OMB's dispute resolution procedure was also proper because this authority is discretionary. EPA's decision not to exercise its discretion in this instance was permissible under the CWA and is consistent with EPA's past treatment of similar permits.

ARGUMENT

I. NEW UNION LACKS CONSTITUTIONAL AND PRUDENTIAL STANDING BECAUSE IT DOES NOT HAVE A SUFFICIENT INJURY OR INTEREST IN THIS ACTION.

The U.S. Constitution and Congress limit the jurisdiction of the federal courts. *Bennett v. Spear*, 520 U.S. 154, 162 (1997). Article III of the Constitution grants federal courts jurisdiction over "cases and controversies." U.S. CONST. art. III, § 2. As a threshold matter, plaintiffs must demonstrate a personal stake in the controversy to show constitutional standing. *Lujan v.*

Defenders of Wildlife, 504 U.S. 555, 578 (1992). Courts can create additional prudential requirements that plaintiffs must satisfy to bring specific actions. For example, plaintiffs challenging agency action must satisfy prudential standing limitations by showing that their complaint falls within the "zone of interests" protected by the statute invoked in the suit. *Ass'n of Data Processing Serv. Org. v. Camp*, 397 U.S. 150, 153 (1970). Like constitutional standing, the case must be dismissed if this requirement is not satisfied.

A. New Union Lacks Prudential Standing to Sue in Either its Sovereign Capacity or *Parens Patriae* Capacity Because Unpolluted Groundwater Does Not Fall Into the "Zone of Interests" Protected by the CWA.

New Union does not have prudential standing to invoke the CWA to protect groundwater. New Union seeks judicial review of the Corps' issuance of the permit under section 702 of the APA, *New Union*, at 3, which requires a person aggrieved by an agency action to show that the alleged injury falls within the "zone of interests" protected by the statute in question. *Ass'n of Data Processing Serv. Org.*, 397 U.S. at 153. The relevant statute is the "statute whose violation is the gravamen of the complaint." *Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871, 886 (1990).

New Union initiated this action for alleged violations of the CWA, a statute designed to eliminate the discharge of pollutants into navigable waters. 33 U.S.C.A. § 1251(a) (2011). The CWA defines "navigable waters" as "waters of the United States," 33 U.S.C.A. § 1362(7) (2011), which the Supreme Court has repeatedly held governs only "open waters." *Rapanos v. United States*, 547 U.S. 715, 735 (2006). Therefore, the protection of "navigable waters" includes only surface waters. *See Oconomowoc Lake v. Dayton Hudon Corp.*, 24 F.3d 962 (7th Cir. 1994) (holding that groundwaters are not "navigable waters" under the CWA).

Even under its broadest reading, the CWA does not apply to the groundwater or aquifer that New Union alleges may become contaminated. Therefore, this potential injury is not within

the "zone of interests" protected by the CWA. In both its sovereign and *parens patriae* capacities, New Union is claiming an injury to its groundwater, so in either role it lacks standing.

B. New Union Lacks Constitutional Standing to Sue in its Sovereign Capacity Because its Allegations that the Issuance of the Permit May Contaminate the Imhoff Aquifer are too Speculative.

In addition to lacking prudential standing, New Union does not have standing to sue in its sovereign capacity as owner and regulator of the state's groundwater. States can act as litigants in their sovereign capacity to protect their interests in their natural resources. *Georgia v. Tenn. Copper Co.*, 206 U.S. 230, 237 (1907). However, like all other litigants, the state must show that it has a sufficient stake in the controversy to give it Article III standing. *See Massachusetts v. EPA*, 549 U.S. 497 (2007) (in dicta suggesting states are afforded "special solicitude," but applying traditional Article III standing requirements to reach holding). Nevertheless, even if states are given leniency for standing, states must still show with some exactitude that their resources are injured or will likely be in the future.

Here, New Union lacks standing because it has failed to prove that this action will cause the state imminent injury as required for Article III standing. Even if this Court exercises leniency due to New Union's sovereign capacity, New Union has failed to show any likelihood of injury to its natural resources as a result of the discharge permit.

1. New Union Does Not Have Constitutional Standing Because it has Failed to Meet the Requisite Burden of Proof that the Discharge Authorized by the Permit Will Cause an Imminent "Injury in Fact."

The U.S. Supreme Court has developed a test to determine whether a plaintiff has a sufficient stake in the outcome of a case to satisfy Article III standing. To meet this test, (1) the plaintiff must have suffered an injury in fact; (2) the injury must be fairly traceable to the defendant's challenged action; and (3) it must be likely, as opposed to speculative, that the injury

will be redressed by a favorable decision. *Defenders of Wildlife*, 504 U.S. at 560-561. The "injury in fact" must be "an invasion of a legally protected interest which is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical." *Id.* at 560. The burden of establishing each of these elements is on the party invoking federal jurisdiction. *Id.* at 561. New Union has failed to meet this burden.

Courts will not find that the plaintiff has alleged a sufficient injury in fact merely because the plaintiff can conjure up a situation in which he could be injured. In *Los Angeles v. Lyons*, the plaintiff asserted standing to sue the City of Los Angeles for the inappropriate use of a chokehold by police officers on the grounds that he could be subjected to a police chokehold in the future. *Los Angeles v. Lyons*, 461 U.S. 95, 99 (1983). The Court held that the plaintiff's assertion that he may again someday be subject to a chokehold did not create the requisite "actual controversy." *Id*. at 104; *see also O'Shea v. Littleton*, 414 U.S. 488 (1974) (holding that plaintiffs did not have standing based on the speculative argument that *if* plaintiffs proceeded to violate an unchallenged law and *if* they were charged and tried, they would then be subjected to discriminatory practices) (emphasis in original). The Court held that an injury is actual or imminent only if the plaintiff can show a realistic threat of injury, rather than speculative apprehension. *Lyons*, 461 U.S. 95 at 107 n.8.

Like the unsupported hypothetical situation proposed in *Lyons*, New Union's only allegations of injury are based on speculation that water from Lake Temp may someday reach the Imhoff Aquifer. *See New Union*, at 5-6. Nothing in the record indicates that the water from Lake Temp will reach the aquifer, let alone contaminate it. New Union's mere apprehension about this hypothetical situation is not a sufficient injury to grant standing.

On review of a summary judgment motion, the plaintiff has the burden of proof to present more than generalized allegations of an injury. *Defenders of Wildlife*, 504 U.S. at 563. New Union has not met its burden of proof because it has only presented general allegations that contamination may eventually reach the aquifer. New Union cannot even argue that the contamination to the aquifer will occur "soon," which the Court in *Defenders of Wildlife* still found was too speculative for standing. New Union had the opportunity to seek out evidence of potential contamination by installing monitoring wells, but it did not even apply for a testing permit to find out. *New Union*, at 6. Without such evidence, New Union has failed to meet its burden of proving that it suffered an injury in fact.

