Competition Team # 49

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 PROGRESS,
Appellee and Cross-Appellant

ON APPEAL FROM ORDER OF
THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW UNION
Civ. No. 148-2011, June 2, 2011

BRIEF FOR THE UNITED STATES

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JURISDICTIONAL STATEMENT

I. Jurisdiction Below

The United States District Court for the District of New Union had jurisdiction pursuant to 28 U.S.C. § 1331 (2006) because this civil action arose under the Constitution and laws of the United States. The district court further had jurisdiction under the Administrative Procedure Act, 5 U.S.C. § 702 (2006) because New Union asserted a grievance resulting from an agency action.

II. Jurisdiction on Appeal

On June 2, 2011, the United States District Court for the District of New Union granted the motion for summary judgment of the United States, and entered a judgment denying New Union's motion. Therefore, the district court's order is a final decision, and this Court has jurisdiction pursuant to 28 U.S.C. § 1291 (2006).

STATEMENT OF THE ISSUES PRESENTED FOR APPEAL

This appeal presents the following issues:

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

II. Whether the Army Corps of Engineers has jurisdiction to issue a permit under the Clean Water Act Section 404, 33 U.S.C. § 1344, because Lake Temp is navigable water under Clean Water Act Sections 301(a), 404(a), and 502(7), 33 U.S.C. §§ § 1311(a), 1344(a), 1362(7).

III. Whether the Army Corps of Engineers has jurisdiction to issue a permit under the Clean Water Act Section 404, 33 U.S.C. § 1344, or the Environmental Protection Agency has jurisdiction to issue a permit under Clean Water Act Section 402, 33 U.S.C. § 1342, for the discharge of slurry into Lake Temp.

IV. Whether the decision by the Office of Management and Budget that the Army Corps of Engineers had jurisdiction under Clean Water Act Section 404, 33 U.S.C. § 1344, and that the Environmental Protection Agency did not have jurisdiction under Clean Water Act Section 402, 33 U.S.C. § 1342, to issue a permit for the Department of Defense to discharge slurry into Lake Temp and the Environmental Protection Agency's acquiescence in Office of Management and Budget's decision violated the act.

STATEMENT OF THE CASE

I. Procedural Background

The State of New Union filed suit in the United States District Court for the District of New Union challenging the issuance of a permit from the Secretary of the Army, acting through the U.S. Army Corps of Engineers ("COE"), under the authority of § 404 of the Clean Water Act ("CWA"), 33 U.S.C. § 1344, to the U.S. Department of Defense ("DOD") to discharge a slurry of spent munitions into Lake Temp. The State of Progress successfully intervened under Fed. R. Civ. P. 24. New Union, the United States, and Progress each filed motions for summary judgment pursuant to Fed. R. Civ. P. 56. On June 2, 2011, the District Court issued a final order granting the motion for summary judgment from the United States and finding that New Union did not have standing, COE did have jurisdiction to issue a § 404 permit for the addition of fill material to Lake Temp because it was a navigable water and slurry is a fill material, and the dispute resolution by the Office of Management and Budget ("OMB") between the Environmental Protection Agency ("EPA") and the COE did not violate CWA. New Union and Progress each filed a Notice of Appeal in the Twelfth Circuit.

II. Factual Background

Nearly ten years ago, DOD in conjunction with COE undertook a long-term, extensive project designed to discharge fill material created as a byproduct of munitions production. (R. at 4.) DOD identified Lake Temp, located entirely within the State of Progress, as an ideal location for this discharge. (Id.) Before undertaking this project, DOD was required by the National Environmental Policy Act ("NEPA") to complete an Environmental Impact Statement ("EIS"). (R. at 6.) As per NEPA procedures, a Notice of Intent was filed with the Federal Register. (Id.) (noting that the DOD followed all normal procedures during NEPA activities). See also 42

U.S.C. § 4332(2)(C) (2006). This informed the public of the project, the upcoming EIS, and how interested parties could become involved in the drafting of the EIS. Id. The State of New Union did not respond to the Notice of Intent. (R. at 6.) After a period of collaboration, open to the public, an EIS was created and published for public review. (Id.) The EIS remained open for public comment for at least 45 days. 42 U.S.C. § 4332(2)(C). The State of New Union did not issue a single comment, nor respond to the EIS in any way. (R. at 6.) After reviewing all comments submitted during this 45 day period, a final EIS was submitted, published, and available for further review for an additional 30 days. 42 U.S.C. § 4332(2)(C). New Union did not comment or respond to the EIS during this 30 day period. (R. at 6.) The details of the project and its environmental impact remain substantially similar to the details found in the EIS submitted for final review. (R. at 6.)

Although Lake Temp is located within federal jurisdiction, residents of several states frequent the lake for leisure activities. (R. at 4.) Hundreds, if not thousands, of residents of the State of Progress, as well as some out-of-state visitors, have used the lake for hunting ducks and other recreational activities. (Id.) At its highest level, Lake Temp is three miles wide and nine miles long. (Id.) Upon completion of the EIS, DOD determined that their proposed discharge of fill material would raise the water level of the lake by approximately six feet. (Id.) However, the EIS projects that the lake will not intrude on New Union land under any circumstances. (R. at 5.) Furthermore, a water purification system, known as the Imhoff Aquifer, is located beneath Lake Temp. (R. at 4.) The vast majority of the aquifer is located within the State of Progress, with only five percent of the aquifer touching the State of New Union. (Id.) Based on the presence of this aquifer and all known information, DOD within the EIS considered all reasonable alternatives to both the location of the project, and the project as a whole. 42 U.S.C. § 4332(2)(C).

DOD prepared this extensive EIS not only for NEPA purposes, but also because it takes its obligation to United States waters under CWA seriously. CWA is the principal federal statute regulating water pollution. By enacting CWA, Congress sought in part to eliminate the discharge of pollutants into the navigable waters of the United States. 33 U.S.C. § 1251(a)(1) (2006). However, a primary feature of CWA was the establishment in § 402 of the National Pollutant Discharge Elimination System ("NPDES"), a nationwide permitting system for point source discharges. Id. § 1342(a). Further, Section 404(a), the Act notes, "The Secretary may issue permits, . . . for the discharge of dredged or fill material into the navigable waters at specified disposal sites." Id. § 1344(a). Per this provision, the Secretary of the Army, through the COE, is granted a discretionary permitting power over "navigable waters" where there is the discharge of "dredged or fill material." Using this authority, the Secretary of the Army issued a permit for the DOD to begin implementation of the Lake Temp project. (R. at 3.) OMB, finding that the DOD was correct to assert jurisdiction, told EPA not to intervene. (Id.) Only now, nearly ten years later, does New Union seek judicial review of the various agency decisions under the Administrative Procedure Act ("APA").

SUMMARY OF ARGUMENT

Article III's case or controversy requirement, U.S. Const. art. III, § 2, cl. 1, demands that New Union prove standing before any court can even review the instant case. See Lujan v. Defenders of Wildlife, 504 U.S. 555, 561 (1992) ("The party invoking federal jurisdiction bears the burden of establishing [standing]."). At an "irreducible constitutional minimum," New Union must demonstrate three elements—injury-in-fact, causation, and redressability. See Lujan, 504 U.S. at 561. Because New Union's alleged injury is neither "concrete and particularized," see, e.g., Warth v. Seldin, 422 U.S. 490, 508 (1975), nor "actual or imminent," see, e.g., Los Angeles

v. Lyons, 461 U.S. 95, 102 (1983), Appellant failed to meet its burden under the injury-in-fact prong. Therefore, as standing doctrine bars judicial review over "conjectural" or "hypothetical" injuries, this Court cannot entertain the instant claim. See Whitmore v. Arkansas, 495 U.S. 149, 155 (1990) (quoting Lyons, 461 U.S. at 101-02). Furthermore, Massachusetts v. EPA, 549 U.S. 497 (2007), cannot cure the flagrant deficiencies in its standing argument as New Union's alleged injury still remains far too speculative to satisfy even a relaxed standing requirement.

Even if New Union has standing, its substantive claims fail because COE had proper jurisdiction and authority to issue the permit for the DOD's proposed slurry. CWA requires federally issued permits for the discharge of any pollutants into "navigable water," broadly defined in the Act as "the waters of the United States." See 33 U.S.C. §§ 1311(a), 1342(a), 1344(a), 1362(7), 1362(12) (2006). Lake Temp reasonably qualifies as a "navigable water" within the meaning of CWA for two reasons. First, CWA's text and purpose embraces "intrastate lakes" like Lake Temp in its broad definition of navigability. Second, Supreme Court case law has confirmed that bodies of water like Lake Temp fall squarely within the bounds of CWA. Further, COE was the proper agency to issue the permit because the DOD's proposed slurry is a "fill material" under CWA. See id. § 1344(a). While Congress does not define "fill material," it does delegate authority to EPA and COE to administer the CWA's permitting schemes, and their interpretations of congressional silence should be afforded deference. As the slurry will ultimately change the bottom elevation of Lake Temp, see 40 C.F.R. § 232.2, the COE has jurisdiction to issue a fill material permit.

Since OMB participation in this case is indelibly linked with EPA's discretionary veto authority, this Court cannot review the former without sanctioning collateral attack on the latter. APA expressly precludes judicial review over such discretionary decision-making. 5 U.S.C. §

701(a)(2). However, even if this Court finds limited "arbitrary and capricious" review warranted, OMB participation would still survive for two reasons. First, presidential supervisory authority over the discretionary decision-making of executive agency officials is entirely permissible as long as the agency's ultimate decision does not violate a positive congressional mandate. Second, because a specific delegation to the Administrator under CWA does not preclude the directive authority of the President, OMB's participation in this case is consistent with any applicable federal or constitutional law.

