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2012 Judges' Bench Memorandum

TWENTY-FOURTH ANNUAL
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COMPETITION
PACE LAW SCHOOL

2012 Judges' Bench Memorandum

Regulatory And Factual Framework

A. Parties

The State of New Union (New Union) overlies five percent of the Imhoff Aquifer. The rest of the aquifer underlies Lake Temp, which is solely contained within the adjoining State of Progress. New Union's Department of Natural Resources (DNR) regulates and runs a use-permitting program for the aquifer waters. New Union was the plaintiff in the district court and is the appellant on appeal.

The United States administers a permitting program via the Secretary of the Army and the Army Corps of Engineers (COE) for the discharge of fill material to navigable waters under the CWA. The COE issued a permit to the Department of Defense (DOD) to deposit a slurry of pulverized munitions into the dry lakebed of Lake Temp. The United States was the respondent below and is the appellee on appeal.

The State of Progress (Progress) shares a border with New Union. It overlies ninety-five percent of the Imhoff Aquifer. The entirety of Lake Temp and the majority of the watershed draining into that lake lie within Progress. Progress was an intervenor in the district court and is an appellee on appeal.

B. Applicable Rules of Law

U.S. CONST. art. I, § 1, cl. 1
U.S. CONST. art. I, § 8, cl. 3
U.S. CONST. art. II, § 1, cl. 1
U.S. CONST. art. III, § 2

28 U.S.C. § 1331 (2006)
Administrative Procedure Act (APA), 5 U.S.C. § 702 (2006)
APA, 5 U.S.C. § 706 (2006)
Federal Water Pollution Control Act (CWA) § 101, 33 U.S.C. § 1251 (2006)
CWA § 301, 33 U.S.C. § 1311 (2006)
CWA § 402, 33 U.S.C. § 1342 (2006)
CWA § 404, 33 U.S.C. § 1344 (2006)
CWA § 502, 33 U.S.C. § 1362 (2006)
CWA § 509, 33 U.S.C. § 1369 (2006)
40 C.F.R. § 232.2 (2008)
33 C.F.R. § 323.2 (2008)
Exec. Order No. 12,088, 43 Fed. Reg. 47,707 (Oct. 13, 1978)

Summary of Facts

The undisputed facts established in the court below are as follows:

Lake Temp is an intermittent lake located wholly within an arid U.S. military reserve run by the Department of Defense (DOD) within Progress but not far from New Union's border. Lake size fluctuates based on rainy and dry seasons. At its greatest extent, it is three by nine miles wide but is entirely dry in at least one of five years. An eight hundred square mile watershed drains into the lake. Lake Temp has no outlets. Lake Temp is an historic stopover point for ducks during migration. A large number of duck hunters, the majority from Progress but a portion from New Union, have used the lake for hunting purposes. A Progress state highway runs along the southern end of the lake close to its high water mark and intersects with several roads leading into New Union. In 1952, DOD posted signs along both sides of the highway stating that entry is illegal and warning of danger. There is no fence surrounding Lake Temp. There is clear evidence that canoes and rowboats have been dragged between the highway and the lake. DOD is aware that people continue to use the lake for hunting and bird watching but has done nothing further to restrict public entry.

The Imhoff Aquifer lies one thousand feet below Lake Temp separated by unconsolidated alluvial fill. New Union requires a

permit from its DNR in order to withdraw aquifer water but no such permit has been issued to date. The aquifer water cannot be used without treatment due to high sulfur levels and this information has been included in New Union groundwater inventories since DOD proposed the Lake Temp project. Dale Bompers, a citizen of New Union, owns a ranch above the aquifer but does not use or plan to use its waters.

This controversy arose when DOD proposed to construct a facility on the shore of Lake Temp to receive and prepare munitions for discharge into the lake. DOD will mix liquid, semi-solid, and granular contents of munitions, many of which are listed in section 311 of the CWA as hazardous, with chemicals to ensure they are not explosive and pulverize any remaining solids (primarily metals). It will combine this waste with water to form a slurry. Over a few years, DOD will spray the slurry into the dry portions of the lake from a pipe, which it will move continually to deposit the slurry over the entire dry lakebed. Due to the arid location, the slurry will dry up relatively quickly. This will increase Lake Temp's maximum elevation by six feet and increase its surface area by two square miles. Projections show that the enlarged lake will not protrude onto New Union territory. COE will grade the edges of the lakebed so that runoff from the watershed will flow into it unimpeded. Eventually, alluvial deposits will cover the lakebed, returning it to pre-operation condition, but at a higher elevation.

COE issued an individual permit for DOD's proposed discharge to Lake Temp under section 404 of the CWA. New Union filed a timely complaint against the United States under 28 U.S.C. § 1331 and the APA, 5 U.S.C. § 702 seeking review of COE's issuance of the permit. New Union claimed that the Environmental Protection Agency (EPA) had the authority to issue the permit in question under section 402 and COE did not have authority to issue the permit under section 404 of the CWA. Progress intervened. After discovery, the United States filed a motion for summary judgment. New Union and Progress each cross-motioned for summary judgment.

On June 2, 2011, the District Court for the District of New Union granted the United States' motion for summary judgment and dismissed New Union's action, holding that (1) New Union

lacked standing, (2) Lake Temp is navigable within the meaning of the CWA, (3) COE, rather than EPA, had authority to issue the permit in question under section 404 of the CWA, and (4) OMB resolution of a dispute between EPA and COE was not improper.

Issues

Summary of Parties' Positions				
	New Union	**United States**	**Progress**	**District Court**
Does New Union have standing?	Yes	No	Yes	No
Is Lake Temp navigable?	Yes	Yes	No	Yes
If so, does COE have authority to issue a section 404 permit?	No (EPA has authority under section 402)	Yes	Yes	Yes
Was OMB involvement improper/illegal?	Yes	No	No	No

The parties have been ordered to brief the following issues on appeal:

- Whether 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.
    - On appeal, New Union argues that it has standing in its sovereign capacity as owner and regulator of the groundwater within its boundaries and/or as *parens patriae* on behalf of its citizens.
    - The United States argues that New Union has no standing under either a sovereign interest or *parens patriae* theory.
    - Progress argues that New Union has standing in its sovereign capacity as owner and regulator of the

groundwater within its boundaries and/or as *parens patriae* of its citizens. (Although it would be to Progress' advantage in this case for New Union to lose on the standing issue, that would establish a precedent against states' interests generally.)

