TEAM 11

The State of New Union

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JURISDICTIONAL STATEMENT

This action is properly brought before the United States Court of Appeals for the Twelfth Circuit. This appeal is from a final order from the United States District Court for the District of New Union. Procedural History ("PH") p. 3. The district court properly had original jurisdiction of this action pursuant to 28 U.S.C.A. § 1331 (West 2011) because this action is a civil action arising under the Clean Water Act, a federal law of the United States. This Court has proper jurisdiction over the final decision of the District Court pursuant to 28 U.S.C.A. § 1291. (West 2011).

ISSUES PRESENTED FOR REVIEW

I. **Under the common law, did the State of the Union have standing to bring suit against the Government and the State of New Progress in its sovereign capacity or its *parens patriae* capacity when they decided to fill Lake Temp?**

II. **Under the Clean Water Act, does Lake Temp qualify as a navigable body of water when the lake is a relatively permanent lake that is navigable in fact and is used by hunters and fisherman?**

III. **Under the Clean Water Act, was the EPA the proper authority to permit when the slurry that the DOD purposed to use can be distinguished from the slurry used in the *Coeur* because it is not resultant from a mining process and contains hazardous materials making it a pollutant; therefore, subject to permitting under § 402 and § 404?**

IV. **Under the Clean Water Act, did the OMB lack authority to make both the decision that the COE had jurisdiction and the decision that the EPA could not veto the permit?**

STATEMENT OF THE CASE

This is a case seeking review of the issuance of a permit by the U.S. Army Corps of Engineers ("COE") under the Clean Water Act ("CWA"). 33 C.F.R. § 1344 (2002). The State of New Union filed suit against the Government in the United States District Court for the District of New Union, and argued that the permit for discharge should have been issued by the

Administrator of the U.S. Environmental Protection Agency ("EPA") under its authority to issue permits for the discharge of pollutants under section 402 of the CWA. PH p.3. The State of New Progress intervened. The State of New Union, the Government, and the State of Progress filed motions for summary judgment. The district court denied the State of New Union's motion and determined that the State of New Union did not have standing, the COE had proper jurisdiction because Lake Temp was a navigable water, the COE had proper jurisdiction because the slurry was fill material, and the OMB's involvement did not violate the CWA. The State of New Union and the State of Progress appealed.

STATEMENT OF FACTS

Lake Temp is a body of water that is oval shaped and can be as large as three miles wide and nine miles long. Factual Background ("FB") p. 3. Lake Temp is relatively permanent because it exists 4 out of every 5 years. FB p. 4. The lake is entirely within the State of Progress though its border is not far from New Union. FB p. 4. Some of the eight-hundred-mile watershed comes from the surrounding mountains in the New Union. FB p. 4. The lake has been a stopover for migratory birds traveling between the Arctic to Southern climates. FB p. 4. Hundreds if not thousands of hunters have used the lake for recreation over the last hundred years, with approximately one quarter of these hunters traveling from out of state. FB p. 4. In 1952, the lake became part of the DOD military base. FB p. 4. The DOD posted signs along the highway prohibiting entrance to use the lake. FB p. 4. However, they never put up a fence to deter others' use of the lake. FB p. 4. Further, the DOD knows people continue to use the lake recreationally and they have done nothing to stop such use. FB p. 4.

There is no outflow from the lake but there is an aquifer, the Imhoff Aquifer, one thousand feet below the lake. FB p. 4. The Imhoff Aquifer is much larger than the lake and with

treatment, the water could be potable or used in agriculture. FB p. 4. Five percent of the aquifer is located within the boundaries of New Union. FB p. 4. One citizen of New Union, Dale Bompers, ranches the land directly above the aquifer. FB p. 4. Further, his ranch will suffer a decrease in value if the aquifer becomes contaminated by the actions of the United States to Lake Temp. FB p 4.

The DOD plans to build a facility that will receive tons of various munitions for discharge. FB p. 4. To begin, they will empty the munitions of any "liquids, semi-solids, and granular contents" containing multiple chemicals listed as hazardous substances by the CWA §311. FB p. 4. The DOD will mix this hazardous waste with chemicals to make the munitions non-explosive. FB p. 4. The metals, and other solids that remain will be ground and pulverized. FB p. 4. Both mixtures will be combined with water to form slurry, which will be discharged with a movable pipe. FB p. 4. The DOD intends to only spray dry portions of the lake continually over a period of several years; consequently, raising the lake bed evenly by several feet. FB p. 4. The lake will be approximately six feet higher and two square miles larger than it is in its current state. FB p. 4. This project will not be re-occurring and the DOD contended that alluvial deposits from the mountains will eventually cover the hazardous material discharged. FB p. 5.

The COE and the EPA disagreed on whether a permit should be issued under section 402 or section 404 under the CWA. District Court Opinion ("DCO") p. 9. The Office of Management and Budget ("OMB") resolved the dispute between the COE and the EPA. DCO p. 9. The COE issued a permit to the DOD under section 404. The EPA did not veto the COE permit. DCO p. 9. From these facts, this suit has been brought to the United States Court of Appeals for the Twelfth Circuit.

SUMMARY OF ARGUMENT

I. The State of New Union has standing to bring suit against the United States.

The District Court erred in its finding that the State of New Union lacked standing. The State of New Union had standing under both its *parens patriae* and its sovereign capacity. First, the State of New Union has standing under its *parens patriae* capacity because the State of New Union is allowed to represent its citizens that who may be injured by the actions of the United States. Second, the State of New Union has standing under its sovereign capacity because, as a state, it is allowed to bring suit if its water rights are infringed, in this case its right to the Imhoff Aquifer. Therefore, the State of New Union does have standing to bring suit.

II. Lake Temp is a navigable water of the United States under the CWA.

The District Court properly found that under the CWA, Lake Temp is a navigable water. Navigable waters have been defined as waters that are deep and wide enough to be traveled across for either travel or commerce. Lake Temp has been used by both hunters and fisherman, using boats, to travel across for commercial activities. Therefore, Lake Temp is a navigable water that is subject to the permitting requirements of the CWA.

III. The EPA had jurisdiction to issue a permit under CWA § 402.

The District Court erred in holding that the COE had jurisdiction to issue a permit under the CWA § 404 for the discharge of slurry into Lake Temp when instead the EPA had jurisdiction to issue the permit under § 402 of the CWA. The COE has jurisdiction to issue permits inert fill material whereas the EPA has jurisdiction to issue permits for toxic pollutants. The action of the United States on Lake Temp will result in not in an inert fill material as was contemplated by § 404 but rather a munitions slurry that instead falls under the jurisdiction of § 402. Therefore, the EPA had jurisdiction and not the COE to issue this permit.

IV. The OMB was improperly participated in decision-making and violated the CWA

The district court erred in finding that the OMB did not improperly participate in the decision-making process. The OMB improperly participated in the decision that the COE had jurisdiction to issue the permit because the OMB did not have authority through Congressional intent to make the decision, and the OMB did not have executive authority to make the decision. The OMB improperly participated in the decision that the EPA could not veto the COE permit because the OMB did not have authority through Congressional intent to make the decision, and the OMB did not have executive authority to make or influence the decision. Therefore, the OMB improperly participated in the decision-making and violated the CWA.

