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

STATE OF NEW UNION,

Appellant and Cross-Appellee,

v.

UNITED STATES

Appellee and Cross-Appellant,

v.

STATE OF PROGRESS

Appellee and Cross-Appellant,

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

BRIEF FOR APPELLANT STATE OF NEW UNION

STATEMENT OF ISSUES FOR REVIEW

I. Whether New Union has standing where the proposed filling of Lake Temp creates an injury in fact caused by the Defendants, which is redressable by the Court.

II. Whether Lake Temp is a navigable water of the United States where it is used in interstate commerce.

III. Whether the EPA has jurisdiction to issue a permit under CWA § 402 for the discharge of slurry into Lake Temp and the COE does not have jurisdiction to issue a permit for that activity under CWA § 404 where the slurry is a pollutant as defined by 33 USC § 1362 and does not constitute "fill material."

IV. Whether the OMB's substantive decisions violated the EPA's authority under the Clean Water Act where there is no congressional intent for the OMB to have authority and the EPA is granted explicit authority under the CWA.

V. Whether the EPA's decision not to issue a permit under CWA § 402 and not to veto the COE's CWA § 404 permit is subject to judicial review where there is explicit judicial review for CWA § 402 permits, the Administrative Procedure Act provides for judicial review, and public policy concerns are present.

VI. Whether the OMB and the EPA are accorded Chevron deference where the OMB intervened in the EPA's authority under CWA § 402 and § 404 without the force of law and where the EPA's decision to acquiesce was not a formal rulemaking. Whether the EPA's acquiescence is unpersuasive under a lower degree of deference and whether it is unreasonable where the clear intent of Congress is violated.

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Jurisdiction Below

The district court had jurisdiction pursuant to 5 U.S.C. § 702 of the Administrative Procedure Act (APA) and under 28 U.S.C. § 1331. In dismissing the complaint, the district court found that New Union lacked standing to challenge the permit issued by the United States Army Corps of Engineers (COE) to the Department of Defense (DOD) pursuant to the Clean Water Act (CWA) § 404, 33 U.S.C. § 1344. This appeal seeks review of that decision.

Jurisdiction on Appeal

The U.S. Court of Appeals for the Twelfth Circuit has jurisdiction to review the district court's grant of summary judgment *de novo* pursuant to 5 U.S.C. § 706 to determine whether the district court correctly applied the relevant substantive law.

STATEMENT OF THE CASE

I. Procedural Background

The State of New Union, the appellant and cross-appellee in this case, borders the State of Progress, which houses the military base where Lake Temp is located. (Record 3.) The State of New Union asks that this Court reverse the United States District Court for the District of New Union's decision to grant summary judgment to the U.S. and the State of Progress. (Id. 1.) The State of New Union sought review in the U.S. District Court of the individual permit issued by the Secretary of the Army, through the U.S. Army Corps of Engineers ("COE") under CWA § 404. (Id. 3.) On June 2, 2011, the lower court granted summary judgment for Defendants, the United States and the State of Progress. (Id. 10.)

The State of New Union ("New Union") and State of Progress ("Progress") each filed a Notice of Appeal to review the decisions of the lower court. (Id. 1.) New Union asks that the court reverse the holdings that New Union lacked standing to challenge the permit issued by the COE, that the COE has jurisdiction to issue the permit under CWA § 404, and that the OMB did not violate the CWA in deciding the dispute between the Environmental Protection Agency ("EPA") and COE over which permit, CWA § 404 or CWA § 402, was applicable. (Id.) New Union is seeking for the Court to affirm the holding that Lake Temp is navigable water subject to federal jurisdiction. (Id.) Progress seeks review of the decision that the COE had jurisdiction to issue a CWA § 404 permit because Lake Temp is not a navigable water. (Id.)

II. Factual Background

Lake Temp, an oval body of water that is three miles wide and nine miles long during its peak season, is located on a military reservation in the state of Progress and borders the Progress state highway near the New Union Border. (R. 4.) Lake Temp is filled with water four out of every five years. (Id.) The Progress state highway is intersected by several roads that lead into New Union and is only one hundred feet from the shore of Lake Temp when the lake is at its historic high. (Id.)

The Imhoff Aquifer, which is located partially within New Union and partially within Progress, is approximately one thousand feet below the lake and follows the general contours of the lake, though it is more extensive. (Id.) The New Union statute requires the New Union Department of Natural Resources to issue permits for aquifer usage after determining that withdrawals will not deplete groundwater over a period of twenty years. (Id. 6.)

The lake is frequented by ducks, hunters, and bird watchers. (Id. 4.) Over the last one hundred years, long before the Lake became part of a military reservation in 1952, thousands of

duck hunters have used Lake Temp. (Id.) The Department of Defense ("DOD") knows that people use the lake for hunting and bird watching, yet they have taken no measures beyond signs to restrict public entry. (Id.) The signs are posted on both sides of the highway at intervals of one hundred yards, twenty-five feet from the road edge, and warn of danger and illegal entry. (Id.) There is no fence around the lake, and clearly visible trails from the road show signs of rowboats and canoes being dragged to the lake. (Id.)

The DOD proposed construction on the shores of Lake Temp to receive, prepare, and discharge munitions into the lake. (Id.) The munitions include many chemicals on the Clean Water Act § 311 list of hazardous substances. (Id.) Preparation is to make sure the munitions will not explode by emptying the munitions of liquid, semi-solid, and granular content, then mixing the contents with chemicals. (Id.) Slurry is formed from grinding and pulverizing the remaining solids (primarily metals) and mixing the remaining substance with water. (Id.) Discharged slurry will dry out soon after contact with the dry portions of the lake bed due to the arid nature of this area. (Id.)

The slurry will be discharged by a movable multi-port pipe across only the dry bed of the lake, a process which will take several years. (Id.) It will be a period of time before the lake can return to its pre-operation condition. (Id. 4-5.) The COE plans to grade the edges of the new lakebed so runoff from the surrounding mountains can continue to flow into the lake, which is at the low point in the drainage basin. (Id.) The lengthy process will rely on alluvial deposits from mountain precipitation to again cover the dry lake bed, which DOD estimates will eventually result in lake top water elevation increase of six feet and surface area increase of two square miles. (Id. 4-5.)

The COE and EPA each sent briefing papers on the issue of Lake Temp to the Office of Management and Budget ("OMB") and also met with the OMB. (Id. 9, n.1.) The OMB made an oral decision and directed the COE to issue a CWA § 404 permit. (Id.) The OMB further ordered the EPA to not veto the CWA § 404 permit and not issue a CWA § 402 permit. (Id.) Subsequently, the DOD received a CWA § 404 permit from the COE, a branch of the DOD, to fill Lake Temp. (Id. 8.)

SUMMARY OF THE ARGUMENT

New Union has standing to challenge COE's munitions discharge because the discharge presents an actual or threatened injury fairly traceable to the defendants. As a procedural challenge brought by a quasi-sovereign state, New Union's complaint faces a lower threshold under the modern Article III standing doctrine. The increased risk of harm to New Union's water in the Imhoff Aquifer establishes an injury in fact sufficient to meet this threshold. New Union's complaint can be redressed through a ruling that the Clean Water Act § 404 permit is invalid.

The permitting requirements of the CWA are applicable to this case because Lake Temp is a navigable water. Due to its effect on interstate commerce, Lake Temp satisfies the requirements of COE regulations and applicable case law which define navigable waters subject to the CWA. The case law relied upon by the district court uses a different definition of navigable waters and is therefore inapplicable.

