Team 60

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 THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF NEW UNION

BRIEF FOR NEW UNION

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JURISDICTIONAL STATEMENT

This is an appeal of a June 2, 2011 decision by the U.S. District Court for the District of New Union. Under 28 U.S.C. § 1331 and the Administrative Procedure Act (APA), 5 U.S.C. § 702, New Union sought review of a permit issued to the U.S. Department of Defense (DOD) by the U.S. Army Corps of Engineers (COE) under the Clean Water Act (CWA) § 404, 33 U.S.C. § 1344. The District Court granted summary judgment in favor of the COE and the DOD. (R. at 10.) The U.S. Court of Appeals for the Twelfth Circuit has jurisdiction for an appeal of a district court's final decision. 28 U.S.C. § 1291 (2011). New Union files this timely appeal.

ISSUES PRESENTED

First, does New Union have standing to challenge a permit allowing the DOD to discharge hazardous munitions wastes into Lake Temp above the Imhoff Aquifer which extends into New Union, threatening New Union's groundwater and its citizens' health and economic welfare?

Second, is Lake Temp, the terminal basin for an 800 mile watershed that has been crossed by hunters in canoes and rowboats for over a century, navigable and therefore under the CWA's jurisdiction?

Third, is the DOD's §404 permit invalid, when (A) the discharge is a spent munitions slurry containing hazardous pollutants, and (B) the Environmental Protection Agency (EPA) attempted to veto the permit but was overruled by the Office of Management and Budget (OMB)?

NATURE OF THE CASE

This is an action by New Union against the United States and Progress. On June 2, 2011, the District Court granted defendant's motion for summary judgment which upheld a §404 permit allowing the DOD to discharge a toxic slurry of spent munitions into navigable waters. New Union files this timely appeal because it believes that the District Court's decision frustrates the CWA's goal of restoring and maintaining the integrity of the Nation's waters. 33 U.S.C. § 1251(a) (2011). The DOD's discharge must be permitted under the CWA § 402, 33 U.S.C. § 1342, and not under the CWA § 404, 33 U.S.C. § 1344. Moreover, the DOD's current §404 permit was illegally issued when the OMB interfered with the EPA's §404 veto power. New Union respectfully asks this Court to uphold the District Court's holding that Lake Temp is navigable and reverse the District Court's judgment with respect to New Union's standing and the legality of the DOD's §404 permit.

STATEMENT OF FACTS

To understand the controversy before the Court, one could follow a drop of rain falling upon the parched earth within 800 square miles of mountainous desert between New Union and Progress. (R. at 4.) This drop does not roll west into the Pacific, nor east into the Atlantic, but instead trickles toward Lake Temp where the harsh region jealously guards its water. (R. at 4.) There the water waits until it evaporates into the dry desert air above or seeps down into the sulfurous Imhoff Aquifer 1000 feet far below. (R. at 4.) Twice a decade, the thirsty air and earth desiccate Lake Temp completely, but in most years Lake Temp retains its bounty. (R. at 4.)

Lake Temp provides an oasis for both migratory waterfowl and human travelers. (R. at 4.) At its largest, Lake Temp is an oval nine miles long and three miles across. (R. at 3-4.) For

over a century, hunters and others wishing to cross Lake Temp take to canoes and rowboats. (R. at 4.) Many of these boaters are from Progress, but about 25% are interstate travelers. (R. at 4.) Paths cut against the arid earth show where these travelers drag their vessels 100 feet or more to Lake Temp's high water mark from a Progress state highway. (R. at 4.) Roads leading from this highway extend into Progress' neighboring state, New Union (R. at 4.) as does the Imhoff Aquifer 1000 feet below. (R. at 4.)

However, Lake Temp is not on Progress' land. Progress sold Lake Temp and its surrounding area to the DOD in 1952. (R. at 4.) Lake Temp is wholly within the DOD's military reservation, (R. at 3-4.), which is wholly within Progress. (R. at 3.) The DOD erected signs warning boaters not to trespass on its land, but has taken no further action against the hunters and birdwatchers that continue to navigate across Lake Temp. (R. at 4.)

The DOD plans to alter the shape and water quality of Lake Temp and the Imhoff Aquifer. The DOD hopes to dispose of its spent munitions in Lake Temp (R. at 4.) raising the lakebed by six feet and increasing its surface area by two square miles. (R. at 4.) The DOD plans to build a facility to turn its munitions into a slurry which will be spread over Lake Temp's seasonally dry portions through a multi-port pipe. (R. at 4.) The DOD will first separate the bullets and bombs' liquid, semi-solid, and granular components, (R. at 4.), many of which are hazardous substances within §311 of the CWA. They will ensure that these components are no longer explosive, (R. at .4), but nothing in the record indicates that the DOD will attempt to reduce the other dangers these components present. The DOD will combine this mixture with the pulverized metallic and solid munitions components (R. at 4.) and spray it all onto the seasonally dry lakebed. (R. at 4.)

The DOD would grade the edges of this raised area so that water would still flow from

the surrounding mountains onto Lake Temp, (R. at 4.), eventually bringing with it enough alluvial deposits to cover the pulverized munitions. (R. at 4-5.) Lake Temp will remain the terminal basin for the 800 square mile interstate watershed, but its waters would intermingle with the DOD's hazardous munitions slurry and seep through it to reach the Imhoff Aquifer. The DOD did not investigate, and does not know, how quickly or how far the pollutants from its munitions wastes will leach through the Imhoff Aquifer. (R. at 6.)

New Union aims to stop the spread of these pollutants at their source by challenging the DOD's §404 permit. (R. at 3.) It aims to protect its groundwater contained in its portion of the Imhoff Aquifer (R. at 5.) as well as the health and welfare of its citizens. (R. at 6.) Dale Bompers exemplifies New Union's concerned citizens. Dale Bompers resides and ranches above a portion of the Imhoff Aquifer in New Union. (R. at 4.) Dale Bompers worries that the DOD's degradation of the groundwater will decrease his property value. (R. at 6.) Dale Bompers has not acquired a permit allowing him to withdraw New Union's groundwater from the Imhoff Aquifer. (R. at 6.)

SUMMARY OF THE ARGUMENT

This Court should reverse the holding of the District Court for the District of New Union regarding New Union's standing and the legality of the DOD's §404 permit, and affirm the holding regarding the navigability of Lake Temp.

I.

New Union has sovereign standing because the DOD's §404 permit presents an actual and imminent risk of harm to its groundwater in the Imhoff Aquifer. The §404 permit allows discharge of munitions wastes containing hazardous substances listed in the CWA §311 into

Lake Temp. These hazardous substances could seep into the Imhoff Aquifer, polluting New Union's groundwater. This harm would be fairly traceable to the DOD's discharge. Invalidating the §404 permit will slow or stop this harm to New Union's sovereign interest in its groundwater.