ARGUMENT

I. THE DISTRICT COURT CORRECTLY HELD THAT NEW UNION LACKS STANDING

Article III's case or controversy requirement, U.S. Const. art. III, § 2, cl. 1, demands that New Union prove standing before any court can even review the instant case. See Lujan v. Defenders of Wildlife, 504 U.S. 555, 561 (1992) ("The party invoking federal jurisdiction bears the burden of establishing [standing]."). The "gist" of constitutional standing is that litigants allege "such a personal stake" in the case's outcome as to guarantee that the adversarial process reaches the correct result. Baker v. Carr, 369 U.S. 186, 204 (1962). At an "irreducible constitutional minimum," New Union must demonstrate three elements—injury-in-fact, causation, and redressability. See Lujan, 504 U.S. at 561. Because New Union's alleged injury is neither "concrete and particularized," see, e.g., Warth v. Seldin, 422 U.S. 490, 508 (1975), nor "actual or imminent," see, e.g., Los Angeles v. Lyons, 461 U.S. 95, 102 (1983), Appellant failed to meet its burden under the injury-in-fact prong. Therefore, as standing doctrine bars judicial review over "conjectural" or "hypothetical" injuries, this Court cannot entertain the instant claim. See Whitmore v. Arkansas, 495 U.S. 149, 155 (1990) (quoting Lyons, 461 U.S. at 101-02).

New Union's attempt to seek refuge in the language of Massachusetts v. EPA, 549 U.S. 497 (2007), cannot cure the flagrant deficiencies in its standing argument. First, Massachusetts v. EPA simply does not apply to the facts of the instant claim. Second, even if Massachusetts v. EPA were applicable, New Union's alleged injury still remains too speculative to satisfy the Supreme Court's relaxed standing requirement.

A. New Union Lacks Standing in Its Sovereign Capacity Because It Has Not Sufficiently Established Injury-in-Fact

Unless "an invasion of a legally protected interest" is both "concrete and particularized" and "actual or imminent," there is no injury-in-fact. E.g., Lujan, 504 U.S. at 560; see also Whitmore, 495 U.S. at 155 (noting that injury must be "concrete in both a qualitative and temporal sense" and "distinct and palpable," rather than "merely abstract," to satisfy standing) (internal citations and quotations omitted). For New Union to have standing in its sovereign capacity, it must not only establish "an injury to a cognizable interest," it must further show that it is itself "among the injured." See Sierra Club v. Morton, 405 U.S. 727, 734-35 (1972). Given the summary judgment posture, New Union also faces an elevated evidentiary burden under Fed. R. Civ. P. 56(e). See Lujan, 504 U.S. at 561 (finding that, in a summary judgment motion, a plaintiff's assertion of standing must rest on "specific facts," not "mere allegations").

No fact entered into the record, nor any combination of facts, establishes anything more than a purely "conjectural" and "hypothetical" injury to New Union in its sovereign capacity. See Whitmore, 495 U.S. at 155. Even assuming that the discharge *does* reach Imhoff Aquifer, any possible harm would likely affect only the State of Progress. Almost all of the aquifer falls within Progress, with a scant five percent touching New Union's land. (R. at 4.) Therefore, this Court could not determine the existence of an injury to New Union without engaging in further speculation. As the lower court noted, New Union "presented no evidence" about when—or even

if—contamination of the portion of Imhoff Aquifer touching New Union's land will occur. (R. at 5.) New Union did not even establish "the strength of the pollution" if the discharge were to reach the aquifer. (Id.) New Union itself confesses its ignorance regarding the timing and severity of any potential contamination. (R. at 6.) Therefore, at best, New Union alleges only a hypothetical injury, of unknown severity, occurring at an unknown time and affecting an unknowable population. As its argument amounts to little more than a naked allegation that injury has not been conclusively *disproved*, New Union failed to discharge its burden of establishing standing. See Lujan, 504 U.S. at 561.

B. New Union Lacks *Parens Patriae* Standing Because the Citizens It Seeks to Represent Have Not Suffered Any Injury-in-Fact and It Lacks a Sufficient "Quasi-Sovereign" Interest

Failing to establish standing its in sovereign capacity, New Union also seeks standing in its "quasi-sovereign" capacity on behalf of citizens possibly affected by a potential contamination of Imhoff Aquifer. Cf. Hawaii v. Standard Oil Co. of Cal., 405 U.S. 251, 257-60 (1972) (acknowledging "the right of a State to sue as *parens patriae* to prevent or repair harm to its 'quasi-sovereign' interests"). However, bringing a suit as *parens patriae* does not relieve New Union from establishing that the citizens it represents meet the constitutional requisites of standing. See Massachusetts v. EPA, 549 U.S. at 538 (Roberts, J., dissenting) ("[A] State asserting quasi-sovereign interests as *parens patriae* must still show that its citizens satisfy Article III."). If anything, when acting in its *parens patriae* capacity, New Union bears the added burden of expressing a "quasi-sovereign interest" independent from the private interests of its citizens. See Alfred L. Snapp & Son, Inc. v. Puerto Rico ex rel. Barez, 458 U.S. 592, 607 (1982) ("In order to maintain such an action, the State must articulate an interest apart from the interests of particular private parties, i.e., the State must be more than a nominal party.").

New Union's assertion of *parens patraie* standing fails on two counts. For one, the alleged harm to the citizens it represents is no less speculative than the injury it asserts in its own right.[1] Because the mere threat of contamination of New Union property rests on pure conjecture, any potential decline in the property values of citizens like Dale Bompers—the individual offered up as the exemplar for those whose rights New Union seeks to vindicate—remains even more hypothetical. Moreover, New Union prohibits its citizens from withdrawing any groundwater from any aquifer without a permit. (R. at 6.) And New Union has never issued any permit allowing the use of water from the Imhoff Aquifer. (R. at 7.) So any alleged injury to its citizens rests entirely on some unprecedented, future consumption of Imhoff Aquifer's groundwater. Therefore, the same reasons that doomed New Union's ability to establish injury-in-fact in its sovereign capacity remain dispositive under the present inquiry as well.

Secondly, New Union has not established a "quasi-sovereign" interest beyond that of its citizens. Critically, New Union took no effort to exercise its lawmaking powers to allow the use of groundwater from Imhoff Aquifer. See Alfred, 458 U.S. at 607 ("One helpful indication in determining whether an alleged injury to the health and welfare of its citizens suffices to give the State standing to sue *parens patriae* is whether the injury is one that the State, if it could, would likely attempt to address through its sovereign lawmaking powers."). When COE posted its Notice of Intent regarding the instant permit in the Federal Register, New Union did not so much as respond. (R. at 6.) Accordingly, New Union's attempt to assert a "quasi-sovereign" interest at

[1] The Supreme Court has recognized that a recreational or "esthetic [interest] is undeniably a cognizable interest for purpose of standing." Lujan, 504 U.S. at 562-63. To the extent that New Union claims that the discharge into Lake Temp would result in recreational injury to its citizens, it has not met its burden of proof on this issue. New Union has made no showing that any of its citizens have a recreational interest in Lake Temp, which is located entirely within the State of Progress, or that such an interest would be negatively impacted by the discharge.

this late juncture is wholly inconsistent with its past behavior.[2] By its own actions, New Union has never before recognized any interest—"quasi-sovereign" or otherwise—in the groundwater of Imhoff Aquifer. And it cannot simply fabricate one now to sustain its instant claim of standing as *parens patriae*. See Alfred, 458 U.S. at 607.

C. New Union Erroneously Relies on *Massachusetts v. EPA* Because That Case Is Inapplicable and Does Not Relax the Injury-in-Fact Requirement

Since it knows it cannot satisfy the elements of the traditional standing inquiry, New Union attempts to avail itself of the more favorable standard under Massachusetts v. EPA. However, to the extent that New Union's invocation of Massachusetts v. EPA rests on the general proposition that "states are subject to a relaxed standing test" (R. at 5), its reliance is woefully misplaced. In that case, Massachusetts' identity as a "state" did not automatically trigger a relaxed standard. Rather, the Court found that, given the existence of a "procedural right *and* Massachusetts' stake in protecting its quasi-sovereign interests, the Commonwealth [was] entitled to special solicitude in [the] standing analysis." 549 U.S. at 520 (emphasis added).

As neither of these necessary preconditions exists in the instant case, New Union cannot hide behind Massachusetts v. EPA to escape the traditional requirements of constitutional standing. The issuance of the COE permit in the case at bar complied with every procedural

[2] Because New Union failed to challenge the EIS during the NEPA-prescribed comment period, it is estopped from challenging it now. See Or. Natural Res. Council v. U.S. Forest Serv., 834 F.2d 842, 847 (9th Cir. 1987) (holding that a claimant was time-barred from raising a challenge to an EIS that was not made during the specified 45-day or 30-day windows). However, if it finds that New Union has standing to bring the present claim, this Court will effectively be sanctioning a collateral attack on the EIS, permitting an end-run around established NEPA procedures. New Union had the opportunity, the funds and the technical capacity to collect information about any prospective harm to it and its citizens during NEPA proceedings. (R. at 6.) New Union was made aware of the plan in 2002 when the government filed its EIS. (Id.) New Union did not object to the plan, even though the details of the plan provided to New Union in 2002 are the exact same details upon which New Union objects today. (Id.) Permitting suit in this situation would allow New Union—despite its own negligence—to delay a federal action consummated in full compliance with federal law.

requirement of NEPA, and New Union failed to object at any point during the nearly decade-long proceedings. (R. at 6.) Therefore, this Court cannot find that New Union holds a "procedural right" without creating one out of thin air, without any statutory support from either NEPA or CWA. Moreover, as shown in *Section I.B*, *supra*, New Union has not established a "quasi-sovereign interest" sufficient to warrant "special solicitude."

