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Article 1

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2012 National Environmental Law Moot Court Competition Problem

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UNITED STATES COURT OF APPEALS
FOR THE TWELFTH CIRCUIT

STATE OF NEW UNION,	)	
Appellant and Cross-Appellee,	)	
v.	)	
UNITED STATES,	)	C.A. No. 11-1245
Appellee and Cross-Appellant,	)	
v.	)	
STATE OF PROGRESS,	)	
Appellee and Cross-Appellant.	)	
	)	

ORDER

Following the issuance of the Order of the District Court dated June 2, 2011, in Civ. 148-2011, the State of New Union and the State of Progress each filed a Notice of Appeal. New Union takes issue with the decision of the lower court with respect to its holding: 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) Section 404, 33 U.S.C. § 1344 to fill Lake Temp; that the COE has jurisdiction to issue the permit under CWA Section 404, 33 U.S.C. § 1344; and that the Office of Management and Budget (OMB) did not violate the CWA when it resolved a dispute between the COE and the Environmental Protection Agency (EPA) over whether the COE had jurisdiction to issue the permit under CWA Section 404, 33 U.S.C. § 1344, or EPA had the jurisdiction to do so under CWA Section 402, 33 U.S.C. § 1342. *The State of Progress takes issue with the decision of the lower court with respect to its holdings that the COE had jurisdiction to issue the permit under CWA Section 404, 33 U.S.C. § 1344, because Lake Temp is not navigable water.*

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Therefore, it is hereby ordered that the parties brief all of the following issues:

1. Whether the State of New Union has standing in its sovereign capacity as owner and regulator of the groundwater in the state or in its *parens patriae* capacity as protector of its citizens who have an interest in the groundwater in the state. (The State of New Union and the State of Progress argue that *New Union* does *have standing* and that the court below erred in granting the United States' motion for summary judgment on this issue; the United States argues that *New Union* does not *have standing* and that the court below was correct in granting summary judgment on this issue.)

2. Whether the COE has jurisdiction to issue a permit under CWA Section 404, 33 U.S.C. § 1344, because Lake Temp is navigable water under CWA Sections 301(a), 404(a), and 502(7), 33 U.S.C. §§ *§ 1311(a)*, 1344(a), 1362(7). (The State of Progress argues that it does not because Lake Temp is not navigable and that the court below erred in granting the United States' motion for summary judgment on the issue; the State of New Union and the United States argue that it does because Lake Temp is navigable and that the court below was correct in granting summary judgment on this issue.)

3. Whether the COE has jurisdiction to issue a permit under CWA Section 404, 33 U.S.C. § 1344, or the EPA has jurisdiction to issue a permit under CWA Section 402, 33 U.S.C. § 1342, for the discharge of slurry into Lake Temp. (The State of New Union argues that EPA has jurisdiction to issue a permit under CWA Section 402, 33 U.S.C. § 1342, for the discharge of slurry into Lake Temp and that the court below erred in holding that the COE has jurisdiction to issue a permit for that activity under CWA Section 404, 33 U.S.C. § 1344; the State of Progress (arguing in the alternative) and the United States argue that the COE has jurisdiction to issue the permit and that the court below was correct in granting summary judgment on this issue.)

4. Whether the decision by OMB that the COE had jurisdiction under CWA Section 404, 33 U.S.C. § 1344, and that EPA did not have jurisdiction under CWA Section 402, 33 U.S.C. § 1342, to issue a permit for DOD to discharge slurry into Lake Temp and EPA's acquiescence in OMB's decision violated the

CWA. (The State of New Union argues OMB had no authority to determine that COE had authority under CWA Section 404, 33 U.S.C. § 1344, and EPA did not have authority under CWA Section 402, 33 U.S.C. § 1342, to issue the permit and that the court below erred in holding that OMB's intervention in the permit issuance process was not improper; the United States and the State of Progress argue that OMB's actions were not improper and the court below was correct in granting summary judgment on this issue.)

SO ORDERED.
Entered this 15th day of September, 2011.

[NOTE: No decisions decided or documents dated after September 1, 2011 may be cited either in the briefs or in oral argument.]