Assuming Lake Temp is a navigable water, EPA has permitting jurisdiction for the discharge proposed by DOD. The discharge satisfies the criteria for a CWA § 402 permit because it comes from a point source, and EPA has express jurisdiction to authorize the discharge of munitions under 33 U.S.C. § 1342. COE lacks jurisdiction to issue a § 404 permit

because the discharge does not satisfy EPA and COE's joint agency definition of fill material under 33 C.F.R. § 323.2 and 40 C.F.R. § 232.2. Even if the discharge constitutes fill material, COE's permitting was arbitrary and capricious due to a lack of critical information on potentially adverse environmental effects. A finding that the § 404 permit is invalid will properly limit the scope of such permits to prevent loopholes for indiscriminate waste disposal.

Furthermore, neither the CWA nor any executive order grants the OMB authority to make a substantive regulatory decision by ordering the EPA not to issue a § 402 permit or § 404 veto. While OMB lacks reviewing power in this case, judicial review is proper under 33 U.S.C. § 1369 for the CWA § 402 permit and the Administrative Procedure Act (APA) for both permitting decisions. Neither OMB's decision to intervene in the permitting process nor EPA's acquiescence should receive Chevron deference by this court; OMB lacked the force of law to intervene, and EPA's acquiescence in the OMB's directive was not a formal rulemaking. Even if EPA's acquiescence is entitled to Chevron deference, the court should find that this acquiescence is unreasonable and in violation of Congressional intent.

ARGUMENT

I. NEW UNION HAS STANDING BECAUSE UNDER MASSACHUSETTS V. EPA THE PROPOSED FILLING OF LAKE TEMP CREATES AN INJURY IN FACT CAUSED BY DEFENDANTS THAT CAN BE REDRESSED BY THIS COURT.

The State of New Union has standing to challenge the COE's decision because discharging spent munitions into Lake Temp above the Imhoff Aquifer increases the probability that chemical waste will contaminate the aquifer, including the portion of the aquifer located within New Union. See Massachusetts v. EPA, 549 U.S. 497, 526 (2007); Friends of the Earth v. Laidlaw Envtl. Servs., Inc., 528 U.S. 167, 183 (2000); Comm. to Save the Rio Hondo v. Lucero, 102 F.3d 445, 446 (10th Cir. 1996). New Union's injuries from the proposed work satisfy the

Article III requirements for standing of (1) an actual or threatened injury that is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical, (2) which is fairly traceable to the defendant, and (3) which is likely to be redressed by the relief requested. See Massachusetts, 549 U.S. at 517; Laidlaw, 528 U.S. at 180-81; Lujan v. Defenders of Wildlife, 504 U.S. 555, 560-61 (1992). In Massachusetts, the Supreme Court found standing for a state challenge of the EPA's refusal to regulate certain greenhouse gas emissions that contribute to global warming. 549 U.S. at 526. Similarly, New Union stands to suffer serious harm to its land, specifically the Imhoff Aquifer, if the proposed munitions disposal site is built. See id. Further, this harm is fairly traceable to Defendant's proposed chemical disposal site and could be redressed by a court order that the EPA permitting process under CWA § 402, which would require testing to determine the likelihood of contamination, govern instead of CWA § 404 as administered by the COE. See 33 U.S.C. §§ 1342, 1344; Massachusetts, 549 U.S. at 523-26.

The standing requirements for New Union also face a lower threshold to show redressability and immediacy under the modern standing doctrine because New Union's challenge is a procedural challenge. See Lujan, 504 U.S. at 572-73; Hodges v. Abraham, 300 F.3d 432, 445 (4th Cir. 2002). New Union's present challenge fits within the concept of a procedural challenge outlined by the Supreme Court in Lujan as the attempt to enforce a "procedural requirement the disregard of which could impair a separate concrete interest." 504 U.S. at 572. Perhaps most importantly, New Union's challenge relies upon a section of the CWA nearly identical to the section of the CAA contested in Massachusetts. 549 U.S. at 516. Just as Massachusetts could challenge the EPA's refusal to engage in rulemaking under § 7607(b)(1) of the Clean Air Act, the Clean Water Act allows any "interested party"—including a state—to challenge the "issu[ance] or den[ial] of any permit" under § 1342. See 33 U.S.C. §

1369(b)(1)(F); Massachusetts, 549 U.S. at 516. Here, New Union in fact alleges multiple procedural deficiencies that seriously increase the risk of harm to the Imhoff Aquifer. (R. 7-10.) These injuries range from OMB hijacking the permitting process to the EPA refusing to administer the permit under the appropriate section of the CWA—the exact kind of procedural injuries recognized under the modern Article III standing doctrine. See Massachusetts, 549 U.S. at 526; Laidlaw, 528 U.S. at 183.

Further, as a litigant asserting a procedural right, New Union need only establish "some possibility" that the requested relief will prompt the injury-causing party to reconsider its decision. See Massachusetts, 549 U.S. at 522. Thus, given that New Union is a state asserting its quasi-sovereign interest in a procedural challenge, the state must only meet the most lenient requirements to satisfy Article III standing. See id.

Additionally, Massachusetts applies to the facts of this case because New Union alleges injury in its quasi-sovereign capacity as the owner and regulator of its groundwater. See id. at 536. Some courts limit the applicability of Massachusetts by distinguishing between a state's attempt to protect its citizens from the operation of federal law, which is prohibited under Massachusetts v. Mellon, 262 U.S. 447, 485-86 (1923), and a state's attempt to assert its own rights under federal law, which is allowed under Massachusetts v. EPA. Citizens Against Ruining the Environment v. EPA, 535 F.3d 670, 676 (7th Cir. 2008). When a state challenges a federal action not merely to protect the interests of some of its citizens but instead, as New Union does here, to prevent concrete harm to the state as a quasi-sovereign body, the state has standing to bring the action. See Massachusetts, 549 U.S. at 526; Hodges, 300 F.3d at 444-45.

A. New Union will suffer an injury in fact if Lake Temp is filled with munitions waste which then seeps into the Imhoff Aquifer.

The increased risk of harm to New Union's water in the Imhoff Aquifer is more than enough to establish an injury in fact under the modern Article III standing requirements, especially given the preventative nature of the CWA. Ethyl Corp. v. EPA, 541 F.2d 1, 25 (D.C. Cir. 1976). In construing a similar provision of the Clean Air Act, the Ethyl court held—in language quoted directly by Justice Stevens in Massachusetts—that ". . . statutes and common sense demand regulatory action to prevent harm, even if the regulator is less than certain harm is otherwise inevitable." 549 U.S. at 531; 541 F.2d at 25. For New Union to establish an injury in fact, it must only show that dumping chemical waste into the Imhoff Aquifer increases the probability that the waste will further contaminate the aquifer. See Laidlaw, 528 U.S. at 167; Baur v. Veneman, 352 F.3d 625 (2d Cir. 2003); Comm. to Save the Rio Hondo, 102 F.3d 446. In Laidlaw the Court recognized that requiring proof of harm to the environment in challenges such as the one brought here by New Union would "raise the standing hurdle higher than necessary." See id.