New Union also has *parens patriae* standing because the §404 permit could adversely affect New Union's quasi-sovereign interests in its citizens' health and welfare. New Union's citizens could incur financial losses if the toxic discharge seeps into the groundwater. Additionally, these citizens' health and New Union' economy could suffer if the DOD is allowed to contaminate Lake Temp.

II.

Lake Temp is subject to CWA jurisdiction because Lake Temp is a navigable waters of the Unites States. Navigable waters include waters used in or susceptible to use in interstate or foreign commerce, which includes "navigable-in-fact" intrastate bodies of water. Although it is impossible to navigate on Lake Temp from one state to another, the CWA applies to intrastate basin lakes like Lake Temp because its intrastate navigability affects or could affect interstate commerce.

Lake Temp covers over twenty-one square miles during wet seasons and hunters have used canoes and rowboats to cross it for over a century. A quarter of Lake Temp's hunters are interstate travelers, and intrastate hunting affects interstate commerce. Lake Temp's navigability is not negated by the DOD's failed attempt to discourage hunting and boating because Lake Temp is still susceptible to future use affecting interstate commerce. Lake Temp's dry seasons and two dry years per decade also do not negate its navigability because a navigable water of the United States needs not be open at all seasons of the year nor at all water levels.

III.

Because Lake Temp is subject to the CWA, the DOD's discharge of munitions waste into Lake Temp requires a permit. The DOD's §404 "dredge and fill" permit is not valid because the munitions slurry is not a legitimate fill material. The munitions slurry is not a mining-related slurry included by the CWA regulations, but is instead the DOD's garbage. Additionally, munitions, especially those containing the CWA §311 hazardous wastes, are pollutants requiring a §402 "NPDES" permit. Therefore, any discharge of spent munitions into Lake Temp requires a §402 permit rather than a §404 permit, and any discharge of the munitions under a §404 permit is illegal.

The DOD's §404 permit is also invalid because the OMB's interference in the permitting procedure violated the CWA. The OMB violated the CWA when it overruled the EPA's decision to deny the DOD a §404 permit. Congress empowered the EPA, and not the OMB, to decide whether to deny or restrict the COE's §404 permitting power. Because the OMB interfered with the EPA's right to veto a §404 permit, and thus encroached upon Congress' legislative powers, it was not a valid exercise of the President's Article II powers.

Lastly, the §404 permit is invalid because the EPA's acquiescence to the OMB was arbitrary and capricious and thus a violation of the CWA. The EPA's acquiescence to the OMB was arbitrary and capricious because there was no rational connection between the facts before the EPA and its decision not to act. Its acquiescence to allow the discharge of a toxic pollutant into navigable waters cannot be attributed to a product of its expertise. Additionally, the EPA did not consider relevant factors and simply based its decision not to act on the OMB's determination. Because the OMB and the EPA violated the CWA, the DOD's §404 permit is invalid.

ARGUMENT

The DOD's discarded bullets and bombs are waging a war on three fronts against the waters of the United States. In the parched mountainous desert in Progress, the DOD plans to assail Lake Temp with a toxic slurry which will seep down into the interstate Imhoff Aquifer 1000 feet below. Meanwhile, the DOD attempts to subvert the goals and language of the CWA through an impermissibly broad interpretation of "fill material." Finally, the DOD's comrades in the executive branch circumvented the CWA's permitting procedure with an illegal override of the EPA's congressionally appointed authority to protect the environment. New Union aims to stand against this barrage to protect its portion of the Imhoff Aquifer and the health and welfare of its citizens by invalidating the DOD's illegal §404 permit to discharge toxic pulverized munitions into Lake Temp.

The District Court's grant of summary judgment is reviewed *de novo*. *Sierra Club v. Babbitt*, 65 F.3d 1502, 1507 (9th Cir. 1995). *De novo* review of a district court judgment concerning an administrative agency's decision means the court views the case from the same position as the district court. *Nev. Land Action Ass'n v. U.S. Forrest Serv.*, 8 F.3d 713, 716 (9th Cir. 1993). Section 706 of the APA governs judicial review of administrative decisions under the CWA. 5 U.S.C. §706 (2011). The court may set aside an agency action if it was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law." *Pyramid Lake Paiute Tribe of Indians v. U.S. Dep't of Navy*, 898 F.2d 1410, 1414 (9th Cir. 1990).

I. NEW UNION HAS STANDING TO CHALLENGE THE §404 PERMIT

New Union has standing to challenge the DOD's §404 permit because discharging the hazardous munitions slurry into Lake Temp presents an imminent threat to New Union's

sovereign interests in its groundwater and its quasi-sovereign interest in the health and welfare of its citizens. Article III of the U.S. Constitution requires a litigant to have standing to invoke the power of a federal court. *Allen v. Wright*, 468 U.S. 737, 750 (1984). As a state litigant with a procedural right to judicial review pursuant to 5 U.S.C. § 702, New Union has standing as a sovereign state under the relaxed standard established in *Massachusetts v. E.P.A.*, 549 U.S. 497, 518 (2007) and as a *parens patriae* protector of its citizens' health and welfare.

A. New Union Has Standing under the Relaxed Standard For State Litigants Established by *Massachusetts v. E.P.A.*

New Union has standing under the relaxed standard for state litigants as established in *Massachusetts*. To prove standing, a private litigant must show: (1) injury that is either actual or imminent; (2) injury that is fairly traceable to the defendant; and (3) a favorable decision that will likely redress that injury. *See Lujan v. Defenders of Wildlife,* 504 U.S. 555, 560–561 (1992). However, 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." *Id*., at 573, n.7. Such state litigant has standing if there is "some possibility that the requested relief will prompt the injury-causing party to reconsider the decision that allegedly harmed" the state. *Massachusetts*, 549 U.S. at 518.

Applying *Lujan*'s three-part standing test under the relaxed standard for state litigants as explained by the Court in *Massachusetts*, New Union has standing to challenge the §404 permit because (1) the §404 permit which allows munitions waste discharge presents an actual and imminent risk of harm to New Union; (2) the harm is fairly traceable to the §404 permit issued to the DOD; and (3) invalidating the §404 permit will prevent or slow the harm to New Union.

1. The DOD's §404 permit presents an actual and imminent risk of harm to New Union.

The DOD's munitions discharge threatens New Union's portion of the Imhoff Aquifer with toxic contamination and thus the §404 permit presents an actual and imminent risk of harm to New Union. In *Massachusetts*, the Supreme Court focused on present harms and the possibility of future harms when addressing Massachusetts' injury. 549 U.S. at 521-523. Scientific reports, such as reports by National Research Council (NRC), can be used to identify an actual risk of harm. *See Massachusetts*, 549 U.S. at 521 (considering NRC's reports on global warming in concluding an injury in fact). "Even a small probability of injury is sufficient" to find standing, *Elk Grove Vill. v. Evans*, 997 F.2d 328, 329 (7th Cir. 1993), but the probability of injury itself cannot be "remote and improbable." *Shain v. Veneman*, 376 F.3d 815, 819 (8th Cir. 2004).