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW UNION

State of New Union,	)	
Plaintiff,	)	
v.	)	
United States,	)	Civ. No. 148-2011
Defendant,	)	
v.	)	
State of Progress,	)	
Intervenor/Defendant.	)	
	)	

Procedural History

The State of New Union seeks review under 28 U.S.C. § 1331 and the Administrative Procedure Act (APA), 5 U.S.C. § 702, of *an individual* permit issued by the Secretary of the Army, acting through the U.S. Army Corps of Engineers (COE), under the authority of section 404 of the Clean Water Act (CWA), 33 U.S.C. § 1344, to the U.S. Department of Defense (DOD) to discharge a slurry of spent munitions into Lake Temp, an intermittent lake wholly within *an arid* military reservation owned by the United States in the State of Progress. New Union argues that any permit for the discharge must be issued by the Administrator of the U.S. Environmental Protection Agency (EPA) pursuant to her authority to issue permits for the discharge of pollutants under CWA Section 402, 33 U.S.C. § 1342, rather than by the COE under section 404. Plaintiff also contends that the Defendant may not proceed with the project in the absence of a permit under the Resource Conservation and Recovery Act, 42 U.S.C. §§ 6901-7000, but that challenge is not the subject of the cross-motions for summary judgment considered here. The State of Progress, within whose boundaries the permitted activities will take place, has intervened. New Union, the United States, and the State of Progress have filed motions for summary judgment. *New Union seeks a ruling that the 404 permit is invalid.*

Factual Background

The relevant facts are not contested by the parties, except as indicated in this opinion. Lake Temp is an oval-shaped intermittent body of water that is up to three miles wide and nine miles long during the rainy season in wet years, much smaller during the dry season, and wholly dry approximately one out of five years. *Although the lake is not far from the New Union border,* Lake Temp at its highest water level is wholly within the State of Progress. Surface water flows into Lake Temp from an eight hundred square mile watershed of surrounding mountains, located primarily in Progress, with a small portion located in New Union. There is no outflow from the lake. The Imhoff Aquifer is located almost one thousand feet below Lake Temp. Although the aquifer follows the general contours of the lake, the aquifer is more extensive than the lake at its greatest extent. Ninety-five percent of the aquifer is located within Progress, wholly under the boundaries of the military reservation, and five percent of the aquifer is located within New Union. *The military reservation boundary does not extend to the border with New Union.* Dale Bompers owns, operates and resides on a ranch located above the small portion of the Imhoff Aquifer in New Union. The Imhoff Aquifer is not potable or usable in agriculture without treatment because of a high level of sulfur. *This information about the aquifer has been included in New Union's groundwater inventory since the time that the project was first proposed.*

When the lake holds water during migration seasons, ducks have historically used it as a stopover in their migration from the Arctic to southern climes and back. Hundreds, perhaps thousands of duck hunters also used it over at least the last one hundred years; most have been residents of Progress but about a quarter were from out of state. A Progress state highway runs along the southern side of Lake Temp, at the edge of the military reservation and within one hundred feet of the shore when the lake is filled to its historic high. *The state highway intersects with several roads that lead into New Union.* When the lake became part of a military reservation in 1952, the DOD posted signs along both sides of the highway at intervals of one hundred yards, twenty-five feet from the edge of the road; warning of danger and that entry was illegal. There is no fence. There are

clearly visible trails leading from the road to the lake and they show signs of rowboats and canoes being dragged between the highway and the lake. DOD has taken no measures beyond the signs to restrict public entry, although DOD has knowledge that people continue to use the lake for hunting and bird watching.

DOD proposes to construct a facility on the shore of Lake Temp to receive and prepare a wide variety of munitions for discharge into the lake. Preparation will begin by emptying munitions of liquid, semi-solid and granular contents*, which include many chemicals on the Clean Water Act § 311 list of hazardous substances,* and mixing the *contents* with chemicals to assure they are not explosive. The remaining solids, primarily metals, will be ground and pulverized. Finally, water will be introduced to both sets of waste to form a slurry, which will be sprayed from a movable multi-port pipe. *The current plan is to spray only the portions of the lake that are dry. Due to the arid nature of this location, the slurry will dry out soon after contact.* The pipe will be moved continually to deposit the slurry evenly over the entire dry bed of the lake, so that eventually the entire lakebed will be raised by several feet. DOD estimates that when the operation is complete, the lake's top water elevation will be approximately six feet higher and its surface area will be two square miles larger than at the present time. *This process will take several years, but once finished, it will not be recurring.* The COE will continually grade the edges of the new lakebed so that runoff from the surrounding mountains will flow unimpeded onto it. The lake, of course, will still remain, since it is at the low point in the drainage basin and there is nowhere else for precipitation falling in the basin to flow. Over time, alluvial deposits from precipitation falling on the mountains and flowing into the basin will cover the lakebed again, returning it to its pre-operation condition, albeit at a higher elevation. *The COE's EIS does not project that the Lake would intrude on New Union under any of the scenarios studied for the project.*