- Whether COE has jurisdiction to issue a permit under section 404 of the CWA because Lake Temp is navigable within the meaning of the CWA, 33 U.S.C. 1311(a)(1), 1344(a), and 1362(7)(a).
    - On appeal, New Union argues that Lake Temp is navigable and subject to the permitting requirements of the CWA.
    - The United States argues that Lake Temp is navigable and subject to the permitting requirements of the CWA.
    - Progress argues that Lake Temp is not navigable and not subject to the permitting requirements of the CWA.
- Whether COE has jurisdiction to issue a permit under section 404 of the CWA or EPA has jurisdiction to issue a permit under section 402 of the CWA for the discharge of slurry to Lake Temp.
    - On appeal, New Union argues that EPA has jurisdiction under section 402 of the CWA to issue the Lake Temp permit.
    - The United States argues that COE has jurisdiction under section 404 of the CWA to issue a permit for the Lake Temp discharge.
    - Progress argues, in the alternative, that COE has jurisdiction under section 404 of the CWA to issue a permit for the Lake Temp discharge.
- Whether the decision by OMB that COE had jurisdiction under section 404 of the CWA and that EPA did not have jurisdiction under section 402 of the CWA to issue a permit for the discharge of slurry to Lake Temp and EPA's acquiescence to OMB's decision violated the CWA.
    - On appeal, New Union argues that OMB had no authority to determine that COE, not EPA, had jurisdiction to issue a permit under the CWA and

EPA's acquiescence to OMB's decision violated the CWA.
- The United States argues that OMB's involvement in the permitting process was not improper.
- Progress argues that OMB's involvement in the permitting process was not improper.

Standing: *Did the lower court err in holding that New Union did not have standing in its sovereign capacity as regulator of a portion of the Imhoff Aquifer or as parens patriae on behalf of its citizens?*

New Union and Progress contend that New Union has standing due to its sovereign interest in the Imhoff Aquifer and as *parens patriae* on behalf of its citizens. The United States contends that New Union has no standing because it cannot show an actual or imminent injury under the *Lujan* test and has no special position within the standing analysis as a quasi-sovereign. The United States also contends that New Union has no *parens patriae* standing because it has not shown that its citizens will be adversely affected by DOD's proposed activity at Lake Temp.

The first issue that the parties should address is whether New Union has standing as a sovereign under the Supreme Court's most recent iteration of the "case and controversy" requirements of the U.S. Constitution. Generally, in order to have Article III standing, a party must show a "concrete and particularized" injury that is "actual or imminent," "fairly traceable" to the actions of the defendant, and "likely . . . [to be] redressed by a favorable decision." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992). A state may bring an action alleging standing based on a sovereign proprietary interest. *Connecticut v. Cahill*, 217 F.3d 93, 97 (2d Cir. 2000). The determination of this issue turns on whether the contamination of the Imhoff Aquifer is a concrete and imminent harm, as the causal relationship between the future aquifer contamination and the Lake Temp discharge is undisputed. There are a number of arguments that the parties may make in relation to this question.

New Union and Progress will argue that New Union has standing by way of its sovereign interest in the portion of the Imhoff Aquifer that lies within its boundaries. New Union has

presented circumstantial evidence that the slurry DOD proposes to spray into Lake Temp will eventually permeate the unconsolidated alluvial soil beneath the lake and contaminate the aquifer. While it cannot predict the timing or severity of the effect on the Imhoff Aquifer, New Union will maintain that this is a concrete, imminent harm satisfying the first element of the *Lujan* test. New Union will also point out that in order to predict the timing and severity of the effects in the aquifer it will need to collect data from a series of monitoring wells on the military reserve but that DOD will not allow access to its property for this non-military activity, thereby preventing New Union from proving the exact contours of the injury it will suffer. In any case, the data collected from the wells will not be available until after the proposed activity occurs.

In contrast, the United States will argue that New Union cannot show a concrete, imminent harm to its interest in the Imhoff Aquifer because it has not shown and cannot show the timing or severity of the contamination. The United States will point out that "[a]llegations of possible future injury do not satisfy the requirements of [Article] III. A threatened injury must be certainly impending to constitute injury in fact." *See Whitmore v. Arkansas*, 495 U.S. 149, 158 (1990). A fact weighing in favor of the United States on this point is that New Union has not applied for DOD permission to install the wells on the military reservation and gain access to this information.

Massachusetts v. EPA

An important sub-issue for parties to consider on this point is whether the Supreme Court's ruling in *Massachusetts v. EPA* grants New Union a special place within the standing analysis due to its quasi-sovereign interest in its property and natural resources. *See generally Massachusetts v. EPA*, 549 U.S. 497, 520 (2007). This issue likely provides New Union and Progress with their strongest arguments in favor of standing.

New Union will argue that, under *Massachusetts v. EPA*, it is subject to a lesser standing requirement due to a special interest (a "well-founded desire to protect its . . . territory") as an affected state defending its quasi-sovereign interests. *See Massachusetts*, 549 U.S. at 520. It has already asserted a sovereign interest in

the Imhoff Aquifer by instituting a permitting system for withdrawals from the aquifer run by the DNR. It will point to landmark cases such as *Georgia v. Tennessee Copper* for the proposition that "in its capacity of *quasi*-sovereign. . . . the State has an interest independent of and behind the titles of its citizens, in all the earth and air within its domain." *Id.* at 518-19 (citing *Georgia v. Tenn. Copper*, 206 U.S. 230, 237 (1907)). Just as Georgia and Massachusetts were granted standing in their land, New Union will argue that it must be granted standing to protect its sovereign interest in the Imhoff Aquifer. New Union will point out that the size of its property endangered by the permitted activity is irrelevant to this special standing analysis; Georgia "[owned] very little of the territory alleged to be affected, and the damage to it capable of estimate in money, possibly, at least, [was] small" yet it had standing. *Id.* Furthermore, the Supreme Court has noted that Massachusetts' large ownership interest in coastline affected by global warming "only served to reinforce" its standing to challenge EPA in federal court. *Id.* at 519. New Union may also highlight the fact that it runs a permitting program for all of the groundwater within its borders, which includes more than the Imhoff Aquifer, in order to show its substantial sovereign interest in protecting its groundwater from interstate pollution. New Union may also bolster its standing argument by comparing the uncertainties in its future harm from the Lake Temp discharge to Massachusetts' uncertainties in its estimates of future harm from global warming and sea level rise. *See id.* at 542, 554-56 (Roberts, C.J., dissenting) (noting scientific uncertainties in modeling effects of global warming with significant error rates). Unlike Massachusetts, which owned the land where the harm occurred and could measure the effects of a presently occurring harm, New Union is unable to collect extensive, concrete data on the effects of DOD's proposed project because it does not own or have access to the land where the harm will occur and the harm-causing activity has not yet begun.