The §404 permit presents both an actual present and imminent future risk of harm to New Union. The §404 permit allows the DOD to empty munitions of liquid, semi-solid and granular contents and mix them with chemicals. (R. at 4.) The DOD will pulverize the remaining solids, which are primarily metals and mix both sets of wastes with water and spray them over the entire dry bed of Lake Temp. (R. at 4.) This mixture includes many hazardous substances listed on § 311 of the CWA. (R. at 4.)

The DOD promises that munitions are no longer explosive (R. at 4.) but not that they are no longer hazardous. Common munitions constituents like TNT, RDX, and HMX can be very toxic to human and ecological life. *EPA Handbook on the Management of Munitions Response Actions Interim Final*, 9-6 (2005), http://nepis.epa.gov/Exe/ZyPURL.cgi?Dockey=P100304J.txt (last visited Nov. 20, 2011). TNT can cause cancer, liver damage, and skin irritations. *Id*. at 3-26. RDX is a carcinogen which can cause prostate and nervous system problems, nausea and

vomiting. *Id*. at 3-26. Finally, HMX can damage the human liver and central nervous system. *Id*.

Once discharged into Lake Temp, these or similar chemicals could harm the ecological life surrounding Lake Temp. *The EPA Handbook* states that TNT can be taken up by plants from contaminated soil, including edible varieties of garden plants, aquatic and wetland plants and tree species. *Id*. at 3-29. Studies have shown that male animals treated with high doses of TNT have developed serious reproductive system damage. *Id*. Moreover, these chemicals could leach through the porous soil into the Imhoff Aquifer, and further contaminate New Union's groundwater.

The EPA Handbook shows that the chemicals in the munitions slurry pose an actual and imminent risk of harm to New Union's portion of the Imhoff Aquifer. Because the land between the lakebed and the Imhoff Aquifer is primarily unconsolidated alluvial fill, (R. at 4), the hazardous pollutants may very well seep into the Imhoff Aquifer under New Union. (R. at 6.) Because a state has an "interest…in all the earth and air within its domain," *Georgia v. Tenn. Copper Co.,* 206 U.S. 230, 237 (1907), this risk of harm to the Imhoff Aquifer below New Union satisfies the injury part of the standing analysis for New Union.

2. The Harm to New Union is traceable to the DOD's §404 permit.

The harm to New Union is traceable to the DOD's §404 permit. The second requirement in the standing analysis is a causal connection between the harm and the challenged activity. *Lujan*, 504 U.S. at 561. The *Massachusetts* Court concluded that there was a causal connection between greenhouse gas emissions and global warming. 549 U.S. at 523. In doing so, the Court noted the fact that the EPA did not dispute the causal connection. *Id*.

There is a fairly traceable causal connection between the harm to New Union and the

DOD's §404 permit. First of all, as the EPA in *Massachusetts*, the COE provides no positive evidence that the munitions waste discharge into Lake Temp will *not* cause any harms to the Imhoff Aquifer. Additionally, the COE does not contest that the discharge contains hazardous substances (R. at 4.) and the District Court admits that it is a pollutant. (R. at 8.)

The DOD has impeded New Union's attempt to prove the connection between the munitions waste discharge and the risk of harm to New Union. (R. at 6.) New Union has shown that it could quantify the potential harm if it were to be able to drill and sample from the Imhoff Aquifer. (R. at 6.) However, the DOD refuses to allow New Union to drill and sample from the Imhoff Aquifer. (R. at 6.) The fact that New Union did not comment on or object during the DOD's NEPA process is not relevant to its challenge against the §404 permit.

The DOD does not dispute a causal connection between the §404 permit and the risk of harm to New Union. It simply denies New Union the chance to test a direct connection and considers this lack of information to be information in its favor. Unless the DOD provides some evidence to the contrary, it is safe to say pollutants permeating the Imhoff Aquifer will not respect the state lines drawn in the sand 1,000 feet above. There is a direct connection between the DOD filling Lake Temp with hazardous munitions wastes, those pollutants seeping into the Imhoff Aquifer below Progress, and then seeping into the Imhoff Aquifer below New Union. Based on these facts, the Court should find a connection between the effects of the §404 permit and the risk of harm to New Union.

3. Invalidating the §404 permit provides relief to New Union.

Invalidating the §404 permit relieves New Union's harm. The redressability requirement is met when the plaintiff "shows that a favorable decision will relieve a discrete injury to himself. [However, h]e need[s] not show that a favorable decision will relieve his every injury."

Larson v. Valente, 456 U.S. 228, 243 n. 15 (1982). The requested relief does not have to show that it could reverse the entire harm at once. *Massachusetts*, 549 U.S. at 525. It is sufficient to show that the requested relief could slow or reduce the present or future harm or is a step toward remedying the entire problem. *Id*. The Court in *Massachusetts* concluded the redressability element was satisfied because although global warming itself could not be reversed, the EPA should regulate emissions with the intent to reduce or slow down the global warming process. *Id*.

As the Court in *Massachusetts* concluded that the harm would be reduced, invalidating the §404 permit will slow or stop the harm to New Union. If the §404 permit is invalidated and the DOD applies for the same permit again, this time the EPA could adequately exercise its veto power and reject the §404 permit. If instead, the DOD applies for the §402 permit, the EPA will have a chance to adequately assess the environmental harms to Lake Temp and limit its toxic effects. Therefore, invalidating the §404 permit will stop or slow down the munitions wastes discharge into Lake Temp and protect New Union's interests in the Imhoff Aquifer.

In sum, New Union has standing to challenge the §404 permit under the *Lujan*'s three-part standing test as applied to a state litigant as explained by the Court in *Massachusetts* because (1) the COE's issuance of the §404 permit allowing munitions wastes discharges to Lake Temp presents an actual and imminent harm to New Union; (2) the harm is fairly traceable to the §404 permit; and (3) invalidating the §404 permit will stop or reduce the harm.

B. New Union Has Standing as a Quasi-Sovereign under the *Parens Patriae* Doctrine.

New Union also has standing under the *parens patriae* doctrine. A state may sue as *parens patriae* on behalf of its citizens, *State of Louisiana. v. State of Texas*, 176 U.S. 1, 19 (1900), when the suit implicates its "quasi-sovereign" interests, such as the health, comfort, and

welfare of its citizens and the general economy of the state. *Alfred L. Snapp & Son, Inc. v. Puerto Rico, ex rel., Barez*, 458 U.S. 592, 607 (1982). If a state invokes 5 U.S.C. § 702 the state has *parens patriae* standing against the Federal Government. *State of Louisiana Through Dep't of Commerce & Indus. v. Weinberger*, 404 F. Supp. 894, 896 (E.D. La. 1975). Because New Union has invoked this provision, (R. at 3.), it has *parens patriae* standing.

