Team 3

C.A. No. 11-1245

UNITED STATES COURT OF APPEALS
FOR THE TWELFTH CIRCUIT

STATE OF NEW UNION,

Appellant and Cross-Appellee,

vs.

UNITED STATES,

Appellee and Cross-Appellant,

vs.

STATE OF PROGRESS,

Appellee and Cross-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW UNION
THE HONORABLE ROMULUS N. REMUS, DISTRICT JUDGE

BRIEF OF APPELLEE AND CROSS-APPELLANT STATE OF PROGRESS.

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JURISDICTIONAL STATEMENT

This is an appeal from a final Order entered on June 2, 2011 by the Honorable Romulus Remus of the District Court for the District of New Union. The District Court had jurisdiction to hear the case pursuant to 28 U.S.C. § 1331 and the Administrative Procedure Act, 5 U.S.C. § 702. The United States Court of Appeals has jurisdiction to review appeals from any final decisions of the District Court for the District of New Union. 28 U.S.C. § 1291 (2006). On September 15, 2011, this Court granted the petitions for review filed by the State of New Union and the State of Progress.

STATEMENT OF THE ISSUES

I. A state has standing to sue when it suffers an injury in fact, the defendant's action are the cause of that injury, and the court can redress that injury. Alternatively, a state has standing if it can establish it has *parens patriae* capacity to sue on behalf of its injured citizens. Does the risk of injury that the permit poses to New Union an its citizens give New Union standing to sue?

II. The CWA does not apply to non-navigable waters. Lake Temp is a non-navigable water because it is wholly interstate and isolate, it is not adjacent to nor does it have a significant nexus to navigable water, and because the occasional trespasser rule does not apply. Is Lake Temp navigable and thus subject to the CWA?

III. The COE has jurisdiction to issue permits for fill material pursuant to Section 404 of the CWA. The material to be discharged into Lake Temp is fill material. Did the COE have proper authority under Section 404 to issue a permit?

IV. The OMB is the designated conflict resolution agency when executive agencies have disputes over enforcing various laws. The OMB intervened to resolve the conflict between the EPA and the COE in enforcing various laws. Was the OMB's intervention proper?

STATEMENT OF THE CASE

The State of New Union sought review of a permit issued by the U.S. Army Corps of Engineers ("COE") allowing the U.S. Department of Defense ("DOD") to discharge a slurry of spent munitions into Lake Temp, an intermittent lake wholly within a military reservation owned by the United States in the State of Progress. Because Lake Temp is located within the State of Progress' boundaries, Progress intervened as a Defendant. The parties filed cross-motions for summary judgment. The State of Progress and the State of New Union filed appeals with this court.

The district court held that New Union does not have standing, and granted the United States' motion for summary judgment on that issue. Record ("R.") at 10. The State of Progress seeks reversal of the District Court's finding that New Union lacks standing to bring suit.

The district court found that Lake Temp is navigable. *Id.* Progress seeks reversal of the district court's finding, arguing that the Lake is not navigable and thus not subject to the CWA.

The district court held that the COE, not the EPA, properly had jurisdiction to issue the permit for Lake Temp. *Id.* In the alternative, Progress argues that if Lake Temp is navigable, the COE was the proper issuing authority under Section 404 of the CWA, not Section 402.

Lastly, the district court held that OMB's role in the permit issuance process was not improper. *Id.* at 11. Progress asks this court to affirm that finding, as the OMB properly intervened in the EPA and COE dispute.

STATEMENT OF THE FACTS

Lake Temp and the Surrounding Area

Lake Temp is a small body of water located wholly within the state of Progress. R. at 3-4. The Lake is intermittent and regularly dries up approximately every five years. When it is not dry, the lake grows to three miles wide and nine miles long during the rainy season of wet years. *Id.* Lake Temp is fed by surface water flowing from surrounding mountains, has no outflow and is not connected to any other bodies of water. *Id.* at 4.