The Motions

After discovery, the Secretary of the Army filed a motion for summary judgment on the basis that 1) New Union does not have standing to appeal the permit issuance; 2) the COE had

jurisdiction to issue a permit for the discharge of fill under section 404 because: a) Lake Temp is navigable water; and b) *Southeast Alaska Conservation Council v. Coeur Alaska, Inc.*, 129 S. Ct. 2458 (2009), decided that a section 404 permit is required in this situation rather than a section 402 permit; and 3) the participation by the Office of Management and Budget (OMB) in the decision that a section 404 permit rather than a section 402 permit should be issued did not violate the CWA. New Union filed a cross-motion for summary judgment that 1) it has standing to appeal the permit issuance; and 2) Lake Temp is navigable water; but 3) the COE lacks jurisdiction to issue a permit under section 404 because the materials it authorizes for discharge are primarily pollutants rather than fill material, requiring a permit from EPA under section 402 rather than from the COE under section 404; and 4) participation by OMB in the decision-making process violated the CWA. Progress also filed a cross-motion for summary judgment asserting that: 1) *New Union does have standing*; and either 2) Lake Temp is not within the jurisdiction of the CWA and the activity requires no permit under either section 402 or 404 because Lake Temp is not navigable water; or 3) the COE has jurisdiction to issue the permit under section 404 pursuant to *Coeur Alaska;* and 4) OMB's participation in the decision-making process did not violate the CWA.

Discussion

A. Standing

New Union argues it is injured in its sovereign capacity with regard to that part of the Imhoff Aquifer located within New Union and in its *parens patriae* capacity with regard to its citizens who may be injured by the contamination of the aquifer. *The United States argues that New Union cannot sufficiently establish that the discharge authorized by the Permit will cause injury to it or its citizens to support standing. Progress did not contest New Union's standing in the District Court and supports New Union's standing in the 12th Circuit.* New Union argues it has a special interest as an affected state, subjecting it to a more favorable test for standing under *Massachusetts v. EPA*, 549 U.S. 497, 518-20 (2007). *The United States contends that Massachusetts does not apply*. Significantly, four of the Justices

in that case dissented from the majority's view that states are subject to a relaxed standing test, but New Union does not even meet the majority's relaxed test. Although New Union has presented circumstantial evidence that contaminated water from the permitted activity will enter the Imhoff Aquifer (because the land between the lakebed and the aquifer is primarily unconsolidated alluvial fill), New Union has presented no evidence as to when the pollution will reach the edge of the aquifer beneath New Union, the strength of the pollution when it reaches that edge, or even that it will ever reach that edge. New Union admits as much, stating that the timing and severity of the pollution's impact on the portion of the Imhoff that underlies New Union depends on the direction and rate of flow of groundwater in the aquifer and the top and bottom elevations of the aquifer throughout its expanse, but they are presently unknown.

New Union presented evidence establishing that the information needed regarding the movement of pollutants in the Imhoff Aquifer can only be established by drilling and sampling from a grid of monitoring wells throughout the aquifer. Its evidence also establishes that if installation of such a grid of wells began today, conclusive results might not be available until after the permitted activity begins. Finally, although New Union claims it is willing to install and operate the wells and to collect the data, it avers that it cannot do so without permission from DOD, but that DOD will not grant access to the military reservation for that or other non-military purposes. DOD does not deny these allegations, but adds that New Union has never filed an application with DOD to install monitoring wells. DOD also responds that New Union admits its injury, if there is one, is susceptible to proof, and that New Union is capable of developing that proof but has not done so. DOD also argues that it completed an Environmental Impact Statement (EIS) on the project under the National Environmental Policy Act, 42 U.S.C. §§ 4321-4370H, in 2002 and that New Union did not comment on or object to either the scoping of the EIS or the final EIS on the basis of the unknowns concerning the Imhoff Aquifer. *The COE followed its normal procedures in terms of public notice at all stages of its NEPA activities. All of the facts regarding the lake and the aquifer mentioned in this decision were mentioned in the EIS.* DOD suggests that since New Union is now time-barred

from objecting to the EIS, it is also estopped from raising issues here that could have been dealt with in the EIS. New Union, of course, has the burden of proving that it will be injured by the complained-of activity and it has not carried that burden. There is no evidence that pollution of groundwater owned or regulated by New Union is imminent or ever will happen. The occurrence, timing and severity of such contamination are completely speculative. The evidence of present and future injury the state presented in *Massachusetts v. EPA* was far less speculative than that presented here by New Union.