Finding injury in fact to New Union would also fall squarely in line with instances where circuit courts have applied Laidlaw and found standing in environmental lawsuits, even those suits involving private organizations that face a more demanding standing test. See Comm. to Save the Rio Hondo, 102 F.3d at 446. In Committee to Save the Rio Hondo, an increased risk of environmental injury due to an agency's uninformed decision-making created sufficient injury in fact for an environmental advocacy group to challenge the Forest Service's decision to issue a permit. 102 F.3d at 446. Similarly, New Union alleges that the uninformed decision-making of the OMB—decision-making that rightfully belonged to the EPA—creates an increased chance of environmental harm to the Imhoff Aquifer. See id. The Ninth Circuit has also held that

procedural injury is tied closely to substantive harm, which consists of the "added risk to the environment that takes place when governmental decisionmakers make up their minds" without following proper procedure. Citizens for Better Forestry v. U.S. Dep't of Agric., 341 F.3d 961, 971 (9th Cir. 2003). The Seventh Circuit has even gone so far as to hold that construction of a radio tower in a 100-year floodplain created injury in fact to the plaintiff because "even a small probability of injury is sufficient to create a case or controversy, to take a suit out of the category of the hypothetical." Vill. of Elk Grove Vill. v. Evans, 997 F.2d 328, 329 (7th Cir. 1993). If increased risk constituted standing in those instances, then the increased probability of contamination in the Imhoff Aquifer alleged by New Union falls squarely within the modern standing doctrine. See Citizens for Better Forestry, 341 F.3d at 971; Vill. of Elk Grove Vill., 997 F.2d at 329.

Further, it is immaterial that New Union's proof of harm is not as concrete as that suffered by Massachusetts in its challenge to greenhouse gas regulation. See Massachusetts, 549 U.S. at 521. First, the Court in Massachusetts faced a different kind of challenge. Id. There, the state challenged the EPA's decision not to regulate a particular emission tied closely to climate change that had already destroyed some of the state's coastline. Id. at 501. By contrast, New Union challenges a disposal permit, a challenge that is by nature a preventative rather than corrective measure. See Massachusetts, 549 U.S. at 501, 531; Ethyl Corp., 541 F.2d at 25. New Union's allegation is much more similar to when the Court cited the preventative nature of the Clean Air Act and found standing to bring suit before any physical damage occurred. See Ethyl Corp., 541 F.2d at 25. Secondly, by the Court's own language, New Union's proof of harm does not have to rise to the level of that suffered by Massachusetts for this Court to find standing. Massachusetts, 549 U.S. at 521. After describing the "special solicitude" states receive in the

standing analysis, Justice Stevens then clearly stated that regardless of any relaxed tests, Massachusetts "satisfied the most demanding standards" of the adversarial process. Id. Thus, although the Court did not specifically describe the minimum requirements of standing for a state, it explicitly stated that the harm suffered by Massachusetts rose well above that hurdle. Id. Accordingly, New Union has standing even though it has not suffered harm commensurate to that of Massachusetts. See id.

New Union further alleges sufficient procedural injury because OMB impermissibly interfered with the permitting process and the EPA abdicated responsibility. (R. 9-10.) In applying the Lujan definition of procedural rights, other circuit courts have granted standing to state challenges in circumstances similar to New Union's. See Hodges, 300 F.3d 444-45. Recently, the Fourth Circuit held under Lujan that the governor of South Carolina had standing to bring a challenge to the Department of Energy's decision to transport excess plutonium from Colorado to South Carolina. Id. There, the court found standing on behalf of South Carolina's governor to protect the state's highways, streams, and woodlands. Id. Further, the court noted that the governor bore official responsibility for preserving the state's groundwater. Id. Similarly, New Union's challenge merely asserts the state's interest in preserving its groundwater, which New Union exclusively regulates under the state's water permitting system. (R. 6.) Additionally, the court in Hodges noted that a state road ran through the proposed plutonium disposal site and found standing for South Carolina's governor to assert his interest as "a neighboring landowner, whose property is at risk of environmental damage." 300 F.3d at 445. Similarly, a New Union road runs within 100 feet of the proposed munitions disposal site at Lake Temp. (R. 4.) Thus, New Union has suffered sufficient injury to bring this challenge. See Massachusetts, 549 U.S. at 526; see Lujan, 504 U.S. at 572-73.

B. The contamination of the Imhoff Aquifer would be fairly traceable to the Defendants because the proposed munitions waste facility would discharge chemical waste that includes hazardous materials into Lake Temp and the Imhoff Aquifer.

The causation alleged by New Union easily exceeds the standard laid down in Massachusetts because Defendants here would likely be a substantial source of pollution in the Imhoff Aquifer. 549 U.S. at 523-24. In Massachusetts, the Court rejected the EPA's argument that greenhouse gas emissions from new cars contributed an insignificant amount to global climate change and that any reductions achieved through American regulations would be offset by increased emissions from India and China. Id. In doing so, the Court explicitly found that even small, incremental steps can worsen the environment and are open to attack in federal courts. Id. Similarly, New Union alleges that any chemical dumping in Lake Temp could eventually seep into the Imhoff Aquifer and greatly compound any existing water contamination. (R. 6.) Further, unlike in Massachusetts, the chain of causation is much more direct—here, a proposed munitions disposal site would spray chemical waste into a lake situated directly above the Imhoff Aquifer. 549 U.S. at 523-24.

C. New Union's complaint would be redressed by the relief requested because a permit issued through the EPA under § 402 of the Clean Water Act would require appropriate testing to determine what if any impact the chemical waste would have on the Imhoff Aquifer.

An order to proceed under the CWA § 404 permitting process for the proposed disposal site on Lake Temp would redress New Union's injuries because it would prevent any further contamination of the Imhoff Aquifer and correct New Union's procedural complaint by ensuring the permitting process goes through CWA § 402 as administered by the EPA. 33 U.S.C. § 1342. This process in turn would require sufficient experimentation and analysis to determine whether the proposed chemical waste site would pollute the Imhoff Aquifer. Id. In Massachusetts, the Court held that the requested remedy—EPA regulation of greenhouse gas emissions from new

cars—would redress the harm, even if such regulation would only slow global warming without necessarily reversing it. 549 U.S. at 525. Similarly, an order by this Court that the permit application go through § 402 would not necessarily lower the sulfur levels of the Imhoff Aquifer but would prevent any further contamination from making the situation even worse. See id. Thus, this Court is capable of ordering an adequate remedy to New Union's harm. See id.

II. LAKE TEMP IS A NAVIGABLE WATER OF THE UNITED STATES BECAUSE IT IS USED IN INTERSTATE COMMERCE OR BECAUSE IT IS A WETLAND ADJACENT TO NAVIGABLE WATERS.

A. Lake Temp is navigable because it fits the COE definition of a water of the United States that affects interstate commerce and falls within the CWA's definition of waters of the United States.

The munitions disposal facility at Lake Temp requires permit approval by the EPA under CWA § 402 because Lake Temp is a central focus of interstate commerce. See United States v. Riverside Bayview Homes, Inc., 474 U.S. 121, 133 (1985); Minnehaha Creek Watershed Dist. v. Hoffman, 597 F.2d 617, 625-26 (8th Cir. 1979). The CWA defines "navigable waters" as "waters of the United States." 33 U.S.C. § 1362. Under the CWA, "navigable waters" extends beyond merely traditional "navigable in fact" waters to include intrastate lakes such as Lake Temp that play a prime role in interstate commerce. See Riverside Bayview Homes, Inc., 474 U.S. at 133; United States v. Cundiff, 555 F.3d 200, 207 (6th Cir. 2009). Congress's expansive definition "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." Riverside Bayview Homes, Inc., 474 U.S. at 133; Cundiff, 555 F.3d at 207. Thus, Lake Temp—a relatively permanent lake that at its peak spans 27 square miles and

attracts visitors from across the world—falls squarely within the CWA's vision of a navigable water.