The Imhoff aquifer is located approximately a thousand feet below Lake Temp. *Id.* The aquifer follows the contours of the lake but is larger. *Id.* Ninety-five percent of the aquifer is located within the military reserve in Progress and five percent of it lies in New Union. *Id.* Dale Bompers, a resident of New Union, owns a ranch in which part of the Imhoff aquifer lies. *Id.* The water from this aquifer is not potable and cannot be used in agriculture without treatment

because of a high sulfur content. *Id.* Dale Bompers does not use the aquifer and does not possess the legally required permit from the state to access water from the aquifer. *Id.*

When the lake has held water during migration seasons, ducks have used it as a stopover in their migration from arctic to southern climes and back. *Id.* Over the years the lake has primarily been used by local duck hunters and birdwatchers. *Id.* The lake became part of a military reservation in 1952. *Id.* The DOD posted signs around the lake warning that entry was illegal but no other enforcement measures were taken and people continued to use the lake for hunting and bird watching. *Id.*

The Proposed Project

The DOD proposes to construct a facility near Lake Temp to receive and prepare slurry that will be discharged as fill into the lake, raising the the lake's water level by approximately six feet. *Id.* The fill will consist of munitions, and preparation will involve the mixing of munitions liquid with semi-solid contents and then adding chemicals to assure the liquid is safe and not explosive. *Id.* Remaining metals will be ground and pulverized. Water will be added to these mixes to form a slurry or fill, which will be sprayed from a movable multi-port pipe. *Id.* The pipe will move continually to deposit the slurry evenly over the entire dry lakebed. *Id.* The COE will continuously grade the edges of the lakebed so runoff from surrounding mountain areas will continue to flow into the lake as it has always done. *Id.* The lake will remain because it is at the low point in the drainage basin and there is nowhere else for precipitation falling in the basin to flow. *Id.* Overtime, alluvial deposits will cover the lakebed again, returning it to its pre-operation condition at a higher elevation. *Id.*

The DOD completed an Environmental Impact Statement ("EIS") on the project under the National Environmental Policy Act ("NEPA"), 42 U.S.C. §§ 4321-4370, in 2002. *Id.* at 6.

New Union did not comment, object or express any displeasure with the project, the scope of the EIS or the final EIS on the basis of the unknowns concerning the Imhoff Aquifer. *Id.* New Union has never requested access to the military reserve to install and operate wells to collect any data on the project and the aquifer. *Id.*

STANDARD OF REVIEW

In evaluating questions of law, this court should review the lower court's determinations *de novo.* Summary judgment is proper only when there is "no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). The Supreme Court explained in *Anderson v. Liberty Lobby* that the existence of a mere "scintilla of evidence" will be insufficient to survive a motion for summary judgment. 477 U.S. 242, 252 (1986). Instead, there must be "evidence on which the jury could reasonably find for the plaintiff." *Id*. Applying this standard requires the court to examine both the "caliber" and "quantity" of the Plaintiff's evidence. *Id*. at 254.

SUMMARY OF THE ARGUMENT

New Union has standing in its sovereign capacity to contest the proposed project because it threatens to increase the risk of groundwater contamination, which is a legally cognizable threat to New Union's proprietary interests. Alternatively, New Union has standing to contest the permit in its *parens patriae* capacity on behalf of its citizens who will suffer economic injuries from issuance of the permit.

The CWA does not apply to Lake Temp because Lake Temp is not navigable. It is not adjacent to navigable water, and does not share a significant nexus to navigable water. Additionally, the occasional trespasser does not constitute interstate commerce under the other

waters regulation enacted pursuant to the CWA. Thus, no permit is required because neither the COE nor the EPA have jurisdiction over this wholly interstate and isolated body of water.

Alternatively, if The Court finds that Lake Temp is navigable and subject to the CWA, the COE had jurisdiction to issue a permit pursuant to Section 404 of the CWA, and the EPA did not have jurisdiction under Section 402 as New Union maintains. The Supreme Court has already confronted this issue and held that when discharge material can be classified as both a pollutant and fill material, Section 404 rather than 402 will apply. *Coeur Alaska v. Southeast Alaska Conservation Council*, 129 S.Ct. 2458 (2009). New Union cannot advance any valid reasons why *Coeur* should not control the outcome of this case, and as such the COE properly issued a permit under Section 404.