On the other hand, the United States will argue that *Massachusetts v. EPA* is distinguishable from the current case and therefore does not apply here. In that case, Massachusetts presented extensive evidence from climate scientists and the NRC on the damaging affects of climate change on sea level rise and the state's many miles of coastline. *See id.* at 521-23. Unlike

Massachusetts, in which extensive coastline had been and will continue to be affected by the alleged harm, New Union has only shown circumstantial evidence that contamination will eventually reach a very small portion of its groundwater. *See id.* at 522. It has shown no adverse economic impact on the state or its residents. Furthermore, it is not clear from the opinion in *Massachusetts v. EPA* that a state will or should always be accorded a special place within the standing analysis; four out of nine justices vigorously dissented to the standing analysis used by the majority. *See id.* at 535-60 (dissenting opinions). The United States will differentiate this case from *Tennessee Copper* by pointing out that the resident plaintiffs in *Tennessee Copper* had traditional standing in their own rights unlike the residents of New Union, such as Dale Bompers. *See id.* at 538 (Roberts dissenting); *see infra* p. 7 and accompanying text on Dale Bompers' standing. The United States may also assert that New Union's reliance upon *Massachusetts*' relaxed state standing requirements is an "implicit concession that [it] cannot establish standing on traditional terms." *Id.* at 540 (Roberts, C.J., dissenting).

Parens Patriae

The other issue parties should address concerning standing is whether New Union has standing as *parens patriae* on behalf of its citizens. This approach presents what are perhaps New Union's weakest – and strategically least important – arguments for standing in this case.

Aside from more traditional bases for standing such as a sovereign or proprietary interest, a state may also assert standing as *parens patriae* ("the parent of the country") in order to protect the health, welfare, and public goods of its citizenry. *See From Georgia v. Tennessee Copper to Massachusetts v. EPA: Parens Patriae Standing for State Global Warming Plaintiffs*, 96 GEO. L.J. 1059, 1068-69 (2008). In order to assert *parens patriae* standing, the state must show a quasi-sovereign interest in (1) the "health and well-being – both physical and economic" of its citizens or (2) its rightful status in the "federal system." *Alfred L. Snapp & Son, Inc. v. Puerto Rico (Alfred L. Snapp)*, 458 U.S. 592, 593 (1982). It must show more than an injury to a single

identifiable group of people. *Id.* The court must also consider whether the state has "alleged an injury to a sufficiently substantial segment of its population." *Id.* However, lower courts have held that a state may show *parens patriae* standing by alleging a "sufficient economic interest" in the case. *See, e.g., Connecticut ex rel. Blumenthal v. United States*, 369 F. Supp. 2d 237, 246 (D. Conn. 2005) (finding *parens patriae* standing due to state's economic interest in the regulation of its fisheries).

Here, New Union and Progress will argue that New Union has standing as *parens patriae* on behalf of its citizens who will be injured if the aquifer is contaminated with the toxic slurry. New Union may point to Dale Bompers, a resident who owns a ranch overlying the Imhoff Aquifer. Toxins from the Lake Temp discharge may negatively affect Bompers' physical or economic well being as required in *Alfred L. Snapp*. *See* 458 U.S. at 593. While no one currently uses the aquifer waters due to high sulfur content, this does not preclude the possibility that New Union citizens could utilize the water in the future, especially given the increased drought conditions throughout the country and the possibility of treating the Imhoff's sulfur-filled water.

In response, the United States will argue that New Union cannot show *parens patriae* standing because it has not shown that the permitted activity will adversely affect its citizens. For example, Dale Bompers owns a ranch above the aquifer but does not use or have plans to use the aquifer water. Additionally, Bompers has no permit to withdraw aquifer water from the New Union DNR. In fact, no such permits have been issued to date to anyone with respect to the Imhoff Aquifer, and New Union law prohibits withdrawal of groundwater without a state-issued permit. The United States may also argue that the *parens patriae* analysis is not a separate standing analysis from *Lujan* but merely adds an additional criterion for New Union to prove – namely that it has a sovereign interest in addition to the traditional standing elements. *See Massachusetts* at 538 (citing *Alfred L. Snapp*, 458 U.S. at 607). The United States will also argue that a state may not assert *parens patriae* standing against the federal government on behalf of its citizens, as the federal government – not the state – represents the citizens in those matters. *See Massachusetts v. Mellon,* 262 U.S. 447, 485–86

(1923) (citation omitted); *see also Alfred L. Snapp*, 458 U.S. at 610 n.16.

Other Arguments

The United States may attempt to strengthen its standing argument by pointing out that New Union failed to comment on DOD's Lake Temp Environmental Impact Statement (EIS) and therefore should be barred from challenging the resulting permit. While the failure to submit comments on an EIS is relevant to a claim under the National Environmental Policy Act (NEPA), it is not relevant to standing under the CWA. Additionally, laches or other equitable defenses based upon these facts are likely fruitless, as those doctrines are generally applied to preclude damages or injunctive relief and are "strongly disfavored in environmental cases." *Ocean Advocates v. U.S. Army Corps of Eng'rs*, 402 F.3d 846, 862 (9th Cir. 2004).

Navigability – *Did the lower court err in holding that Lake Temp was navigable and therefore subject to the permitting requirements of the Clean Water Act?*

The CWA prohibits the discharge of pollutants or fill material into "navigable waters" without a permit and defines navigable waters as "waters of the United States, including territorial seas." 33 U.S.C. §§ 1311(a), 1362(7). Therefore, the navigability of a water body is a necessary element in order for EPA to issue section 402 permits and for COE to issue section 404 permits. In this case, Progress challenges the jurisdiction of both COE and EPA to issue permits for discharges to Lake Temp by claiming that the lake is not navigable. New Union and the United States respond that the lake is navigable and therefore DOD requires a permit for its proposed discharge under the CWA.