Lake Temp further meets the definition of "waters of the United States" as promulgated by the COE. 33 C.F.R. §§ 328.3(a)(1), (a)(3)(i) (1986). Lake Temp in fact fits several of the definitions of "waters of the United States" as defined by the COE because of Lake Temp's role in interstate commerce. See 33 C.F.R. §§ 328.3(a)(1), (a)(3)(i) (1986); Utah ex rel. Div. of Parks & Recreation v. Marsh, 740 F.2d 799, 803 (10th Cir. 1984). For more than a century, hunters have used Lake Temp as an area to trap and kill wild game, both from the shore adjacent to the state highway and from the opposite shore. (R. 4.) One definition of "waters of the United States" includes "[a]ll waters which are used, or were used in the past . . . in interstate or foreign commerce." 33 C.F.R. 328.3(a)(1) (1986). Lake Temp is and has been used by hunters in interstate commerce for more than 100 years, bringing the lake well within the definition of navigable waters. Marsh, 740 F.2d at 803. A non-navigable-in-fact intrastate lake used by interstate hunters and fishers falls within the scope waters found to be navigable because of their effect on interstate commerce. Id. Thus, Lake Temp is navigable because of its current and historic use in interstate commerce. See id.

Lake Temp also meets the definition of "waters of the United States" that includes "all other waters such as intrastate lakes . . . which are or could be used by interstate or foreign travelers for recreational or other purposes," because it is an intrastate lake currently used by interstate travelers for bird-watching, fishing, and other activities. 33 C.F.R. § 328.3(a)(3)(i) (1986). An intrastate lake is navigable if the lake's primary use is recreational by a mix of interstate travelers and local residents. Minnehaha Creek Watershed Dist., 597 F.2d at 625-26; see also Colvin v. United States, 181 F. Supp. 2d. 1050, 1055 (C.D. Cal. 2001) (finding Salton

Sea a navigable waters of the United States because sea was a popular destination for out-of-state and foreign tourists who fished and engaged in other recreational activities on the sea and its shoreline). Similarly, Lake Temp is a popular recreational destination for many out of state travelers, and at least one-quarter of all visitors to Lake Temp come from outside Progress. See Minnehaha Creek Watershed Dist., 597 F.2d at 625-26.

B. The determination of whether Lake Temp is navigable is not controlled by the recent Supreme Court cases relied upon by the District Court because those cases addressed a different definition in the CFR and the Court's concerns were nonetheless not implicated by Lake Temp.

Lake Temp is a relatively permanent body of water that at its high water mark spans approximately 27 square miles and holds water nearly 80 percent of the time. (R. 3-4.) The Supreme Court has objected to the COE's expansive approach to defining "waters of the United States," but none of the concerns cited in those cases are present at Lake Temp. See Rapanos v. United States, 547 U.S. 715, 745-46 (2006); Solid Waste Agency of N. Cook County (SWANCC) v. U.S. Army Corps of Eng'r's, 531 U.S. 159, 174 (2001) (striking down COE's "migratory bird rule" that classified any water used by migratory birds as navigable). First, these decisions dealt with bodies of water that were defined as "waters of the United States" under 33 C.F.R. 328.3(7) (1986), which includes any wetlands adjacent to any other body of water classified as waters of the United States, or with the migratory bird rule. Rapanos, 547 U.S. at 729-30; SWANCC, 531 U.S. at 174. New Union is not arguing that Lake Temp is navigable as an adjacent wetland or because of the migratory bird rule, and therefore neither SWANCC nor Rapanos applies. See Rapanos, 547 U.S. at 729-30; SWANCC, 531 U.S. at 174.

Further, even if this Court shares the more general concern that the COE reaches too far in its definitions of "waters of the United States," Lake Temp does not present any such problems. See Rapanos, 547 U.S. at 733-34; SWANCC, 531 U.S. at 174. In SWANCC, Justice

Rehnquist declined to extend the term "waters of the United States" to cover an abandoned sand and gravel pit that contained several ponds ranging from a few inches to several feet deep. Id. Similarly, Justice Scalia's plurality opinion in Rapanos refused to classify a wetland containing somewhat saturated soil as waters of the United States. Rapanos, 547 U.S. at 733-34. Justice Scalia further chastised the COE for expanding the definition to include "transitory puddles or ephemeral flows of water" and said the phrase "waters of the United States" should instead include "*relatively* permanent . . . bodies of water 'forming geographic features' that are described in ordinary parlance as 'streams[,] . . . oceans, rivers [and] *lakes*." Rapanos, 547 U.S. at 733, 739 (emphasis added). Lake Temp easily falls within the definition of "waters of the United States" endorsed by the Rapanos plurality because it is a lake—a relatively permanent body of water—that spans as much as 27 square miles and offers standard recreational lake activities. See Rapanos, 547 U.S. at 745-46. Thus, even if this Court supports the view of the Rapanos plurality, Lake Temp meets both the COE and Supreme Court definitions of "waters of the United States." See 33 C.F.R. 328.3(a)(1), (a)(3)(i) (1986); Rapanos, 547 U.S. at 733-34.

III. EPA HAS JURISDICTION TO ISSUE A PERMIT UNDER CWA § 402, 33 U.S.C. § 1342, FOR THE DISCHARGE OF SLURRY INTO LAKE TEMP, AND COE DOES NOT HAVE JURISDICTION TO ISSUE A PERMIT FOR THAT ACTIVITY UNDER CWA § 404, 33 U.S.C. § 1344.

The CWA prohibits discharges of pollutants into waters of the United States unless such discharge is in compliance with one of the Act's permitting regimes. See 33 U.S.C. § 1311(a). The two permitting regimes which gain the most attention—and scrutiny—are found in § 402 and § 404 of the CWA. 33 U.S.C. §§ 1342, 1344. Section 402 grants permitting authority to the EPA for the discharge of any pollutants, except as provided in § 404. See 33 U.S.C. § 1342. Under § 404, the COE may issue permits for discharge of dredged or fill material which may otherwise be subject to § 402 permitting requirements. See 33 U.S.C. § 1344. In the instant

case, the discharge of slurry into Lake Temp falls within EPA's § 402 permitting authority, and it does not meet the standards for § 404 permitting by COE. Accordingly, this court should rule that the § 404 permit is invalid.

A. EPA had jurisdiction to issue a § 402 permit because the discharge of munitions is a pollutant as defined by 33 U.S.C. § 1362.

The discharge proposed by DOD meets all the criteria for EPA's § 402 permitting authority. Therefore, it is subject to the effluent limitations standards of § 402. See 33 U.S.C. § 1342. Section 402 of the Clean Water Act creates a permitting regime under which the EPA has jurisdiction to issue permits "for the discharge of any pollutant" into navigable waters of the United States. See 33 U.S.C. § 1342. To obtain a permit, any discharger must be in strict compliance with the Act's effluent limitations and performance standards. See 33 U.S.C. §§ 1311, 1316(b). These standards limit the discharge of most pollutants while requiring the application of best available technologies in the discharge process. See 33 U.S.C. §§ 1311, 1316(b). Section 402's strict requirements allow Congress to further its goal "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a). In the instant case, DOD's discharge is of a type subject to EPA's § 402 jurisdiction. See 33 U.S.C. § 1342.

First, DOD's discharge of munitions slurry comes from a point source under the CWA. This brings DOD's actions within the realm of EPA's § 402 permitting authority. See id. The CWA defines "point source" as "any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container…from which pollutants are or may be discharged." 33 U.S.C. § 1362. In defining "point source," Congress intended to embrace "the broadest possible definition of any identifiable conveyance from which pollutants might enter the waters of the United States."