Finally, the OMB's role in mediating disputes between the EPA and COE has no relevance to the determination of this case. OMB was acting pursuant to executive directives, and its decisions were neither arbitrary nor capricious. OMB was simply fulfilling its normal obligations as agency mediator in full compliance with the law.

ARGUMENT

I. The district court erred in concluding New Union lacked standing because New Union has standing to contest the permit in both its sovereign and *parens patriae* capacities

In order to satisfy the Constitutional requirements of standing, a plaintiff must show (1) that it has suffered an "injury in fact" that is both (a) concrete and particularized and (b) actual or imminent; (2) that the injury complained of is "fairly traceable" to the Defendant's action; and (3) that it is "likely," as opposed to speculative, that the injury will be redressed by a favorable decision. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-561 (1992). The District Court erred in holding that the discharges allowed by the permit at issue do not sufficiently threaten New

Union's interests to confer Article III standing. The slurry that DOD proposes to release into Lake Temp will flow into the underlying Imhoff Aquifer, part of which is within New Union's territory. R. at 4. This is a grave threat to New Union's proprietary interests and to the health of its citizens. Although it is not an absolute certainty that the polluted water will reach the portion of the Imhoff Aquifer that is beneath New Union, the substantial risk that the permit presents is sufficient for standing purposes. As such, the Court must find that New Union has standing to contest the permit both in its sovereign capacity and in its *parens patriae* capacity with regard to its citizens who may be injured by the polluted water.

A. Increased Risk of Groundwater Contamination Poses a Legally Cognizable Threat to New Union's Proprietary Interests Sufficient to Confer Standing

The District Court held that New Union did not have standing based on its proprietary interests because it never proved (1) that the discharges would reach its portion of the Imhoff Aquifer and (2) that they would be toxic if they did. R. at 4, 5. These rationales are intertwined and demand an analysis that blends both the 'injury in fact' and 'causation' prongs of standing. The arguments below address both issues, though they do not explicitly distinguish between the two. The final element, redressability, is uncontested in this case.

i. Increased Risk of Pollution Constitutes an 'Injury in Fact'

The District Court erroneously concluded that because there is *some* chance that the discharges allowed by the permit may not migrate to the portion of the Imhoff Aquifer that is underneath New Union, the state failed to assert an injury in fact. This holding runs counter to the extensive jurisprudence that supports a finding of 'injury in fact' where the risk of injury is drastically increased, though not a certainty. Of course, one of the primary purposes of Article III's standing requirements is prevent meritless suits where the alleged harm is only conjectural

or speculative. *See generally Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992) *and City of Los Angeles v. Lyons*, 461 U.S. 95 (1983). Notwithstanding these valid concerns, Courts have been willing to accept less than certain 'injury in fact' allegations so long as a Plaintiff can show that the Defendant's action increased the risk of injury. *See, e.g., Pennell v. San Jose*, 485 U.S. 1 (1988) (holding that the *likelihood* of the city enforcing an ordinance that was allegedly unconstitutional was sufficient to confer standing); *Dimarzo v. Cahill*, 575 F.2d 15 (1st Cir. 1978) (holding that substandard conditions at a jail which increased the *risk* of fire provided plaintiff prisoners with standing).

Many of the cases in which courts have found risk of harm to confer standing have been environmental suits. *Bauer v. Veneman*, 352 F.3d 625, 634 (2003). The most frequently cited reason for this pattern is that environmental harms are "by nature probabilistic" and therefore a degree of uncertainty inheres in most environmental cases. *Friends of the Earth v. Gatson Copper Recycling*, 204 F.3d 149, 160 (4th Cir. 2000). Circuit courts across the country have embraced the 'risk of injury' concept both with respect to the CWA and other environmental statutes. In *Central Delta Water Agency v. United States*, farmers brought suit to prevent the release of water from a reservoir, which they feared would increase water salinity and hurt their crops. 306 F.3d 938 (9th Cir. 2002). Although the law that governed the maintenance of water salinity levels had not yet been violated and it was not certain that the release would *ever* violate the law, the Ninth Circuit held that the risk of harm to the farmers' crops was not so speculative as to render the controversy hypothetical. *Id.* at 948-949. Similarly, in *Village of Elk Grove Village v. Evans*, the Seventh Circuit held that the increased risk of flooding that would result from construction of a radio tower on a creek's floodplain was sufficient to confer standing to challenge a permit granted by the Army Corps of Engineers under the CWA. 997 F.2d 328 (7th