2. Despite Suing in its Sovereign Capacity, New Union is Required to Meet Article III Standing Requirements.

Despite its status as a sovereign state, New Union must meet the constitutional requirements for standing. The Supreme Court has long held that at a minimum the Constitution requires all litigants to suffer an injury in fact that is likely redressable by a favorable court decision. *Defenders of Wildlife*, 504 U.S. at 560. The Court affirmed this constitutional baseline in *Massachusetts v. EPA* by holding that Massachusetts satisfied the requirements of Article III standing; only in dicta did the Court mention the concept of "special solicitude." 549 U.S. at 520. Since the Court gave no guidance on the mention of "special solicitude," New Union is still required to meet traditional Article III standing requirements.

Nowhere in the text of Article III is there any suggestion that two levels of "case or controversy" exist, one for cases presenting sovereign interests and another for the remainder of cases. Calvin Massey, *State Standing After Massachusetts v. EPA*, 61 FLA. L. REV. 249, 261 (2009). Indeed, the Supreme Court refused to permit any leniency in interpreting the standing requirements by describing the test for standing set forth in *Defenders of Wildlife* as the

"irreducible constitutional minimum." 504 U.S. at 560 (also finding that the requirements are "an essential and unchanging part of the case-or-controversy requirement of Article III"). These foundational requirements cannot be applied differently based merely on the status of the litigant.

Arguing that the Supreme Court overruled its previous unambiguous requirements for constitutional standing in *Massachusetts v. EPA* overextends the importance of the dicta in the Court's decision and creates an impossible rule for lower courts to follow. The Court merely suggested that because Massachusetts had a stake in protecting its quasi-sovereign interests, the state was entitled to "special solicitude." *Massachusetts*, 549 U.S. at 520. However, in the very next sentence the Court explained how Massachusetts met Article III standing requirements and never purported to give the state more lenient treatment. *Id*. at 521; *see also Del. Dept. of Natural Res. & Env't Control v. FERC*, 558 F.3d 575, 579 (D.C. Cir. 2009) ("[S]pecial solicitude does not eliminate the [petitioner's] obligation to establish a concrete injury."). Without any analysis of "special solicitude," or reliance on it in the majority's holding, lower courts cannot create new constitutional law by interpreting these two words without any guidance from the Court. *Agostini v. Felton*, 521 U.S. 203, 235 (1997) (finding that the Supreme Court's interpretation of the Constitution can only be overruled by constitutional amendment or its overruling of prior decisions). Therefore, New Union must be held to the same Article III standing requirements as all other litigants.

3. Even if New Union is Afforded Special Solicitude, it Still Lacks Standing.

If this Court decides to apply an uncertain "special solicitude" analysis to New Union's assertion of standing, the Court should nevertheless uphold the District Court's ruling because New Union's alleged injury is too speculative. Since the Court did not give any guidance regarding how "special solicitude" relates to the standing analysis, the Court's purported

meaning of this phrase must be gleaned from an examination of the state's injury that is sufficient to afford it standing to sue. The injury claimed by New Union is far more speculative than the injury claimed by Massachusetts in *Massachusetts v. EPA*, which was based on both current injuries and undisputed future injuries. The Court held that even though the plaintiffs could not quantify the exact amount of land that would be lost due to global warming, the undisputed allegations that the sea levels were rising and would continue to do so, leading to the loss of sovereign territory, were sufficient for standing. *Id*. at 523 n.21.

Here, the injury claimed by New Union lacks both the existing injury and the guaranteed future injury that the Court required in *Massachusetts v. EPA*. New Union has provided no evidence that the discharge into Lake Temp will ever contaminate the aquifer. *New Union*, at 5. While the Court in *Massachusetts v. EPA* did not require any exact statistics, it affirmed standing only because actual injury had occurred and it was undisputed that the injury would continue into the future. Any assertion that New Union does not need to show even that an injury is likely sometime in the future stretches the Court's single reference to "special solicitude" beyond constitutional limits. This Court should affirm the District Court's grant of summary judgment.

C. New Union Does Not Have Standing to Sue the Federal Government in its *Parens Patriae* Capacity Because the United States is the Ultimate Parent of the Country and a State Cannot Intrude on This Role.

This Court should affirm the District Court's ruling because New Union lacks standing to sue a federal agency in its *parens patriae* capacity. "*Parens patriae*" literally means "parent of the country" and allows states to bring suit to protect their citizens from injury. *Alfred L. Snapp & Son, Inc. v. Puerto Rico ex rel. Barez*, 458 U.S. 592, 600 (1982). A longstanding exception to this rule is that states cannot sue the federal government, including federal agencies, in this capacity. The Supreme Court first put forth this exception in *Massachusetts v. Mellon*. 262 U.S.

447, 485 (1923). The Court held that states do not have the duty or power to enforce the rights of their citizens against the federal government; under such circumstances the United States, not the state, represents the people as *parens patriae*. *Id*. at 486.

The Supreme Court has unequivocally affirmed its intention to prohibit state *parens patriae* suits against the federal government. In *Alfred L. Snapp & Son, Inc.*, the Court stated, "A State does not have standing as *parens patriae* to bring an action against the Federal Government." 458 U.S. at 610. Since this ruling, appellate courts have had little trouble denying jurisdiction on the ground that states do not have standing to sue as *parens patriae* in actions against the federal government. *See e.g.*, *Nevada v. Burford*, 918 F.2d 854, 858 (9th Cir. 1990); *Kansas v. United States*, 16 F.3d 436, 439 (D.C. Cir. 1994).

Massachusetts v. EPA does not change the well settled prohibition of state *parens patriae* suits against the federal government. In *Massachusetts*, the Court held that the State had standing to sue EPA in this capacity with little precedent to support its conclusion. 549 U.S. 497. In a brief footnote, the Court based its application of the rule from *Mellon* on the Court's holding in a case from 1945, thirty-seven years before the Court's unambiguous holding in *Alfred L. Snapp & Son, Inc*. *Id.* (citing *Georgia v. Pennsylvania R. Co.*, 324 U.S. 439 (1945)). This unsupported notation should not give states standing to sue the federal government in their *parens patriae* capacity in light of the long history of cases barring such suits. Here, New Union is similarly barred from bringing suit against the federal government.

D. Even if States Can Sue the Federal Government in their *Parens Patriae* Capacity, New Union Does Not Have Standing Because it Has Failed to Demonstrate Any Injury to the Health or Well Being of a Significant Portion of its Citizens.

Even if New Union can bring this suit in its *parens patriae* capacity, the State has failed to meet the standing requirements for such an action. In order to have Article III standing to

bring a *parens patriae* action, the Supreme Court has determined that the state must: (1) articulate an interest apart from the interests of particular private parties; (2) express a quasi-sovereign interest; and (3) allege an injury to a sufficiently substantial segment of the population. *Alfred L. Snapp & Son, Inc.*, 458 U.S at 607. The Court went on to determine that a state has a quasi-sovereign interest in the health and well being of its residents in general. *Id.*

In this case, New Union has failed to allege an injury that will affect the health and well being of a substantial segment of its population. The injury asserted by New Union must be concrete, rather than speculative. *Quapaw Tribe of Okla. v. Blue Tee Corp.*, 653 F.Supp.2d 1166, 1179 (N.D.Oklahoma, 1998). If the injury is based on future actions, it must be impeding based on definite plans. *Defenders of Wildlife*, 504 U.S. at 564. The injury asserted here, exemplified by Dale Bompers (Bompers), is speculative and uncertain, not concrete and particularized. Bompers owns, operates, and resides on a ranch above the Imhoff Aquifer, *New Union*, at 6, yet even he cannot show that he will be injured by the issuance of the permit. Bompers' claims that his ranch will be diminished in value are irrelevant since he has no proof of any loss of property value. *Id*. Additionally, Bompers has never used the Imhoff Aquifer, nor does he have any plans or ability to use it in the future. *Id*. This injury asserted by New Union, through Bompers, is far too speculative to give New Union standing in its *parens patriae* capacity.