Finally, even if Massachusetts v. EPA were applicable, that still would not relieve New Union of the burden of establishing injury-in-fact. See Summers v. Earth Island Inst., 555 U.S. 488, 497 (2009) ("Unlike redressability[,] the requirement of injury in fact is a hard floor of Article III jurisdiction that cannot be removed by statute."); Massachusetts v. EPA, 549 U.S. at 517-18 ("[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*.'") (quoting Lujan, 504 U.S. at 572 n.7) (both emphases added). The alleged harm in the instant case is far more speculative that it was in Massachusetts v. EPA. There, the Court found that rising sea level had "already begun to swallow Massachusetts' coastal land." 549 U.S. at 522. Also, given that Massachusetts owns a "substantial portion" of coastal land, including "approximately 53 coastal state parks, beaches, reservations, and wildlife sanctuaries," the potential for prospective harm "could [have] run well into the hundreds of millions of dollars." Id. at 522-23 & n.19. And, even though the stakes in Massachusetts v. EPA were orders of magnitude greater than they are in the case at bar, four Justices still vigorously dissented over whether Massachusetts had sufficiently established standing. Since New Union must establish injury-in-fact even if relaxed standards apply, this Court cannot allow Appellant to use Massachusetts v. EPA as a subterfuge to shirk its duty to set forth specific facts proving a concrete and actual injury. See Lujan, 504 U.S. at 561.

II. LAKE TEMP IS "NAVIGABLE WATER" SUBJECT TO CWA'S PERMITTING SCHEME

CWA requires a permit[3] for any discharge of pollutants into "navigable water." See 33 U.S.C. § 1311(a) (2006) (prohibiting "the discharge of any pollutant by any person" except where permitted under other provisions of CWA); Id. § 1362(12) (defining "discharge of pollutant" as "any addition of any pollutant to navigable waters from any point source"). The Act defines "navigable water" expansively as "the waters of the United States." Id. § 1362(7). Lake Temp is "navigable water" within the meaning of CWA for two reasons. First, CWA's text and purpose embraces "intrastate lakes" like Lake Temp in its broad definition of navigability. Second, Supreme Court case law has confirms that bodies of water like Lake Temp fall squarely within the bounds of CWA.

A. Intrastate Lakes Such as Lake Temp Are Subject to CWA Jurisdiction

CWA marked a profound expansion of federal jurisdiction over the Nation's waters. Prior to CWA, water control statutes required navigability-in-fact. See, e.g., Rivers and Harbors Act of 1899, 33 U.S.C. § 403 (2006) (asserting federal jurisdiction over waters such as "ports, roadsteads, havens, harbors, canals, navigable rivers, or other navigable water"). Limited by the interpretative canon of *ejusdem generis*, these statutes only applied to waters bearing a capacity to transport vessels in interstate or foreign commerce. With CWA, however, Congress broadened their focus beyond the literal "navigable capacity" of particular waters. Compare id. § 403 (stressing navigability-in-fact), with id. § 1362(7) (applying more broadly to "the waters of the United States"). Congress' stark redefinition upset pre-existing understandings of navigability.

[3] Where a body of water is "navigable," permits may be authorized under CWA § 402(a) or § 404(a). See CWA § 402(a), 33 U.S.C. § 1342(a) (allowing EPA to issue permits for "the discharge of any pollutant"); CWA § 404(a), Id. § 1344(a) (allowing COE to issue permits for "the discharge of dredged or fill material into the navigable waters at specified disposal sites").

See United States v. Riverside Bayview Homes, Inc., 474 U.S. 121, 133 (1985) ("Congress evidently intended to repudiate limits that had been placed on federal regulation by earlier water pollution control statutes and to exercise its powers under the Commerce Clause to regulate at least some waters that would not be deemed 'navigable' under the classical understanding of that term."). To achieve its missions of establishing national water quality standards, Congress recognized that the interconnectivity of the nation's water systems extended well beyond navigability-in-fact. Accordingly, it is inconceivable that Congress intended to exclude bodies of water like Lake Temp from federal oversight under CWA. For one, applying CWA's broad definition of navigability to Lake Temp is more consistent with the legislative purpose of the Act. In enacting CWA, Congress's mission was to restore and maintain the chemical, physical, and biological integrity of the Nation's waters. 33 U.S.C. § 1251(a). Exempting a body of water that has as substantial an impact on interstate commerce as Lake Temp does would flatly undermine CWA's apparent purpose, not advance it.

Furthermore, existing COE and EPA regulations expressly include "intrastate lakes" such as Lake Temp within the sweep of their interpretations of "navigable water." See 40 C.F.R. § 230.3(s)(3) (EPA) (including "intrastate lakes . . . the use, degradation or destruction of which could affect interstate or foreign commerce" within the definition of "water of the United States"); 33 C.F.R. § 328.3(a)(3) (COE) (same). This definition includes any such waters "[w]hich are or could be used by interstate or foreign travelers for recreational or other purposes." See 40 C.F.R. § 230.3(s)(3)(i); 33 C.F.R. § 328.3(a)(3)(i). Accordingly, if this Court finds there is any ambiguity in CWA's definition of "navigable waters," this Court should defer to EPA and COE's reasonable application of the statute they administer to intrastate lakes with

the potential for a significant impact on interstate commerce. See Chevron U.S.A., Inc. v. NRDC, 467 U.S. 837, 842-43 (1984); United States v. Mead Corp., 533 U.S. 218, 227 (2001).

Applying EPA's and COE's jurisdictional definition of "the waters of the United States," Lake Temp is undeniably navigable. Lake Temp qualifies as an "intrastate lake" under the regulations. While the size of Lake Temp fluctuates between years, it is nevertheless a substantial body of water with a width of three miles and a length of nine miles during the rainy season in wet years. (R. at 4.) Moreover, Lake Temp is "of the United States" due to the fact that its use, degradation, or destruction could affect interstate or foreign commerce. Hundreds, if not thousands, of duck hunters have come to its shores over the past one hundred years. (Id.) At least a quarter of these hunters have been interstate travelers. (Id.) Any impact on Lake Temp would affect this recreational duck-hunting haven. Lake Temp also invites other recreational travelers, from bird watchers to visitors with rowboats and canoes. (Id.) The proximity of the lake to a Progress state highway, the clearly visible trail leading from the road to the lake, and the evidence of recreationalists dragging their rowboats and canoes from the highway to the water, indicates that some number of these individuals are also interstate travelers. (Id.) All of these factors confirm that federal jurisdiction over Lake Temp is appropriate and consistent with EPA and COE's reasonable interpretations of CWA.

B. Case Law Interpreting "Navigable Waters" Supports the Application of CWA to Lake Temp

Previous Supreme Court decisions regarding the jurisdictional reach of CWA confirms that Lake Temp is "navigable water" under the Act. For instance, in Riverside Bayview Homes, the Court—recognizing "the evident breadth of congressional concern for protection of water quality and aquatic ecosystems"—accepted the argument that CWA "abandon[ed] traditional notions of 'waters' and include in that term 'wetlands' as well." 474 U.S. at 133-34. The lesson

of Riverside Bayview Homes is that bodies may be included within the sweep of CWA's jurisdiction notwithstanding navigability-in-fact, and even if they would not comport with traditional notions of "waters." If navigability under CWA is broad enough to embrace "adjacent wetlands" within its meaning, it is surely expansive enough to apply to Lake Temp.

Further, the State of Progress's reliance on Solid Water Agency of Northern Cook Co. v. COE ("SWANCC"), 531 U.S. 159 (2001), to defeat CWA jurisdiction is misguided. In SWANCC, the Court rejected COE's attempt to assert jurisdiction over excavation trenches that had become seasonal and permanent ponds visited by over 100 species of migratory birds. Overturning the Seventh Circuit's rubber-stamp on COE's questionable interpretation, the Court found that CWA jurisdiction could not be established solely because the pits "serve[d] as habitat for migratory birds." Id. at 171-72. SWANCC's narrow holding simply does not apply to this case. The SWANCC excavation pits were "isolated," incidental "ponds." Lake Temp is anything but isolated. For over a hundred years, the lake has been used by interstate travelers due to its location near a highway. (R. at 4.) Unlike the SWANCC ponds, Lake Temp, at its largest is three miles wide and nine miles long. (R. at 3-4.) Lake Temp does not just serve as a habitat for migratory birds; it plays a pivotal part in an 800-sqaure-mile watershed. (R. at 4.)

Lake Temp is an established body of water connected to more traditionally navigable waters, an important distinction crystallized in the Supreme Court's decision in Rapanos v. United States, 547 U.S. 715 (2006) (plurality opinion). Writing for four justices, Justice Scalia explained that found the phrase "the waters of the United States" applies only to "*relatively* permanent, standing or continuously flowing bodies of water." Id. at 716. (emphasis added).