Cir. 1992). Again, the injury was probabilistic – the 'injury in fact' alleged was increased risk of flood – but the Seventh Circuit had no trouble finding standing, stating "even a small probability of injury is sufficient to create a case or controversy." *Id* at 329. *See also Mountain States Legal Foundation v. Glickman*, 92 F.3d 1228 (D.C. Cir. 1996) (holding that increased risk of wildfire from logging practices constitutes an 'injury in fact').

In view of the relevant precedent, there can be no doubt that the harm alleged by New Union is legally cognizable. The proposed discharges into Lake Temp, which the District Court found would flow into the Imhoff Aquifer, would contain many substances on the CWA's list of hazardous chemicals. R. at 3, 4. DOD would release these substances in such vast quantity that the water level of Lake Temp (a three-by-nine mile body of water) would rise by six feet. *Id*. These facts are enough to assert a sufficiently high risk of harm to fit into the 'risk of injury' jurisprudence cited above. New Union is similarly situated to the Plaintiffs in *Evans* and *Central Delta*. All parties stand to suffer serious harm if the Defendants' actions have the result they fear – in this case, heavy contamination of New Union's groundwater. Crucially, as these cases make clear, New Union is *not* required to prove to a scientific certainty that the pollution will reach the portion of the Aquifer that lies underneath its territory, nor is it required to prove that the pollution will be extremely toxic if it does. It need only prove that there is a substantial risk of these possibilities occurring, and the case law demonstrates that the 'substantial risk' standard in the environmental context is relatively lax. In *Evans*, the Plaintiff village presented no statistical or scientific evidence for its allegation that construction of a radio tower in a floodplain would increase risk of flooding in the area. In *Glickman*, the D.C. Circuit held that just a ten percent increased risk of wildfire gave logging companies standing to contest the Forest Service's logging plan. These cases are illustrative of the broader judicial trend in environmental suits of

finding standing when there is "even a small probability of injury." *Evans*, 997 F.2d at 329. The District Court failed to give appropriate weight to such case law. New Union has alleged a harm that is indistinguishable in any legally relevant respect from the probabilistic environmental injuries that courts have repeatedly found sufficient for standing purposes. For this reason, the Court should hold that New Union has standing to contest the proposed permit.

ii. New Union is Subject to a Relaxed Standing Inquiry under Massachusetts v. EPA

As the District Court recognized, the Supreme Court recently held in *Massachusetts v. EPA* that states are entitled to greater standing rights than other parties. 127 S.Ct. 1438 (2007). Citing the long history of states suing to protect their quasi-sovereign interests and the sovereign dignity accorded to states by our Federalist system, the majority held that "the Commonwealth is entitled to special solicitude in our standing analysis." *Id* at 1454-1455. Although the extent to which states are subject to special standing deference is unclear from the opinion, it suffices for purposes of the principal case to point out that they are entitled to *some* sort of relaxed test. *See generally* Mark Bradford, *Should States Have Greater Standing Rights Than Ordinary Citizens?: Massachusetts v. EPA's New Standing Test for States*, 49 WM. & MARY L. REV. 1701 (2008). Under the 'risk of injury' jurisprudence exemplified by *Central Delta*, *Evans*, and *Glickman*, New Union would have standing in this suit even if it were not a state. When subject to a less stringent standing test, New Union's claim to standing is even stronger.

B. New Union Has Standing to Sue in its *parens patriae* capacity on Behalf of Citizens who will Suffer Economic Injuries from DOD's Proposed Discharges

Even if the Court finds that New Union does not have standing to contest the permit on the basis of its proprietary interests, it must nonetheless find that New Union has standing to sue in its *parens patriae* capacity with respect to its citizens who will be injured by the pollution.