STANDARD OF REVIEW

For the first issue of whether the State of New Union has standing, this Court should apply *de novo* review. Courts have found that it is the petitioner's burden of production in the court of appeals is accordingly the same as that of a plaintiff moving for summary judgment in the district court: it must support each element of its claim to standing "by affidavit or other evidence." *Lujan v. Defenders of Wildlife,* 504 U.S. 555, 561 (1992). However, even though the State of New Union carries the burden of proof in establishing that standing does exist, this court must review the lower court's decision under *de novo* review. *Connecticut v. American Elec. Power Co., Inc*, 582 F.3d 309, 320 (2009). Therefore, this Court should reverse the district court's holding if this Court finds that the State of New Union does have standing under either its sovereign capacity or its *parens patriae* capacity.

For the second issue, whether the Lake Temp is a navigable water is a law-declaring action that this court should review under the *Chevron* standard of review. The *Chevron* standard of review is appropriate because this is an agency's interpretation of a statute under its own

administration. *Chemical Waste Mgm't. Inc. v. United States EPA*, 873 F.2d 1477, 1481 (D.C.C. 1989). The first inquiry of the *Chevron* standard of review is whether Congress has spoken directly on the question. *Chevron, U.S.A. v. Natural Resources Defense Council*, 467 U.S. 837, 842 (1984). If Congress did speak on this precise question, the court must give effect to the intent of Congress and may not defer to agency interpretation. *Id.* at 842-43. If this court finds that the statute is ambiguous or silent on this specific question, the court must proceed to the second Chevron inquiry, which is whether the agency interpretation is a permissible construction of the statute. *Chevron*, 467 U.S. at 843. If this court finds that the agency did not have a permissible construction of the statute, it may not defer to agency interpretation. *Id.* at 844. This Court should affirm the district court's finding if it finds that Lake Temp was a navigable water under the *Chevron* standard of review.

For the third issue, whether the EPA or the COE had proper jurisdiction to issue the permit is a law-declaring action that this Court should review under *de novo* review. This issue does not require *Chevron* deference because the agencies share responsibility for the administration of this statute on this issue. *Rapaport v. United States Department of the Treasury, Office of Thrift Supervision*, 59 F.3d 212, 216 (D.C. Cir. 1995). This Court should reverse the district court's finding if it finds that the EPA had proper jurisdiction to issue the permit.

For the fourth issue there are two decisions and each decision requires a separate standard of review. This Court should review whether the OMB's decision that the COE had jurisdiction violated the CWA under *de novo* review. This Court should review whether the OMB's decision that the EPA could not veto the COE permit under the arbitrary and capricious standard. A court may only use the *Chevron* standard of review when the issue for review is an agency's

interpretation of a statute under that agency's administration. *Chemical Waste Mgm't Inc. v. United State EPA*, 873 F.2d 1477 (D.C. Cir. 1989). A court may give deference to an agency's interpretation of a statute not under its administration if the court determines deference is appropriate due to the agency's body of experience and informed judgment, however the court is not required to defer to the agency. *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944). An agency's discretionary actions are reviewed under the arbitrary and capricious standard. Administrative Procedure Act section 10(e), 5 U.S.C. section 706(2)(A) (2011). This Court should reverse the district court's finding if it finds that the OMB violated the CWA in making the decision that the COE had jurisdiction. This Court should reverse the district court's finding if it finds that the EPA acted arbitrarily or capriciously in relying on the OMB's decision that the EPA could not veto the COE permit.

ARGUMENT

I. STATE OF NEW UNION HAS STANDING IN ITS SOVEREIGN CAPACITY AS OWNER AND REGULATOR OF THE GROUNDWATER IN THE STATE AS WELL AS IN ITS *PARENS PATRIAE* CAPACITY AS PROTECTOR OF ITS CITIZENS WHO HAVE AN INTEREST IN THE GROUNDWATER IN THE STATE.

The district court erred in finding that the State of New Union did not have standing because the State of New Union had standing both in its sovereign capacity and its *parens patriae* capacity. In order to have standing, the plaintiff must show that there is both a statutory and Constitutional right to bring suit. *Association of Data Processing Service Organizations, Inc. v. Camp*, 397 U.S. 150, 153-154 (1970). Consequently, the first question of this case is whether there is a statute that allows suit to be brought, under the CWA, New Union is allowed to bring suit for alleged violations of the Act. 33 U.S.C. § 1251 (2002). Therefore, the remainder of this argument will focus on the requirements for Constitutional standing.

The Constitution of the United States limits federal court jurisdiction to "Cases and Controversies." U.S. Const. art. III, § 2. These words confine "the business of federal courts to questions presented in an adversary context and in a form historically viewed as capable of resolution through the judicial process." *Flast v. Cohen*, 392 U.S. 83, 95 (1968). A State may bring suit in a federal court under three capacities: "(1) proprietary suites in which the State sues much like a private party suffering a direct, tangible injury; (2) sovereignty suits requesting adjudication of boundary disputes of water rights; or (3) *parens patriae* suits in which States litigate to project 'quasi-sovereign' interest." *Connecticut v. Cahill*, 217 F. 3d 93, 97 (2d Cir. 2000).

New Union has standing to bring this suit against the United States in both its sovereign capacity and its *parens patriae* capacity. New Union has standing in this suit under its sovereign capacity because it is allowed to bring suit on matters in which it has an interest in regulating and lawmaking duties. New Union also has standing to bring this suit under its *parens patriae* capacity because it is entitled to protect its citizens from harm. New Union can establish standing under both its sovereign capacity and its *parens patriae* capacity. Therefore, the district court erred in deciding

A. New Union has standing under its sovereign capacity because part of the Imhoff Aquifer is located within the State of New Union, which allows it to control what happens to the water.

New Union has standing under its sovereign capacity because part of the Imhoff Aquifer is located within New Union and thus, New Union has the power to regulate the water it owns. New Union can bring suit under its sovereign capacity when seeking to adjudicate boundary disputes or water rights. *Connecticut v. Cahill*, 217 F. 3d at 97. Disputes of boundaries, both land and water, are found to be within the term of "controversies" and they are therefore also within

the scope of what can be adjudicated by the federal courts. *State of Rhode Island v. Com. Of Massachusetts*, 37 U.S. 657, 726 (1838).

In *State of Rhode Island*, the United States Supreme Court considered whether Rhode Island and Massachusetts gave up their sovereign rights, in particular their right to resolve boundary disputes, by signing the Constitution and becoming part of the United States. *Id*. at 669, The Court looked to the Articles of Confederation to determine the intentions of the writers of the Constitution, which had insured that states retained individual sovereignty. *Id*. at 674. The Court determined that the goal of creating the Constitution was not to take away States sovereignty completely, but to form a "more perfect Union." *Id*. at 690-91. From this goal, the Court determined that by signing the Constitution, states did not give up all their rights as sovereigns when they became part of the United States. *Id*. at 690. While the states did give up some rights, the Court found that because each state no longer had the ability to redress problems with fellow states by ultimately taking the problems into its own hands, a state was still afforded the right to redress these problems through the judicial system. *Id*. at 689. Therefore, in matters where a state is contesting a boundary line or a right that is being possibly infringed by another State, that State does have standing to bring suit under its sovereign capacity. *Id*. at 726.