New Union's suit implicates its quasi-sovereign interests in the health and welfare of its citizens and the general economy of the state. For instance, New Union's citizen, Dale Bompers, currently owns, operates and resides on a ranch located above the Imhoff Aquifer in New Union (R. at 4.) and his property value could decrease if the hazardous wastes in munitions contaminate the groundwater. (R. at 6.) Citizens' economic interests are long recognized quasi-sovereign interests that a state protects on behalf of its citizens. *Alfred*, 458 U.S. at 607. It is irrelevant that Dale Bompers has no property interest in the groundwater until he obtains a permit from New Union because his concern is with the value of his property.

More generally, New Union has quasi-sovereign interests in protecting its citizens who will be negatively impacted by the munitions discharge. People who travel on the nearby highway use Lake Temp quite frequently. (R. at 4.) For the last century, thousands of people have come to Lake Temp to hunt ducks and one quarter of these duck hunters come from states other than Progress. (R. at 4.) Since Lake Temp is near New Union's state border, (R. at 4.), it is reasonably certain that its citizens have used and will use Lake Temp for recreational purposes. New Union's citizens' health and interests in the future recreational use of Lake Temp could be endangered when the hazardous munitions wastes enter the lakebed.

The permit could also have a negative impact on New Union's general economy. The toxic materials in the discharge can harm the ecological life including the ducks that currently

attract numerous hunters every year. Ducks that are contaminated with munitions wastes would not attract hunters anymore, which would harm New Union's general economy. Additionally, the DOD's activities would diminish the value of New Union's land near Lake Temp and above the Imhoff Aquiffer. These harms to New Union's quasi-sovereign interests could be relieved if the §404 permit is invalidated for the same reasons stated above in section A.

New Union has standing either as a state litigant or as a *parens patrie* of its citizens. The EPA's scientific studies on munitions wastes and its negative impacts on human and ecological life, interstate travelers' use of Lake Temp, New Union's geographical proximity to Lake Temp, and New Union's interest in protecting the quality of the Imhoff Aquifer and Lake Temp for its own citizens all prove a risk of harm to New Union and its citizens if the DOD were to discharge munitions wastes into Lake Temp. New Union has standing because this harm can be remedied if the §404 permit is in invalidated.

II. LAKE TEMP IS A NAVIGABLE WATER OF THE UNITED STATES.

The District Court correctly ruled that Lake Temp is a navigable water of the United States subject to CWA jurisdiction. Lake Temp is an endorheic lake, meaning its waters either evaporate into the air or dissipate into the Imhoff Aquifer, but never flow out to the sea. Lake Temp's size depends on annual rainfall, growing to an oval nine miles by three miles (approximately twenty-one square miles) during wet years and disappearing entirely about twice every ten years. Interstate hunters have rowed and paddled across Lake Temp for the past century, making it navigable-in-fact, and their waterborne recreation and economic activities affect interstate commerce to secure Lake Temp's navigability under the CWA. Furthermore, Lake Temp's occasional dry years do not negate its navigability.

A. Lake Temp is Navigable-in-Fact.

Lake Temp is a navigable water of the United States because it is navigable-in-fact. The CWA defines "navigable waters" as "waters of the United States, including the territorial seas." 33 U.S.C. § 1362(7) (2011). Waters of the United States include waters used in or susceptible to use in interstate or foreign commerce. Definitions, 40 C.F.R. § 122.2 (2011). The EPA and the COE interpret this subsection of the definition to encompass "traditionally navigable waters," meaning waters included by the Rivers and Harbors Act of 1899 and all bodies of water that are "navigable-in-fact," like the Great Salt Lake or Lake Minnetonka. *Draft Guidance on Identifying Waters Protected by the Clean Water Act* at 6, http://water.epa.gov/lawsregs/guidance/wetlands/upload/wous_guidance_4-2011.pdf (last accessed Nov. 27, 2011). These navigable-in-fact waters "are used, or are susceptible of being used, in their ordinary condition, as highways for commerce, over which trade and travel are or may be conducted in the customary modes of trade and travel on water." *The Daniel Ball*, 77 U.S. 557, 563 (1870).

Under the CWA, endorheic lakes that are susceptible to recreational boating, like the Great Salt Lake in Utah and Mono Lake in California, are considered navigable-in-fact. *See Nat'l Audubon Soc'y v. Dept. of Water*, 869 F.2d 1196 (9th Cir. 1988) (Mono Lake); *Great Salt Lake Minerals and Chem. Corp. v. Marsh*, 596 F. Supp. 548, 551 (D. Utah 1984) (Great Salt Lake). While it is impossible to navigate these waters from one state to another, the CWA applies to these endorheic lakes because their intrastate navigability affects or could affect interstate commerce. *State of Utah By and Through Div. of Parks and Recreation v. Marsh*, 740 F.2d 799, 803 (10th Cir. 1984).

Lake Temp's large size allows interstate boaters and hunters to navigate across it. Lake Temp covers over 13,000 acres (over twenty-one square miles) during wet seasons. Boaters save a ten-mile walk around Lake Temp by paddling three miles across it, and hunters have done so for over a century. In comparison, the gravel pits in *Solid Waste Agency of N. Cook Cnty. v. U.S. Army Corps of Eng'r* were no bigger than a few acres each, totaling a combined thirty-one acres (less than 0.05 square mile). 531 U.S. 159, 192 (2001) (holding that gravel ponds too small for boats and far removed from the waters of the United States did not require a §404 permit). Lake Temp regularly supports the "customary modes of trade and travel on water," with every season of hunters that cross it from shore to shore, and therefore is navigable-in-fact.

B. Lake Temp's Use and Susceptibility to Future Use Affect Interstate Commerce.

Lake Temp's navigability is also established by its use and susceptibility to use in interstate commerce. The relevant regulation defines navigable waters as "[a]ll other waters such as intrastate lakes . . . the use, degradation, or destruction of which would affect or *could affect* interstate or foreign commerce including any such waters…[w]hich are or *could be* used by interstate or foreign travelers for recreational or other purposes . . ." 40 C.F.R. § 122.2(c) (emphasis added).

Lake Temp's interstate visitors, not the fleeting fowl but the men in boats pursuing them, establish Lake Temp's navigability within the CWA. A quarter of Lake Temp's hunters cross state lines in pursuit of their quarry and presumably bring their trophies home with them. The interstate visitors drag their boats, instruments of interstate commerce, 100 yards to Lake Temp's high water mark from a highway, a channel of interstate commerce. Intrastate hunting affects interstate commerce. *Conservation Force, Inc. v. Manning*, 301 F.3d 985, 994 (9th Cir. 2002). Interstate commerce may be affected when as few as 2% of recreational boaters are from out of

state. *State of Utah*, 740 F.2d at 804 (holding that recreational boating on Utah Lake, a body of water with no tributaries or outflows extending intrastate, is navigable).