Lake Temp meets Justice Scalia's base requirements of an established body of water. Although Lake Temp has an intermittent quality because it is completely dry one year out of

every five, it is considerably more fixed and present than "transitory puddles or ephemeral flows of water." Id. at 734. In the category of "merely intermittent," Scalia collects "'ephemeral streams,' 'wet meadows,' storm sewers and culverts, 'directional sheet flow during storm events,' drain tiles, manmade drainage ditches, and dry arroyos in the middle of the desert." Id. Each of these water flows is characterized by extreme irregularity—more often than not these locations are "dry channels" completely devoid of water. Lake Temp, on the other hand, is "relatively permanent," containing a substantial amount of water 80% of the time.

Lake Temp would also likely pass the nexus test for navigability introduced in Justice Kennedy's Rapanos concurrence. Focusing on the nexus between wetlands and traditional navigable waters, Justice Kennedy's definition includes "wetlands, either alone or in combination with similarly situated lands in the region, [which] significantly affect the chemical, physical, and biological integrity of other covered waters more readily understood as 'navigable.'" Id. at 780 (Kennedy, J., concurring). Though not traditionally "navigable" itself, Lake Temp's position within the watershed provides a sufficient nexus to other covered waters.

Progress argues that the plurality opinion Rapanos overrides EPA's and COE's regulatory definitions of "navigable waters," and therefore that this Court should not utilize the EPA and COE regulations to interpret the reach of CWA. First, the precedential value of Rapanos is limited by its lack of a majority opinion or even a uniting theme between five justices. More importantly, to the extent that either Justice Scalia's and Justice Kennedy's opinions override, as an unreasonable interpretation of CWA, EPA's and COE's regulatory definition of their jurisdiction, Lake Temp still falls well within the jurisdictional metes and bounds of CWA.

III. COE PROPERLY ISSUED THE SECTION 404 PERMIT BECAUSE DOD'S PROPOSED DISCHARGE CONSTITUTES "FILL MATERIAL"

A. Congress's Separate COE-Operated Permitting Scheme for Fill Materials Is Independent of EPA's Permitting Scheme for Pollutants

CWA creates two independent permitting schemes for the discharge of materials into "navigable waters"—one covering the discharge of dredged or fill material under § 404(a), 33 U.S.C. § 1344(a), and a second governing the discharge of pollutants under § 402(a), id. § 1342(a). In § 402, Congress created the NPDES permit program. Id. § 1342(a). In spite of § 301(a)'s prohibition on "the discharge of any pollutant by any person," Congress allows the Administrator under § 402(a) to issue permits for the discharge of pollutants that either meet other applicable standards within CWA or conditions deemed necessary by EPA to carry out the Act's provisions. Id. § 1342(a). Beyond the NPDES framework, Congress also created an alternate permitting scheme, regulated by the Secretary through COE, providing that "[t]he Secretary may issue permits, after notice and opportunity for public hearings, for the discharge of dredged or fill material into the navigable waters at specified disposal sites." Id. § 1344(a). Determining whether a particular discharge requires an EPA-issued § 402 permit or a COE-issued § 404 permit turns on the definitions of "pollutant" versus "dredged or fill material."

As CWA's "may" language indicates, each agency's issuance of permits is discretionary. However, in its grant of authority to EPA to issue § 402 permits for pollutants, Congress explicitly exempted the COE's § 404 permitting scheme. See id. § 1342(a) (granting power to EPA to issue pollutant permits, "except as provided in sectio[n] 1344 of this title). The trumping language of § 402 creates mutually exclusive permitting jurisdiction between EPA and COE. If COE's jurisdiction is triggered because the discharge is a "fill material," EPA no longer has power to issue a permit, but retains discretionary authority to veto a COE permit under § 404(c).

Moreover, as the Supreme Court addressed in Coeur Alaska, Inc. v. Southeast Alaska Conservation Council, CWA creates an either/or system of permitting placing power in the hands of COE over EPA to regulate in this realm. See 129 S. Ct. 2458, 2465 (2009) ("The Act is best understood to provide that if the Corps has authority to issue a permit for a discharge under § 404, then EPA lacks authority to do so under § 402."). The interpretation is bolstered by EPA's regulations, which provide discharging fill material into water of the United States, which is regulated under § 404 of CWA, does not require § 402 permits. 40 C.F.R. § 122.3.

While providing that COE and EPA have mutually exclusive permitting authority, CWA draws no jurisdictional bright-line between discharges requiring § 404 permits and those requiring permits under § 402. See Coeur Alaska, 129 S. Ct. at 2477 (Breyer, J., concurring) (noting the Court's recognition of "a legal zone within which the regulating agencies might reasonably classify material [under either provision]" while still complying with the statute). Instead, CWA leaves defining the jurisdictional contours of the permitting regime to the informed discretion of COE and EPA.[4] Applying the Coeur Alaska model, a material qualifying as both a pollutant and a fill material—absent an EPA veto—only requires a COE permit to be lawfully discharged into a water of the United States.

B. The DOD's Proposed Slurry Is A Fill Material Regulated by COE Because It Will Change the Bottom Elevation of Lake Temp

The DOD's proposed slurry is both a pollutant and a fill material, and therefore COE is the permitting arbiter. CWA defines the term "pollutant" in § 502(6) as **"**dredged spoil, solid waste, incinerator residue, sewage, garbage, sewage sludge, munitions, chemical wastes,

[4] First, CWA mandates that the Administrator (in conjunction with the Secretary) promulgate guidelines for COE to follow in issuing permits. 33 U.S.C. § 1344(b). Second, CWA "authoriz[es]" the Administrator "to prohibit" or "to deny or restrict the use of" a permit issued by COE. Id. § 1344(c).

biological materials, radioactive materials, heat, wrecked or discarded equipment, rock, sand, cellar dirt and industrial, municipal, and agricultural waste discharged into water." 33 U.S.C. § 1362. By contrast, CWA does not define "dredge or fill material." As required by § 404(b), EPA—in conjunction with COE—has filled this congressional gap with a definition of its own. 40 C.F.R. § 232.2. Specifically, fill material means "material placed in waters of the United States where the material has the effect of . . . [c]hanging the bottom elevation of any portion of a water of the United States." Id.

Here, the DOD's proposed facility will process a variety of munitions by emptying them of liquid, semi-solid, and granular contents; adding chemicals to these contents to inhibit their explosiveness; grinding and pulverizing any remaining solids, primarily metals; and adding water to both sets of waste to form a slurry. (R. at 4) "Munitions" are specifically listed within CWA as pollutants. 33 U.S.C. § 1362(6). However, the proposed slurry will also serve as a fill material. By spraying the entire dry bed of the lake, the lakebed will be raised by several feet. (R. at 4) In rainier seasons, the lake will return to its pre-operation condition. (Id.) Ultimately, the lake's top water elevation will be approximately six feet higher. (Id.) The slurry material qualifies as a fill material under 40 C.F.R. § 232.2 because it will have the effect of "changing the bottom elevation of any portion of a water of the United States."

This Court should not give credence to New Union's unfounded argument that the regulatory definition of "fill material" is an unreasonable interpretation of CWA, not permissible under the Act and not deserving Chevron deference. New Union acknowledges that CWA is silent regarding the meaning of "fill material." However, they argue that the agency's uncapped definition of "fill material" under 40 C.F.R. § 232.2 exceeds EPA and COE's grant of statutory authority. New Union stresses their definition for fill material as any material that changes the

bottom elevation of any portion of a water of the United States, including the slurry involved here, contravenes the legislative purposes of CWA. Each of New Union's arguments fails because Congress expressly delegated authority to EPA—in conjunction with COE—to develop permitting guidelines for § 404(a). See 33 U.S.C. § 1344(b); Coeur Alaska, 129 S. Ct. at 2467 ("EPA must write guidelines for the Corps to follow in determining whether to permit[.]").

Moreover, Congress did not restrict the power of COE to issue permits for fill material with references to other statutory concerns, such as pollutants or conflicts of interest. In Coeur Alaska, the Court considered whether COE could issue a § 404 permit for an Alaskan gold mining company's use of slurry composed in part of "tailings" when EPA's regulations on new source performance standard prohibited the slurry from qualifying for a § 402 permit. Confronting the question of whether the § 404 included an explicit exception for material barred by EPA regulations, the Court responded that "§ 404's text does not limit its grant of power in this way. Instead, § 404 refers to all 'fill material' without qualification." Coeur Alaska, 129 S. Ct. at 2469. This lack of limitation further extends to concerns about self-dealing. Nowhere in CWA does Congress limit COE's permitting power based on *who* is applying for a permit. Congress has empowered COE to make the call about the discharge of fill material, and this Court must respect their legislative decision.

IV. OMB PARTICIPATION IN EPA'S FAILURE TO VETO IS NOT REVIEWABLE AND DID NOT VIOLATE CWA

A. Regardless of Any OMB Participation, 5 U.S.C. § 701(a)(2) Precludes Judicial Review of EPA's Failure to Veto

This Court cannot assess the propriety of OMB participation in the instant case without evaluating EPA's failure to veto the COE permit under § 404(c), 33 U.S.C. § 1344(c). APA expressly precludes judicial review where agency action is "committed to agency discretion by

law." 5 U.S.C. § 701(a)(2) (2006). As allowing *any* such review exposes discretionary agency decision-making to judicial scrutiny in violation of APA, this Court is without jurisdiction to entertain what amounts to a collateral attack on EPA's failure to veto.