New Union's *parens patriae* standing as a representative of its citizens is exemplified by Dale Bompers, who owns, operates and resides on a ranch above the Imhoff Aquifer in New Union. Bompers claims the value of his ranch will be diminished if the Imhoff Aquifer below his ranch is contaminated by the permitted discharge, although he presents no proof of a loss in property value. He does not presently use the Imhoff Aquifer, for it is not potable or fit for agricultural use without treatment, due to naturally occurring sulfur in the aquifer. He has no definite plans to use the Imhoff Aquifer in the future. Indeed, under the New Union statute regulating use of groundwater, Bompers could not withdraw groundwater from the aquifer without a permit from the New Union Department of Natural Resources (DNR). The statute requires DNR to determine that permitted withdrawals will not deplete groundwater over a period of twenty years. Although the statute does not limit withdrawals to owners of land above the groundwater to be withdrawn, it gives a preference to such owner if withdrawals are limited by threatened depletion. Under the statute, no one has rights in groundwater unless and until the DNR issues a withdrawal permit. *No such permits have been issued to date with respect to the Imhoff Aquifer, and New Union law prohibits withdrawal of groundwater without a state-issued permit.* On these facts and the facts related in the above paragraph, because Bompers would have no injury to establish standing to challenge the permit issuance, New Union does not have derivative standing under a *parens patriae* theory.

Although this disposes of New Union's claim, for purposes of judicial economy in the event of an appeal I will address the remaining issues raised by the parties.

B. Navigability

Progress argues that Lake Temp is not a "water of the United States" subject to the jurisdiction of the CWA and therefore does not require a permit from either EPA under section 402 or the COE under section 404. The lake is only intermittent and regularly disappears entirely. *Progress argues that* intermittent bodies of water are not navigable, *citing Rapanos v. United States*, 547 U.S. 715 (2006). It is entirely intrastate; located within a basin with no outlets, and flowing nowhere. It is not used in interstate commerce, except in its role as a stopover for migratory birds and *Progress contends* that is not a basis for categorization as navigable water under *Solid Waste Authority of Northern Cook County v. U.S. Army Corps of Eng'rs* (*SWANCC*), 531 U.S. 159 (2001). The ponds at issue in *SWANCC* were from less than an acre to several acres in surface area and from a few inches deep to several feet deep. They were isolated from and had no connection to navigable waters. The COE justified their navigability only by reference to the "migratory bird rule" which defined water as navigable, *inter alia*, if it was used as habitat by birds in interstate migration. The Court overturned the migratory bird rule as outside the bounds of the CWA. Progress argues that *SWANCC* perfectly matches the situation at Lake Temp. DOD and New Union respond that Lake Temp is several square miles, while the largest pond in *SWANCC* was only several acres. Progress replies that small size may prevent navigability, but large size does not establish it. The COE and New Union argue further that Lake Temp has been part of the highway of interstate commerce for interstate hunters, who not only have hunted from the shores of the lake for over one hundred years, but also have hunted from boats and canoes on the lake and have rowed or paddled across the lake to hunt from the shore opposite the highway. The size and use in interstate commerce of Lake Temp differ greatly from the size and use of the ponds in *SWANCC*, making that decision distinguishable. Lake Temp is well within the description of water bodies that have traditionally

been held navigable because of use by interstate travelers (rather than use by interstate birds).

C. Section 402 or 404?

The Supreme Court recently addressed the relationship between section 402 and Section 404 in a similar context. In *Coeur Alaska, Inc. v. Southeast Alaska Conservation Council* the Court held that the discharge of slurry into a lake, elevating and changing the bottom configuration of the lake, was the discharge of fill material requiring a section 404 permit, rather than the discharge of a pollutant, requiring a section 402 permit. *Coeur* is similar to this case in all relevant respects. In both cases, a lake was to be filled. In both cases, the material filling it was slurry. In both cases, the slurry was a pollutant as well as fill material. In both cases, the COE issued a permit and EPA did not veto it. In *Coeur*, the Court held that the issuance of a section 404 permit made the discharge legal under section 301(c) of the CWA, obviating the need for a section 402 permit. This Court is bound by that decision to uphold the COE permit to fill Lake Temp.