The DOD's "no trespassing" signs do not preclude the waters from being navigable because they do not effectively prevent interstate travelers from using Lake Temp, nor do they diminish Lake Temp's future susceptibility to navigation by recreational boaters. Even if Lake Temp had never wetted the keel of a single boat, a test ride in a canoe could be used to show its navigational susceptibility. *FPL Energy Marine Hydro L.L.C. v. F.E.R.C.*, 287 F.3d 1151, 1157 (D.C. Cir. 2002). Moreover, long after the DOD ever sells or transfers the land, Lake Temp will continue to collect all the rain falling on its 800 square mile watershed. The DOD's present "use, degradation, or destruction of [Lake Temp] would affect or could affect" the future commercial uses of Lake Temp in violation of 40 C.F.R. § 122.2. Therefore, Lake Temp's present and future affect on interstate commerce establishes its navigability under the CWA.

C. Lake Temp's Dry Years Do Not Negate its Navigability.

The occasional dry year at Lake Temp does not impede its susceptibility to future use affecting interstate commerce. "Navigability, in the sense of the law, is not destroyed because the water course is interrupted by occasional natural obstructions or portages; nor need the navigation be open at all seasons of the year, or at all stages of the water." *Econ. Light & Power Co. v. United States*, 256 U.S. 113, 122 (1921). The condition of navigable waters "should be such as to ordinarily assure regularity and predictability of usage." *Loving v. Alexander*, 745 F.2d 861, 865 (4th Cir. 1984).

Lake Temp is navigable although it occasionally disappears. Lake Temp's occasional disappearance is no different than large swaths of the Great Salt Lake where seasonal rainfall variations have created more than 2,000 square miles surface area difference in recent history.,

Great Salt Lake- Lake Elevations and Elevation Changes, http://ut.water.usgs.gov/greatsaltlake/elevations (last accessed Nov. 6, 2011). Should the Great Salt Lake 's Farmington Bay or Lake Temp occasionally disappear, these "intermittent lakes" are very much different from "intermittent streams" that only occasionally appear.

In *Rapanos v. United States*, Justice Scalia denied CWA jurisdiction to an "ordinarily dry channel through which water occasionally or intermittently flow[s]." 547 U.S. 715, 733 (2006). His definition of navigable waters of the United States applied to "relatively permanent, standing or flowing bodies of water . . . forming geographical features . . . [and not] transitory puddles or ephemeral flows." *Id*. at 732-33.

Four years out of five, people paddle and row across Lake Temp. While these interstate travelers may arrive to find Lake Temp completely dry, they could safely assume its 800 square mile watershed had not discovered a new nadir. Until the mountains and valleys shift so water that falls within those 800 square miles settles elsewhere, Lake Temp is a permanent geographical feature. Its seasonal and yearly variations in water level do not negate its navigability. *Econ. Light & Power Co.*, 256 U.S. at 122; *Alaska v. Ahtna, Inc.*, 891 F.2d 1404 (9th Cir. 1989). CWA jurisdiction extends to a lake's ordinary high-water mark, Geographic and jurisdictional limits of rivers and lakes, 33 C.F.R. § 329.11 (2011), so any toxic munitions slurry sprayed on Lake Temp's seasonally dry lakebed requires CWA permitting approval.

Moreover, the streams and wetlands in *Rapanos* were not navigable because their tenuous connection to navigable waters of the United States stretched thin Congress' commerce clause authority to regulate their use. Here, Lake Temp is itself a navigable water of the United States. Under either Justice Kennedy's "significant nexus" test or the plurality's "continuous surface connection" test from *Rapanos*, Lake Temp's connection to itself is unquestionable. Lake Temp

is a navigable water of the United States, subject to CWA jurisdiction. Discharging a pollutant or fill material within its ordinary high water mark, even to prevent the discharge of a pollutant elsewhere, necessitates a permit issued under the CWA.

II. THE DOD'S §404 PERMIT IS INVALID.

The DOD requires a valid CWA permit to discharge munitions wastes into Lake Temp. The goal of the CWA is to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a). In pursuit of this goal, the CWA requires a §404 permit to dredge or fill in the waters of the United States, and a §402 NPDES permit to discharge pollutants into those waters. Congress gave the EPA authority to issue or deny §402 permits, *Waterkeeper Alliance, Inc. v. U.S. E.P.A.*, 399 F.3d 486, 491 (2d Cir. 2005), and veto §404 permits based on the EPA's expertise in environmental matters. *Coeur Alaska, Inc. v. Se. Alaska Conservation Council*, 129 S. Ct. 2458, 2465 (2009). The COE has authority over the dredging and filling of navigable waters of the United States, but must issue its §404 permits in accordance with environmental guidelines. *Id*. at 2464-65.

Under the COE and the EPA guidelines, "a permit may not be issued where it 'will cause or contribute to significant degradation of the waters of the United States,' which includes significantly adverse effects on the 'life stages of aquatic life and other wildlife dependent on aquatic ecosystems' and 'loss of fish and wildlife habitat.' " *Alliance to Save the Mattaponi v. U.S. C.O.E.*, 606 F.Supp.2d 121, 124 (D.C. Cir. 2009) (citing to 40 C.F.R. 230.10(a)) (2011); *and Sierra Club v. Van Antwerp*, 709 F.Supp.2d 1254, 1270 (S.D. Fla. 2009). Additionally, these permits should not be issued for activities that will "cause or contribute to the significant degradation of navigable waters." 40 C.F.R. 230.10(c).

Here, the spent munitions are toxic liquid and semi-solid chemicals and pulverized metals. (R. at 8.) Discharging the spent munitions into Lake Temp would violate the goals of the CWA because the toxic slurry would degrade Lake Temp's chemical, physical, and biological integrity. The toxicity of the spent munitions would significantly and adversely affect Lake Temp and its fish and wildlife and would also impede its future use in interstate commerce. The EPA tried to veto the §404 permit, but was illegally overruled by the OMB. The toxic spent munitions require a §402 permit to be discharged into Lake Temp.

A. The DOD's Munitions Slurry Discharge Requires a §402 Permit and not a §404 Permit.

The DOD's current §404 permit is invalid because the munitions slurry is not a legitimate fill material. Instead, the DOD's discharge requires a §402 permit because the munitions are pollutants. Unlike the issue in *Coeur Alaska*, there is no proposed overlap in the COE and the EPA's jurisdictions here. The COE never had authority to issue a §404 permit for the toxic munitions discharge because it is not a legitimate fill material, and the EPA maintains its authority to regulate the environmental impact of these discharged pollutants.