United States v Earth Scis., Inc., 599 F.2d 368, 373 (10th Cir. 1979). Throughout DOD's disposal process, a movable multi-port pipe will continually deposit the munitions slurry over the entire dry bed of Lake Temp. (R. 4.) This multi-port pipe is a proximate source from which the munitions pollutant enters Lake Temp. Accordingly, the pipe comes within the purview of CWA's "point source" definition. See Catskill Mountains Chapter of Trout Unlimited, Inc. v. City of New York, 273 F. 3d 481, 493 (2d Cir. 2001).

Alternatively, the discharge of natural runoff from the slurry piles is a point source discharge because it is channeled through a "discernible, confined and discrete conveyance" in a system of channels and piles. See 33 U.S.C. § 1362. The COE intends to grade the edges of the new lakebed so that rainfall runoff will flow from the surrounding mountains unimpeded. (R at 4.) In Sierra Club v Abston Construction Co., 620 F. 2d 41, 45 (5th Cir. 1980), the court examined whether pollutants carried by rainfall runoff through channels into navigable waters constituted a point source discharge. The court held that the spoil piles, designed to channel rainfall runoff, were a point source of pollution. Id. Similarly, DOD's creation of pollutant piles which will channel rainwater into the dry lake bed falls within the definition of point source as intended by Congress. See id. Additionally, any machinery used to spread the pollutant during the grading process would constitute a "point source" of pollution as it conveys and redeposits it across the lake bed. See Peconic Baykeeper, Inc. v. Suffolk County, 600 F. 3d 180, 189 (2d Cir. 2010) (finding a mechanical sprayer emitting pesticide 'fog' into the air constitutes a point source).

Furthermore, the munitions deposited into Lake Temp are explicitly governed by the § 402 permitting regime. See 33 U.S.C. § 1342. The CWA provides a clear definition of what materials are to be considered "pollutants" for the purposes of § 402. See 33 U.S.C. § 1362(6).

In relevant part, the section specifically cites "munitions, chemical wastes, biological materials, [and] radioactive materials" as pollutants for CWA purposes. Id.

DOD proposes to discharge a wide variety of munitions materials into Lake Temp. (R. 4.) The liquid, semi-solid and granular contents of the munitions include many chemicals on the Clean Water Act's list of hazardous substances. See 33 USC § 1321. Furthermore, the munitions shells will be pulverized into solid metal particles. (R. 4.) Although the munitions will not be discharged in their original state, their entire contents will be discharged into Lake Temp, along with the crushed munitions shells. Id. Even though the munitions will no longer be explosive, the pollutant qualities thereof are the key ingredients of DOD's discharge. Id. Thus, the slurry discharge is a pollutant subject to § 402 effluent limitations. See 33 U.S.C. § 1342.

As already established, CWA permitting standards are applicable to DOD's discharge because Lake Temp is a navigable water. See 33 U.S.C. § 1362. The munitions slurry meets all the criteria of a pollutant discharge set forth in § 402. See 33 U.S.C. § 1342. Accordingly, the discharge requires a permit under EPA's § 402 authority. See id.

B. A § 404 permit under COE's authority is invalid because the munitions slurry does not constitute "fill material" as defined by EPA and COE regulations.

Assuming, *arguendo,* that the DOD munitions discharge is subject to a § 402 permit, DOD's actions could only be subject to § 404 permitting if the discharge qualified as "dredged or fill material." See 33 U.S.C. §1344(a). The statute itself is silent with respect to the meaning of "fill material." See id. Thus, the crucial question for this court is whether DOD's munitions slurry constitutes "fill material" as defined by the COE and EPA.

While DOD can claim that its purpose is to 'fill' Lake Temp with the munitions slurry, the actual effect of the discharge is not fill material as required by § 404. See 33 U.S.C. § 1344. In 2002, the COE and EPA revised their regulatory definitions of "fill material" to create a joint

agency definition. See 33 C.F.R. § 323.2(1986); 40 C.F.R. § 232.2 (2008). The 2002 revisions illustrate that the EPA and COE no longer focus on the "primary purpose" of the material discharged. Rather, an effects-based test is used to determine whether the discharge is in fact fill material. See Final Revisions to the Clean Water Act Regulatory Definitions of "Fill Material" and "Discharge of Fill Material," 67 Fed. Reg. 31129-01 (May 9, 2002) (to be codified at 33 C.F.R. § 323.2, 40 C.F.R. § 232.2). In relevant part, the joint regulations state that "the term fill material means material placed in waters of the United States where the material has the effect of: (i) replacing any portion of a water of the United States with dry land; or (ii) changing the bottom elevation of any portion of a water of the United States." See 33 C.F.R. § 323.2 (1986); 40 C.F.R. § 232.2 (2008). In adopting an effects-based test, the agencies can ensure that discharges with similar environmental effects are treated similarly by applying an objective approach, thus achieving clarity and consistency in the permitting process. See 67 Fed. Reg. 31129-01.

DOD's munitions fail to meet the effects-based test set forth by both EPA and COE. See id. Although the DOD slurry may, at some point in the future, result in raising the bottom elevation of Lake Temp, this change will not occur until several years after the discharge process begins. (R. at 4.) Both EPA and COE anticipated and rejected such veiled attempts at defining this type of discharge as fill material. See 67 Fed. Reg. 31129-01 (2002). In his concurring opinion in Coeur Alaska, Inc. v. Southeast Alaska Conservation Council, 129 S. Ct. 2458, 2478 (2009), Justice Breyer also acknowledged the distinction between the *immediate* effect of fill material and an incidental, over time effect, stating "[t]he EPA thereby sought to apply the distinction it had previously recognized between discharges that have the immediate effect of raising the bottom elevation of water, and those that only have the 'associated effect, over time,

of raising the bottom elevation of a water due to settling of waterborne pollutants.'" See also 67 Fed Reg. 31129-01, 31135 (2002) (concluding that §402 applies to the latter).

The pollutant discharged by DOD will potentially have two effects: first, liquid chemicals from the munitions slurry will be quickly absorbed into the arid, dry lake bed. (R. 4.) These chemicals will not have the effect of fill; instead, they will be absorbed into the lake bed and potentially pollute the groundwater beneath. Second, the solid contents left behind on the lake bed will remain over the course of the discharge project, which could last for several years. See id. During this dry period, the pollutants will be exposed; no effect on water elevation will be seen until—and if—Lake Temp refills fully as DOD predicts. See id.

This over-time effect is wholly distinct from previous cases where the courts have determined a discharge constitutes fill material. For example, the Court in Coeur Alaska, Inc. determined that discharge from a gold mine's froth-flotation mill constituted fill material, but the slurry would be discharged into a lake that was 51-feet deep. See 129 S. Ct. at 2464. In the case of wetlands, courts have found discharge constitutes fill material because it is filling areas of vegetation and saturated soil. See Riverside Bayview Homes, Inc., 474 U.S. at 131; Fairbanks N. Star Borough v. U.S. Army Corps of Eng'r's, 543 F. 3d 586, 590 (8th Cir. 2008). In the instant case, the munitions discharge fails to replace the bottom elevation of any body of water, and merely lies in waiting until Lake Temp decides to return to a saturated state. (R. 4.) This prolonged process of pollutant discharge is exactly the type that both the EPA and COE referenced in their regulations as discharge which should not be considered "fill material." See 33 C.F.R. § 323.2 (1986); 40 C.F.R. § 232.2 (2008). The rules proffered by both EPA and COE, as well as the text of the CWA itself, make it clear that "fill material" is not to be interpreted so

broadly as to allow such slurry to avoid § 402 pollutant limitations and fall within the § 404 permitting regime. See 33 C.F.R. § 323.2 (1986); 40 C.F.R. § 232.2 (2008).