Under *State of Rhode Island*, this Court should find that New Union has standing to bring suit under its sovereign capacity because the United States' actions infringed on its water rights in the Imhoff Aquifer. Even though *State of Rhode Island* addressed the right of states to bring cases to court that dealt with boundary line disputes, this finding can be analogized to this case because, like the rights of land, the rights of water are rights that states are allowed to be adjudicated fairly. Further, the fact that the actions of one state could in effect steal the rights of another state to its water is similar to one state crossing over and taking another state's land.

Under *State of Rhode Island*, the aggrieved state is allowed to be heard and has a right to plead its case if it cannot wage war on the state that is causing the harm. Therefore, the actions of the United States in the State of Progress, which will cause pollution to the Imhoff Aquifer, should not occur without New Union first having the opportunity to bring suit under its sovereign capacity to fight for its right to the waters in the Imhoff Aquifer.

B. New Union has standing under its *parens patriae* capacity because under the *Snapp* test, it is allowed to represent its citizens who may be injured by the contamination of the Imhoff Aquifer.

New Union has standing under its *parens patriae* capacity to bring suit because under the *Snapp* test, New Union is allowed to represent its citizens who may be injured by the contamination of the Imhoff Aquifer. *Parens patriae* is an ancient common law right which "is inherent in the supreme power of every state and is often necessary to be exercised in the interests of humanity, and for the prevention of injury to those who cannot protect themselves." *Late Corp. of the Church of Jesus Christ of Latter-Day Saints v. United States*, 136 U.S. 1, 57 (1890).

Courts have recognized the *parens patriae* capacity for over a century. In 1901, the United States Supreme Court allowed Missouri to sue Illinois under its *parens patriae* capacity to enjoin Illinois from dumping sewage that poisoned Missouri's water supply. *Connecticut v. American Elec. Power Co. Inc.*, 582 F. 3d 309, 334 (2d. Cir. 2009). The rationale behind *parens patriae* was further articulated in *Georgia v. Tennessee Copper Company*, where the court found that "…the state has an interest independent of and behind the titles of its citizens, in the earth and air within its domain. It has the last word as to whether…its inhabitants shall breathe pure air." 206 U.S. 230, 237 (1907).

In *Massachusetts v. EPA*, the United States Supreme Court recognized the distinction between Massachusetts acting as a sovereign State and not, as a private individual. 549 U.S. 497, 519 (2007). This conclusion removed states, when suing under *parens patriae* capacity, out of the established 3-prong *Lujan* standing test and relied solely on the test laid out in *Snapp v. Puerto Rico*. *Connecticut v. American Elec. Power Co., Inc*, 582 F. 3d at 336. The *Snapp* test provides that a State, to meet *parens patriae* capacity, (1) "must articulate an interest apart from the interests of particular private parties, i.e. the State must be more than a nominal party"; (2) "must express a quasi-sovereign interest"; and (3) must have "alleged injury to a sufficiently substantial segment of its population." *Id*. at 336. (Quoting *Snapp v. Puerto Rico,* 458 U.S. 592 (1982)).

In *Connecticut v. American Electric Power Company*, Connecticut and eight other states, New York City, and three land trusts, brought suit against six electric power corporations that owned and operated fossil fuel fired power plants. *Id*. at 314. Connecticut and the other plaintiffs brought suit on the theory that the defendants were contributing to global warming because the defendants were the five largest emitters of carbon dioxide in the United States and among the largest in the world. *Id*. The United States Supreme Court, applied the *Snapp* test found that Connecticut did have standing to sue in its *parens patriae* capacity. *Id*. The Court first looked at whether Connecticut articulated an interest apart from the interests of particular private parties. *Id*. at 338. The Court determined that the states in this case were more than mere "nominal parties" as the states' interests in safeguarding the public health and resources was an interest apart from any interest held by individual private entities. *Id*. Second, the Court looked at whether the states could express a quasi-sovereign interest. *Id*. The *Snapp* case identified two types of quasi-sovereign interests: (1) protecting "the health and well being of its residents" and

(2) "securing observance of the terms under which the state participates in the federal system." *Snapp*, 458 U.S. at 612. The Court recognized that the quasi-sovereign interests of the states involved was their concern for the health and well-being, both physical and economic, of their residents by the harms that could come from the continued emission of carbon dioxide. *Id*. at 338. Finally, in looking at whether or not the alleged injury was to a sufficiently substantial segment of its population, the Court found that the States "have alleged that the injuries resulting from carbon dioxide emissions will affect virtually their entire populations." *Id*. Therefore, the Court determined that all three of the requirements laid out under the *Snapp* test were met and the states had standing under their *parens patriae* capacity. *Id*. at 339

Under *Connecticut v. American Electric Power Company*, New Union should have standing in its *parens patriae* capacity under the *Snapp* test. First, New Union meets the first requirement of the *Snapp* test because New Union has an interest apart from the interests of particular private parties and more specifically, New Union has more than a nominal interest in the effects of contaminating the Imhoff Aquifer. New Union owns five percent of the water that is found in the Imhoff reservoir. FB p. 4. New Union controls this water by only allowing individuals to use the water once they have received a permit through the New Union Department of Natural Resources. FB p. 4. Further, New Union restricts the use of this water, as the withdrawals that are permitted are not allowed to deplete the groundwater over a period of twenty years. FB p. 4. This shows that New Union has more than just a nominal interest in the water, but rather has a considerable interest in the resource for both New Union and its citizens' needs for water rights. Therefore, this Court should find that New Union met the first requirement of the *Snapp* test.

New Union meets the second requirement of the *Snapp* test because New Union has expressed a quasi-sovereign interest in the matter, e.g. whether it is protecting the health and well-being of its residents or securing observance of the terms under which the state participates in the federal system. Here, as was shown *Connecticut v. American Electric Power Company*, New Union is protecting the health and well-being of its residents, including their economic well-being. As the facts show, the contamination of the water in the Imhoff Aquifer will not only have a negative effect on any citizen that wished to obtain a permit to get water from the aquifer but is also shown specifically by Dale Bompers, a citizen of New Union, who will suffer an economic hardship by the contamination by the diminishing value of his ranch. FB p.4. Therefore, the second prong of the *Snapp* test is also satisfied.

Finally, New Union has alleged an injury that applies to sufficiently substantial segment of its population. As shown in *Massachusetts v. EPA*, the potential injuries from the emissions of carbon dioxide into the air would effect the entire population. 549 U.S at 522. The Court in that case did not need an actual injury but rather the potential injury and the amount of people it would effect was enough to find the *Snapp* test was met. *Id*. The same can also be shown for New Union. The potential injury to the water, even though only five percent of the entire Imhoff Aquifer, has the potential of hurting the entire state if the water is no longer available as a resource. FB p. 4. This would result in an injury to almost all of the New Union's citizens as water is a finite resource and its depletion from contamination will cause injury to all. Therefore, as New Union meets all three requirements of the *Snapp* test, New Union has standing in its *parens patriae* capacity.

The United States may argue that the *Snapp* test is not the only test that must be applied when evaluating whether a State has standing to bring suit under its *parens patriae* capacity.

Rather, the United States may contend that under *Massachusetts v. EPA*, the classic three-part standing test and analysis from *Lujan* is appropriate. 549 U.S. at 521. However, this Court should find that the additional *Lujan* three-pong test is unnecessary for a state to have standing because that would contradict the finding in *Massachusetts v. EPA.* In *Massachusetts v. EPA*, it was noted that the original Lujan test was created to govern private parties, not the deferential treatment of States. *Id*. However, if this Court does find that both tests need to be satisfied, this Court should find that the New Union also passes the *Lujan* test for standing.