New Union seeks to distinguish *Coeur* because the material discharged in *Coeur* was crushed rock, an inert material that is more a fill material than a pollutant, whereas here the material discharged will be spent munitions: liquid and semi-solid chemicals and pulverized metals, a toxic pollutant rather than an inert fill. While it might have been rational for Congress to make this distinction, it did not. Section 502(6) defines pollutants by categories, including "munitions," "chemical waste," and "rock," rather than by degrees of toxicity or inertness and section 404 does not define fill by degrees of toxicity or inertness. The distinction urged by New Union is not relevant to whether a section 402 or section 404 permit is required. The materials to be discharged in both cases fit well within the definitions of both "pollutant" and "fill." The more relevant defined term is "fill material." If it is fill material, *Coeur* decided, it is subject to a section 404 permit, not a section 402 permit, because the CWA provides that section 402 permits cannot authorize the discharge of fill material. If it "has the effect of . . . [c]hanging the bottom elevation" it is fill material. 40 C.F.R. § 232.2. There is no question on this record that the discharge will elevate and change

the bottom elevation of Lake Temp. Indeed, New Union does not contest that fact. In summary, the discharge is both fill material and a pollutant. As long as it is legitimate fill material, it is subject to a section 404 permit, not a section 402 permit.

New Union also seeks to distinguish *Coeur* because the lake in *Coeur* served the purpose of a treatment pond that otherwise would have to be constructed, with a greater environmental detriment, whereas here the lake is not serving as a treatment alternative. To the contrary, while the lake in *Coeur* was treating the mine's effluent so that it met CWA effluent requirements when lake wastewater was subsequently discharged to downstream waters, the lake here is preventing the discharge of any pollutants or wastewater to other navigable waters, in effect creating zero discharge of pollutants, the goal of the statute. CWA Section 101(a)(1), 33 U.S.C. § 1251(a)(1).

New Union also seeks to distinguish *Coeur* because, in *Coeur*, the COE made its decision as an uninterested regulator, while here the COE is an interested subsidiary of the permit applicant. It argues that the COE, as a regulator, is supposed to be protecting the public. Here, however, the COE cannot help but be serving the interests of DOD, a classic conflict of interest situation. New Union argues that a more egregious case of the fox guarding the hen house is difficult to imagine. It argues that having EPA issue a 402 permit rather than the COE issuing a section 404 permit will easily cure the conflict of interest.

The COE comments that New Union's argument leads nowhere. Granted, the COE is part of DOD, the COE is issuing the permit to DOD, and the COE is in a subordinate relationship to DOD. Is New Union arguing that if DOD is the permit applicant, an organization outside of DOD must issue the permit or that if the COE is the permit issuer, DOD may not apply for a section 404 permit? Those suggestions rewrite the statute, which neither this Court nor Plaintiff can do. Congress determined the COE would be the issuer of section 404 permits, that decision is properly a legislative decision, and courts cannot rewrite the statute to place section 404 permit issuance authority elsewhere when DOD is the applicant for a section 404 permit. In any event, the COE must apply the same legislative and regulatory criteria when issuing a permit to DOD that it applies when

issuing a permit to any other entity. And the public may challenge the issuance of such permits if they do not meet those statutory and regulatory criteria, as New Union is doing here. This situation, although somewhat awkward in appearance, is common. Many agencies must issue a permit to themselves or to an entity in the same department. EPA, for instance, issues permits for EPA laboratories and other EPA facilities with discharges requiring section 402 permits.