1. The munitions slurry is not a legitimate fill material.

The DOD's munitions slurry is not a legitimate fill material under §404 of the CWA. The mining slurry in *Coeur Alaska* was a fill material and a pollutant, but the munitions slurry here is only a pollutant. The CWA's text, regulations, and the COE's rulemaking plainly differentiate between the mining wastes in *Coeur Alaska* and pulverized liquidized garbage threatening Lake Temp.

Merriam-Webster defines "slurry" as "a watery mixture of insoluble matter (as mud, lime, or plaster of paris)." *Slurry Definition*, Meriam-Webster.com, http://www.merriam-webster.com/dictionary/slurry (last accessed Nov. 27, 2011). The Code of Federal Regulations

(CFR) applies the word to all sorts of slurries which would never be considered legitimate fill material, including manure, industrial hazardous materials, meat additives, PVC chemical tests, explosives and rocket fuel. *See e.g.,* Components of paper and paperboard in contact with aqueous and fatty foods, 21 C.F.R. § 176.170 (food pigment slurry); Missile Technology Control Regime Annex, 22 C.F.R. § 121.16 (rocket fuel slurry); Definitions, 30 C.F.R. § 56.6000 (explosive materials containing substantial portions of liquid, oxidizers, and fuel, plus a thickener); Test Methods, 40 C.F.R. § 61 app. B (polyvinyl chloride resin slurry); GHGs to report, 40 C.F.R. § 98.362 (manure slurry); *and* Designation of Hazardous Substances, 40 C.F.R. § 302.4 (acid plant blowdown slurry). The various uses of the word "slurry" in the CFR illustrate that the DOD's munitions slurry is not the same as *Coeur Alaska*'s mining slurry.

Discharging fill materials under a §404 permit, however, applies to the "placement of overburden, slurry, or tailings or similar mining-related materials . . . " 33 C.F.R. §323.2 (2011) (emphasis added). The canon of *noscitur a sociis* suggests that "slurry" within the CWA should be known by its associates. "Overburden," when used as a noun, means "material overlying a deposit of useful geological materials or bedrock." *Overburden Definition,* Meriam-Webster.com, http://www.merriam-webster.com/dictionary/overburden (last accessed Nov. 27, 2011). "Tailings" are "ground rock and process effluents that are generated in a mine processing plant." *Tailings Definition*, Meriam-Webster.com, http://www.tailings.info /tailings.htm (last accessed Nov. 11, 2011). Most pointedly, "similar mining-related materials" explicitly contextualizes "overburden, slurry, or tailings." The slurry at the gold mine in *Coeur Alaska* was a slurry for the purposes of §404 because it was mining related. A manure slurry, an acid plant blowdown slurry, a polyvinyl chloride resin slurry, a rocket fuel slurry, or the DOD's pulverized

bullet and bomb slurry here are not slurries applicable to §404 because they are not mining-related.

The COE and the EPA also recognize that mining-related slurries are distinct from other wastes. The COE and the EPA's rulemaking explained that mining-related wastes may be used as fill while other refuse may not because "[s]ome waste (e.g., mine overburden) consists of material such as soil, rock and earth, that is similar to "traditional" fill material [and] can, unlike trash or garbage, be indistinguishable either upon discharge or over time from structures created for purposes of creating fast land." 67 FAR 31129-01 at 31133 (2002). Accordingly, the COE and the EPA included mining-related wastes in the examples of discharges of fill material but explicitly excluded trash and garbage from the definition of fill material. 33 C.F.R. § 323.2.

The munitions here are the DOD's garbage and it is not a fill material. The munitions are manufactured instruments of war, tooled and refined for deadly accuracy. The DOD has used them and now aims to discard their toxic remnants. They are the DOD's garbage.

Garbage is explicitly excluded from the definition of fill material, 33 C.F.R. 323.2(e), and can only be used as fill if three specific criteria are met. First, the otherwise excluded materials must be placed in waters of the United States in a manner consistent with traditional uses of fill material to create a structure or infrastructure. 67 FAR 31129-01 at 31134. The DOD fails this condition because the munitions would not be used to create a structure or infrastructure. Instead, they are covering a lakebed with their garbage to get rid of their garbage here.

Second, the material's characteristics must be suitable to the project's purpose. *Id.* The DOD's purpose here is to dispose of its spent munitions. These munitions contain hazardous wastes that can poison life in and around Lake Temp and seep down into the Imhoff Aquifer

below. The DOD has not shown that its munitions slurry is any better than or even similar to traditional fill materials, like concrete or gravel.

Third, the review under §404 must effectively ensure that the material will not cause or contribute to significant environmental degradation. *Id*. The EPA and the COE disputed whether the project would cause significant environmental degradation, and the EPA's concerns were overridden by the OMB. The EPA was not allowed to effectively ensure that the DOD's munitions slurry would not cause significant environmental degradation, so the munitions discharge fails to meet the third criterion of garbage fill material. Because the munitions slurry is not a legitimate fill material but simply the DOD's garbage, the DOD's §404 permit is invalid.

2. The munitions slurry is a pollutant.

The EPA's §402 permit is necessary here because the munitions slurry is a pollutant and not a legitimate fill material. In cases where the discharges into navigable waters are munitions, courts have determined that the munitions are pollutants and that the EPA's §402 permit should be controlling.

In *Cordiano v. Metacon Gun Club, Inc.*, 575 F.3d 199, 202 (2d Cir. 2009), plaintiffs brought suit against a gun club for CWA violations because it discharged lead munitions on its land. The court stated that the CWA requires a §402 permit when there is a discharge of a pollutant by any person from any point source into navigable waters of the United States. *Id.* at 215. Plaintiff's environmental experts conducted a study and reported that spent munitions from typical firing range activities are contaminants that may have an effect on both humans and wildlife. *Id.* at 204. The court concluded that munitions are pollutants requiring a §402 permit if they were discharged into navigable waters. *Id*. at 215. Therefore, under *Cordiano*, the DOD's munitions discharge would require a §402 permit.

Other courts have also determined that munitions are pollutants requiring a §402 permit. *See Rapanos*, 547 U.S. at 759-760 (stating that the CWA prohibits the discharge of any pollutant by any person except as provided in the Act and defining a pollutant to include munitions); *United States v. Lucas*, 516 F.3d 316, 330 (5th Cir. 2008) (stating that munitions are pollutants); *and Benjamin v. Douglas Ridge Rifle Club*, 673 F.Supp.2d 1210, 1214 (D. Or. 2009) (stating that the CWA prohibits the discharge of pollutants into navigable waters, unless the discharger has a §402 permit and defining a pollutant broadly to include munitions); Because the munitions slurry is a pollutant and not a legitimate fill material, the DOD needs a §402 permit to discharge into Lake Temp.