Even if this Court finds Bompers' hypothetical injury sufficiently concrete, it will not affect a large enough segment of New Union's population to give New Union standing. States suing in their *parens patriae* capacity must show that the injury impacts a substantial portion of the state's population, rather than a particular group of individuals. *Alfred L. Snapp & Son*, *Inc.*, 458 U.S. at 607. The injury must affect the state's citizens at large and be sufficiently widespread. *Illinois v. Life of Mid-America Ins. Co.*, 805 F.2d 763, 766 (7th Cir. 1986).

Here, only five percent of the Imhoff Aquifer is located within New Union. *New Union*, at 4. Suing for possible injury to the individuals who may live above this small area is insufficient to grant New Union standing. Furthermore, DNR's permitting program, *New Union*, at 6, prevents any potential injury from being so widespread that it affects New Union's citizens at large. New Union has not showed that anyone will be injured, much less a substantial segment of its population. Thus it does not have standing to sue in its *parens patriae* capacity.

In conclusion, this Court should dismiss New Union's claims because New Union lacks standing in both its sovereign and *parens patriae* capacities. New Union must satisfy both constitutional and prudential standing requirements, and its speculative injury to its groundwater is insufficient to satisfy either. Since New Union lacks standing this Court does not have jurisdiction to hear this case and should dismiss it without review of the merits.

II. LAKE TEMP IS A WATER OF THE UNITED STATES UNDER THE CWA BECAUSE IT IS A NAVIGABLE, RELATIVELY PERMANENT, STANDING BODY OF WATER THAT AFFECTS INTERSTATE COMMERCE.

This Court should affirm the District Court's decision that Lake Temp is a navigable water of the United States. Lake Temp is navigable in fact and a relatively permanent, standing body of water with near continuous flow. Further, Lake Temp is a water of the United States because of its effects on interstate commerce. The text, structure, and evolution of the CWA make clear that Lake Temp falls within its jurisdictional reach as a water of the United States.

A. The CWA's Structure, Purpose, and Evolution Demonstrate its Broad Reach Over All Waters of the United States that Affect Interstate Commerce.

The evolution of the CWA demonstrates its broad jurisdictional reach. The CWA makes it unlawful to discharge pollutants into "navigable waters" without a permit. 33 U.S.C. §§ 1311(a), 1342(a) (2011). In 1977, Congress expanded the definition of "navigable waters" to include "waters of the United States." 33 U.S.C. §1367(2) (2011). In doing so, Congress

expanded CWA jurisdiction to waters that "require neither actual nor potential navigability." *Solid Waste Agency of N. Cook Cnty. v. U.S. Army Corps of Eng'rs*, 531 U.S. 159, 175 (2001) (Stevens, J., dissenting) (*SWANCC*). This amendment shows Congress' intention to expand CWA jurisdiction to protect national waters that are not traditionally navigable.

The Corps has developed regulations to define the phrase "waters of the United States." 33 U.S.C. § 1344 (2011). In 1986, the Corps consolidated its regulatory provisions and defined "waters of the United States" to include traditional navigable waters as well as others, such as "intrastate lakes, rivers, streams [including intermittent streams] . . . the use, degradation, or destruction of which could affect interstate or foreign commerce." 51 Fed. Reg. 41,216-41217 (Nov. 13, 1986); 33 C.F.R. § 328.3(a) (2011) . This encompasses waters "[w]hich are or could be used by interstate or foreign travelers for recreational or other purposes; or from which fish or shellfish are or could be . . . sold" in interstate commerce, or "which are used or could be used for industrial purpose by industries in interstate commerce." *Id*. EPA has promulgated regulations defining "waters of the United States" that are identical to the Corps'. *See* 40 C.F.R. § 230(3)(s) (2011); 40 C.F.R. § 232.2 (2008); *and* 40 C.F.R. § 122.2 (2011).

The Supreme Court has placed limitations on the Corps' CWA jurisdiction. In *SWANCC*, the Court's holding was limited to finding that Corps regulations alone were insufficient to make an abandoned sand and gravel pit a "navigable water." *SWANCC*, 531 U.S. at 174. Similarly, in *Rapanos*, the Court held that the phrase "waters of the United States" includes relatively permanent, standing, or continuously flowing bodies of water "forming geographic features that are described in ordinary parlance as 'streams,' 'oceans, rivers, [and] lakes,' and does not include channels through which water flows intermittently or ephemerally." *Rapanos*, 547 U.S. at 716.

In response to *SWANCC and Rapanos*, the Corps issued guidance to clarify the Corps' jurisdiction and affirm the statute's broad reach. The Corps' 2008 guidance document states that the Corps maintains jurisdiction over navigable waters of the United States defined in modified regulations, guided by decisions of the federal courts, and waters that have historically been used, or could be used in the future, for commercial navigation or water-borne recreation. *See* Envtl. Prot. Agency, *Clean Water Act Jurisdiction Following the U.S. Supreme Court's Decision in Rapanos v. United States & Carabell v. United States*. Although *SWANCC* and *Rapanos* affirmed that some open water is necessary for CWA jurisdiction, they did not narrow CWA jurisdiction over navigable waters or waters that are otherwise subject to the Commerce Clause.

Further, courts have interpreted the terms "navigable waters" and "waters of the United States" expansively to give the CWA its intended legislative effect. *See United States v. Riverside Bayview Homes,* 474 U.S. 121, 133 (1985) (holding that "navigable" is of limited import). The Supreme Court reiterated this in *Rapanos*, holding that "the meaning of 'navigable waters' . . . is broader than the traditional understanding of that term." 547 U.S. at 731.

B. Lake Temp is a Navigable Waterway of the United States Under the CWA.

1. Lake Temp is Navigable in Fact.

Despite the fact that a water body does not need to be traditionally navigable to fall within CWA jurisdiction, Lake Temp is navigable-in-fact and thus a traditional navigable water. In *Utah v. United States*, reaffirming the century-old *The Daniel Ball*, the Supreme Court held that waters are "navigable in fact" when they are used, or are susceptible of being used as highways for commerce, over which trade and travel are or may be conducted. *Utah v. United States*, 403 U.S. 9, 10 (1971); *The Daniel Ball*, 77 U.S. 557, 563 (1870).