Courts have considered bodies of water traditionally "navigable . . . when they 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." *See The Daniel Ball*, 77 U.S. 557, 563 (1870). However, recent agency regulations and cases challenging the constitutional reach of the CWA have – perhaps –

altered the meaning of the phrase "navigable waters" in the context of the CWA. *See generally Solid Waste Agency of N. Cook Cnty. v. U.S. Army Corps of Eng'rs (SWANCC), 531 U.S. 159 (2001); Rapanos v. United States, 547 U.S. 715 (2009).* This possible disconnect between the traditional notion and more recent understanding of navigability presents several arguments for parties to present in this portion of the appeal.

Progress will contend that Lake Temp is not subject to the permitting requirements of the CWA because it is an intermittent body of water. *See Rapanos*, 547 U.S. at 733-34 (the CWA "exclude[s] channels containing merely intermittent or ephemeral flow.") In *Rapanos*, the plurality opinion required that a body of water be "relatively permanent" in order for CWA jurisdiction to attach. *Id.* at 732. For example, a stream with a "permanent flow" clearly falls under CWA authority while streams that come and go "at intervals" do not. *Id.* at 732 n.5. The latter is analogous to Lake Temp, which has no permanent standing water but is dry at intervals of one out of five years. Additionally, Progress will argue that Lake Temp falls outside of the CWA's purview because it does not affect interstate commerce: it is *intra*state and has no outlets by which to affect other interstate or navigable waters. Progress may attempt to bolster this argument by pointing out that the lake is not open to the public but is contained within a restricted military reserve, which also prevents it from affecting interstate commerce. (However this is easily undercut by evidence of regular use by the public and a lack of enforcement by DOD.) Drawing these arguments together, Progress could argue that, as a lake that is only present in four out of five years and flows to no navigable waters, Lake Temp should not be accorded protection under the CWA as a "relatively permanent" body of water; while intermittent tributaries of navigable water bodies are accorded such protection because they may convey pollutants to navigable waters when wet, Lake Temp conveys no pollutants to navigable waters at any time.

In contrast, New Union and the United States have several strong arguments to support Lake Temp's navigability. Despite being "intermittent," Lake Temp is traditionally navigable because it is capable of supporting interstate commerce in its

ordinary condition, such as duck hunting and bird watching from boats. *See The Daniel Ball*, 77 U.S. at 563; *see also United States v. Utah*, 403 U.S. 9, 11-13 (1971). It is also part of an interstate network within the eight hundred square mile watershed that crosses the border between Progress and New Union. New Union may liken the Lake Temp case to that of *United States v. Utah*, where the Supreme Court found that an entirely intrastate lake was traditionally navigable because it was susceptible to use in interstate commerce such as running a ferry from the shore to an island and supporting excursion boats, which are comparable activities to the ones undertaken on Lake Temp. *Utah*, 403 U.S. at 11-13. However, Progress can distinguish Lake Temp from *Utah* based on the physical characteristics of the lakes in each case – the lake in the former case was the Great Salt Lake, which is a significant geographic feature as compared to Lake Temp. It can also distinguish the cases based on legal posture – *United States v. Utah* considered traditional navigability to determine whether the United States or Utah owned the land beneath the Great Salt Lake, whereas here the Court must decide the navigable status of Lake Temp to determine whether the United States has authority to regulate discharges to it.

To further buoy the argument for Lake Temp's navigability, New Union and the United States may assert that the Supreme Court has not detracted from CWA jurisdiction over traditionally navigable waters in recent cases but has merely clarified that the CWA applies to traditionally navigable waters *plus* certain other waters or wetlands. *See Rapanos*, 547 U.S. at 730 ("the [CWA's] term 'navigable waters' includes something *more* than traditional navigable waters." (Emphasis added)). Therefore, as a traditionally navigable lake, Lake Temp's status as "navigable" within the meaning of the CWA would not be questioned by the *Rapanos* plurality although the lake occasionally dries up. New Union and the United States will also reason that Lake Temp affects interstate commerce as evidenced by the aforementioned interstate hunters and bird watchers.

SWANCC

A sub-issue that parties may address relating to the subject of navigability is whether *SWANCC* affects CWA jurisdiction over

Lake Temp. *See generally SWANCC, 531 U.S. 159 (2001).* Here, Progress will challenge the lower court's holding that Lake Temp is navigable and subject to the CWA by comparing the Lake Temp case to *SWANCC*, in which the Supreme Court ruled that adding fill material to intrastate seasonal ponds did not require a permit under the CWA because the ponds were not navigable. *See id.* at 166. However, New Union and the United States can easily distinguish Lake Temp, a significant three-by-nine mile wide lake, from the small ponds that had developed out of ditches at an abandoned gravel mine in *SWANCC*. *See id*. at 163. Additionally, New Union and the United States will argue that *SWANCC* is inapplicable to the case at hand, as it merely rejected COE's rule that included any waters (including intrastate ponds) that could be inhabited by migratory birds (Migratory Bird Rule). *See id*. at 164. Unlike SWANCC, New Union and the United States do not rely on the Migratory Bird Rule in order to establish the navigability of Lake Temp, which is traditionally navigable and supports interstate commerce in the form of duck hunters and bird watchers.

Permitting Authority– *Did the lower court err in holding that COE rather than EPA had authority to issue the Clean Water Act permit for the Lake Temp discharge because the discharge will raise the elevation of the lakebed?*

New Union contends that EPA, not COE, has authority to issue a permit for DOD's discharge to Lake Temp. The United States and Progress respond that COE has exclusive authority to issue a section 404 permit in this case.

Under the CWA, EPA has authority to issue a section 402 permit for the discharge of pollutants to navigable waters except where COE has authority to issue a permit under section 404 of the CWA. 33 U.S.C. § 1342(a). COE has authority to issue a section 404 permit for the discharge of dredge and fill material to navigable waters. 33 U.S.C. § 1344(a). Both EPA and COE regulations define fill material as

> [M]aterial placed in waters of the United States where the material has the effect of . . . [r]eplacing any portion of a water of the United States with dry land; or . . . [c]hanging the bottom elevation of any portion of a water of the United States. . . .

> Examples . . . include, but are not limited to: rock, sand, soil, clay, plastics, construction debris, wood chips, overburden from mining or other excavation activities, and materials used to create any structure or infrastructure in the waters of the United States.