Furthermore, the type of material discharged by DOD is in stark contrast to that intended by the fill material regulation. See 40 C.F.R. § 232.2 (2008) ("Examples of such fill material include, but are not limited to: rock, sand, soil, clay, plastics, construction debris, wood chips, overburden from mining or other excavation activities, and materials used to create any structure or infrastructure in the waters of the United States."). In Coeur Alaska, Inc., the Court recognized that a broad interpretation of § 404 could result in certain solids, now restricted by EPA standards, being discharged without the appropriate limitations. See 129 S. Ct. at 2468. In his majority opinion, Justice Kennedy stated that, "if, in a future case, a discharger of…solids were to seek a § 404 permit, the dispositive question for the agencies would be whether the solid at issue-for instance, 'feces and uneaten feed'-came within the regulation's definition of 'fill.'" See id.

DOD's slurry discharge consists of semi-solid and granular hazardous materials, as well as pulverized solid metals. (R. 4.) This material is more akin to waste product which both agencies have historically concluded does not constitute fill material. In the 2002 revisions to the CWA's regulatory definitions of "fill material", the EPA and COE eliminated a "waste exclusion" from the regulations. See 67 Fed. Reg. 31129-01. In doing so, the agencies intended to allow some leeway for certain waste disposal—particularly that of mining operations—to be defined as fill material. See id. However, the agencies made clear that § 404 should not be considered a loophole for waste disposal. See id. This concern was shared in Coeur Alaska, Inc. by Justice Ginsburg, who stated that "[w]hole categories of regulated industries can thereby gain

immunity from a variety of pollution-control standards...not only standards governing mining activities." 129 S. Ct. at 2483.

In the instant case, DOD attempts to disguise its waste disposal as fill material in order to avoid § 402 effluent limitations standards. See 33 U.S.C. § 1342. But for the addition of water—which will seep into the arid lake bed rapidly—liquid, semi-solid, and solid pollutants remain behind. (R. 4.) This discharge has no similarities to "traditional", inert fill material, which may be used for the purposes of creating fast land for development. See 67 Fed. Reg. 31129-01. Furthermore, the waste is distinct from that considered in Coeur Alaska, Inc., which was entirely from mining operations. See 129 S. Ct. at 2464.

If this court were to find that DOD's slurry constituted "fill material" subject to COE authority, the overall effect would be to exclude almost any discharge from § 402 permitting authority and NPDES standards imposed by EPA. See 33 U.S.C. § 1342. The definitions promulgated by both EPA and COE must be put in their proper context to ensure that the goals of the CWA—to eliminate discharge of pollutants—are met. See 33 U.S.C. §1251. A finding that DOD's § 404 permit is invalid will not result in a rejection of Coeur Alaska, Inc.'s precedent but will properly limit the scope in which § 404 permits can be obtained by pollutant dischargers. See id.

C. The § 404 permit must be invalidated because COE was arbitrary and capricious in its decision-making.

Regardless of whether the DOD slurry constitutes fill material, COE's issuance of a § 404 permit was invalid because it failed to consider practicable alternatives to the proposed discharge. See 33 U.S.C. § 1344. In granting any permit, the COE is required to use a public interest balancing test to determine probable adverse impacts. 33 C.F.R. § 320.4(a)(1). A proper public interest review requires an evaluation of several factors, including, but not limited to:

general environmental concerns, fish and wildlife values, recreation, water supply and conservation, water quality, and whether there are unresolved conflicts as to resource use. See id. Specific to § 404 fill material permits, federal regulations also define practicable alternatives as "activities which do not involve a discharge of dredged or fill material into the waters of the United States." 40 C.F.R. § 230.10(a)(1) (2008).

Under the arbitrary and capricious standard, this court must review COE's actions to ensure that it took a "hard look" at the environmental consequences of the proposed action, "carefully reviewing the record to ascertain whether the agency decision is 'founded on a reasoned evaluation 'of the relevant factors'" required by federal regulations. See Greenpeace Action v Franklin, 14 F. 3d 1324, 1332 (9th Cir. 1992) (quoting Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402, 416 (1971)). The court may not accept new evidence or testimony, but may only evaluate whether the EIS "was compiled in objective good faith and whether the resulting statement would permit a decisionmaker to fully consider and balance the environmental factors." See Sierra Club v. Morton, 510 F. 2d 813, 819 (5th Cir. 1975). COE's permit issuance was arbitrary and capricious in light of the several questions left unanswered upon completion of the EIS. See id.

The regulations do not require that the COE conduct its own investigations—the applicant or an independent consulting firm can do so freely—but nevertheless, these investigations must take place. See Friends of the Earth v. Hintz, 800 F. 2d 822, 834-835 (9th Cir. 1986). In Hintz, the COE requested several reports regarding whether a § 404 permit applicant's activity complied with water standards of the CWA. See id. at 835. The COE consulted with various federal and state agencies about the project, requested additional reports from the applicant, and after careful analysis concluded the fill activity was proper. See id. The

court found that the COE's actions were sufficient to fulfill its obligations as a permitting authority. See id.

In the present case, COE made its decision to grant a § 404 permit in the midst of reasonable debate as to the potentially adverse effects of the discharge. The impact on Imhoff Aquifer, a water source shared by both New Union and Progress, remains unknown. (R. 6.) Drilling and sampling from monitoring wells throughout the aquifer could provide this information, but neither the COE nor DOD installed such monitoring devices. Id. It is COE's burden to compile the relevant information as to when DOD's pollution will reach the edge of the aquifer, the strength of the pollution upon reaching the aquifer, and when, if ever, the aquifer will be polluted. See Sierra Club v. U.S. Army Corps of Eng'r's, 701 F.2d 1011, 1030 (2d Cir. 1983).

The COE's decision to grant a § 404 permit lacked substantial information as to the environmental impact of DOD's disposal, and was therefore arbitrary and capricious. See id. Because COE's uninformed discretion was a "clear error of judgment", the § 404 permit must be held invalid. See Marsh v. Or. Natural Res. Council, 490 U.S. 360, 385 (1989).

IV. THE SUBSTANTIVE DECISIONS MADE BY THE OMB VIOLATE THE AUTHORITY RESERVED FOR THE EPA UNDER THE CLEAN WATER ACT.

When the OMB ordered the EPA not to veto the COE's CWA §404 permit and issue a permit under § 402, the OMB made a substantive regulatory choice in violation of Congressional intent and the EPA's authority prescribed by the Clean Water Act. See Dole v. United Steelworkers, 494 U.S. 26, 33-34 (1990); Exec. Order No. 12,291, 46 Fed. Reg. 13,193, Sec. 6(a) (Feb. 17, 1981). The OMB has authority to review regulations promulgated by administrative agencies in order to "identify duplicative, overlapping and conflicting rules...and…require appropriate interagency consultation to minimize or eliminate such duplication, overlap, or

conflict." Exec. Order No. 12,866, 58 Fed. Reg. 51,735, Section 2(b) (Sept. 30, 1993); Exec. Order No. 12,291, 46 Fed. Reg. 13,193, Sec. 6(a)(5) (Feb. 17, 1981). While this allows the OMB to review decisions, the OMB is not authorized to make substantive regulatory decisions under the CWA since the OMB is not granted express authority in the CWA and may only review regulations "to the extent permitted by law." See Dole, 494 U.S. at 33-34; Exec. Order No. 12,291, 46 Fed. Reg. 13,193, Sec. 6(a) (Feb. 17, 1981).