Some courts have noted that navigability stretches much further than solely to commercial navigation. *See Ryals v. Pigott*, 580 So.2d 1140, 1150 (Miss. 1990). In *Ryals*, the Supreme Court of Mississippi went so far as to say that navigable in fact means navigable by loggers, fishermen, and pleasure boaters. *Id*. at 1152. The Supreme Court has likewise held that a manmade canal lying wholly within one state is navigable. *The Robert W. Parsons*, 191 U.S. 17, 24 (1903). Here, Lake Temp is currently used and has been used in the past as a highway for interstate commerce for hundreds and potentially thousands of interstate boats, canoes, and hunters. *New Union*, at 7. Lake Temp is presently navigable in fact and is susceptible of being rendered so in the future; it thus falls into the CWA's traditional definition of navigability.

2. Lake Temp is a Relatively Permanent, Standing Body of Water With Near Continuous Flow.

The definition of waters covered by the CWA was further refined in *Rapanos* to include only relatively permanent, standing, or flowing bodies of water. *Rapanos*, 547 U.S. at 732-33. The thrust of the Court's holding in *Rapanos* was that "transitory puddles" and "ephemeral streams" do not come within the CWA's reach. *Id.* at 733. This has no bearing on large, relatively permanent lakes.

Lake Temp is an open water. Lake Temp's geographical categorization connotes *Rapanos*' requirements of a "continuously present, fixed bod[y] of water, as opposed to [an] ordinarily dry channel." *Id* at 733. It stretches across approximately twenty-seven square miles at its largest and has considerable surface water eighty percent of the time. *New Union*, at 4. Its past and current use as a highway for interstate commerce for potentially thousands of interstate boats, canoes, and hunters, denotes the very essence of an open water. *Id.* at 7.

In addition to its surface water stretch, water continuously flows into Lake Temp from an eight hundred square mile watershed of surrounding mountains from multiple states. *New Union*,

at 4. This starkly differs from the *Rapanos* plurality's rejection of federal jurisdiction over "ephemeral streams, 'wet meadows,' storm sewers and culverts, 'directional sheet flow during storm events,' . . . and dry arroyos in the middle of the desert." *Rapanos*, 547 U.S. at 734. Lake Temp fits into the type of open water that both *Rapanos* and *SWANCC* require.

Moreover, the argument that Lake Temp is intermittent and therefore impermanent holds no water. *Rapanos* pointed out that lakes and streams that dry up extraordinarily were an exception to intermittency: "By describing 'waters' as 'relatively permanent,' we do not necessarily exclude streams, rivers, or lakes that might dry up in extraordinary circumstances, such as drought. We also do not necessarily exclude seasonal rivers, which contain continuous flow during some months of the year but no flow during dry months . . . " 547 U.S. at 733. It follows that Lake Temp's occasional intermittency does not exclude it from CWA jurisdiction.

"Moreover, as the plurality opinion in *Rapanos* states, 'no one contends that federal jurisdiction appears and evaporates along with the water.' Once a seasonal waterway falls within the CWA definition of 'waters of the United States,' it is considered a water of the United States whether or not there is actually water in it at the time of discharge." *United States v. Vierstra*, 1:10-CR-204-REB, 2011 WL 1064526 (D. Idaho Mar. 18, 2011) (citing *Rapanos,* 547 U.S. at 733 n. 6). New Union's assertion that Lake Temp is intermittent is inapposite. If Lake Temp is a "water of the United States" at the time of discharge—as it is here—it will always be a water under the CWA. Thus this Court should uphold the District Court's determination.

3. The Corps' Determination that Lake Temp is a Traditional Navigable Water Deserves Deference.

The Corps acted reasonably in interpreting the provisions of the CWA defining "waters of the United States," as well as its own guidance defining this phrase. Since the CWA is silent on defining navigable waters as well as waters of the United States, the question for this Court is

whether the Corps' application of these phrases to Lake Temp is based on a permissible construction of the statute. *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 843 (1984). So long as the Corps' interpretation is not plainly erroneous, this Court cannot substitute its judgment for the Corps'. *Kentuckians for Commonwealth Inc. v. Rivenburgh*, 317 F.3d 425, 446-47 (4th Cir. 2003). Here, the Corps' interpretation of Lake Temp as a "water of the United States" is hardly plainly erroneous. A large lake used for navigation and commercial activity certainly falls into a permissible and reasonable understanding of "waters of the United States," especially given the CWA's legislative history, expansive amendments, and current legal reach. Therefore, the Court should affirm the District Court's holding and defer to the Corps.

C. The CWA Maintains Jurisdiction Over Lake Temp Because of Lake Temp's Effects, and Potential Effects through the Commerce Clause.

The U.S. Constitution grants the federal government power to "regulate commerce . . . among the several States." U.S. CONST. art. I, § 8. This includes commerce that concerns multiple states or affects other states, even if the regulated activity occurs within a single state. *Gibbons v. Ogden*, 22 U.S. 1 (1824); *see also Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 258 (1964) (holding that congressional power over interstate commerce extends to those activities intrastate which affect interstate commerce).

Courts have agreed that EPA and the Corps are permitted to use the broadest possible interpretation of the CWA's definition of "waters of the United States" under the Commerce Clause. *Leslie Salt Co. v. Froehlke*, 578 F.2d 742, 753-55 (9th Cir. 1978). Despite the fact that Lake Temp is an intrastate body of water, federal legislation, including the CWA, is empowered to regulate any economic activity that may "substantially affect interstate commerce." *United States v. Morrison*, 529 U.S. 598, 608 (2000). This authority also includes the "power to regulate the local incidents" of commerce, including local activities which might have substantial

commercial effects. *Heart of Atlanta*, 379 U.S. at 258. Furthermore, so long as there is a rational basis for finding that a regulated activity may have interstate economic effects, courts will not substitute their judgment for political agencies, including the Corps. *Id*.

Federal courts have gone very far in upholding CWA jurisdiction over intrastate waters. In *United States v. Byrd*, the court extended CWA jurisdiction to cover filling activities adjacent to an inland lake visited by interstate travelers through the broad reach of the Commerce Clause where no other commercial activities were present. 609 F.2d 1204, 1209-11 (7th Cir. 1979). Further, "[w]hen relied on 'to support some exertion of federal control or regulation,' the Commerce Clause permits 'a very sweeping concept' of commerce." *Philadelphia v. New Jersey*, 437 U.S. 617, 621 (1978). This jurisdiction certainly extends to the commercial and economic activities that occur at Lake Temp.