In *Lujan v. Defenders of Wildlife*, the United States Supreme Court articulated a three-prong test to determine whether plaintiff's had standing to bring suit: (1) injury-in-fact, (2) causation, (3) redressability. 504 U.S. 555, 560-61 (1992). New Union can meet all three prongs because of the actions of the United States and the harm that will occur to the Imhoff Aquifer.

First, New Union will meet the first prong of *Lujan* because New Union has an injury-in-fact. The injury that the plaintiff asserts must be concrete and particularized. *Id*. at 560. The injury must be actual or imminent, not conjectural or hypothetical. *Id*. The injury does not have to be to the environment but may be an injury to the plaintiff. *Friends of the Earth, Inc. v. Laidlaw Environmental Services (TOC), Inc*. 528 U.S. 167, 181 (2000). Further, injuries to a persons' aesthetic and environmental well-being and injuries to their recreational interests are cognizable injuries for standing purposes. *Sierra Club v. Morton*, 405 U.S. 727, 734 (1972).

In *Friends of the Earth, Inc.*, the Court found that the injury-in-fact prong was supported and reasoned that the potential injury of curtailed recreational because of the discharging of excess mercury into the North Tyger River was sufficient to meet this prong. *Id*. 181-184. The reasoning in the *Friends of the Earth* is applicable to New Union because the injury to New Union is not definitive but it will decrease recreational use for New Union citizens. FB p. 4.

Further, the specific citizen, Dale Bompers, will lose the economic value in his ranch by these actions to the aquifer. FB p. 4. Therefore, New Union has shown that there is an injury-in-fact to meet the first *Lujan* prong

New Union can further satisfy the second *Lujan* prong, that the United States' actions are the cause of the injury. The asserted injury-in-fact has to be fairly traceable to the defendant's action. *Lujan*, 504 U.S. at 560-61. *In Massachusetts v. EPA*, the court held that the standard for whether defendant's action caused the injury need only to be "meaningfully contribute[d] to the plaintiff's injury" and consequently determined that because the action of automobile emissions contributed to greenhouse gas concentrations, these emissions were the "causation" of the injury-in-fact. 549 U.S. at 523-24. This standard from *Massachusetts v. EPA* is more than satisfied by the present facts. The actions of the United States will have more than a "meaningfully contribution" to the contamination of the Imhoff Aquifer. The injury to Dale Bombers land value and others' recreational uses will be directly related to the Government's action of filling Lake Temp. FB p. 4. Therefore, New Union has shown that the Government is the cause of its injury.

Finally, New Union can satisfy the third *Lujan* prong that a favorable decision by this court of stopping the Government's plan to fill Lake Temp will redress New Union's injury. The redressability element requires that the injury "be 'likely' as opposed to merely 'speculative,' and that the injury will be 'redressed by a favorable decision'" of the federal court. *Lujan v. Defenders of Wildlife*, 504 U.S. at 561. In *Massachusetts v. EPA*, the Court found that making the EPA regulate mobile source emissions of carbon dioxide and other greenhouse gases would reduce the total emissions of those gases, compared to what would have occurred without such regulation. 549 U.S. at 522. The Court determined that climate change effect would be less severe than without the regulation, and therefore, redressibility in that case was met. *Id.*

Applying *Massachusetts v. EPA* to New Union, having the United States refrain from making Lake Temp a fill lake will not only reduce the contamination of the Imhoff Aquifer and more specifically the water owned and regulated by New Union, but actually completely stop any injury from happening. Thus, the State of New Union has met the final *Lujan* prong that the injury be redressible, therefore, New Union has met all three-prongs of the *Lujan* standing test.

New Union has standing to bring suit against the United States under both its sovereign capacity and its *parens patriae* capacity. First, New Union is allowed to bring suits to the federal courts in its sovereign capacity in matters that deal with land or water disputes with other states and in this case, New Union's rights in the water located in the Imhoff Aquifer meets this. Second, New Union, under its *parens patriae* capacity, has met all the requirements needed to bring suit in both the *Snapp* test as well as the *Lujan* test. Therefore, under a *de novo* standard of review, this court should reverse the finding of the District Court on the issue of standing.

II. THE DISTRICT COURT PROPERLY FOUND THAT LAKE TEMP IS A NAVIGABLE BODY OF WATER OF THE UNITED STATES BECAUSE IT IS A RELATIVELY PERMANENT LAKE THAT IS NAVIGABLE IN FACT AND IS USED IN INTERSTATE COMMERCE.

The district court's finding that Lake Temp is a navigable body of water should be affirmed because Lake Temp is a relatively permanent, traditionally navigable lake used in interstate commerce. The CWA allows the COE to permit the "discharging of dredged or fill material" into "navigable waters". 33 U.S.C. §1344 (2002). The CWA defines "navigable waters" as "waters of the United States". 33 U.S.C. §1362 (7). Thus, for the Lake Temp permitting to be governed by the CWA Lake Temp must be a "navigable" body of water that constitutes "water of the United States." Lake Temp is a navigable body of water because Lake Temp navigable in fact as boats cross it consistently. Further, Lake Temp is a "water of the United States" because Lake Temp is used in interstate commerce by foreign hunters and

fishermen for recreation. Thus, Lake Temp is a "water of the United States" and under the CWA makes it navigable and subject to permitting under the CWA. Therefore, under a *Chevron* standard of review, this Court should find that the statutory language is clear and affirm the district court's finding.

A. The District Court properly found Lake Temp to be a "water of the United States" because Lake Temp is navigable in fact and is relatively permanent.

The district court properly found that Lake Temp is a relatively permanent lake that is navigable in fact because boats cross the lake for recreational purposes. Navigable waters were defined by the CWA's predecessor statute, the Federal Water Pollution Control Act ("FWPCA"), as interstate bodies of waters that were navigable in fact. 33 C.F.R. § 1344 (2002). Webster's dictionary defines navigable as "deep enough and wide enough to allow for passage of a ship." *Navigable Definition*, Websters.com, http://unabridged.merriam-webster.com/cgi-bin/unabridged?va=navigable (last visited Nov. 29, 2011). Therefore, under the original statute the term "navigable waters" included waters deep enough and wide enough for boats and ships to use in interstate travel or commerce. The United States Supreme Court and the COE both agree Congress sought to expand the jurisdiction of the EPA and the COE beyond this original definition with its amendment to the FWPCA in 1972, commonly known as the CWA. *Rapanos v. United States*, 547 U.S. 715, 724 (2006). The amendment defines navigable waters as "waters of the United States". 33 U.S.C. §1362(7) (2011). This ambiguous definition has been a source of great confusion for the agencies and the courts. The COE defined the ambiguous term of "waters of the United States" as "traditional navigable waters and all other waters such as intrastate lakes, rivers, streams, (including intermittent streams), mudflats, sandflats, wetlands, sloughs, prairie potholes, wet meadows, playa lakes, or natural ponds, the use, degradation or destruction of which could affect interstate or foreign commerce." 33 C.F.R. §328.3(a)(3)

(1999). The Court in *Rapanos* restricted the COE definition and defined "waters of the United States" by narrowly applying the definition only to waters "as found in streams and bodies forming geographical features such as oceans rivers and lakes…including only relatively permanent standing or flowing bodies of water" and "adjacent wetlands with sufficient surface connection to a navigable waters." 547 U.S. at 736. The Court further clarified that in defining waters as "relatively permanent" this definition did not exclude streams, rivers, or lakes that might dry out under extreme conditions like drought. *Id* at 739.