The question of whether § 701(a)(2) precludes judicial review in a particular case "requires careful examination of the statute" on which the claim of agency illegality is based. Webster v. Doe, 486 U.S. 592, 600 (1988). Where an agency has sufficiently clear legal guidelines to cabin its discretion, judicial oversight is most appropriate. But where the law provides no meaningful guidance—where one can say there is "no law to apply"—APA forecloses intervention by Article III courts. See Citizens to Pres. Overton Park, Inc. v. Volpe, 401 U.S. 402, 413 (1971) (quoting S.Rep. No. 752, 79th Cong., 1st Sess., 26 (1945)); cf. Baker v. Carr, 69 U.S. 186, 217 (1962) (foreclosing review under the political question doctrine where there exists no "judicially discoverable and manageable standards" to resolve a case). Any § 701(a)(2) analysis ultimately boils down to "a determination whether the agency is called upon to perform a mere ministerial act or to exercise an informed discretion." Sugarman v. Forbragd, 267 F. Supp. 817, 823 (N.D. Cal. 1967), aff'd, 405 F.2d 1189 (9th Cir. 1968).

The Supreme Court has repeatedly held that Article III oversight over regulatory *inaction* of the type at issue here demands a greater measure of judicial restraint. In Heckler v. Chaney, the Court held that failures to exercise permissive statutory authority—such as where an agency decides *not* to bring an enforcement action—are presumptively unreviewable. 470 U.S. 821, 831 (1985). Similarly, where a litigant seeks "to compel agency action unlawfully withheld or unreasonably delayed" due to a failure to act, 5 U.S.C. § 706(1), the claim "can proceed only where a plaintiff asserts that an agency failed to take a *discrete* agency action that it is *required to take*." Norton v. S. Utah Wilderness Alliance ("SUWA"), 542 U.S. 55, 64 (2004).

The Administrator's decision whether or not to veto a COE permit under § 404(c) epitomizes discretion. Unlike the affirmative duty CWA thrusts upon EPA to promulgate guidance regarding COE's permitting jurisdiction, 33 U.S.C. § 1344(b), the statute merely "authorize[s]" the Administrator to veto a COE permit; it does not mandate her to do so. 33 U.S.C. § 1344(c); see also Chaney, 470 U.S. at 835 (suggesting the term "authorize" in the Food, Drug and Cosmetic Act ("FDCA"), 21 U.S.C. § 372, implies discretionary authority); Panama Canal Co. v. Grace Line, Inc., 356 U.S. 309, 317 (1958) (holding that, where a statute "authorized" an agency to prescribe and alter tolls, "the exercise of that authority [was] far more than the performance of a ministerial act" and § 701(a)(2) precluded judicial review). Further, the veto authority vests "whenever [s]he determines" that triggering criteria are satisfied. 33 U.S.C. § 1344(c). Thus, the condition precedent for the Administrator's veto authority is itself left to her sole discretion. Cf. Her Majesty the Queen in Right of Ontario v. EPA, 912 F.2d 1525, 1533 (D.C. Cir. 1990) (finding that § 115(a) of the Clean Air Act ("CAA"), which *mandates* that the Administrator give notification "[w]henever" she "has reason to believe" that a condition is met, 42 U.S.C. § 7415(a), implies a "degree of discretion"). The applicable regulations confirm that EPA interprets § 404(c) only to confer discretionary veto authority. See 40 C.F.R. § 231.1(a) ("Under section 404(c), the Administrator *may* exercise a veto[.]") (emphasis added); 40 C.F.R. § 231.3(a) ("If the Regional Administrator *has reason to believe* . . . that an 'unacceptable adverse effect' could result . . . he *may* initiate the following actions[.]") (emphases added).

The overwhelming weight of authority recognizes that EPA's veto authority under § 404(c) is purely discretionary, both in cases decided under APA and in citizen-suits brought under

CWA § 505(a)(2), 33 U.S.C. § 1365(a)(2).[5] See Pres. Endangered Areas of Cobb's History, Inc. v. COE, 915 F. Supp. 378, 381 (N.D. Ga. 1995) (interpreting § 701(a)(2) and § 505(a)(2) consistently with each other), aff'd, 87 F.3d 1242, 1249-50 (11th Cir. 1996) (affirming the district court's interpretation under § 505(a)(2)); City of Olmstead Falls v. EPA, 266 F. Supp. 2d 718 (N.D. Ohio 2003) (deciding the matter under § 701(a)(2)), aff'd, 435 F.3d 632 (6th Cir. 2006); Alliance To Save Mattaponi v. COE ("Alliance I"),[6] 515 F. Supp. 2d 1, 4-5 (D.D.C. 2007) (deciding the matter under § 505(a)(2)). But see Nat'l Wildlife Fed'n v. Hanson, 859 F.2d 313, 315-16 (4th Cir. 1988) (finding that § 404(c) imposes upon the Administrator a non-discretionary duty of oversight over the permitting process, allowing for suit under § 505(a)(2)).[7] Courts deciding the analogous issue for state permitting schemes under NPDES have reached the same conclusion. See, e.g., Dist. of Columbia v. Schramm, 631 F.2d 854, 860 (D.C. Cir. 1980) (finding that EPA decision not to review or veto an NPDES permit application under CWA § 402(b), 33 U.S.C. § 1342(b), is committed to agency discretion). Given the discretionary nature of the Administrator's veto authority, § 701(a)(2) precludes all manner of review under § 706. Therefore, this Court is without jurisdiction even to reach the issue of OMB participation.

[5] Echoing the language of § 701(a)(2), the citizen-suit provision of CWA grants federal courts subject-matter jurisdiction to review "a failure of the Administrator to perform any act . . . which is *not discretionary*." CWA § 505(a)(2), 33 U.S.C. § 1365(a)(2) (emphasis added).

[6] The Alliance I court still found a limited basis for review under § 706(2). The Alliance I decision is both anomalous and wrongly decided. See *Section IV.A.1*, *infra*.

[7] Hanson's holding is narrower than it appears at first blush. In Hanson, the court specifically found that the Administrator's ultimate responsibility for the protection of wetlands created a non-discretionary duty of oversight under § 404(c) to ensure that COE "make[s] reasoned wetlands determinations." 859 F.2d at 315-16. Thus, where EPA failed to exercise the duty of oversight, a citizen-suit under § 505(a)(2) against the Administrator could proceed—and COE could be joined under Fed. R. Civ. P. 20—in order to review COE's wetland determination. Id. at 315-16. As New Union's collateral attack challenges the Administrator's failure to veto COE permits itself, and not any of COE's non-discretionary findings, Hanson does not apply.

1. "Arbitrary and Capricious" Review of EPA's Failure to Veto Under § 706(2) Is Unavailable Because Alliance I Is Wrongly Decided

Despite finding that the discretionary nature of EPA's veto authority barred suit under § 505(a)(2), the Alliance I court nevertheless went on to hold that § 701(a)(2) did not preclude a claim under APA because it found that § 404(c) still supplied "a meaningful standard against which to judge the agency's exercise of discretion." 515 F. Supp. 2d at 7-8 (quoting Chaney, 470 U.S. at 830). Distinguishing Chaney, the district court noted that EPA's failure to veto essentially constituted a reviewable final action because "the decision not to veto the permit had the same impact on the parties as an express denial of relief," id. at 9 (citing Her Majesty, 912 F.2d at 1531). However, the Alliance I court expressly limited the scope of review to § 706(2),[8] holding that the plaintiffs' claim was "directed not at an 'agency action unlawfully withheld,' but rather at a consummated 'agency action' that APA views as final, notwithstanding the fact that the agency 'did' nothing." 515 F. Supp. 2d at 9.

To justify its anomalous proposition, the Alliance I court weaved a tapestry of flawed reasoning that unravels upon even cursory examination of the underlying bases for its analysis. For one, the court relied heavily on dicta from Sierra Club v. Thomas, 828 F.2d 783, 793 (D.C. Cir. 1987), characterizing the decision as allowing for review "where agency inaction is final action having the same impact as agency action." 515 F. Supp. 2d at 9. But Alliance I grossly misconstrued the actual language of the D.C. Circuit's opinion. In Sierra Club v. Thomas, the

[8] Judicial review under this provision requires an agency to justify that its final action was not "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A); see also Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43 (1983) (articulating the judicial standards for "arbitrary and capricious" review, namely "whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment") (internal citations and quotations omitted).

D.C. Circuit noted that certain instances of inaction warrant judicial review[9] because the "agency inaction may represent effectively final agency action *that the agency has not frankly acknowledged*," as doing so would make the agency's decision reviewable. 828 F.2d at 793 (emphasis added); see also Envtl. Def. Fund, Inc. v. Hardin, 428 F.2d 1093, 1099 (D.C. Cir. 1970) ("[A]n agency cannot preclude judicial review *by casting its decision in the form of inaction* rather than in the form of an order denying relief.") (emphasis added); Bennett v. New York City Hous. Auth., 248 F. Supp. 2d 166, 171 (E.D.N.Y. 2002) (pointing out that the categories of inaction reviewable under Sierra Club v. Thomas "all presumed either a pending request for relief or a 'clear statutory duty'").