At Lake Temp, there is evidence of past, current, and potential use for interstate commerce in accord with traditional jurisdiction over navigable waters, and the Corps' post-*Rapanos* guidance over jurisdiction.[2] At the lake's fullest, it stretches across twenty-seven square miles. *New Union*, at 4. Lake Temp's size shows its potential for commercial use in connection with navigation; evidence of use by boats confirms that it actually is used as such. *Id*. The use by interstate travelers and Lake Temp's proximity to an interstate highway reinforces that these activities may substantially affect interstate economic activity. Notwithstanding the recreational and commercial activities that occur on and near Lake Temp, the dumping of dredge or fill

[2] "For purposes of CWA jurisdiction and this guidance, waters will be considered traditional navigable waters if they are waters currently being used for commercial navigation, including commercial waterborne recreation (e .g., boat rentals, guided fishing trips, water ski tournaments, etc.), or they have historically been used for commercial navigation, including commercial water-borne recreation; or they are susceptible to being used in the future for commercial navigation, including commercial water-borne recreation." Envtl. Prot. Agency, *Clean Water Act Jurisdiction Following the U.S. Supreme Court's Decision in Rapanos v. United States & Carabell v. United States*.

material into Lake Temp is also economic. According to the Supreme Court, solid waste disposal is "commerce." *Philadelphia*, 437 U.S. at 621. Although the discharge of fill differs from solid waste, the discharge here potentially involves manufacturing, construction, land development, job creation, solid waste disposal, and the issuance of contracts to multi-state and even multi-national corporations that may contract with the government. Thus the fill activities to be regulated at Lake Temp are also economic in nature. It follows that Lake Temp is an intrastate body of water that affects interstate commerce through its visitation by interstate travelers, historic and current use by interstate hunters, proximity to interstate highways, make-up of water from various states, and current and potential use as a commercial facility.

Because Lake Temp is under Congress' intended reach when amending the CWA, the interpretation of the courts construing the CWA, and is consistent with current agency guidance and is permissible in light of the statute, this Court should affirm the District Court's holding that Lake Temp is a navigable water. Further, this Court should uphold the District Court's holding regardless of navigability, because activities at the Lake substantially affect interstate commerce.

III. CWA SECTION 404 CLEARLY, EXPLICITLY, AND UNAMBIGUOUSLY GRANTS THE CORPS EXCLUSIVE JURISDICTION OVER PERMITS FOR THE DISCHARGE OF FILL MATERIAL INTO U.S. WATERS.

Section 404 of the CWA explicitly grants the Corps jurisdiction to grant or deny permits for the discharge of fill material into waters of the United States. Section 404 is a more specific, and thus controlling, statutory exception to section 402, governing the discharge of "dredged or fill material" into U.S. waters. Because the discharge material at Lake Temp unambiguously qualifies as "fill material," the Corps had proper jurisdiction over the permit. Further, the EPA-Corps regulations defining "fill material" are reasonable in light of the CWA's structure and purpose. The Corps' determination is thus entitled to deference. Moreover, New Union's

argument that EPA should have authority over the permit because the discharge here may more toxic than other pollutants has no merit. The Corps was the proper agency to exercise jurisdiction over the discharge of fill material into Lake Temp.

A. The Corps Acted Properly in Exercising Jurisdiction Over Discharge of Fill Material into Lake Temp Because Section 404 Permits Cover Dredged or Fill Material, While Section 402 Permits Cover "Other" Pollutants.

1. Section 404 is an Exception to 402.

The CWA makes it illegal to discharge any pollutant into navigable waters before first receiving a discharge permit under sections 402 or 404. 33 U.S.C. § 1342(a)(1) (2011). EPA has the authority to issue permits for the discharges of pollutants, except as provided in other sections. Section 404 is one such exception to EPA's authority. It states, "The Secretary of the Army Corps of Engineers may issue permits . . . for the discharge of dredged or fill material into the navigable waters." 33 U.S.C. § 1344(a) (2011). This is further reiterated by the Supreme Court's holding in *Coeur Alaska, Inc. v. Southeast Alaska Conservation Council*, which held that so long as discharge is "defined by regulation as 'fill material,' 40 C.F.R. § 232.2 (2008)," the Corps has jurisdiction under section 404, rather than the EPA under section 402. 129 S. Ct. 2458, 2463 (2009). Thus the Corps has jurisdiction over fill material.

2. The Specific, 404, Governs Over the General, 402.

The structure of the CWA makes clear that the type of pollutant discharged will determine what permit is required. Section 402 is a general provision, covering discharges of all pollutants. Section 404 provides more exact and precise regulations for specific pollutants that qualify as dredged or fill material. Specific statutory provisions govern over general ones. *Edmond v. United States,* 520 U.S. 651, 657 (1997). "However inclusive may be the general language of a statute, it will not be held to apply to a matter specifically dealt with in another part

of the same enactment." *Fourco Glass Co. v. Transmirra Prods. Corp.,* 353 U.S. 222, 228 (1957). Here, section 404 is an exception to, and more specific than, section 402; it grants the Corps authority to issue permits over dredge or fill material, as opposed to all other forms of discharge. The more exact 404 governs, and this Court should dismiss New Union's claim.

3. Section 404 Defines Fill Material Based on the Effect of the Discharge on the Water Body, Not the Toxicity Level.

The Corps and EPA have jointly defined fill material as "changing the bottom elevation of any portion of a water of the United States." 33 C.F.R. § 323.2. New Union's contention that this case should be differentiated from *Coeur* because the discharge here may be more toxic is unsubstantiated. Whether filling Lake Temp with pulverized munitions is useful, desirable, or wise is not at issue. In *Coeur*, the Supreme Court held that the CWA authorized the Corps, rather than the EPA, to issue a permit to discharge slurry because the slurry fell well within the definition of "fill material." 129 S. Ct. at 2463. Here, the situation at Lake Temp is nearly identical. The toxicity level of the discharge is irrelevant.

EPA and the Corps did "not define fill by degrees of toxicity or inertness." *New Union*, at 8. Whether a discharge qualifies as fill is determined by its effect on a waterbed level. 33 C.F.R. § 323.2. In accord with the agency's regulations defining fill, the slurry discharged at Lake Temp will raise Lake Temp's bottom elevation by six feet at the conclusion of the operation. *New Union*, at 4. Thus, the Corps properly had jurisdiction over the fill raising Lake Temp's depth.

B. The Corps Did Not Exceed Its Authority Because Joint EPA-Corps Regulations Defining Fill Material are Reasonable and Based on a Permissible Construction of the CWA.

The Corps and EPA adopted regulations defining fill material under the CWA. *See* 40 C.F.R. § 232.2 (2008) (EPA); 33 C.F.R. § 323.2 (Corps). Under *Chevron*, if a statute is ambiguous on its face, an agency may employ its own reasonable interpretation of the statute.

467 U.S. at 843. Here, the CWA is silent on defining fill material, making that term ambiguous; therefore, the question is whether the Corps-EPA regulations defining fill material are based on a permissible construction of the CWA. Since the Corps' interpretation is not plainly erroneous, this Court cannot substitute its judgment for the agency. *Kentuckians*, 317 F.3d at 446-47.

1. The EPA-Corps Regulations Reasonably Define Fill Material and are a Permissible Construction of the CWA.

EPA and the Corps have jointly defined fill material to mean any "material [that] has the effect of . . . [c]hanging the bottom elevation" of water. 40 C.F.R. § 232.2 (2008) (EPA); 33 C.F.R. § 323.2 (Corps). In *Coeur*, the Supreme Court held that section 404 empowers the Corps to issue permits for the discharge of fill material, because the agencies' regulations both define fill material to include slurry and similar mining-related waste. The Court further held that because the slurry would raise the bottom elevation of the lake, it fell "*well within*" the Corps' section 404 permitting authority, "rather than the EPA's section 402 authority." *Coeur,* 129 S. Ct. at 2468 (emphasis added). This case is like *Coeur* in all relevant aspects.