D. OMB's Participation

New Union notes that EPA made a positive decision in *Coeur* not to veto the COE's section 404 permit. Indeed, in *Coeur* EPA issued a section 402 permit for the discharge from the lake to downstream waters, incorporating the effluent limitations applicable to treated wastewater from the operation. In essence, EPA agreed with and participated in the COE's interpretation of the statute under the facts of the case. But here, New Union argues, EPA was preparing to exercise its authority to veto the COE's section 404 permit and issue a section 402 permit, but the OMB instructed EPA not to do so.[1] EPA argued to OMB that the nature of the discharge here was significantly different from the discharge in *Coeur*, so as to warrant a different outcome, requiring a section 402 permit at least for treatment of the non-fill liquid and semi-solid portion of the material before discharge to navigable waters. New Union argues that Congress conferred authority directly on the Administrator of EPA "to administer" the CWA generally, 33 U.S.C. § 1251(d), and in particular to veto permits proposed by the COE, 33 U.S.C. § 1344(c). Congress conferred no authority directly or indirectly on OMB to issue permits or veto permits under 33 U.S.C. §§ 1342 or 1344 or to decide which permit should be issued in any particular instance. New Union argues that OMB violated the statute by directing EPA not to veto the permit and EPA violated the statute by acquiescing in OMB's directive, both "incompatible with the will of Congress and . . . [un]sustainable as a valid exercise of the President's Article II powers." *Envtl. Def. Fund v. Thomas*, 627 F.

1. *The COE and EPA both sent briefing papers on the issue to OMB and attended a meeting with OMB, which culminated in OMB's oral decision and directive. The papers are not in the record of this case.*

Supp. 566 (D.D.C. 1986). One effect of OMB's action is to place the interpretation of the statute by OMB, not an administrator of any portion of the statute, and the COE, the administrator of one section of the statute, section 404, before this Court rather than the interpretation of EPA, administrator of the more than one hundred other sections of the statute, including the basic prohibition in section 301(a), and of parts of section 404 itself. New Union argues this prevents the Court from properly interpreting the statute using a *Chevron* test. *Chevron, U.S.A., Inc. v. Natural Res. Def. Council*, 467 U.S. 837 (1984).

The COE comments that New Union's argument is a collateral attack on EPA's decision not to veto the COE permit. The COE points out that EPA's decision not to veto a section 404 permit is not subject to judicial review because EPA's authority to veto section 404 permits is wholly discretionary, and "agency action . . . committed to agency discretion by law" is not subject to judicial review, 5 U.S.C. § 701(a)(2). Even if EPA's decision not to veto the COE permit was subject to judicial review, review would be limited to whether the decision was arbitrary or capricious under 5 U.S.C. § 706(2)(A). EPA's decision not to veto the COE permit was neither arbitrary nor capricious because it was either required by or consistent with the Court's ruling in *Coeur*.

New Union protests that EPA made no decision not to veto the COE permit; the OMB, in violation of the CWA, made that decision. The COE admits that OMB resolved a dispute between EPA and the COE over the permit, pursuant to procedures for reconciling disputes within the executive branch first established by Exec. Order No. 12,088, 43 Fed. Reg. 47,707 (Oct. 13, 1978). Nonetheless, the COE argues that after OMB's decision EPA took no further action, i.e., it decided not to veto the COE permit and EPA's decision was not arbitrary or capricious for two reasons. First, EPA's decision is required by or consistent with *Coeur*, regardless of OMB's participation. Second, all the executive power of the United States is vested by the Constitution in the President, not the Administrator of EPA or the Secretary of the Army, *U.S. CONST. art. II,* § 1, cl. 1. Moreover, the Constitution charges the President with the duty to "take Care that the Laws be faithfully executed." U.S. CONST. art. II, § 3. That gives the President both the duty and the power to assure that all

discretionary decisions made within the executive branch, including those made by the Secretary of the Army and the Administrator of EPA, are faithful to the Constitution, treaties and laws of the Nation. That power and duty necessarily includes the authority to resolve legal and policy disputes between executive branch entities. Differences of interpretation often occur between two agencies in the executive branch and sometimes they must be decided before the executive branch takes action. They certainly must be decided before the government takes a litigation position, as it had to do here. If OMB had not already decided the matter, the Attorney General would have to have decided the matter prior to filing responses in this case. The participation by OMB in EPA's decision did not violate the CWA, did not make EPA's decision subject to judicial review and did not render EPA's decision arbitrary or capricious. Finally, OMB's participation did not affect the COE's decision to issue the permit or the terms of the permit it issued.

For the reasons stated above, the Court grants Defendant's motion for summary judgment on the CWA counts and denies Plaintiff's motion:

Plaintiff has no standing;

The COE had jurisdiction to issue a section 404 permit for the addition of fill to Lake Temp because Lake Temp is a navigable water and the slurry is a fill material; and

OMB's dispute resolution between EPA and the COE did not violate the CWA.

SO ORDERED.
Romulus N. Remus
United States District Judge

June 2, 2011