As the D.C. Circuit's opinion in Her Majesty demonstrates, such review only reaches those cases where an agency actually takes an action but keeps some material aspect of it unresolved to avoid the appearance of having consummated it. There, the question before the court was whether letters written in response to an inquiry regarding the status of rulemaking petitions constituted reviewable final action denying the plaintiffs' petitions. 912 F.2d at 1531. In the letters, the Acting Assistant Administrator ("AAA") stated that initiating rulemaking proceedings was premature, but that the agency would "continue to assess [its] ability to take action on [the] petition[s]." Id. at 1530. Applying Sierra Club v. Thomas, the D.C. Circuit concluded that the inaction at issue—namely, EPA's "failure to issue a more formal interpretation"—was reviewable as final action "that the agency ha[d] not frankly acknowledged" because the AAA's letters expressed a definitive EPA interpretation that had the direct and immediate impact of

[9] In Sierra Club v. Thomas, the D.C. Circuit also stated that two other categories of inaction may warrant review: (1) where inaction represents an agency's disregard of a "clear statutory duty," 828 F.2d at 793, and (2) where inaction constitutes an "unreasonable delay" of final action, id. at 794. These types of inaction represent actions reviewable under 5 U.S.C. § 706(1). 828 F.2d at 793-94. The instant case does not implicate either of these categories of agency inaction.

denying the petitions. Id. at 1532. This mode of review under Sierra Club v. Thomas simply does not apply to the instant case because, here, the Administrator did not attempt to dress up affirmative agency decision-making in the guise of inaction; she failed to act altogether.

Moreover, by interpreting EPA's failure to veto no differently than an express refusal to do so, Alliance I attempted an end-run around the Supreme Court's unequivocal pronouncement that the "'failure to act' is not the same thing as a 'denial.'" See SUWA, 542 U.S. at 62-63. Rather than honestly confronting that SUWA posed an insurmountable obstacle, however, the Alliance I court instead tried to circumvent the issue by shifting the basis for review from § 706(1) to § 706(2). See 515 F. Supp. 2d at 10. Of course, Alliance I is technically correct that the *ultimate* question in "SUWA addresse[d] only attempts to 'compel agency action' pursuant to § 706(1)." Id. But this argument entirely ignores that, in its discussion regarding the terms "failure to act" and "denial," the SUWA Court was construing the statutory definition of "agency action" *under 5 U.S.C. § 551(13)*, a definition that must apply uniformly across all provisions of APA. 542 U.S. at 62-63. Thus, this Court cannot accept Alliance I's holding without adopting inconsistent definitions of "agency action" between § 706(1) and § 706(2). Rather than honor its official "role [of] mak[ing] sense rather than nonsense out of the *corpus juris*," see W. Virginia Univ. Hospitals, Inc. v. Casey, 499 U.S. 83, 100-01 (1991), the Alliance I court worked a judicial sleight of hand that would—if followed by this Court—fracture future analysis under APA.

The Alliance I court also erred in finding the Chaney presumption of nonreviewability for agency inaction did not apply, resting this assertion on the conclusory finding that a failure to veto is simply "different" from failure to enforce or prosecute. See 515 F. Supp. 2d at 8. On the contrary, failures to veto involve the very same "complicated balancing" of factors "peculiarly within [an agency's] expertise" that serves as the primary justification for applying the

presumption in the case of failures to enforce. See Chaney, 470 U.S. at 831. Compare Alliance to Save the Mattaponi v. COE ("Alliance II"), 606 F. Supp. 2d 121, 140 (D.D.C. 2009) (noting that EPA based its failure to veto a COE permit on, *inter alia*, determinations that initiating the proper proceedings "would divert resources," that the proceedings "would be unlikely to add any new information," and that higher priorities existed that "needed to be addressed"), with Chaney, 470 U.S. at 831 (noting that failures to enforce typically involve assessing "whether agency resources are best spent on this violation or another, whether the agency is likely to succeed if it acts, whether the particular enforcement action requested best fits the agency's overall policies, and, indeed, whether the agency has enough resources to undertake the action at all").

Because the only authority allowing "arbitrary and capricious" review for a failure to veto a COE permit rests upon interpretations foreclosed by and inconsistent with Supreme Court precedent, this Court should not follow the district court in Alliance I in making the same mistake. Rather, this Court should apply the reasoning of SUWA and hold that § 701(a)(2) bars review of the inaction at issue here not only under § 706(1), but § 706(2) as well.

2. Subjecting EPA Failures to Veto to "Arbitrary and Capricious" Review Under § 706(2) Violates Vermont Yankee

Long-standing Supreme Court precedent prohibits federal courts from adding procedural obligations beyond those prescribed under APA and the relevant enabling statute governing a legislative delegation. See, e.g., Vermont Yankee Nuclear Power Corp. v. NRDC, 435 U.S. 519, 549 (1978) (warning Article III courts "not [to] stray beyond the judicial province to explore the procedural format or to impose upon the agency its own notion of which procedures are 'best' or most likely to further some vague, undefined public good"); Costle v. Pac. Legal Found., 445 U.S. 198, 214-15 (1980) (reversing the appellate court's order requiring an adjudicatory hearing before taking action on an NPDES permit where CWA only called for notice and *opportunity* for

a hearing). To the extent that "arbitrary and capricious" review under § 706(2) introduces new procedural burdens upon EPA, it flouts Vermont Yankee's admonition that only *agencies*, not courts, can augment procedures beyond statutorily prescribed minima. See 435 U.S. at 523-25.

As the D.C. Circuit noted in Schramm, the fundamental difficulty in reviewing EPA failures to veto permits is that such failures to act generally leave no paper trial. 631 F.2d at 859-60 ("When [EPA] vetoes a permit, a clear record exists of its actions and reasons; when [EPA] decides not to act, there may be no record to review."). Significantly, only where the Administrator affirmatively exercises her veto authority does § 404(c) impose any mandatory requirements at all. First, CWA forbids the Administrator from determining that a discharge pursuant to a COE permit will have an "unacceptable adverse effect" on aquatic areas until "after notice and opportunity for public hearings." 33 U.S.C. § 1344(c). Second, CWA provides that the Administrator "*shall* consult with" the Secretary before exercising her veto authority. Id. (emphasis added). Finally, the statute requires that the Administrator "set forth in writing and make public [her] findings and [her] reasons" for vetoing any COE permit. Id.

By contrast, the Administrator's *failure* to veto a COE permit does not require any further justification under CWA. See Cascade Conservation League v. M.A. Segale, Inc., 921 F. Supp. 692, 698 (W.D. Wash. 1996) (holding that the strictures of § 404(c) "d[o] not come into play at all" when EPA *fails* to veto a permit issued by COE). In enacting CWA, Congress effectively committed to the Administrator the discretion to trigger the litany of additional procedures under § 404(c) if and only if she determined that allowing the COE permit would have an "unacceptable adverse" impact. However, as a condition precedent to even reaching the issue of OMB participation in the instant case, New Union would require this Court to transform EPA's *discretionary* veto authority under § 404(c) into a *mandatory* duty to monitor every COE permit

even though "[n]othing in the subsection states or implies that the Administrator is required to review every decision [COE] makes." Cascade Conservation League, 921 F. Supp. at 698.

In effect, subjecting failures to veto COE permits to "arbitrary and capricious" review under § 706(2) would require this Court to entirely rewrite EPA's statutory obligations under CWA. Because nothing in § 404(c) requires the Administrator to defend and explain her failures to veto, this Court cannot engage in review under § 706(2) without judicially imposing additional burdens of justification, in direct violation of Vermont Yankee and its progeny.

B. Even if the Court Finds Review Under § 706(2) Is Appropriate, OMB Participation Did Not Make EPA's Failure to Veto "Arbitrary and Capricious"

Even if this Court finds limited review under § 706(2) warranted, OMB participation in EPA's decision not to veto would still survive because the Administrator's failure to veto was not "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." See 5 U.S.C. § 706(2)(A). For one, applying the judicial standards for such review enunciated in State Farm, 463 U.S. at 43, the failure to veto was not "arbitrary and capricious" because OMB participation in discretionary agency decision-making is permissible when exercised consistently with statutory requirements. Furthermore, since New Union's residual argument that CWA's specific delegation to the Administrator precludes the directive authority of the President is unsustainable both as a matter of constitutional interpretation and historical practice, OMB participation in the instant case was fully in accordance with all applicable law.

1. OMB Participation Did Not Render EPA's Failure to Veto "Arbitrary and Capricious" Because EPA's Decision Was Consistent With CWA

Judicial evaluation of the propriety of OMB participation contravenes long-standing precedent allowing presidential oversight over the discretionary decision-making of Executive officers. See Marbury v. Madison, 5 U.S. (1 Cranch) 137, 166 (1803) (marking a distinction

between discretionary acts by Executive officers, which are "only politically examinable," and ministerial acts, where the law assigns a specific duty that presidential oversight may not affect); Kendall v. U.S. ex rel. Stokes, 37 U.S. (12 Pet.) 524, 610-13 (1838) (holding that mandamus relief is appropriate for duties "of a mere ministerial character," as opposed to discretionary duties "the discharge of which is under the direction of the President"); Panama Canal, 356 U.S. at 317-18 (demonstrating the ministerial/discretionary distinction survives under APA). Consistent with this bedrock principle of administrative law, courts have only disapproved of presidential oversight where its use leads an agency to violate a positive congressional mandate. See Envtl. Def. Fund v. Thomas ("EDF"), 627 F. Supp. 566, 571 (D.D.C. 1986) (reprimanding the Reagan-era OMB for using its review process to delay the promulgation of regulations beyond an explicit statutory deadline). Because EPA's ultimate decision did not violate any affirmative requirements under CWA or the decisional law interpreting it, EPA did not commit "clear error" in considering OMB's position, see State Farm, 463 U.S. at 43, and OMB participation did not render EPA's failure to veto "arbitrary and capricious."