In *Rapanos,* the Court applied this definition to find that Mr. Rapanos and several others could fill wetlands contained on their property without a § 404 permit under the CWA because the wetlands did not have sufficient surface connections to an actual "water of the United States". *Id.* at 756. In a concurrence, Justice Kennedy urged the Court to return to the broader standard used in *United States v. Riverside Bayview Homes, Inc.,* and apply the nexus test which determined the adjacency of a wetland to navigable waters based on soil hydrology. *Id.* at 786. The Court stated that it did not need to decide the precise extent to which the qualifiers "navigable" and "of the United States" restricted the coverage of the CWA because the facts clearly showed the wetlands to be non-navigable and not adjacent to "waters of the United States". *Id.* at 731. Further, in evaluating whether intermittent waterways were navigable, the Court concluded that there was a separate and distinct category for point sources. *Id.* at 735. The Court described point sources as "ditches, channels tunnels, conduits, wells" which are very different from standing geological features. *Id.* This decision re-affirmed the Court's decision in *Solid Waste Authority of Northern Cook County v. U.S. Army Corps of Engineers* ("*SWANCC*"), where the Court held that small permanent and intermittent ponds were not navigable in fact or

sufficiently adjacent to waters of the United States to be navigable under the CWA. 531 U.S. 159, 174 (2001).

Lake Temp is a body of water that is navigable in fact. Hunters and fishermen use boats to move from shore to shore, through the water. FB p. 4. Thus, Lake Temp falls under the traditional definition of navigable. Further, it is a lake which is a geological formation specifically named by the rule in *Rapanos*. Though Lake Temp dries out one out of every five years from drought, these extreme conditions do not classify the lake as "intermittent". FB p. 4. Rather, Lake Temp is a relatively permanent body of water that only dries out under extreme conditions. Lake Temp is not a waterway synonymous with water flow for which the Court in *SWANCC* though the qualifier of intermittent would apply. Accordingly, Lake Temp is not an intermittent body of water but is a relatively permanent lake that is navigable in fact.

B. The District Court properly found that Lake Temp is a "water of the United States" because it fosters hunting and fishing from interstate travelers.

The district court properly found Lake Temp to be a "water of the United States" despite being an intrastate body of water because Lake Temp is used by interstate travelers for recreational activities including hunting and fishing. The COE defines waters of the United States as waters "which are or could be used by interstate or foreign travelers for recreational or other purposes." 33 C.F.R. 328.3 (a)(3)(i) (1999). However, this regulation is limited by the ruling of *SWANCC*. 531 U.S. at 170. The COE created a Migratory Bird Rule in an attempt to clarify the grant of power Congress awarded the COE under the CWA. 51 Fed. Reg 41217 (1986). The Migratory Bird Rule states that intrastate waters used as habitats by birds protected by the Migratory Bird Treaties or migratory birds that cross state lines shall fall under the protection of § 404 of the CWA. *Id.* The United States Supreme Court found the definition to be outside the grant of power Congress gave to the COE under§ 404 because regulation of

migratory birds was too attenuated to be considered interstate commerce under the Commerce Clause in the United States Consitution. 531 U.S. at 170.

Lake Temp has been used for over a century as a place for hunting and fishing. FB p. 4. These recreational activities are enjoyed by citizens of the state of Progress as well as foreign travelers. FB p. 4. A quarter of the people who use Lake Temp for hunting and fishing are from other states. FB p. 4. These foreign travelers are directly linked to interstate commerce. The recreational activities of hunting and fishing also affect interstate commerce as the animals and fish are taken across state lines for consumption and sale. Though migratory birds do land on Lake Temp, it is not the only interstate connection. FB. p. 4. Lake Temp is a "water of the United States" because it has sufficient ties to interstate commerce that distinguish Lake Temp from the holding in *SWANCC.*

Accordingly, Lake Temp is a water of the United States because it is navigable in fact. The lake is a geological feature that is relatively permanent. Further, Lake Temp has sufficient ties to interstate commerce to make it a "water of the United States" under the definition of the CWA. Thus, Lake Temp meets the definition of a navigable body of water set out by the CWA giving the COE and the EPA jurisdiction in permitting any discharge into the lake. Therefore, under a *Chevron* standard of review, this Court should find that the statutory language is clear that Lake Temp is a navigable water and should affirm the district court's finding.

III. THE DISTRICT COURT ERRED IN FINDING *COEUR* IS CONTROLLING BECAUSE THE SLURRY IS DIFFERENT IN KIND, THE DISCHARGE INTO LAKE TEMP DOES NOT MEET THE GOALS OF THE CWA, AND A CONFLICT OF INTEREST EXISTED FOR THE COE IN PERMITTING FOR THE DOD.

The district court erred in finding *Southeast Alaska Conservation Council v. Coeur Alaska, Inc.* controlling in determining that the COE was the proper authority to permit because

several distinct factors existed to merit distinction. First, the COE was not the proper agency because the munitions slurry the DOD intends to use as fill material has a chemical makeup and hazardous effects that are significantly different from the slurry in *Coeur*. Second, the discharge into Lake Temp does not meet the purpose and goals of the CWA because a degradation of the nation's water will occur unlike the discharge addressed in *Couer*. Third, the COE in this case is not evaluating the permit of a private entity as in *Coeur* but rather is evaluating the permit of the DOD, and this subordinate relationship hinders the ability of the Corps to effectively serve the public. Accordingly these facts effectively distinguish Lake Temp from the decision in *Coeur* and under *de novo* review this Court should reverse the district court's finding and remand for further proceedings.

A. The District Court erred in finding that the COE was the proper agency to permit when the munitions slurry the DOD sought to use as fill material was significantly different in chemical makeup and hazardous effects from the slurry addressed in *Coeur*.

The district court erred in its finding that the DOD munitions slurry constituted fill, because this slurry does not fit the characteristics of the protected listed materials under the CWA. The CWA grants the COE the power to "issue permits… for the discharge of dredged or fill material" under § 404. However, under § 404 (b) the EPA has the power to issue guidelines for the COE when making permitting decisions. Further, the EPA may veto a permit issued by the COE. 40 C.F.R. § 230-232 (2011). Until 2002, the EPA and COE had conflicting statutory provisions defining fill material. Claudia Copeland, Cong. Research Serv., RL 31411, Controversies Over Redefining "Fill Material" Under the Clean Water Act 3 (2009). Both the EPA and the COE decided to adopt the EPA's definition of fill material. *Id.* The EPA's definition of "fill material" is"any pollutant which replaces portions of the "waters of the United States" with dry land or which changes the bottom elevation of a water body for any purpose."

Id. This definition was chosen because it excluded the COE's provision regarding the exclusion of material dumped primarily for waste. *Id.* at 4. The new definition allowed the construction and mining industries the flexibility needed to work efficiently under the CWA while still preventing the discharge of trash or garbage. *Id.* at 5. The definition allows the use of fill in building infrastructures or maintaining existing structures. 40 C.F.R. 232 (2011). Further, it allows for "the placement of overburden, slurry, or tailings or similar mining-related materials". *Id.* The construction of this phrase shows that the slurry the regulation is intended to cover is mining related material.