Here, the Corps granted a permit for the deposit of slurry over the dry bed of Lake Temp, so that afterwards, the "lake's top water elevation will be approximately six feet higher" than before. *New Union*, at 4. New Union does not contest that fact. *Id*. at 8. Further, just like in *Coeur*, the permit is for depositing slurry onto a lakebed, which the Court held falls squarely within the EPA-Corps definition of fill. *See* 40 C.F.R. § 232.2 (2008); 33 C.F.R. § 323.2.

Second, EPA and the Corps' longstanding history of regulatory division and cooperation with respect to section 404 and 402 permits further affirms that the Corps' interpretation of "fill material" was reasonable. In 2002, EPA and the Corps issued a final rule to clarify the "404 regulatory framework" and ensure that both agencies' regulations were identical and "consistent with existing regulatory practice." 67 Fed. Reg. 31129-01 (May 9, 2002). Importantly, both

agencies stated: "this rule . . . reflects the approach in EPA's longstanding regulations." *Id.* The rule's text shows that the agencies have cooperated extensively to define fill material. This cooperation demonstrates the thoughtfulness of the regulatory definitions. Moreover, the regulations have been given deference over a period of approximately thirty years. Because "fill material" is reasonably defined by EPA-Corps within the context of the CWA, and the Corps' interpretation was reasonable here, the Corps was the proper agency to issue the permit.

2. Although Fill Material is Defined Broadly, the Section 404 Permit Program Adequately Protects the Nation's Waters and Further Demonstrates the Reasonableness of the Definition.

The regulations promulgated by the Corps and EPA are reasonable and permissible in the context of the CWA as a whole. They further the purpose of the CWA to protect the nation's waters. Both agencies gave thoughtful consideration to maintaining the integrity of the nation's waters when drafting their regulations, and the CWA maintains implicit safeguards against abuse. EPA and the Corps recognized that some fill material may exhibit characteristics, such as chemical contamination, which may be of environmental concern, but safeguards exist to protect the nation's waters. *See* 67 Fed. Reg. 31129-01 (May 9, 2002).

As the final rule points out, the "section 404 permitting process exists to protect the nation's navigable waters" and provide a regulatory scheme for doing so. *Id.* In this case, Lake Temp is actually "preventing the discharge of any pollutants or wastewater to other navigable waters, in effect creating zero discharge of pollutants, the goal of the statute." *New Union*, at 8. These protective measures reiterate the reasonableness of the joint EPA-Corps definition of fill material. The CWA does not permit just anything to be deposited into the nation's waters. Discharge, including fill material, must comply with the protective measures of the regulations, other CWA provisions, and other environmental statutes.

Importantly, whether the Corps' action in *approving* the permit for discharge into Lake Temp was proper is not on appeal. It is whether they have jurisdiction to do so. Nothing in the record indicates that the Corps' did not fulfill its statutory duty in following guidelines, and its regulations are permissible in the context of the CWA. Since the authority to regulate the discharge of fill material is explicitly granted to the Corps, and the regulations and interpretation of fill material are permissible in light of the CWA's structure and other protective provisions, this Court should uphold the District Court's grant of summary judgment.

IV. OMB'S INVOLVEMENT IN THE 404 PERMITTING DECISION TO RESOLVE A DISPUTE BETWEEN EPA AND THE CORPS AND EPA'S PARTICIPATION IN THE DISPUTE RESOLUTION DID NOT VIOLATE THE CWA.

OMB's involvement with the Corps' 404 permitting decision was proper because OMB was merely acting in its capacity as an intra-executive branch dispute resolution authority under EO 12,088. OMB's involvement was also proper because OMB was exercising its agency oversight authority as the management arm of the Executive Office. EPA's decision not to veto the Corps' permit did not violate the CWA because EPA's veto power is discretionary. EPA *may* veto a permit if it finds that a project will have an "unacceptable adverse impact" on water and wetland resources. 33 U.S.C. § 1344(c). EPA's decision not to exercise its veto power was also permissible under the CWA.

The President "shall take Care that the Laws be faithfully executed," U.S. CONST. art. II, § 3, and the President has the authority to oversee and manage the components of his own branch. *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 130 S. Ct. 3138, 3146 (2010). The President's authority is not without limitation. *See, e.g., United States v. Nixon*, 418 U.S. 683, 693 (1974) (holding the inherent power of the executive is not without limit). Nevertheless, executive power must be comprehensive due to "[t]he impossibility that one man should be able

to perform all the great business of the State." *Free Enterprise*, 130 S. Ct. at 3146 (quoting 30 Writings of George Washington 334 (J. Fitzpatrick ed.1939)).

OMB's origin is the Budget and Accounting Act of 1921, when it was called the Bureau of Budget. Reorganization Plan No. 2 of 1970, 35 Fed. Reg. 7959 (July 1, 1970), *reprinted in* 31 U.S.C. § 501 (1982). President Nixon created OMB in 1970 explicitly out of the need to better manage the rapidly expanding executive branch. *Id.* Nixon placed OMB in the Executive Office of the President in order to "ensure that the Government could perform 'promptly, effectively, without waste or lost motion,'" with OMB acting as the President's "principal arm." *Id.*

A. OMB's Involvement Constituted a Permissible Exercise of Executive Oversight.

The power of the Executive Branch is vested in the President, and the President is charged with the responsibility of seeing the nation's laws faithfully executed. U.S. CONST., art. II, § 1, cl. 1; art. II, § 3. In order to exercise this power, the President has the power to oversee and administer those within the Executive Branch. *Myers v. United States*, 272 U.S. 52, 135 (1926) (holding limited on other grounds by *Humphrey's Ex'r v. United States*, 295 U.S. 602 (1935)). Administrative agencies are housed within the Executive Branch, and the Executive dictates agency policy and manages agency action. Relation of the President to the Executive Departments, 7 U.S. Op. Att'y Gen. 453, 460-61 (1855).

1. OMB's Exercise of Dispute Resolution Authority Under EO 12,088 Was Proper Because One of OMB's Principal Roles is to Manage the Executive Agencies and Resolve Disputes Between Them.

The President directs OMB's management through executive orders and memoranda. EO 12,088 directs all agencies to comply with federal pollution control standards. *See*, Exec. Ord. No. 12,088, 43 Fed. Reg. 47,707 (Oct. 13, 1978) (section 1-4 revoked by Exec. Ord. No. 12,580 (Jan. 23, 1987)). EPA has the authority to oversee agency compliance with EO 12,088; however,

OMB retains oversight in a dispute resolution capacity. *Id.* at § 1-6. When an inter-agency dispute arises that EPA cannot resolve, EPA has a non-discretionary duty to appeal to OMB's dispute resolution authority. *Id.* at § 1-602 ("If the Administrator cannot resolve a conflict, the Administrator *shall* request the Director of [OMB] to resolve the conflict." (emphasis added).