A. There is neither Congressional intent nor explicit authority for the OMB to make substantive decisions under the Clean Water Act.

Since the EPA has explicit jurisdiction and the OMB does not have substantive review beyond that indicated in the Executive Order, the OMB's decision not to veto the permit resulted in the OMB making a substantive choice reserved for the EPA by statute. See 33 U.S.C. §§ 1342, 1344(c); Dole, 494 U.S. at 33-34. Where there is no Congressional intent to permit the OMB to have authority, the OMB has no authority to interfere with the EPA's substantive decisions. See Dole, 494 U.S. at 33-34; Exec. Order No. 12,291, 46 Fed. Reg. 13,193, Sec. 207 (Feb. 17, 1981). In Dole, the Court found that the OMB's determination that the Department of Labor's requirements were too narrow and unnecessary qualified as a substantive regulatory choice. 494 U.S. at 30-31, 33-34. Since there was no Congressional intent for the OMB to have authority, the Court held that the OMB could not make substantive decisions. Id. at 30-31, 43. Due to the lack of congressional intent, the OMB is unable to make decisions to issue or veto permits under CWA § 402 and § 404, and cannot interfere in EPA and COE decisions regarding these CWA provisions. See 33 U.S.C. §§ 1342, 1344(c).

Congress did not explicitly authorize the OMB to make substantive decisions under the CWA. See 33 U.S.C. §§ 1251, 1344(c); Dole, 494 U.S. at 33-34; Exec. Order No. 12,291, 46 Fed. Reg. 13,193, Sec. 207 (Feb. 17, 1981). It is not the OMB, but the EPA that has authority

under CWA § 402 to issue permits and to veto permits under CWA § 404. 33 U.S.C. §§ 1342, 1344(c). The EPA may decide to veto the COE's § 404 permit upon finding that "the discharge of such materials into such [disposal site] will have an unacceptable adverse effect on municipal water supplies, shellfish beds and fishery areas…, wildlife, or recreational areas." 33 U.S.C. § 1344(c). In addition, the Administrator of the EPA has explicit authority over the CWA "[e]xcept as otherwise expressly provided in this chapter . . . [to] administer this chapter." 33 U.S.C. § 1251. Therefore, the OMB is unable to decide which agency must issue and veto a permit because there is no authorization in the statute for the OMB to perform this role. See 33 U.S.C. §§ 1251, 1342, 1344(c); Dole, 494 U.S. at 33-34.

B. The OMB cannot make substantive regulatory choices under the reviewing powers delineated by executive order.

By making substantive decisions for the EPA instead of commenting and allowing for EPA negotiations and approval, the OMB usurped their agency review power defined by executive order. See Envtl. Def. Fund v. Thomas, 627 F. Supp. 566, 570 (D.D.C. 1986); Exec. Order 13,423, 72 Fed. Reg. 3919 (Jan. 24, 2007). The OMB does have reviewing authority that allows the OMB to review agency implementation and to ensure agency goals and policies are followed. Exec. Order 13,423, 72 Fed. Reg. 3919 (Jan. 24, 2007). However, the OMB's reviewing power is narrowed because "the President may not, as a general proposition, require or permit agencies to transgress boundaries set by Congress." See Envtl. Def. Fund, 627 F. Supp. at 567-68.

While the OMB has the ability to make substantive comments unless there is a deadline conflict, these are differentiated from substantive final decisions. See id. at 572. In Environmental Defense Fund, the OMB issued concerns to the EPA, negotiated with the EPA, and the EPA signed off on the final regulations. Id. at 569. In contrast, this case involved the

OMB making substantive final decisions by ordering the EPA not to issue a CWA § 402 permit or CWA § 404 veto. See id. The OMB went beyond regulatory review reserved for the OMB and acted under powers granted to the EPA by making these substantive decisions. See id. at 572.

V. THE EPA'S DECISION NOT TO ISSUE A PERMIT UNDER CWA § 402 AND NOT TO VETO THE PERMIT ISSUED UNDER CWA § 404 IS SUBJECT TO JUDICIAL REVIEW UNDER 33 U.S.C. § 1369 AND DUE TO PUBLIC POLICY CONCERNS WHICH DEEM JUDICIAL REVIEW NECESSARY.

The EPA's decision under the CWA§ 402 is reviewable by the circuit courts of appeal. 33 U.S.C. § 1369. Even if CWA § 402 does not apply, the court has jurisdiction to review the EPA's decisions because the Administrative Procedure Act provides for judicial review in situations where agencies unlawfully withhold action and otherwise act outside of the law. 5 U.S.C. § 706(1), (2)(A)&(C). While some courts have found administrative decisions unreviewable where Congress intended deference to agency expertise, this is inapplicable here where the OMB made decisions in defiance of the EPA's expertise and statutory authority. See Save the Bay, Inc. v. Adm'r of EPA, 556 F.2d 1282, 1295 (5th Cir. 1977). Finally, public policy requires that courts have review over decisions where an agency acts outside of its prescribed authority. See id.

A. The court may review the EPA's decision to not issue a CWA § 402 permit under 33 U.S.C. § 1369 and may review both permitting decisions under the Administrative Procedure Act because agency action was withheld unlawfully.

Congressional intent explicitly provides that the EPA's actions under CWA § 402 "in issuing or denying any permit under Section 1342" are reviewable by the Circuit Court of Appeals. 33 U.S.C. § 1369. Since the EPA attempted to issue a permit under CWA § 402, but was ordered not to by the OMB, this is reviewable by the courts. See id. The Court in Crown Simpson Pulp Co. v. Costle, 445 U.S. 193, 196 (1980), held that the circuit court has jurisdiction

to review decisions by the EPA to veto permits even though the CWA indicates that "issuing or denying" a permit is reviewable. The Court decided that the court of appeals review fit with Congressional goals to "ensur[e] prompt resolution of challenges to EPA's actions." Id. Therefore, it was implied that judicial review is appropriate in cases where the EPA has made a decision to issue, deny or veto a permit or its "functional equivalent." See id. Judicial review is appropriate in this case because the EPA made a positive decision to not veto the CWA § 404 permit and to not issue a CWA § 402 permit. See id.

Even if the court were to find that 33 U.S.C. § 1369 is not applicable in this case, judicial review is permissible because the OMB did not act in accordance with the law and wrongfully exercised the EPA's statutory rights. See 5 U.S.C. § 706(1), (2)(A)&(C); 33 U.S.C. § 1369. The Administrative Procedure Act specifies that courts in reviewing agency decisions "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; . . . (C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right." 5 U.S.C. § 706(1), (2)(A)&(C). In this case, the OMB did not act in accordance with the law and acted outside of its statutory jurisdiction to make substantive decisions under the CWA. See id. The EPA unlawfully withheld action by choosing not to veto under CWA § 404 and not to issue a permit under CWA § 402 at the directive of the OMB, despite the EPA's clear statutory authority. See id.

B. Public policy requires that the court review substantive decisions made by an agency that does not have statutory authority and deferrable expertise.