In *Coeur,* the Court held that the mine had properly obtained a permit from the COE under §404 to use slurry as it is defined in 33 C.F.R. 323.2 (f) as a fill material in the Lower Slate Lake. *Coeur*, 129 S.Ct. at 2476. The slurry was a mining byproduct created through the process of "froth floatation" which Coeur Alaska used to separate gold from rock. *Id.* at 2464. The water and rock mixture left over from the frothing was slurry. *Id*. Thirty percent of the slurry's volume was crushed rock, an inert material, and the standard way to dispose of this type of rock is in a tailing pond. *Id*. When the COE approved the permit for the discharge of the slurry, the COE effectively turned the lake into a tailings pond. *Id*. The Court upheld this permit because the type of slurry that Coeur Alaska used as fill was the type of slurry contemplated by the statute. *Id.* at 2476. However, the Court further stated that a question remained as to whether extreme materials used to create slurry would meet the definition of slurry as it applies to fill material under the statute. *Id.* at 2468.

The munitions slurry does meet the definition of slurry contemplated as material under the CWA that would require a section 404 permit, but rather meets the definition to require a section 402 permit. The munitions slurry is a combination of liquids, semi-solids, and granules

treated with hazardous chemicals defined by §311 of the CWA. It is then combined with water and pulverized metals. FB p. 4. It is a toxic pollutant rather than an inert fill as in *Coeur*. Further, it is not a by-product of mining or in a construction project. FB p. 4. The slurry is being created solely to dispose of spent munitions. This purpose leans strongly towards this particular slurry not fitting the definition of slurry for fill but rather trash or garbage. For these reasons, the district court erred in awarding summary judgment because there is an issue of material fact as to whether or not the munitions slurry fits the definition of slurry for the purposes of fill under § 404 or § 402 permitting. Therefore, this court should reverse the District Court's finding that this was under § 404 permitting and remand for further proceedings.

B. Lake Temp is distinguishable from *Coeur* because the purposes of the lakes are different under the goal of the CWA.

The district court erred in relying on *Coeur* because the DOD's proposal for Lake Temp does not meet the purpose and goals of the CWA. 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. 1344 (1) (2011). Further, "[i]t is the national goal that the discharge of pollutants into the navigable waters be eliminated." *Id.* However, §404 of the CWA allows for the discharge of dredged or fill material. 40 C.F.R. § 232.2 (2011). These permitted discharges can result in listed pollutants entering navigable waters. These discharges are permitted by the COE and the COE must evaluate each situation for environmental harm and possible alternatives. *Coeur*, 129 S.Ct. at 2064. Further the EPA may veto a COE permit if it finds cause. *Id*. In *Coeur*, the COE determined that the discharge of the mining tailings into the Lower Slate Lake was the most environmentally effective way to dispose of the slurry. 129 S.Ct. at 2465. If the lake was not used, the resulting tailings would be dispersed across dozens of acres of wetlands permanently destroying them. *Id.* The decision in *Coeur* fits with the purposes of the CWA. Even though the

discharge initially degrades chemical, physical, and biological integrity of the Nation's waters, these waters would recover. *Id.* Further, the action in *Coeur* would prevent the degradation of dozens of acres of wetlands permanently. *Id*.

The proposed discharge into Lake Temp is distinguishable from *Coeur* because this discharge was not being used as an alternative to a more extensive and serious degradation of the "Nation's waters". The DOD's decision to discharge the munitions slurry into Lake Temp is not protecting more extensive damage but is rather creating extensive damage to the natural environment. FB p. 4. The discharge the DOD plans is in direct conflict with the purpose of the CWA. For these reasons, the degradation of Lake Temp is distinguishable from Lower Slate Lake and the holding in *Coeur* should not control this case.

C. The District Court erred in not distinguishing Coeur because the COE had a conflict of interest in granting a permit to the DOD due to the COE's subordinate relationship to the DOD that compromised its ability to serve the public.

The district court erred in relying on *Coeur* because the COE's subordinate relationship to DOD in this case is different from the COE's evaluation of a private entity, and this conflict of interest affects the COE's ability to serve the public. When an agency is incapable of serving the public it should recuse itself if a competent branch can step into the permitting process. The COE primarily reviews applications for § 404 permits from private entities. In *Coeur*, the permit applicant was a privately owned entity seeking a permit to discharge tailings. Coeur, 129 S.Ct. at 2464. The COE determination to grant Coeur Alaska a permit occurred without any overhanging conflicts of interest. *Id*. A conflict of interest is defined as a "conflict between the private interests and the official responsibilities of a person in a position of trust (as a government official)." *Conflict of Interest Definition*, Websters.com, http://unabridged.merriam-webster.com/cgi-bin/unabridged?va=conflict+of+interest (last visited Nov. 29, 2011). When the

COE approved the DOD's permit to discharge the munitions slurry, it was an obvious conflict of interest. As a subordinate agency to the DOD, the COE could not be free from entanglements in making their decision; thus, they could not properly serve the public. Accordingly, the conflict of interest that exists between the DOD and COE in permitting distinguishes Lake Temp for the holding in *Coeur*.

For these reasons, *Coeur* is distinguishable from Lake Temp in three major ways. The slurry is not mining related and thus is different in kind than what was intended by congress as fill material. The degradation of Lake Temp does not meet the goals of the CWA and as a subordinate agency the COE has a serious conflict of interest evaluating the DOD's permit. Therefore, under *de novo* review this Court should reverse the district court's decision and remand for further proceedings.

IV. THE OMB VIOLATED THE CWA BECAUSE BOTH THE DECISION THAT THE COE HAD JURISDICTION AND THE DECISION THAT HTE EPA COULD NOT VETO WERE OUTSIDE THE OMB'S AUTHORITY

The district court erred when it determined that the OMB's participation was not improper because both of the OMB's decisions were outside the OMB's authority and therefore violated the CWA. First, the decision by the OMB that the COE had jurisdiction and that the EPA did not have jurisdiction to issue the permit violated the CWA because the OMB decision-making was contrary to Congressional intent and the OMB not have executive power to make the decision. Second, the EPA's acquiescence to the OMB's decision that the EPA could not veto the COE permit violated the CWA because the OMB decision-making was contrary to Congressional intent, the OMB did not have executive power to make or influence the EPA's decision. Under *de novo* review, this Court should find that the OMB decision that the COE should have jurisdiction should not receive deference and therefore violated the CWA. Under the arbitrary

and capricious standard, this Court should find that the EPA's acquiescence was arbitrary and capricious and therefore violated the CWA. Therefore, this Court should reverse the district court's finding that the OMB's participation was proper.

A. The OMB decision that the COE had jurisdiction and that the EPA did not have jurisdiction violated the CWA

The OMB decision that the COE had jurisdiction and that the EPA did not have jurisdiction to issue the permit violated the CWA and should not receive deference because the decision-making was contrary to Congressional intent and even in the absence of Congressional intent, the OMB lacked executive power to make the decision. First the OMB decision-making was contrary to Congressional intent because the clear statutory language of the CWA granted decision-making authority to the EPA and not the OMB. Second, even if Congressional intent was unclear, the OMB did not have executive power under the Constitution to make the decision because any executive power to interfere with agencies was limited to the removal power and would not extend to this case.