Dispute resolution procedures such as EO 12,088 allow the Executive to resolve intra-branch conflicts internally. *Tenn. Valley Authority v. EPA*, 278 F.3d 1184, 1199 (11th Cir. 2002) (opinion withdrawn in part on other grounds by *Tenn. Valley Authority v. Whitman*, 336 F.3d 1236, 1248 (11th Cir. 2003)) (*TVA*). In *TVA*, TVA sought review of EPA's decision that TVA had violated the Clean Air Act. *Id*. EPA argued that the dispute was not justiciable because TVA had not complied with the alternative dispute resolution requirement of EO 12,088. *Id.* at 1201. The court rejected this argument because it was up to EPA to initiate EO 12,088 dispute resolution procedures and there was no evidence that it had done so. *Id.* The court further noted that EPA and TVA were welcome to utilize executive dispute resolution and that "the President could bring this litigation to a close on his own initiative at any point." *Id.* at 1203.

In this case, a dispute arose between EPA and the Corps regarding the Corps' decision to permit DOD's fill activities in Lake Temp. *New Union*, at 9. Unlike the situation in *TVA v. EPA,* here EPA and the Corps did avail themselves on the internal executive branch dispute resolution procedures. EPA and the Corps could not decide whether the Corps' permit complied with the CWA, and EPA could not resolve the conflict. If EPA had solved it, OMB never would have become involved because, under EO 12,088, OMB only begins dispute resolution proceedings if EPA cannot resolve the conflict internally. § 1-602. This suggests that EPA's failure to resolve the conflict prompted involvement with OMB. OMB acted in accordance with EO 12,088 by having EPA and the Corps brief their sides then deciding the issue swiftly. *New Union*, at 9 n.1.

2. Regardless of Whether OMB's Assertion of Dispute Resolution Authority Under EO 12,088 Was Proper, OMB's Actions Did Not Violate the CWA.

As the agency charged with management of the Executive Branch, it is OMB's job to oversee agency actions and resolve intra-branch disputes. There is no evidence that OMB acted improperly or extended its authority beyond its mandate. *Sierra Club v. Costle* articulated the fundamental role of OMB as the President's Executive Branch management agency. 657 F.2d 298 (D.C. Cir. 1981). In *Sierra Club*, the court excluded ex parte communications related to an EPA rulemaking from the administrative record. *Id.* One such communication was between the President and high-level agency officials including OMB. *Id.* at 387. The court said that such communications were necessary because "[o]ur form of government simply could not function effectively or rationally if key executive policymakers were isolated from each other and from the Chief Executive." *Id.* at 406. *Sierra Club* stands for the fundamental need for the President to oversee executive agencies to ensure control over their actions and policies. *Id.* at 405.

In this case, OMB was acting in accordance with the principles articulated in *Sierra Club*. OMB was overseeing a dispute between EPA and the Corps in its capacity as the management arm of the President. The President cannot personally oversee every member of every branch. OMB reduces this bureaucratic burden on the President by exercising much of the President's oversight authority in his stead. This is specifically what was contemplated when OMB was created in 1970. *See* Reorganization Plan. Generally, OMB acts within its statutory mandate when it acts in this capacity absent express legislative or executive directive otherwise.

Even when OMB extends its management extensively into agency functions, courts will treat OMB's behavior as proper unless there is clear evidence to the contrary. In *New York v. Reilly*, petitioners challenged EPA's final rules claiming that OMB made improper suggestions and EPA changed its final rule to comply with OMB's suggestions. 969 F.2d 1147, 1152 (D.C.

Cir. 1992). The court held that the mere fact OMB made suggestions was insufficient to show unlawful interference with the rulemaking. *Id.* In order to show improper influence, there would have to be clear evidence that OMB's reasoning had been completely substituted for EPA's. *Id.*

OMB's involvement would only be improper if it exceeded its statutory authority by not fulfilling its management, cooperative, and expeditious purpose in interacting with the agencies. For example, in *Environmental Defense Fund v. Thomas*, the court found that OMB had exceeded its authority when it used its rule-review authority to delay EPA's non-discretionary promulgation of regulations. 627 F. Supp. 566 (D.D.C. 1986). The court acknowledged that the President is afforded deference to control and supervise executive agencies; however, such deference did not extend to OMB when it delayed and imposed substantive changes on the rulemaking. *Id.* at 570. The court went on to clarify that such a holding did intrude to some degree on executive authority, but, in the unusual circumstances of that case, OMB was directly interfering with EPA's ability to comply with its statutory mandate. *Id.* at 571.

Unlike *Environmental Defense Fund*, here there is no evidence that EPA's decision not to veto the Corps' permit was only the result of OMB's dispute resolution involvement, nor is there any evidence of unlawful interference. *New Union*, at 9. Here, OMB's involvement streamlined and expedited the permitting process, and OMB did not do anything to cause EPA to violate its statutory requirements. EPA had no statutory duty to veto the Corps' permit, and, even if EPA initially considered a veto, EPA's concern did not rise to the level necessary for EPA to decide to initiate veto procedures. *Id*. at 10. OMB facilitated the quick resolution of the dispute.

OMB's participation was a proper exercise of its executive oversight authority. OMB did not tread on EPA's authority under the CWA because it did not decide whether or not to initiate veto review authority. OMB merely allowed EPA and the Corps a venue to air their differences,

and, ultimately, EPA decided not to initiate review. As in *Reilly*, EPA may have changed its view after participating in OMB's dispute resolution proceeding, but such a change does not mean OMB unlawfully interfered with EPA's authority. Absent evidence of undue influence or egregious conduct, OMB deserves deference acting in its executive management capacity.

B. EPA Did Not Violate the CWA by Not Vetoing the Corps' 404 Permit.

The CWA gives the Administrator of the EPA the authority to implement the CWA and issue permits for discharges of pollutants, except in certain specified sections. CWA section 402(a)(1) specifically sets section 404 apart from EPA's administration. The Corps, with EPA's input and oversight, administers section 404 instead. Congress decided that the Corps should maintain jurisdiction under section 404 because it would be consistent with the Corps' preexisting authority under the Rivers and Harbors Act. *See* 33 U.S.C. §§ 403, 426p, and 1371 (2011). When the Federal Water Pollution Control Act was amended extensively in 1972, the Corps already possessed jurisdiction to permit filling and dredging in certain circumstances under the Rivers and Harbors Act of 1910, 33 U.S.C. § 401, et seq. (2011) ; thus, Congress merely carried the Corps' jurisdiction over to section 404 of the CWA, subject to some EPA oversight. S. Rep. No. 92-414, at 3751 (1971).

EPA and the Corps have issued joint regulations to implement section 404 as required by 404(b) and 404(q). Additionally, EPA has general oversight authority over the Corps' permitting decisions, including discretionary veto power. EPA and the Corps have a lengthy review process by which EPA initiates a process to consider whether it should exercise this veto power. This process, and the fact that EPA has only vetoed a Corps' permit thirteen times since section 404 was enacted in 1972, establishes that EPA only rarely vetoes a Corps permit.