33 C.F.R. § 323.2 (2008); 40 C.F.R. § 232.2 (2008). This is an effects-based test to determine whether a pollutant qualifies as fill material and is therefore governed by COE under section 404 rather than EPA under section 402. *See* Nathaniel Browand, *The Shifting Boundary Between the Sections 402 and 404 Permitting Programs and the Definition of Fill Material*, 31 B.C. ENVTL. AFFAIRS L. REV. 617, 624-29 (2004). COE previously defined fill material using a purpose-based test, finding that a pollutant qualified as fill material if the primary purpose and not merely the effect of the discharge was to raise the elevation of navigable waters. *Id.* at 625.

The resolution of this issue revolves around *Coeur Alaska, Inc. v. Southeast Alaska Conservation Council*, which determined that COE – to the exclusion of EPA – had jurisdiction under the CWA to issue a permit for a mining company's discharge of slurry to an intrastate lake. *Coeur Alaska, Inc. v. Se. Alaska Conservation Council* (*Coeur Alaska*), 129 S. Ct. 2458 (2009). In that case, the Supreme Court held that where COE has authority to issue a section 404 permit for a discharge of fill material under the CWA, EPA lacks authority to issue a more rigorous section 402 permit. *Id.* at 2467. Importantly, the slurry of crushed rock and mining wastes in *Coeur Alaska* met the definition of fill material and was therefore governed by section 404 because it had the *effect* of changing the bottom elevation of the lake, thereby giving COE jurisdiction under section 404. *Id.* at 2468.

New Union's main strategy will be to differentiate the case at hand from *Coeur Alaska*. For example, in the earlier case, COE and EPA agreed that the discharge required a section 404 permit while these agencies disagree as to which permit should be issued for Lake Temp. *Id.* at 2464. It will also highlight the fact that the lake in *Coeur Alaska* was being used as a treatment pond within a larger section 402 permitting scheme whereas Lake Temp is not part of a treatment system and not subject to a larger permitting scheme overseen by EPA. *Id.* New Union will also point out that

the discharge in *Coeur Alaska* was the least environmentally disruptive alternative, while it is unknown if filling Lake Temp is the least environmentally disruptive alternative available to DOD. *Id.* at 2465. Additionally, the Lake Temp slurry differs from the slurry discharged in *Coeur Alaska*, which consisted of tailings and crushed rock and not the heavy metals and previously explosive munitions materials. New Union may make use of a portion of *Coeur Alaska*, in which the Supreme Court acknowledged the possibility that a section 404 permit could be used to discharge dangerous materials prohibited by EPA under section 402, such as toxic battery wastes or fecal matter. *Coeur Alaska*, 129 S. Ct. at 2468. The Court stated that such "extreme instances" were not presented by *Coeur Alaska* but that a future plaintiff could challenge such an instance based on the agency's interpretation of fill material. *Id.* New Union therefore will assert that the Lake Temp discharge presents just such an extreme instance. By including such extremely harmful pollutants (spent munitions, heavy metals, and previously explosive material), EPA and COE's interpretation of the term "fill material" is unlawful under the CWA, the goal of which is to is to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251; *see Coeur Alaska*, 129 S. Ct. at 2468. This is not the type of material that the CWA envisioned as fill material but is the extreme type of pollutant that should be regulated under section 402. *See id.* at 2483-84 (Ginsburg, J., dissenting) ("a discharge of a pollutant . . . becomes lawful if it contains sufficient solid matter to raise the bottom of a water body . . . that is not how Congress intended the [CWA] to operate."). New Union will also differentiate this case from *Coeur Alaska* and fortify its argument that the Lake Temp discharge should not be defined as fill material based on the distinct effects on elevation presented in each case. In *Coeur Alaska*, the fill material was projected to result in a significant, fifty-foot increase in the elevation of the lake, almost doubling its depth, while DOD's proposed discharge in this case will raise Lake Temp's elevation by a mere six feet. *Coeur Alaska*, 129 S. Ct. at 2464. While EPA and COE currently use an effects-based test to determine whether a pollutant is fill material, it is not appropriate in this case. Ultimately, New Union will argue, the Lake Temp discharge presents an entirely different case from

Coeur Alaska – it consists of highly toxic munitions slurry rather than inert rock and will only result in a slight elevation of the lake rather than almost doubling the elevation.

In contrast, the United States and Progress will present strong arguments that *Coeur Alaska* is controlling. The current definition of fill material clearly covers the discharge to Lake Temp. Here, just as in *Coeur Alaska*, the discharge of pollutants undeniably has the effect of raising the elevation of the lake. COE and EPA regulations make no distinction between discharges that raise the elevation of navigable waters by large or small increments, nor do they make distinctions based on the level of toxicity presented by the discharge. 33 C.F.R. § 323.2; 40 C.F.R. § 232.2. Therefore, the slurry DOD proposes to discharge to Lake Temp is fill material despite that fact that it consists of munitions and will only increase lake elevation by six feet. Because it is fill material, COE has exclusive authority to issue a section 404 permit under *Coeur Alaska*. While the Supreme Court briefly acknowledged the possibility that "extreme instances" could present a problem for the agency definition of fill material and this permitting scheme, Lake Temp does not present such an instance. *Coeur Alaska*, 129 S. Ct. at 2468. In *Coeur Alaska*, the plaintiffs discussed severe instances of water pollution, such as discharges of fecal matter and battery waste, but DOD's proposed discharge is more analogous to the rock and mining wastes discharged in *Coeur Alaska*; DOD plans to treat the munitions to eliminate their ordinary chemical properties, leaving inert rock and metals in Lake Temp similar to the tailings left *Coeur Alaska*. Just as in *Coeur Alaska*, the discharge will be covered by "native material," which will eventually return the lakebed to its former state. *See Coeur Alaska*, 129 S. Ct. at 2465 (stating that the mining company planned to cover the tailing with four inches of native material). Ultimately, DOD's proposed discharge to Lake Temp is plainly fill material under the joint COE and EPA definition because it will have the effect of raising Lake Temp's elevation by six feet. Therefore, *Coeur Alaska* dictates that COE have exclusive permitting authority under section 404 of the CWA.

OMB Involvement: *Did the lower court err in holding that OMB's involvement in the interagency dispute between EPA and COE was proper?*

In this case, EPA and COE sent briefing papers regarding the Lake Temp permit dispute to OMB, which issued an oral decision and directive (not made a part of the record) that COE has jurisdiction to issue section 404 permit. New Union contends that OMB's involvement in the dispute rendered EPA's decision not to issue a section 402 permit violative of the CWA. It will make the case that EPA should have vetoed the section 404 permit and issued a section 402 permit to DOD rather than acquiesce to OMB's decision. Progress and the United States will argue that Executive Order No. 12,088 specifically allows OMB to resolve such a dispute between agencies and that EPA was therefore justified in complying with OMB's answer to the Lake Temp permitting question. They will also argue that, in any case, EPA's decision not to issue a permit is not reviewable.