Moreover, the Record states, and the United States and Progress do not contest, that the slurry includes many chemicals found on the CWA §311 list of hazardous substances. (R. at 4.) Any discharge of substances under §311 are a violation of the CWA unless the DOD acquires a §402 permit. *United States v. Colonial Pipeline Co., Inc.*, 242 F. Supp. 2d 1365, 1368 (N.D. Ga. 2002); *and* 33 U.S.C. § 1321 (2011);

Because the munitions slurry is not a legitimate fill material and is a pollutant, there is no conflict in permitting authority as there was in *Coeur Alaska*. In *Coeur Alaska*, an appellate court had required a gold mining company was required to get both a 402 and a 404 permit for the same activity. 129 S. Ct. at 2463. The Supreme Court held that the language of §404 gave permitting authority to the COE and did not reserve authority for the EPA to a permit under §402 for the same activity. *Id*. at 2467-68. They relied on the fact that dangerous fill materials were precluded from 404 permitting, and on the fact that the EPA could always override an 404 permit to protect the environment. *Id*. at 2465; *see also Id*. at 2478 (J. Breyer, concurring). Here, not

only is the munitions slurry an illegitimate toxic fill material unlawfully included in a 404 permit, but the EPA's veto power was hobbled by the OMB.

B. The COE's §404 Permit is Invalid Because the OMB Interfered with the Permitting Process.

The District Court erred in holding that it was proper for the OMB to interfere with the CWA's permitting process because the OMB's interference violated the CWA. The OMB violated the CWA when it overruled the EPA's decision to deny the DOD a §404 permit. The EPA also violated the CWA when it acquiesced to the OMB's decision and failed to determine whether to veto the §404 permit.

1. The OMB violated the CWA because Congress conferred authority to the the EPA to administer the CWA.

The OMB violated the CWA because Congress conferred authority to the EPA, and not the OMB, to administer the CWA. The OMB's decision infringed upon Congress's legislative authority and was not a valid exercise of the President's Article II powers.

a. The OMB's decision infringed upon the EPA's authority to veto §404 permits.

The OMB's interference with the EPA's decision to veto the DOD's §404 permit overstepped its executive authority. Congress empowered the EPA to decide whether to deny or restrict the COE's §404 permitting power. The statutory language and related case law make clear that Congress did not allow a separate executive agency to overrule the EPA's authority to manage the environmental effects of the §404 permits.

The plain text of the CWA specifies the EPA's authority to deny or restrict a §404 permit. Section 404(c) of the CWA delegates to the Administrator of the EPA the authority "to *deny or restrict* the use of any defined area for specification…as a disposal site, *whenever he determines*…that the discharge of such materials into such areas will have an…adverse effect on

municipal water supplies, shellfish beds and fishery areas…wildlife, or recreational areas." 33 U.S.C. § 1344(c) (2011) (emphasis added). The language of the statute specifically delegates authority to the EPA Administrator to determine whether a §404 permit should be denied or restricted.

The Supreme Court also determined that §404(c) of the CWA establishes "the EPA's power to veto a permit." *Coeur Alaska,* 129 S.Ct. at 2467. The Court stated that the EPA's function in regulating fill material is different from its function in regulating other pollutants, but it acknowledged that the EPA does have some authority over §404 permits. *Id*. The Court indicated that §404(c) gives the EPA the "authority to 'prohibit' any decision by the [COE] to issue a permit for a particular disposal site." *Id.* The Court referred "to this as the EPA's power to veto a permit." *Id*.

The plain text of the CWA and related case law explain that Congress empowered the EPA to decide whether to veto §404 permits, not the OMB. Therefore the OMB violated the CWA when it infringed upon Congress's legislative authority.

b. The OMB's decision was not a valid exercise of the President's Article II powers.

Because the OMB effectively overrode the EPA's congressionally enacted right to veto a §404 permit, it was not a valid exercise of the President's Article II powers. Executive action that goes against Congressional intent is not valid because it encroaches on Congress' legislative powers. The Constitution did not subject Congress' law-making power to presidential or military control. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 588 (1952). The Constitution separated the three branches of the federal government so that "[w]hen any Branch acts, it is presumptively exercising the power the Constitution has delegated to it." *I.N.S. v. Chadh*a, 462 U.S. 919, 951-52 (1983). Article II of the Constitution vests executive power in the

President to "take care that the Laws be faithfully executed [which therefore]…refutes the idea that he is to be a lawmaker." *Youngstown,* 343 U.S. at 587. Instead, the Constitution vests all legislative powers in Congress and it is Congress that may "make all laws which shall be necessary and proper." *Id*. at 588.

In *Environmental Defense Fund v. Thomas*, the court held that the OMB's interference with the EPA's promulgation of permitting standards under the Resource Conservation and Recovery Act was "incompatible with the will of Congress and cannot be sustained as a valid exercise of the President's Article II powers." 627 F.Supp 566, 570 (D.D.C. 1986). The court was concerned that the OMB would improperly withhold permitting approval and intrude upon the EPA's independent and expert judgment. *Id*.

The court's reasoning in *Environmental Defense Fund* applies here. Congress empowered the EPA Administrator to determine whether a §404 permit should be denied or restricted. The EPA's expertise in environmental matters qualifies its determination whether a §404 permit would have an adverse effect on navigable waters. Additionally, the Fourth Circuit determined that Congress gave the EPA final decision on a §404 permit because it recognized the EPA's expertise in environmental matters and that the EPA's veto authority "to protect the environment is practically unadorned." *James City Cnty., Va. v. E.P.A.*, 12 F.3d 1330, 1336 (4th Cir. 1993). In contrast, the OMB does not have the same expertise and should not be allowed to encroach upon the independence and expertise of the EPA by overriding EPA's expert decision. The OMB's interference intruded upon Congress' lawmaking powers and cannot be sustained as a valid exercise of the President's Article II powers. Therefore, the OMB violated the CWA.

2. The EPA violated the CWA when it acquiesced to the OMB.

The EPA violated the CWA when it deferred its decision to veto the DOD's §404 permit to the OMB. Congress mandated that the EPA administer the CWA and to maintain the discretion of denying or restricting §404 permits. *Coeur Alaska*, 129 S.Ct. at 2467. Because the EPA did not make the decision whether to veto the COE's permit, its inaction was arbitrary and capricious, and therefore a violation of the CWA.

a. The EPA's inaction is subject to judicial review.

The EPA's inaction is judicially reviewable. Judicial review of an agency is strongly presumed unless the governing statute precludes review or the agency action is an action committed by law to agency discretion. *Abbott Lab. v. Gardner*, 387 U.S. 136, 140 (1967). Here, the EPA's inaction is judicially reviewable because the plain text of §404 of the CWA does not expressly preclude judicial review of the EPA, *Alliance To Save Mattaponi v. U.S. C.O.E.*, 515 F. Supp. 2d 1, 7 (D.D.C. 2007), and the EPA's inaction is not an action committed by law to agency discretion. The EPA's inaction is not an action committed by law to agency discretion because (1) the CWA provides a meaningful standard of judicial review and (2) the EPA's inaction was not a refusal to take discretionary agency action.