1. EPA's 404(c) Veto Power is Discretionary and a Decision Not to Veto is Not Reviewable by this Court.

EPA's authority to veto Corps' permits under section 404(c) is discretionary and is therefore not reviewable under the APA. Section 404(c) reads: "The Administrator is authorized to prohibit the specification . . . of any defined area as a disposal site, and [she] is authorized to deny or restrict the use of any defined area for specification . . . ." EPA's own regulations further highlight the discretionary nature of EPA's veto powers by stating that the Regional Administrator "may" initiate specified veto action if he or she finds that "an 'unacceptable adverse effect' could result from the specification or use . . . ." 40 C.F.R. § 231.3(a) (2011). The combination of language in 404(c) and EPA's regulations establish that EPA's veto power is discretionary. *Pres. Endangered Areas of Cobb's History, Inc.*, 87 F.3d at 1249.

Similarly, the APA exempts "agency action" that is "committed to agency discretion by law" from judicial review. 5 U.S.C. § 701(a)(2) (2011). The Supreme Court has narrowed this exception to review of situations where the agency's exercise of discretion leaves the courts "no law to apply." *Citizens to Pres. Overton Park*, 401 U.S. at 410 (overruled on other grounds by *Califano v. Sanders*, 430 U.S. 99, 105 (1977)). Commonly, this exception applies when an agency chooses not to take a discretionary action. *See Lincoln v. Vigil*, 508 U.S. 189 (1993) (holding agency's decision to not allocate appropriations was discretionary and not reviewable under the APA).

While APA judicial review cannot extend to an agency's decision to engage in, or not to engage in discretionary action, agencies still must abide by their statutory mandates. *Heckler v. Chaney*, 470 U.S. 821, 833 (1985). In *Alliance to Save the Mattaponi v. U.S. Army Corps of Engineers*, petitioners challenged EPA's decision to not veto a 404 permit. 606 F. Supp. 2d 121 (D.C. Cir. 2009). The court held that EPA's decision was reviewable under the APA because,

even though a decision to veto is discretionary, EPA had completely disregarded the standard by which a veto can be exercised. An agency must exercise its discretion within its statutory mandate in order to be exempt from APA judicial review because agency discretion "is not a roving license to ignore the statutory text," which, in this case is 404(c)'s unacceptable adverse impact standard. *Id.* at 140 (citing *Massachusetts*, 549 U.S. at 533).

In light of the foregoing, it is well established that EPA's decision to not veto the Corps' permit in this case was a decision committed to agency discretion by law. EPA also did not exceed its statutory guidelines. Therefore, New Union cannot seek judicial review of EPA's decision. EPA raised an initial concern that the Corps' permit may cause adverse effects, but then EPA declined to proceed with its veto procedures after participating in OMB's dispute resolution process. *New Union*, at 9. Therefore, EPA exercised its discretion completely within the bounds of its statutory mandate, and this decision falls beyond the reach of APA review.

2. EPA Did Not Intend to Pursue 404(c) Oversight of the Corps' Permitting Decision Because this Permit is for an Activity that is Insignificant Compared to Permits EPA Usually Vetoes.

EPA rarely vetoes a Corps permit, and when it does, it is because the permit is allowing an activity that is going to have a drastic long-term impact on high-quality water resources. If EPA invokes its veto power, it must first consult with the Corps. 33 U.S.C. § 1344(c). Further, section 404(q) of the CWA requires EPA and the Corps to enter into agreements with one another to expedite the permitting process. Accordingly, EPA and the Corps have issued joint regulations and entered into a series of memoranda of understanding.

The 1992 Memorandum of Understanding (1992 MOU) lays out the procedures EPA and the Corps have agreed to follow related to projects that could be vetoed under EPA's 404(c) authority. These projects are limited to those that "will result in unacceptable adverse effects to

aquatic resources of national importance." Memorandum of Agreement Between the Environmental Protection Agency and the Department of the Army, at 7 (Aug. 11, 1992). The 1992 MOU sets deadlines for initiating veto review, which require EPA to give the Corps notice that a project may be considered, and the Corps must respond. *Id.* at 7-9. According to the 2008 update to the 1992 MOU, this coordination process has been heavily utilized and is highly successful. Memorandum from the Environmental Protection Agency on Coordination Between Regional Offices and Headquarters on the Clean Water Act Section 404(q) Actions, at 1 (May 1, 2008). In a year-long review period, the 1992 MOU coordination procedures were used forty-seven times. *Id.* In comparison, in the thirty-nine years since section 404 of the CWA was enacted, EPA has only vetoed a Corps permit thirteen times. EPA, Clean Water Act Section 404(c) "Veto Authority", http://water.epa.gov/lawsregs/guidance/cwa/dredgdis/upload/404c.pdf (EPA Veto Guidance). This great numerical disparity signifies that EPA will only veto a Corps' permit in the most egregious circumstances, and EPA and the Corps are able to communicate and work together so that a permit veto is usually unnecessary.

For example, the last veto issued by EPA was on January 13, 2011. EPA, Final Determination of the U.S. Environmental Protection Agency Pursuant to § 404(c) of the Clean Water Act Concerning the Spruce No. 1 Mine, Logan County, West Virginia (Jan. 13, 2011). In that case, the Corps issued a permit that would bury three creeks and their tributaries as a result of a coal mining operation. *Id.* at 6. EPA determined that the permit would result in unacceptable adverse impacts because it would eliminate the last undisturbed streams in the area. *Id.* at 6-7. Other vetoes issued by EPA have been in response to similarly highly destructive projects. EPA Veto Guidance; *see, e.g.*, 73 Fed. Reg. 54398 (Sept. 19, 2008) (Yazoo Pumps veto issued because flood control project would "significantly degrade" 67,000 acres of some of the "richest

wetland and aquatic resources in the Nation"); 56 Fed. Reg. 76 (Jan. 2, 1991) (Two Forks vetoed because dam would destroy ninety percent of a river classified as "unique and irreplaceable.").

Here, the permitted activity is not of comparable gravity. Unlike previous EPA vetoes, the filling at Lake Temp will not result in adverse impacts that rise to the level that led to the thirteen above-mentioned vetoes. Rather than destroying an entire watershed or habitat for many species, filling Lake Temp has little impact, and it will only occur in areas of the lake that are dry. *New Union*, at 4. The fill will only happen once, and when it is finished, the lake will be restored nearly to its previous state. *Id.*

Therefore, EPA's decision not to veto the Corps permit was a proper exercise of EPA's power under the CWA. EPA's discretionary action is not reviewable under the APA because it was decided within the confines of EPA's statutory mandate. Even if EPA may have had concerns about the impacts of the permit, these concerns did not rise to the level usually needed for EPA to consider initiating veto proceedings. Accordingly, this Court should affirm the District Court's decision granting summary judgment in favor of the United States.

CONCLUSION

For the aforementioned reasons, New Union does not have standing to bring this case. Even if New Union did have standing, the Corps' permitting decision was proper because Lake Temp and the permit are subject to the Corps' CWA jurisdiction. OMB's involvement to resolve a potential dispute between EPA and the Corps and EPA's decision not to veto the permit were proper under the CWA. Accordingly, this Court should affirm the District Court's grant of summary judgment in favor of the United States.