"Presidential prodding" regarding the discretionary decision-making of Executive agencies is entirely permissible, notwithstanding whether it results in an outcome "different from the [one] that would have obtained in the absence of [p]residential involvement." See Sierra Club v. Costle, 657 F.2d 298, 407-08 (D.C. Cir. 1981) (holding that the President's oral communications with EPA during the post-comment period of an informal rulemaking need not be disclosed). The D.C. Circuit emphatically stated in Sierra Club v. Costle, "[o]ur form of government simply could not function effectively or rationally if key executive policymakers were isolated . . . from the Chief Executive." Id. at 406; see also Myers v. United States, 272 U.S. 52, 135 (1926) (finding that the Constitution, "in vesting general executive power in the President alone,"

entitles him to "supervise and guide" Executive officers in "their construction of the statutes under which they act"); EDF, 627 F. Supp. at 570 ("A certain degree of deference must be given to the authority of the President to control and supervise executive policymaking.").

Only where Executive oversight causes an agency to transgress a firmly laid congressional boundary can courts call into question the President's general supervisory authority over those executing the laws. See Bldg. & Const. Trades Dept., AFL-CIO v. Allbaugh, 295 F.3d 28, 32-33 (D.C. Cir. 2002) ("[Executive] officers are duty-bound to give effect to the policies embodied in the President's direction, *to the extent allowed by the law*.") (emphasis added). Therefore, New Union misplaces its reliance on EDF in arguing that OMB participation of the kind at issue here is impermissible. That case only stands for the proposition that OMB cannot prevent an agency from complying with *non-discretionary* statutory requirements. 627 F. Supp. at 571. Moreover, even though the court in EDF found that OMB acted improperly in delaying the promulgation of permitting standards beyond a congressionally mandated deadline, it nonetheless ruled that "enjoining OMB from interacting at all with EPA simply because OMB *might* cause delay past the new judicial deadline [was] premature and an unwarranted intrusion into discretionary executive consultations." Id. Instead, it granted only limited declaratory relief, holding that "all [OMB] interaction [could] continue" absent any further conflict with deadlines. Id. at 572.

Unlike the unjustifiable dilatory tactics in EDF, the OMB participation at issue here is neither "incompatible with the will of Congress" nor "[un]sustainable as a valid exercise of the President's Article II powers."[10] See id. at 570. OMB merely guided EPA's decision-making

[10] The President's supervisory power derives from four constitutional provisions (and their judicial gloss): the Vesting Clause, U.S. Const. art. II, § 1, cl. 1; the Take Care Clause, U.S. Const. art. II, § 3; the Written Opinion Clause, U.S. Const. art. II, § 2, cl. 1; and the Removal Power incident to the Appointments Clause, U.S. Const. art. II, § 2, cl. 2. For further argument regarding the President's directive authority, see *Section IV.B.2*, *infra*.

within the permissible bounds of its discretionary authority. Where EPA operates within this "legal zone" of discretion, see Coeur Alaska, 129 S. Ct. at 2477 (Breyer, J., concurring), as it did in the instant case, the simple addition of OMB input does not transform an otherwise permissible agency decision into an "arbitrary and capricious" one. Therefore, as EPA's ultimate decision not to veto remained consistent with the policies and procedures of CWA and Coeur Alaska, and because the Administrator's veto authority is discretionary, OMB participation did not doom EPA's otherwise permissible failure to veto under "arbitrary and capricious" review.

2. Congress' Grant of Authority to the Administrator in CWA Does Not Preclude the Directive Authority of the President

New Union's only possible remaining argument—that Congress' specific delegation to the Administrator by *expressio unius* reasoning precludes the President's directive authority—cannot withstand constitutional muster and contradicts well-established historical practice. In granting the Administrator authority "to administer" CWA, 33 U.S.C. § 1251(d), and to veto COE permits, 33 U.S.C. § 1344(c), Congress was silent regarding the President's rights and responsibilities under the statute. But no authority exists that would read such congressional silence as a blanket prohibition on executive oversight, as New Union would have this Court do. Therefore, even if OMB's participation pursuant to Exec. Order No. 12,088, 43 Fed. Reg. 47,707 (Oct. 13, 1978), constituted an exercise of *directive*, rather than general supervisory, authority, that fact does not deprive OMB's actions of their validity.

When Congress is silent with respect to the scope of executive power, "there is a zone of twilight in which [the President] and Congress may have concurrent authority." Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 637 (1952) (Jackson, J., concurring). In this "zone of twilight," the President's may rely not only upon his inherent Article II powers, but also upon any "congressional inertia, indifference or quiescence" in historical Executive practices. Id.

The Constitution and its judicial gloss furnish multiple bases for the President's directive authority over Executive agencies. First off, the Constitution expressly vests all executive power exclusively in the office of the President. U.S. Const. art. II, § 1, cl. 1; see also Sierra Club v. Costle, 657 F.2d at 405 ("The idea of a 'plural executive' . . . was considered and rejected by the Constitutional Convention. Instead the Founders chose to risk the potential for tyranny inherent in placing power in one person, in order to gain the advantages of accountability fixed on a single source."). Moreover, the President's duty to "take Care that the Laws be faithfully executed," U.S. Const. art. II, § 3, implies that the President has "general administrative control of those executing the laws." Free Enter. Fund v. Pub. Co. Accounting Oversight Bd., 130 S. Ct. 3138, 3152 (2010) (quoting Myers, 272 U.S. at 164). And the Written Opinion clause, which authorizes the President to demand written opinions from Executive agency heads on "any Subject relating to the Duties of their respective Offices," U.S. Const. art. II, § 2, cl. 1, clearly buttresses the foundation for the President's supervisory control.

Where purely Executive officers are concerned, the argument for the President's directive authority sounds even stronger as Congress cannot limit the President's removal power over such officers; they serve at the pleasure of the President and may be fired at-will. Myers, 272 U.S. at 117; see also Synar v. United States, 626 F. Supp. 1374, 1401 (D.D.C.) ("Once an officer is appointed, it is only the authority that can remove him, and not the authority that appointed him, that he must fear and, in the performance of his functions, obey."), aff'd sub nom. Bowsher v. Synar, 478 U.S. 714 (1986). But see Humphrey's Ex'r v. United States, 295 U.S. 602, 629 (1935) (allowing Congress to insulate *quasi-legislative* or *quasi-judicial* officers from at-will removal); Morrison v. Olson, 487 U.S. 654, 690-94 (1988) (same for *inferior* officers). Presidential authority over EPA is particularly "clear since [EPA] has never been considered an 'independent

agency,' but always part of the Executive Branch." Sierra Club v. Costle, 657 F.2d at 405-06.

In light of such strong constitutional authority, congressional silence on the issue of presidential oversight cannot reasonably be interpreted to preclude OMB participation as New Union argues it must. In fact, as then-professor, now-Justice, Elena Kagan argued in 2001, "presuming an undifferentiated presidential control of executive agency officials" where Congress has not restricted the President's removal power better reflects "the general intent and understanding of Congress." Elena Kagan, Presidential Administration, 114 Harv. L. Rev. 2245, 2327-228 (2001); see also Relation of the President to the Executive Departments., 7 Op. Att'y Gen. 453, 482 (1855) ("[A]s a general rule, the direction of the President is to be presumed in all instructions and orders issuing from the competent Department.").

New Union's interpretation is also inconsistent with congressionally authorized practices governing delegations made directly to the office of the President. If a specific delegation to the Administrator precludes presidential directive authority, as New Union asserts, then it follows that the President only retains such authority where Congress has made a specific delegation to his office. But, under the Presidential Subdelegation Act of 1950, the President may freely designate any Executive officer "to perform without approval, ratification, or other action by the President any function which is vested in the President by law." 3 U.S.C. § 301(a) (2006). Read in this light, the specific delegations to the Administrator under CWA do not preclude the President's directive authority, they merely narrow the field of Executive officers that the President can act *through* in exercising his discretion.

To the extent that New Union argues that allowing OMB participation interferes with this Court's ability to construe CWA under Chevron, New Union misconceives the nature of the inquiry. One of the primary justifications the Court offered for Chevron's deferential mode of

review was the greater political accountability afforded to agencies because of presidential oversight. 467 U.S. at 865-66 ("While agencies are not directly accountable to the people, the Chief Executive is, and it is entirely appropriate for this political branch of the Government to . . . resolv[e] the competing interests which Congress itself either inadvertently did not resolve, or intentionally left to be resolved[.]"). OMB participation does not defeat Chevron's applicability; it bolsters the long-held constitutional intuition that "no Head of Department can lawfully perform an *official* act against the will of the President." 7 Op. Att'y Gen. at 469-70.

As both our Constitution and our historical practice uniformly illustrates, congressional silence regarding the scope of presidential oversight in CWA cannot be read as a prohibition on the President's directive authority without sacrificing the consistency of the administrative state. Since he is the only elected official with a national constituency, the President has a unique vantage point over the increasingly complex regulatory landscape, one that is more politically accountable than either single-mission agencies or courts. Recognizing this, the court below rejected the idea that OMB participation violated CWA, and this Court should do the same.

CONCLUSION

For the foregoing reasons, and any others that may appear to this Court after oral argument, this Court should find (1) that New Union lacks standing; (2) that Lake Temp is a "navigable water" subject to the jurisdiction of CWA; (3) that the COE permit was properly issued under § 404(a); and (4) that OMB participation in EPA's failure to exercise its discretionary veto authority under § 404(c) is unreviewable and, in any case, permissible under CWA, APA and the Constitution. The United States of America therefore respectfully asks this Court to affirm the decision of the lower court on all counts.

APPENDIX A

THE CLEAN WATER ACT

33 U.S.C.A. § 1311
§ 1311. Effluent limitations

(a) Illegality of pollutant discharges except in compliance with law
Except as in compliance with this section and sections 1312, 1316, 1317, 1328, 1342, and 1344 of this title, the discharge of any pollutant by any person shall be unlawful.