This issue revolves around the administration of the CWA and the resolution of conflicts between administrative agencies, namely EPA and COE. The CWA states that the Administrator of EPA shall issue permits for the discharge of pollutants under section 402 and the Secretary of the Army shall issue permits for the discharge of fill material under section 404. 33 U.S.C. §§ 1342(a), 1344(a). Executive Order No. 12,088 states that the

> Administrator of [EPA] shall make every effort to resolve conflicts regarding such violation between Executive agencies . . . If the Administrator cannot resolve a conflict, the Administrator shall request the Director of [OMB] to resolve the conflict. The Director . . . shall consider unresolved conflicts at the request of the Administrator. The Director shall seek the Administrator's technological judgment and determination with regard to the applicability of statutes and regulations. These conflict resolution procedures are in addition to, not in lieu of, other procedures.

Exec. Order No. 12,088, 43 Fed. Reg. 47,707 (Oct. 13, 1978).

President Carter signed this executive agreement to ensure that federal facilities and activities complied with federal pollution control standards. *See* Margaret K. Minister, *Federal Facilities and the Deterrence Failure of Environmental Laws: The*

Case for Criminal Prosecution of Federal Employees, 18 HARV. ENVTL. L. REV. 137, 153-54 (1994). Another executive order that affects interagency disputes over jurisdiction is Executive Order No. 12,146, which requires the heads of administrative agencies to submit legal disputes – particularly over jurisdiction – to the Attorney General for a legal opinion prior to any proceeding in court. Exec. Order No. 12,146, 44 Fed. Reg. 42,657 (July 18, 1979); *see* Michael W. Steinberg, *Can EPA Sue Other Agencies?*, 17 ECOL. L.Q. 317, 328-30 (1990). However, neither of these executive orders prevents the dispute from being resolved in a court of law. Steinberg, *supra*, at 328-30.

In this case, OMB resolved a jurisdictional dispute between COE and EPA in COE's favor under the CWA. New Union will argue that this is the equivalent of OMB making EPA's decision not to issue a section 402 permit for the proposed Lake Temp discharge and that OMB is not authorized to do so under the CWA. EPA administers and implements most of the one hundred sections of the CWA and COE administers only section 404 subject to EPA guidelines and veto power. Nowhere is there evidence that Congress intended that OMB have authority within the Act. Courts have cited EPA's extensive power to implement the CWA as a reason for giving EPA deference in interpreting the Act. *See Arkansas v. Oklahoma*, 503 U.S. 93, 112 (1991); *Chem. Mfrs. Ass'n v. NRDC, Inc.*, 470 U.S. 116, 125 (1985). In making the decision that a section 404 permit is required for the Lake Temp discharge, OMB substituted its interpretation for EPA's and prevented the administrator's interpretation from being placed before the Court, which OMB has no statutory authority to do.

New Union will point to cases and secondary sources suggesting that OMB interference with agency functions and decision-making is illegal. For example, in *EDF v. Thomas*, the D.C. Circuit held that OMB's contribution to a sixteen-month delay in EPA nondiscretionary rulemaking under the Resource Conservation and Recovery Act (RCRA) was unlawful. *EDF v. Thomas*, 627 F. Supp. 566, 570-72 (D.C.C. 1986) ("OMB has no authority to use its regulatory review under [an executive order] to delay promulgation of EPA regulations . . . beyond the date of a statutory deadline."); *see also Public Citizens Health Research*

Group v. Tyson, 796 F.2d 1479, 1507 (D.D.C. 1997) (recognizing a "vigorous" disagreement between the parties and within the legal community as to the constitutionality of OMB's involvement in EPA decisions but refraining from deciding the issue.) Many legal scholars challenge both the wisdom and legality of OMB oversight of agency decisions even where OMB does not cause a delay. For example:

> This system . . . places the ultimate rulemaking decisions in the hands of OMB personnel who are neither competent in the substantive areas of regulation, nor accountable to Congress or the electorate in any meaningful sense. . . . [The] entire process operates in an atmosphere of secrecy and insulation from public debate that makes a mockery of the system of open participation embodied in the Administrative Procedure Act.

Alan B. Morrison, *OMB Interference with Agency Rulemaking: The Wrong Way to Write a Regulation*, 99 HARV. L. REV. 1059, 1064 (1986); *see also* Robert B. Percival, *Checks Without Balances: Executive Office Oversight of the Environmental Protection Agency*, 54 L. & CONTEMP. PROBS. 127, 156 (1991) (arguing that OMB oversight of EPA has usurped EPA decision-making authority and resulted in delays, weaker environmental regulations, and reduced ability of public to monitor the regulatory process).

Conversely, the United States and Progress will distinguish OMB's action in the current case from its actions in cases such as *EDF v. Thomas*. Here, OMB did not act to delay a non-discretionary agency action beyond a statutory deadline set by Congress but merely resolved an intra-executive branch dispute as contemplated in Executive Order No. 12,088. Furthermore, *EDF v. Thomas* was not a proscription of all OMB oversight of agency action or involvement in resolving disputes: "[OMB oversight] is not an inappropriate interference with the interaction of executive agencies; all such interaction may continue absent a 'conflict with deadlines imposed by statute or by judicial order.'" *Id*. at 572.

The United States and Progress may contend that the effect of OMB's oversight is no different than the Attorney General's opinion that EPA would need to seek under Executive Order No.

12,146. However, New Union may respond that the Attorney General merely gives EPA a legal opinion as to its jurisdiction over the Lake Temp discharge, which differs from OMB's actions in deciding that EPA should not issue a section 402 permit.

Constitutional Arguments

This case presents several possible constitutional arguments for and against OMB's involvement in the Lake Temp permitting dispute. Two constitutional principles central to these arguments are that all legislative power is vested in Congress and all executive power is vested in the President. U.S. CONST. art. I, § 1, cl. 1; U.S. CONST. art. II, § 1, cl. 1.