Even, *arguendo*, if the court finds that the EPA's actions do not fit in the definition of an "Administrator's Action" under 33 U.S.C. § 1369, judicial review is still required due to public policy that seeks to defer to expertise and statutory authority of administrative agencies. See

Save the Bay, Inc., 556 F.2d at 1295. This case is differentiated from Save the Bay, Inc., which stated that a decision to not veto by the EPA is unreviewable by the federal courts where "judicial review could add little" because of the expert level of the EPA. See id. This would be applicable law if the EPA simply exercised their statutory authority to not veto the permit. See id. However, where another agency steps in and issues a directive to the EPA to make a decision to not veto the permit, this is contrary to public policy, which seeks to provide efficiency through deference to administrative agencies that Congress deems have appropriate expertise. See id. Therefore, it is necessary that a court step in to review a substantive decision made not solely by the EPA, which has expertise and statutory authority under the CWA, but through an order from the OMB who does not have statutory authority or expert deference under the CWA. See id.; 33 U.S.C. § 1251.

The court may review the EPA's decision to not issue a permit under CWA § 402 and to not veto a permit under CWA § 404 because public policy requires that there be a way to review decisions where the primary concern is not a state-EPA issue but another administrative agency exercising rogue authority against statute. 33 U.S.C. § 1342; see Dist. of Columbia v. Schramm, 631 F.2d 854, 859-60 (D.C. Cir. 1980). There, the court found that the EPA's choice to not exercise veto power against a state NPDES permit was not reviewable by federal district court because Congress intended for state control of water pollution once a state NPDES program was approved. See Schramm, 631 F.2d at 859-60; 33 USC 1342; see also Am. Paper Inst., Inc. v. EPA., 890 F.2d 869, 871,874-75 (7th Cir. 1989) (deciding the CWA does not permit federal judicial review over EPA objections to state-issued permits where EPA has supervisory role due to concerns about conflicting authority between federal and state courts). However, in Schramm the EPA only had a supervisory role due to approval of the state NPDES program. 631 F.2d at

859-60. In contrast, there is no state NPDES program with control over Lake Temp, but instead the EPA has primary authority. See id. Therefore, the EPA's decisions to not veto the CWA § 404 permit and not to issue a CWA § 402 permit are reviewable by the court. See id.

VI. THE OMB'S DECISION TO INTERVENE IN THE EPA'S AUTHORITY TO ISSUE A PERMIT UNDER CWA § 402 AND NOT VETO THE PERMIT UNDER CWA § 404 IS NOT ACCORDED *CHEVRON* DEFERENCE. THE EPA'S ACQUIESCENCE IN THE OMB'S DIRECTIVE ALSO DOES NOT RECEIVE *CHEVRON* DEFERENCE AND IS UNPERSUASIVE BECAUSE IT VIOLATED CONGRESSIONAL INTENT.

A. *Chevron* deference should not be accorded to either the OMB or the EPA because the OMB is not the agency who has the force of law and the EPA's decision to follow the OMB's directives was not a formal rulemaking and unpersuasive.

The OMB's directive to the EPA to not veto the permit under CWA § 404 and to not issue a permit under CWA § 402 should not be accorded Chevron deference because the OMB's decisions are interpretations that are not accorded the force of law. See United States v. Mead Corp., 533 U.S. 218, 237 (2001); Christensen v. Harris County, 529 U.S. 576, 587 (2000); Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 842-43 (1984). In Mead Corp., the Court found that Chevron judicial deference is not required where an administrative agency issues a ruling that is not "defined as the 'official' position of an agency." Mead Corp., 533 U.S. at 237. In addition, "interpretations such as those…contained in policy statements, agency manuals, and enforcement guidelines" lack the force of law and therefore, do not get Chevron deference. Christensen, 529 U.S. at 587. The decision by the OMB that the COE had the ability to issue a CWA § 404 permit and the EPA could neither issue a CWA § 402 permit nor veto the COE's § 404 permit, did not have the force of law, but was instead an interpretation enforced by a reviewing agency that may not be accorded Chevron deference. See Mead Corp., 53 U.S. at 237; Christensen, 529 U.S. at 587.

The EPA's compliance with the OMB's directive to not issue a CWA § 402 permit and not veto the COE's CWA § 404 permit should also not receive Chevron deference because this was not a formal rulemaking. See Catskill Mountains Chapter of Trout Unlimited, Inc., 273 F.3d at 490. There, the court gave the EPA a lesser degree of deference in regards to opinion letters and held that "the agency position should be followed to the extent persuasive." See id. at 490-91. Here, the EPA should not be afforded Chevron deference because the EPA did not issue an opinion on the subject of whether a CWA § 402 permit should be issued or a CWA § 404 permit vetoed. See id. Instead, the EPA took orders from an unauthorized agency, the OMB, and chose not to carry out the EPA's duties under the CWA. See id.

In addition, the Court should find that the EPA's decision to not issue the CWA § 402 permit and not veto the CWA § 404 permit was not "persuasive" because the EPA chose not to issue and veto these permits based on the OMB's orders despite the plain meaning of the text which requires that the EPA administer this chapter except where otherwise expressly provided. See 33 U.S.C. § 1251(d); Catskill Mountains Chapter of Trout Unlimited, Inc., 273 F.3d at 489-91; see also Mead Corp., 33 U.S. at 235. There, the Court found that the EPA was not persuasive in its opinion letters that claimed dam releases are not discharges under the CWA and do not require NPDES permits because there was nothing in the statute purpose or plain meaning of the text that lent itself to the EPA's opinion. See 273 F.3d at 489-91; see also Mead Corp., 533 U.S. at 235 (citing Skidmore v. Swift & Co., 23 U.S. 134, 140 (1944) (finding that where Chevron deference is not applicable but specialized expertise is present, the agency may be accorded respect in respect to their power to persuade)). The EPA did not use their specialized expertise to make their decision, but went along with the OMB's order. See Catskill Mountains Chapter of Trout Unlimited, Inc., 273 F.3d at 489-91. There is nothing in the plain meaning of

the text or the policy goals that suggests that the EPA may simply act under a directive from the OMB instead of using their own expertise to make CWA-related decisions. 33 U.S.C. § 1251; see Catskill Mountains Chapter of Trout Unlimited, 273 F.3d at 489-91. Therefore, the EPA's decision is unpersuasive under the lesser degree of deference. See id.

B. Even if *Chevron* deference is applicable, the court should find that the EPA's decision not to veto the permit under CWA § 404 and to not issue a permit under CWA § 402 is unreasonable because acquiescence to the OMB's directives violated the clear intent of Congress.

Even if the EPA's decision to acquiesce to the OMB's directives and not issue a CWA § 402 permit or veto the CWA § 404 permit is reviewed under Chevron, the Court should find that the EPA acted in defiance of Congressional intent and thus, it was unreasonable. See Chevron U.S.A., Inc., 467 U.S. at 842-43. Under Chevron, the court must first defer to the "unambiguously expressed intent of Congress" when reviewing "an agency's construction of the statute which it administers." Id. In this case, the EPA acted against the Congressional intent "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters" by accepting the OMB's decision and not going through with issuance of permits under CWA § 402 and veto of the COE's permit under CWA § 404. See 33 U.S.C. 1251(a); Chevron U.S.A., Inc., 467 U.S. at 842-43. Therefore, the EPA's decision was unreasonable and the second step of Chevron, whether the EPA "based [its decision] on a permissible construction of the statute," is not reached. See Chevron U.S.A., Inc., 467 U.S. at 843.

CONCLUSION

For the foregoing reasons, this court should find that (1) the State of New Union has standing, as an affected state, to challenge the permit issuance; (2) Lake Temp is a navigable water within the purview of CWA; (3) EPA has jurisdiction to issue a permit under CWA Section 402; and (4) COE lacks jurisdiction to issue a permit under CWA Section 404. Furthermore, the court should hold that the OMB had no authority to intervene in the permit issuance process to determine whether the COE or EPA had permitting jurisdiction.