1. Congress did not intend the OMB to make this decision

The OMB's decision that the COE had jurisdiction violated the CWA and should not receive deference because the OMB decision conflicted with Congressional intent. The OMB derives authority from statute, and Congress has deemed that the OMB Director administer the office under the direction of the President. 31 U.S.C.A. 501 (West 2011). The President has issued executive orders to direct specific activities of the OMB, including requiring the OMB to guide other agencies in regulation and review specific regulatory activities. Exec. Order 12,866 (1993). Therefore, any authority the OMB had to act could only be authority held by the President and any authority of the OMB was limited by any limitations on executive power.

The President is vested with all executive power. U.S. Const. art. I, § 1, cl. 1. The President further has the duty to "take Care that the Laws be faithfully executed."; U.S. Const. art. II § 3. However, the President's executive power is limited by both the Constitution and Congressional action. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 585 (1952). Powers granted to the OMB through executive orders cannot interfere with an agency's statutory obligations. *Environmental Defense Fund v. Thomas*, 627 F.Supp. 566, 568 (D.C.Cir. 1986).

In *Environmental Defense Fund v. Thomas*, the OMB reviewed EPA regulations under specific authority granted under an executive order to consider proposed and final rules of agencies. *Id.* at 567-68. Congress had created a statutory deadline for promulgating these regulations. *Id.* at 570. The EPA discussed the regulations with the OMB pursuant to the executive order, and the OMB took several actions that resulted in the delay of promulgation, including seeking significant changes in the proposed regulations. *Id.* at 568-69. The D.C. Circuit recognized that the OMB could not prevent agencies from complying with statutory requirements, and determined that the OMB could not use its authority to delay the statutory deadline. *Id.* at 571.

Under *Thomas*, the OMB's decision in this case, that the COE had jurisdiction to issue the permit, impermissibly conflicted with Congressional intent. The text of the CWA states that the Administrator of the EPA shall administer the CWA unless otherwise expressly stated within the CWA. 33 U.S.C.A. § 1251(d) (2011). The text of the CWA does not expressly give the OMB any decision-making power, nor does it expressly state who has decision-making authority between the EPA and the COE on this issue. In fact, general authority to administer the statute is given to the EPA Administrator. Under *Thomas*, because Congress gave the EPA Administrator general power to administer the CWA, unless expressly stated otherwise, any authority the OMB

had through the executive order could not interfere with this statutory requirement. The OMB's decision did interfere with Congressional intent and therefore violated the CWA.

2. The OMB's decision violated the CWA because the OMB did not have executive power to make this decision

Even if Congressional intent were not clear on this issue, the OMB's decision violated the CWA and should not receive deference because the OMB did not have executive power under the Constitution to make this decision. The OMB did not have executive power because the extent of executive power in expressing a preferred outcome in agency decisions is the removal power, and the OMB decision far exceeded the removal power.

If Congressional intent is not clear, the President may have concurrent authority but he must rely on his own independent executive powers. *Youngstown Sheet & Tube Co*., 343 U.S. 579, 638 (1952) (Jackson, J. concurring). The President does have some ability under his executive powers to supervise the agencies within the executive branch. *Myers v. United States*, 272 U.S. 52, 134 (1926). Executive input is necessary as these agencies act in part to implement the President's national policy interests. *Myers*, 272 U.S. at 134. However, this supervision and control has been limited in the text of the Constitution to invoking executive privilege, demanding written opinions from executive officers and appointing and removing officials. *Sierra Club v. Costle*, 657 F.2d 298, 406 (D.C. Cir. 1981). Specifically, the President's removal power of executive officials is recognized as being a reasonable way for the President to act if he doubt's an executive officer's ability to faithfully execute the laws. *Myers*, 272 U.S. at 134. Further, even this removal power may be restricted depending upon the character of the office. *Humphrey's Executor*, 195 U.S. 602, 631-32 (1935).

In *Myers v. United States*, the United States Supreme Court explicitly recognized that the President had exclusive power in removing executive officers appointed by him. 272 U.S. at 176.

The Court engaged in a thorough discussion of executive power, and stated that vesting executive power in the President clearly required the assistance of subordinate executive officials in executing the laws. *Id.* at 117. The Court recognized that these executive officials must exercise discretion pursuant to the national public interest, and that the President may properly guide and supervise these executive officials because their powers come from the President's own general grant of executive power. *Id.* at 135. The Court specifically recognized a difference between the President's clear power to remove officers that he finds to be inefficient or negligent and any Presidential power to control an officer's interpretation of his own statutory duty in a specific instance. *Id.* The Court noted that there may be cases where an executive officer's duties affect the interests of individuals and Presidential control would be improper. *Id.*

Even assuming the OMB had the maximum executive authority to act to make this decision, the OMB violated the CWA and should not receive deference because the OMB exceeded its executive power by making this specific permitting decision. In this case, the OMB is utilizing executive authority to express its preferred outcome in the permitting decision between the OMB and the EPA. Under the rationale of *Myers*, while it is recognized that the President must supervise agency decisions and even supervise these decisions through the OMB, the only recourse when the executive disagrees with a particular decision is the removal power. This is not a removal case, but is a far more intrusive act by the President into the workings of an agency by allowing the OMB to make this specific permitting decision. Therefore the OMB exceeded its executive authority.

The OMB violated the CWA by acting outside of Congressional intent. Further, even if Congressional intent were not at issue, the OMB violated the CWA by exceeds its grant of executive power. Therefore, this Court should not give deference to the OMB's decision and

under *de novo* review this Court should reverse the district court's finding and find that the OMB's participation was improper.

B. The OMB decision that the EPA could not veto the COE permit violated the CWA.

The OMB decision that the EPA could not veto the COE permit and the EPA's subsequent acquiescence to this decision was arbitrary and capricious and therefore violated the CWA because the OMB did not have Congressional authority to make the decision or executive power to make or influence the decision. As an initial matter, the decision whether to veto the permit meets the definition of order under the Administrative Procedure Act, and therefore the decision not to veto was an adjudication. 25 U.S.C.A. § 551 (West 2011). The OMB did not have Congressional authority to make this adjudicatory decision for two reasons. First, the OMB's decision-making was contrary to Congressional intent because the text of the CWA expressly gave this adjudication to the EPA and not the OMB. Second, the OMB did not have executive power to make or influence this adjudication because executive power does not extend to discretionary decisions of agencies, and specifically not to adjudications such as this case. For these reasons, this action was arbitrary and capricious and this Court should reverse the district court's finding and find that the OMB's participation was improper.

1. The OMB violated the CWA because the OMB's decision was contrary to Congressional intent

The OMB decision was contrary to Congressional intent because the text of the CWA gave the decision making authority to the EPA. The text of the CWA states that the EPA Administrator maintains the authority to deny the use of a specific disposal site if adverse effects are determined to be likely. 33 U.S.C.A. § 1344 (2011). In *Coeur Alaska, Inc. v. Southeast Alaska Conservation Council*, EPA action not to veto is considered a positive decision not to

exercise the veto option. As stated previously, an executive order by the President cannot conflict with Congress' legislative actions. *Thomas*, 627 F.Supp. at 568.