Based on the separation of powers doctrine, New Union may point to the above constitutional principles in an argument against OMB's involvement in EPA's permitting decisions. The separation of powers doctrine states that no branch of government may perform a function more properly performed by another branch without violating the Constitution. *See* THE FEDERALIST NO. 48, at 250 (James Madison) (cited in Michael W. Steinberg, *supra* p. 13, at 341); *see, e.g.*, *Bowsher v. Synar*, 478 U.S. 714 (1986) (holding that a grant of executive power to an agent of Congress was unconstitutional.) The executive branch, including OMB, may not perform legislative duties or encroach upon legislative powers. Here, Congress validly delegated power to EPA to administer the CWA and decide whether to issue a section 402 permit and whether to veto a section 404 permit. 33 U.S.C.A. § 1251(d). OMB – acting pursuant to the President's executive power – then interfered with the legislative mandate to EPA when it determined that the Lake Temp discharge requires a section 404 permit. This attempt by the executive branch to exercise power over an action that the legislative branch assigned to EPA violated the principle of separation of powers and is therefore unconstitutional.

In response, the United States and Progress may rely on the unitary executive theory to justify executive branch oversight of EPA and other administrative agencies via OMB. This theory is based on the idea that agencies within the executive branch, including EPA and COE, are subordinate to the President. It is the President's prerogative, under the constitutional mandate

that he or she "take care that the laws are faithfully executed," to ensure interagency cooperation and coordination. *See Meyers v. United States*, 272 U.S. 52, 135 (1926) (stating that the President has "general administrative control" and may "properly supervise and guide [administrative officers'] construction of the statutes under which they act in order to secure that *unitary and uniform execution of the laws*."); *see also* Steinberg, *supra* p. 13, at 325-31 (giving an overview of the unitary executive theory). In other words, the "President, as the voice of each executive agency, has the ultimate authority to harmonize executive actions. . . . Disputes between two agencies therefore must be resolved internally." *See* Minister, *supra* p. 13, at 154. For example, the D.C. Circuit has upheld the validity of intra-executive branch communication, organization, and review during an agency rulemaking process due to the President's "basic need . . . to monitor the consistency of executive agency regulations with Administration policy." *Sierra Club v. Costle*, 657 F.2d 298, 405 (D.C.C 1986). Following this logic in the case at hand, OMB legitimately intervened in the interagency dispute between EPA and COE in order to "harmonize" actions within the executive branch. OMB's action was therefore a valid exercise of executive branch power over two executive agencies.

Reviewability of EPA's Action

An underlying issue that parties may raise is whether EPA's decision not to veto the section 404 permit for Lake Temp is reviewable. The United States and Progress will contend that EPA's consent to the issuance of a section 404 permit for Lake Temp is not reviewable by this Court because it was discretionary. Section 404(c) of the CWA grants EPA veto power over COE's decision to issue a section 404 permit for the discharge of dredge and fill material. 33 U.S.C. § 1344(c). This section requires that the Administrator of EPA give notice and opportunity for a public hearing and then determine that the discharge at the specific disposal site would "have an unacceptable adverse effect on municipal water supplies . . . wildlife, or recreational areas." *Id.* This veto authority is at EPA's discretion. *See Preserve Endangered Areas of Cobb's History, Inc. v. U.S. Army Corps of Eng'rs*, 87 F.3d 1242, 1245

(11th Cir. 1996) ("the decision of the Administrator not to overrule the decision of the Army Corps is discretionary"); *see also Alliance to Save Mattaponi v. U.S. Army Corps of Eng'rs*, 515 F. Supp. 2d 1, 4-5 (D.D.C. 2008). Under section 701 of the APA, discretionary agency action is not subject to judicial review. 5 U.S.C. § 701(a)(2) (2006). Therefore, EPA's inaction in this case is not reviewable by this or any other court. *See Preserve Endangered Areas of Cobb's History*, 87 F.3d at 1245; *see also Alliance to Save Mattaponi*, 515 F. Supp. 2d at 4-5.

In response, New Union's best strategy may be to frame this issue of reviewability as irrelevant on appeal by distinguishing its argument on OMB interference from its opponents' contentions regarding EPA's failure to exercise its veto power: New Union is *not* challenging EPA's decision not to exercise jurisdiction over Lake Temp or its failure to invoke its veto power under section 404. It is challenging the legality of OMB's involvement in deciding whether EPA or COE had permitting jurisdiction over Lake Temp.

Another strategy that New Union may employ regarding this sub-issue is to point to cases finding that EPA inaction under section 404(c) of the CWA is in fact reviewable in certain circumstances under APA section 701 or the CWA citizen suit provision. For example, in *Alliance for Mattaponi*, the D.C. Circuit found that section 701 of the APA did not bar review of EPA's failure to invoke its section 404 veto power over a COE permit because "the decision not to veto the permit had the same impact on the parties as an express denial of relief." *Alliance for Mattaponi*, 515 F. Supp. 2d at 9. In *National Wildlife Federation v. Hanson*, the court found that the plaintiff could bring a CWA citizen suit against EPA for failure to "exercise the duty of oversight imposed by section [404(c) of the CWA]" due to EPA's nondiscretionary duty to regulate dredge and fill material under section 404. *Nat'l Wildlife Fed'n v. Hanson*, 859 F.2d 313, 316 (4th Cir. 1988); *see also S.C. Coastal Conservation League v. U.S. Army Corps of Eng'rs*, 2008 WL 4280376 at *5-*9 (D.S.C. 2008). In sum, New Union will argue that, because EPA authority under section 404 of the CWA is not discretionary, EPA's inaction in the Lake Temp case is reviewable under section 701 of the APA.

Arbitrary and Capricious

In the event that this Court finds that EPA's action in the Lake Temp permitting process reviewable, the United States and Progress will argue that such review is limited to whether EPA's decision was arbitrary or capricious under section 706 of the APA. *See* 5 U.S.C. § 706. These parties will recall their earlier arguments under *Coeur Alaska* to show that EPA's decision not to veto the COE permit was neither arbitrary nor capricious because it was either required by or consistent with the Supreme Court's ruling in *Coeur Alaska*. *See supra* pp. 10-12. New Union will answer that *Coeur Alaska* did not require EPA to acquiesce to OMB's determination that COE had jurisdiction and EPA did not. *See id.* Additionally, New Union can point to *Chevron* and claim that this Court cannot properly engage in an analysis of whether EPA's decision as to Lake Temp permitting jurisdiction was arbitrary or capricious due to OMB's involvement in EPA's decision-making. In *Chevron*, the Supreme Court held that, where Congress leaves the agency room to decide a particular issue before the court, the court must decide whether the agency acted based on a permissible construction of the statute. *Chevron U.S.A., Inc., v. NRDC*, 467 U.S. 837, 842-43 (1984). In this case, while Congress gave EPA the discretion to decide whether to veto a section 404 permit under the CWA, the Court cannot properly determine whether EPA then acted based upon a "permissible construction of the statute" because EPA's action was based upon OMB's decision, not on the factors enumerated under section 404(c) of the CWA. Furthermore, New Union will argue that EPA's decision in this case was arbitrary and capricious because it was based on an impermissible construction of the CWA: EPA allowed OMB to decide whether it should issue a section 402 permit or veto the section 404 permit but the CWA gives EPA sole statutory authority to do so. *See* 33 U.S.C. §§ 1342, 1344.