33 U.S.C.A. § 1342
§ 1342. National pollutant discharge elimination system

(a) Permits for discharge of pollutants

(1) Except as provided in sections 1328 and 1344 of this title, the Administrator may, after opportunity for public hearing, issue a permit for the discharge of any pollutant, or combination of pollutants, notwithstanding section 1311(a) of this title, upon condition that such discharge will meet either (A) all applicable requirements under sections 1311, 1312, 1316, 1317, 1318, and 1343 of this title, or (B) prior to the taking of necessary implementing actions relating to all such requirements, such conditions as the Administrator determines are necessary to carry out the provisions of this chapter.

(2) The Administrator shall prescribe conditions for such permits to assure compliance with the requirements of paragraph (1) of this subsection, including conditions on data and information collection, reporting, and such other requirements as he deems appropriate.

(3) The permit program of the Administrator under paragraph (1) of this subsection, and permits issued thereunder, shall be subject to the same terms, conditions, and requirements as apply to a State permit program and permits issued thereunder under subsection (b) of this section.

(4) All permits for discharges into the navigable waters issued pursuant to section 407 of this title shall be deemed to be permits issued under this subchapter, and permits issued under this subchapter shall be deemed to be permits issued under section 407 of this title, and shall continue in force and effect for their term unless revoked, modified, or suspended in accordance with the provisions of this chapter.

(5) No permit for a discharge into the navigable waters shall be issued under section 407 of this title after October 18, 1972. Each application for a permit under section 407 of this title, pending on October 18, 1972, shall be deemed to be an application for a permit under this section. The Administrator shall authorize a State, which he determines has the capability of administering a permit program which will carry out the objective of this chapter to issue permits for discharges into the navigable waters within the jurisdiction of such State. The Administrator may exercise the authority granted him by the preceding sentence only during the period which begins on October 18, 1972, and ends either on the ninetieth day after the date of the first promulgation of

guidelines required by section 1314(i)(2) of this title, or the date of approval by the Administrator of a permit program for such State under subsection (b) of this section, whichever date first occurs, and no such authorization to a State shall extend beyond the last day of such period. Each such permit shall be subject to such conditions as the Administrator determines are necessary to carry out the provisions of this chapter. No such permit shall issue if the Administrator objects to such issuance.

33 U.S.C.A. § 1344
§ 1344. Permits for dredged or fill material

(a) Discharge into navigable waters at specified disposal sites
The Secretary may issue permits, after notice and opportunity for public hearings for the discharge of dredged or fill material into the navigable waters at specified disposal sites. Not later than the fifteenth day after the date an applicant submits all the information required to complete an application for a permit under this subsection, the Secretary shall publish the notice required by this subsection.

(b) Specification for disposal sites
Subject to subsection (c) of this section, each such disposal site shall be specified for each such permit by the Secretary (1) through the application of guidelines developed by the Administrator, in conjunction with the Secretary, which guidelines shall be based upon criteria comparable to the criteria applicable to the territorial seas, the contiguous zone, and the ocean under section 1343(c) of this title, and (2) in any case where such guidelines under clause (1) alone would prohibit the specification of a site, through the application additionally of the economic impact of the site on navigation and anchorage.

(c) Denial or restriction of use of defined areas as disposal sites
The Administrator is authorized to prohibit the specification (including the withdrawal of specification) of any defined area as a disposal site, and he is authorized to deny or restrict the use of any defined area for specification (including the withdrawal of specification) as a disposal site, whenever he determines, after notice and opportunity for public hearings, that the discharge of such materials into such area will have an unacceptable adverse effect on municipal water supplies, shellfish beds and fishery areas (including spawning and breeding areas), wildlife, or recreational areas. Before making such determination, the Administrator shall consult with the Secretary. The Administrator shall set forth in writing and make public his findings and his reasons for making any determination under this subsection.

33 U.S.C.A. § 1362
§ 1362. Definitions

Except as otherwise specifically provided, when used in this chapter:

(5) The term "person" means an individual, corporation, partnership, association, State, municipality, commission, or political subdivision of a State, or any interstate body.

(6) The term “pollutant” means dredged spoil, solid waste, incinerator residue, sewage, garbage, sewage sludge, munitions, chemical wastes, biological materials, radioactive materials, heat, wrecked or discarded equipment, rock, sand, cellar dirt and industrial, municipal, and agricultural waste discharged into water. This term does not mean (A) “sewage from vessels or a discharge incidental to the normal operation of a vessel of the Armed Forces” within the meaning of section 1322 of this title; or (B) water, gas, or other material which is injected into a well to facilitate production of oil or gas, or water derived in association with oil or gas production and disposed of in a well, if the well used either to facilitate production or for disposal purposes is approved by authority of the State in which the well is located, and if such State determines that such injection or disposal will not result in the degradation of ground or surface water resources.

(7) The term “navigable waters” means the waters of the United States, including the territorial seas.

(12) The term “discharge of a pollutant” and the term “discharge of pollutants” each means (A) any addition of any pollutant to navigable waters from any point source, (B) any addition of any pollutant to the waters of the contiguous zone or the ocean from any point source other than a vessel or other floating craft.

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(16) The term “discharge” when used without qualification includes a discharge of a pollutant, and a discharge of pollutants.

APPENDIX B

THE ADMINISTRATIVE PROCEDURE ACT

5 U.S.C.A. § 701
§ 701. Application; definitions

(a) This chapter applies, according to the provisions thereof, except to the extent that--
(1) statutes preclude judicial review; or
(2) agency action is committed to agency discretion by law.

(b) For the purpose of this chapter--
(1) "agency" means each authority of the Government of the United States, whether or not it is within or subject to review by another agency, but does not include--
(A) the Congress;
(B) the courts of the United States;
(C) the governments of the territories or possessions of the United States;
(D) the government of the District of Columbia;
(E) agencies composed of representatives of the parties or of representatives of organizations of the parties to the disputes determined by them;
(F) courts martial and military commissions;
(G) military authority exercised in the field in time of war or in occupied territory; or
(H) functions conferred by sections 1738, 1739, 1743, and 1744 of title 12; subchapter II of chapter 471 of title 49; or sections 1884, 1891-1902, and former section 1641(b)(2), of title 50, appendix; and
(2) "person", "rule", "order", "license", "sanction", "relief", and "agency action" have the meanings given them by section 551 of this title.

5 U.S.C.A. § 701
§ 702. Right of review

A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof. An action in a court of the United States seeking relief other than money damages and stating a claim that an agency or an officer or employee thereof acted or failed to act in an official capacity or under color of legal authority shall not be dismissed nor relief therein be denied on the ground that it is against the United States or that the United States is an indispensable party. The United States may be named as a defendant in any such action, and a judgment or decree may be entered against the United States: *Provided*, That any mandatory or injunctive decree shall specify the Federal officer or officers (by name or by title), and their successors in office, personally responsible for compliance. Nothing herein (1) affects other limitations on judicial review or the power or duty of the court to dismiss any action or deny relief on any other appropriate legal or equitable ground; or (2) confers authority to grant relief if any other statute that grants consent to suit expressly or impliedly forbids the relief which is sought.

5 U.S.C.A. § 706
§ 706. Scope of review

To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall--

(1) compel agency action unlawfully withheld or unreasonably delayed; and

(2) hold unlawful and set aside agency action, findings, and conclusions found to be--

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;
(B) contrary to constitutional right, power, privilege, or immunity;
(C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;
(D) without observance of procedure required by law;
(E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or
(F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error.

APPENDIX C

U.S. CONSTITUTION

U.S. Const. Art. II § 1, cl. 1
Section 1, Clause 1. Executive Power, Term

Section 1. The executive Power shall be vested in a President of the United States of America. He shall hold his Office during the Term of four Years, and, together with the Vice President, chosen for the same Term, be elected, as follows:

U.S. Const. Art. II § 3
Section 3. Messages; Convene and Adjourn Congress; Receive Ambassadors; Execute Laws; Commission Officers

Section 3. He shall from time to time give to the Congress Information of the State of the Union, and recommend to their Consideration such Measures as he shall judge necessary and expedient; he may, on extraordinary Occasions, convene both Houses, or either of them, and in Case of Disagreement between them, with Respect to the Time of Adjournment, he may adjourn them to such Time as he shall think proper; he shall receive Ambassadors and other public Ministers; he shall take Care that the Laws be faithfully executed, and shall Commission all the Officers of the United States.

U.S. Const. Art. II § 2, cl. 1
Section 2, Clause 1. Commander in Chief; Reprieves and Pardons

Section 2. The President shall be Commander in Chief of the Army and Navy of the United States, and of the Militia of the several States, when called into the actual Service of the United States; he may require the Opinion, in writing, of the principal Officer in each of the executive Departments, upon any Subject relating to the Duties of their respective Offices, and he shall have Power to grant Reprieves and Pardons for Offenses against the United States, except in Cases of Impeachment.

U.S. Const. Art. II § 2, cl. 2
Section 2, Clause 2. Treaty Making Power; Appointing Power

He shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur; and he shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.

U.S. Const. Art. III § 2, cl. 1
Section 2, Clause 1. Jurisdiction of Courts

Section 2. The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;--to all Cases affecting Ambassadors, other public Ministers and Consuls;--to all Cases of admiralty and maritime Jurisdiction;--to Controversies to which the United States shall be a Party;--to Controversies between two or more States;--between a State and Citizens of another State;--between Citizens of different States;--between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.