The OMB's decision that the EPA could not veto and the EPA's subsequent acquiescence to that decision was arbitrary and capricious and therefore violated the CWA because this process was contrary to Congressional intent. Congress granted the EPA Administrator the specific authority to veto the COE permit. Further, as recognized in *Coeur*, the EPA's decision not to veto is also considered a decision under the CWA. Congress did not grant the OMB authority either to veto or to choose not to veto a permit in the CWA, therefore the OMB violated the CWA by making this decision.

2. The OMB did not have executive authority to either make or influence the decision

The OMB action was arbitrary and capricious and therefore violated the CWA because the OMB did not have executive authority to either make or influence the decision by the EPA not to veto. The OMB did not have executive authority to make the decision because the executive branch does not have authority to make specific decisions of agencies. The OMB did not have executive authority to influence the decision because this decision was adjudicatory and at most, the courts have recognized influence in agency rule-making actions. As the OMB made this decision without executive authority to either make or influence this decision, this Court should find that the EPA's acquiescence to this decision was arbitrary and capricious.

a. *The OMB Did Not Have Executive Authority To Make The Decision That The EPA Could Not Veto*

The OMB did not have executive authority to make the decision that the EPA could not veto because the executive branch does not have the power to make specific decisions of agencies. The express powers granted to the executive in the Constitution in relation to agencies are the power to demand written opinions from executive officers, the power to invoke executive

privilege, and the power to appoint and remove officials. *Costle*, 657 F.2d at 406. However, outside of these powers the courts have been reluctant to allow specific decision-making of agencies. In particular, courts have noted concerns with duties that may be of a quasi-judicial nature, and have determined that these duties may be of a type of which the President cannot properly control due to the decisions affecting the interests of individuals. *Humphrey's Executor*, 195 U.S. at 631-32. A distinguishing feature to determine executive power may be whether the executive officer in question had legislative or judicial power, and an executive officer with such power may be farther outside the control of the President. *Id.* at 627.

In this case, the OMB's decision violated the CWA because the decision-making went beyond any power held by the executive branch. This was not a removal issue, but is a far more intrusive act by allowing the executive to make specific decisions of agencies. Further, this case fits into the specific quasi-judicial characteristic identified by the courts as an area where courts are hesitant to allow executive power. This decision by the EPA, on whether to veto a permit, is clearly a quasi-judicial function to be exercised by the EPA, which *Humphrey's Executor* noted is an area outside the proper control of the President. The OMB decision violated the CWA by exceeding its grant of executive power.

b. The OMB did not have executive authority to make the decision that the EPA could not veto

Even if State of Progress and the United States could argue that the OMB did not make the decision but merely influenced the decision, the OMB did not have executive authority to influence the decision. The OMB could not influence this decision because this was an adjudicatory action and, at most, the executive power may influence an agency's rule-making actions.

The President has the authority to both supervise and control executive policy-making granted to him directly in the Constitution, and an executive agency's regulations may have national policy implications that are of concern to the President. *Sierra Club v. Costle*, 657 F.2d 298, 406 (1981). It is not clear the legal extent of the President's authority acting through the OMB on rulemaking decisions, though it is possible that the President has executive authority to influence rule-making for national policy reasons. See *Public Citizen Health Research Group v. Tyson*, 796 F.2d 1479, 1507 (1986) (stating that OMB participation in rulemaking elicited difficult constitutional questions).

However, though courts have considered the extent of executive power to influence agency rule-making, the executive power influence is not appropriate in adjudicatory proceedings. No inherent executive power exists to control individual rights in adjudicatory or quasi-adjudicatory settings. *Costle*, 657 F.2d at 407. In *Myers*, the Court noted that for quasi-judicial duties of an agency, the decisions affect interests of individuals and those particular duties may be of a type that the President cannot influence. *Id.* at 135. The President's responsibilities for broad foreign and domestic relations may speak to allowing his input on the broad policies of an agency through rule-making, but does not make sense for specific matters with specific individuals. *See* 1 U.S. Op. Atty. Gen. 624 (1823).

Further, even when executive influence is permitted on agency action, executive influence is not a sufficient reason alone for an agency to decide a scientific issue. *Massachusetts v. EPA*, 549 U.S. 497, 533-34 (2007). In *Massachusetts v. EPA*, the EPA denied a rule-making petition asking the EPA to regulate greenhouse gas emissions. *Id.* at 510-11. The EPA advanced as one reason for denying the petition that a number of executive programs already existed to address greenhouse gas emissions. *Id.* at 533. The United States Supreme Court noted that considerations

of executive policy in these programs did not constitute a reasoned justification for denying the petition. *Id.* at 533-34.

The OMB did not have authority to influence the EPA's decision not to veto. First, this is not a rule-making decision but an adjudication, for which there is no precedent allowing executive power interference, and in fact judicial caution exists against allowing Presidential influence in this type of case. The policy rationale advanced in *Costle* for involvement in rule-making simply does not exist in this adjudicatory setting. The EPA decision to veto does not involve a broad national policy interest in which the executive branch may be interested, but is merely a decision on whether or not to veto one specific permit, a decision intended to be made by the EPA based on scientific evidence. The individual rights at issue in the adjudicatory setting puts this decision outside the expertise of the executive branch, and thus executive influence would be inappropriate.

Second, even if executive influence were allowed for this particular case, this influence is not sufficient alone for the EPA to decide not to veto. Considering *Massachusetts*, the EPA could not rely on OMB influence as the sole reason for deciding not to veto but had to have reasoned judgment for deciding not to veto. It is unclear from the record what reasoned explanation the EPA had not to veto, and in fact, the record suggests that the Administrator had more reasons to veto the COE permit. The OMB influence is not sufficient alone to justify the EPA's decision not to veto a permit and because the record is lacking on this issue, summary judgment is inappropriate.

Both the decision by the OMB that the COE had jurisdiction to permit and the decision by the OMB that the EPA could not veto the COE permit violated the CWA. First, the OMB did not have authority to make the decision that the COE had jurisdiction to permit because OMB

decision-making was contrary to Congressional intent and the OMB did not have executive power to make the decision. Second, the OMB did not have authority to make the decision that the EPA could not veto the permit because OMB decision-making was contrary to Congressional intent and the OMB did not have executive power to make or influence this decision intended for the EPA. Under de novo review, this Court should find that the OMB's decision that the COE had jurisdiction to issue the permit did not deserve deference and therefore violated the CWA. Under the arbitrary and capricious standard, this Court should find that the EPA's acquiescence to the OMB's decision was arbitrary and capricious. Therefore, this Court should reverse the district court's finding that the OMB's involvement was proper.

CONCLUSION

The District Court erred in its finding that the State of New Union lacked standing when the State of New Union, under both its sovereign capacity and its *parens patriae* capacity, does have standing to bring suit against the Government and the State of New Progress when they decided to fill Lake Temp. The District Court properly found that under the Clean Water Act, Lake Temp was a navigable water and therefore subject to the permitting requirements of the CWA. Further, the District Court erred in finding that the EPA had jurisdiction to issue this permit and the COE did not. Finally, the District Court erred in finding the OMB had authority to make the decision that COE had jurisdiction and further had authority to make the decision that the EPA could not veto the permit. For the above stated reasons this court should uphold the district court's finding on the second issue and reverse and remand on the first, third, and fourth issues.