This is not intended to be an exhaustive analysis of the problem, merely an indicative list of issues to be discussed in written submission by teams. One should appreciate reasoned and reasonable creativity and ideas beyond those in this limited analysis.

Sample Questions

These questions are suggested as a starting point. Please feel free to develop your own.

Issue 1 (Standing) Questions

- New Union & Progress
    - How can New Union meet *Lujan*'s concrete and imminent harm requirement when it cannot show the timing or severity of any future aquifer contamination?
        - How, if at all, is New Union's standing affected by the fact that it failed to apply for permits to install monitoring wells on DOD property to determine the timing and severity of the alleged harm?
    - In seeking to establish standing by relying on the "relaxed" standing requirements of *Massachusetts v. EPA*, is New Union implicitly conceding that it cannot establish standing on traditional terms?
    - Can New Union validly assert *parens patriae* standing on behalf of its citizens when its citizens do not use the Imhoff Aquifer/will not be adversely affected by contamination?
        - Can New Union assert *parens patriae* standing against the federal government?
- United States
    - Doesn't New Union's ownership of a portion of the Imhoff Aquifer and implementation of a permitting program for that aquifer give it standing as an affected quasi-sovereign?
        - How does *Georgia v. Tennessee Copper* affect state standing in this case?
    - Doesn't the potential for future use of treated aquifer water give New Union *parens patriae* standing?

- As a sovereign, does New Union have a public trust obligation to preserve its natural resources for present and future generations of its citizens?
  - If so, is the imminence of the harm to those resources relevant to its standing?
  - When is harm imminent here; when waste begins irretrievably to migrate to the aquifer; when it contaminates the aquifer, or when contamination reaches New Union?

Issue 2 (Navigability) Questions

- Progress
  - Isn't Lake Temp traditionally navigable in that it supports interstate commerce in the form of duck hunting, boating, and bird watching?
    - Is this case distinguishable from *Utah v. United States*?
  - Justice Scalia stated in *Rapanos* that the Clean Water Act applies to something more than traditionally navigable waters. Doesn't this admission detract from any *Rapanos*-based arguments against Lake Temp's navigability?
  - If the Clean Water Act accords protection to intermittent tributaries of navigable waters, why should Lake Temp – a lake draining and 800-square-mile watershed – not be given the same protection?
  - Since New Union does not rely on the Migratory Bird Rule to show navigability, is *SWANCC* applicable to this case?
- New Union & United States
  - Is Lake Temp navigable under *Rapanos* if it is dry one out of every five years?
    - Isn't Lake Temp analogous to the streams that "come and go at intervals" that the *Rapanos* plurality determined are non-navigable?
  - How can Lake Temp be navigable when it is entirely intrastate and has no outlets?

- Is Lake Temp distinguishable from the intermittent ponds in *SWANCC*?
- In *SWANCC* the Court rejected the migratory bird rule as a test for navigability. Didn't that in effect rule out the argument that use of Lake Temp by interstate duck hunters makes it navigable?

Issue 3 (Permitting Authority) Questions

- New Union
  - Since the discharge of slurry to Lake Temp will raise the bottom elevation of the lake by 6 feet, doesn't this discharge clearly fall under the definition of fill material?
    - Is there any legal authority suggesting that toxicity be taken into account when determining whether a discharge constitutes fill material?
  - Is *Coeur Alaska* distinguishable from the case at hand?
- United States & Progress
  - In *Coeur Alaska*, the Supreme Court noted that there could be extreme instances in which the discharge of fill material may warrant a section 402 permit, such as the discharge of toxic battery waste. How does the toxic slurry DOD proposes to discharge to Lake Temp differ from such an extreme instance?
  - In *Coeur Alaska*, the parties agreed that filling the lake was the least environmentally disruptive way to dispose of the mining waste. In this instance, it is not clear whether filling Lake Temp is DOD's least environmentally disruptive alternative or that other alternatives have even been explored. How, if at all, does this affect COE's permitting authority under section 402?
  - In *Coeur Alaska*, EPA agreed with the COE that a 404 permit was required. Here EPA believes a 402 rather than a 404 permit is required. As the

agency administering the whole CWA, shouldn't EPA's opinion be given deference?

Issue 4 (OMB Involvement) Questions

- New Union
  - *EDF v. Thomas* dealt with OMB actions that delayed a non-discretionary agency action beyond a statutory deadline. OMB created no such delay in relation to the Lake Temp permit. Isn't EPA's authority to veto a section 404 permit discretionary? See section 404(c). In light of the dissimilarity between the two cases, how, if at all, is *EDF v. Thomas* relevant to the case at hand?
  - In *Sierra Club v. Costle*, the D.C. Circuit stated that the President has a "basic need . . . to monitor the consistency of executive agency regulations." Isn't that what the executive branch was doing via OMB in the Lake Temp dispute?
  - Is EPA's decision not to veto the Lake Temp permit discretionary under section 404(c)? If so, is it reviewable by this court?
  - If *Coeur Alaska* dictates that COE and not EPA has permitting authority for the Lake Temp discharge, is it possible for EPA's decision not to veto the permit to be arbitrary and capricious?
  - Isn't the President ultimately responsible for the execution of the laws enacted by Congress, as a function of Article II of the Constitution? If so, why doesn't the President have authority to direct the Administrator of EPA how to exercise discretionary authority, such as the authority to veto a 404 permit?
- United States & Progress
  - The Supreme Court has noted EPA's extensive power to implement the Clean Water Act. Congress did not name OMB as an administrator of the Clean Water Act or decide whether to veto a 404 permit. Where does OMB get its authority to

dictate EPA's decision to issue or refrain from issuing a permit for Lake Temp?

- Doesn't OMB's involvement in EPA's administration of the Clean Water Act violate the Separation of Power doctrine?