The EPA's inaction is judicially reviewable because the plain text of the CWA provides a meaningful standard of judicial review. Judicial review is unavailable where the statute is "drawn in such broad terms that in a given case there is no law to apply." *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 410 (1971). When there is no law to apply, there is no "meaningful standard" against which the court judges the agency's discretionary act. *Heckler v. Chaney*, 470 U.S. 821, 830 (1985). Here, the CWA provides guidance to help the court determine whether the agency abused its discretion because the EPA can veto a §404 permit "

'whenever [it] determines . . . that the discharge . . . will have an unacceptable adverse effect . . .' " *Alliance To Save Mattaponi*, 515 F. Supp. 2d at 8 (quoting 33 U.S.C. § 1344(c)). The EPA Administrator's determination is not based solely upon her own discretion. Instead, she must make her decision after determining whether the discharge would adversely affect navigable waters. In contrast, the Supreme Court determined an agency's action was not reviewable when the relevant statute gave the agency director discretionary authority. *Webster v. Doe*, 486 U.S. 592, 600 (1988) (stating that the National Security Act gave the CIA Director discretionary authority to terminate employees "whenever the Director 'shall *deem* such termination necessary'…not simply when the dismissal *is* necessary").

The CWA's statutory structure also provides that a meaningful standard exists. The Supreme Court determined that there was not meaningful standard because the NSA's deference to the Director parallels the statutory purpose to maintain the CIA's effectiveness and the Nation's security. *Webster*, 486 U.S. at 601. Here, a meaningful standard is present because the purpose of the CWA is "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251 (2011). To ensure that the CWA's legislative goals are met, Congress would not bestow upon the Administrator so much discretion where there would be no meaningful standard to determine whether a discharge adversely effects navigable waters. Thus, the CWA's meaningful standard makes the EPA's inaction judicially reviewable.

The EPA's inaction is not a refusal to take discretionary agency action. The Supreme Court recognized that an agency's refusal to take enforcement action is generally committed to the agency's discretion. *Heckler*, 470 U.S. at 831. The Court reasoned that an agency's refusal to this discretionary action "involves a complicated balancing of a number of factors which are peculiarly within its expertise." *Id.* at 832. Here, the EPA's inaction was not based on a balance

of factors pertaining to its expertise but on the OMB's executive override. In fact, the EPA was preparing to veto the DOD's permit when the OMB overrode its decision. (R. at 9.) Because the EPA's inaction was not based on its own discretion, it is subject to judicial review.

b. The EPA's acquiescence to the OMB was arbitrary and capricious.

The EPA's acquiescence to the OMB was arbitrary and capricious. Agency action may be overturned by the courts if it is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). Under the arbitrary and capricious standard, (1) the agency must show a "rational connection between the facts found and the choice made;" *Burlington Truck Lines v. United States*, 371 U.S. 156, 168 (1962) and (2) the reviewing court must determine whether the agency considered relevant factors in making its determination. *Citizens to Preserve Overton Park*, 401 U.S. at 416.

There was no rational connection between the facts of this case and the EPA's choice not to act. With its expertise, the EPA would have determined that the spent munitions are toxic pollutants and should not be discharged into navigable waters. Similarly, in *N.R.D.C. v. E.P.A.*, the court determined that the EPA's failure to include deadlines for permit approval was arbitrary and capricious because the EPA failed to follow a key component of the statutory scheme. 571 F.3d 1245, 1300 (D.C. Cir. 2009). Here, like in *NRDC*, the EPA's acquiescence to the OMB, cannot be attributed to a product of its expertise. In addition, the EPA's decision not to regulate the emissions of greenhouse gases was also considered arbitrary and capricious because the EPA did not give a reasoned explanation. *Massachusetts*, 549 U.S. at 534. Here, the EPA also did not provide a reasoned decision for its acquiescence to the OMB.

The EPA also did not consider relevant factors in acquiescing to the OMB. The district court in *Alliance to Save the Mattaponi* determined that the EPA's failure to veto a §404 permit

was arbitrary and capricious because the Administrator based his decision on factors unrelated to the statutory text. 606 F. Supp. 2d 121, 141 (D.D.C. 2009). The Court stated that the Administrator's discretion to veto "is not a roving license to ignore the statutory text," but must relate to whether the permit would adversely affect navigable waters. *Id.* at 140. Here, the EPA relied on irrelevant factors because it based its inaction on the OMB's decision rather than considering whether the §404 permit would likely have adverse effects on navigable waters.

Furthermore, the EPA's acquiescence to the OMB is distinguishable from the EPA's independent decision not to act in *Coeur Alaska*. In *Coeur Alaska*, the EPA issued a §402 permit and, in essence, agreed with the COE's interpretation of the statute 129 S.Ct. at 2465. Here, the EPA was preparing to exercise its authority to veto the DOD's permit, but the OMB instructed the EPA not to do so. (R. at 9.) Also, the material discharged in *Coeur Alaska* was crushed rock, an inert material, 129 S.Ct. at 2464, while the discharge here will be spent munitions, a toxic material. (R. at 8.)

In addition, the Executive Branch does not have the power to resolve the legal and policy dispute in this case. The reconciliation procedures established under Executive Order 12,088, 43 Fed. Reg. 47,707 (Oct. 13, 1978) confers to the OMB the authority to resolve conflicts only at the EPA Administrator's request. (R. at 10.) However, the record does not expressly state whether the EPA Administrator requested the OMB's participation in resolving the dispute between the EPA and the COE. Moreover, a dispute between the EPA and the COE in this regard would be swiftly settled by the EPA's discretionary and congressionally approved veto power. Accordingly, the EPA's acquiescence to the OMB's decision is arbitrary and capricious and in violation of the CWA.

Because the OMB and the EPA violated the CWA, the District Court erred when it held that the OMB's decision was proper. The DOD's §404 permit unlawfully assails the waters of Lake Temp with toxic pollutants, undermines the language of the CWA with overbroad interpretations, and disrupts the §404 permitting procedure with unconstitutional executive intervention. The DOD's §404 permit is repugnant to the law that created it, and should be held invalid.

CONCLUSION

For the forgoing reasons, this Court should reverse the District Court's decision as to New Union's standing to challenge the §404 permit and the legality of the DOD's §404 permit, and affirm the decision below as to the navigability of Lake Temp.

Dated: November 28, 2011 Respectfully Submitted

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Attorney Appellant and Cross-Appellee

Counsel for Appellant and Cross-Appellee

1234 XXXX Street

City, State 00000

1-(777)-777-7777