Parens patriae, or "parent of the country," is a long-recognized common law doctrine that allows states to represent their citizens in legal actions where there is a "quasi-sovereign" injury. *Snapp v. Puerto Rico*, the leading case on *parens patraie* standing, articulated the test States must meet to ensure that they are properly asserting a case or controversy. 458 U.S. 592 (1982). A state must: (1) "articulate an interest apart from the interests of particular private parties, i.e., the State must be more than a nominal party"; (2) "express a quasi-sovereign interest"; and (3) have "alleged injury to a sufficiently substantial segment of its population." *Id.* at 607. New Union is more than a nominal party, and has asserted a valid "quasi-sovereign" interest.

i. Economic Injury to Citizens is a Valid "Quasi-Sovereign" Interest

In *Snapp*, Puerto Rico sued a number of Virginia apple growers, alleging that they violated the Wager-Peyser Act and the Immigration and Nationality Act. The purpose of these laws was to grant citizens of the United States, including Puerto Ricans, hiring preference over foreign temporary workers. In holding that Puerto Rico had standing to sue in its *parens patriae* capacity, the Supreme Court made it clear that the economic well-being of citizens is a valid "quasi-sovereign" interest. *Id.* Under this formulation of "quasi-sovereign" interests, New Union's allegations of economic harm to the property value of its residents, exemplified by Dale Bompers, entitle it to contest the permit at issue.

Property interests are, like employment opportunities, classic "economic interests" recognized by the law. The District Court did not dispute this, but rather based its dismissal of New Union's *parens partriae* argument on its finding that Dale Bompers did not allege an injury upon which New Union could base derivative standing. R. at 6, 7. The District Court so held because Bompers does not use the water from the Imhoff Aquifer and does not plan to do so in the immediate future. *Id.* While these facts would be decisive if the claimed injury was inability

to use the water, they are not dispositive in the context of property value. Bompers' property value is determined by how much a prospective buyer is willing to pay for his land. This number is a function of a many factors, and two important ones are negatively impacted by the proposed permit: (1) the ways in which a prospective buyer could use the land, and (2) consumer perceptions of the quality of Bompers' property. The District Court ignored the first factor entirely by improperly focusing on how Bompers currently uses the land, instead of how a new owner *could* use the land. If the permit is granted, Bompers' property has no value to these classes of consumers. Furthermore, even if a potential buyer has no intention of using the groundwater, the mere fact that there may be a toxic plume of water underneath the entire property will undoubtedly drive down the cost of the land – no property owner wants to live on top of a serious health hazard.

ii. New Union Has Alleged Economic Harm to a Substantial Segment of Its Population

Courts have carefully avoided defining a precise number of residents that must be affected for *parens patriae* to serve as a valid theory of standing. In *Snapp*, the number of jobs in controversy was 787. However, the Court cautioned that focusing solely on the number of directly affected individuals would lead to "too narrow a view of the interests at stake" and held that courts must consider both the direct and indirect effects of the contested action. *Id*. at 609. For this reason, courts have strongly downplayed the importance of raw numbers since *Snapp*. *See People by Vacco v. Mid Hudson Med. Group, PcC.*, 877 F. Supp. 143, 148 (S.D.N.Y. 1995) ("the raw number of individuals directly involved does not determine whether the State has 'alleged injury to a sufficiently substantial segment of its population'"); *New York v. Cain*, 418 F. Supp. 2d 457 (S.D.N.Y. 2006) ("It is not fatal to the plaintiffs' *parens patriae* standing that

the alleged violations . . .directly impacted only a relatively small number of people.”). In *New York ex rel. Abrams v. 11 Cornwell Co.*, the state of New York sued a real estate partnership for preventing the State from acquiring a building to use as a home for eight to ten mentally impaired adults. 695 F.2d 34 (2d Cir. 1982), *vacated in part on other grounds*, 718 F.2d 22 (2d Cir. 1983). In finding that the Attorney General had alleged injury to a “substantial segment of its population,” the Court reasoned that it must account for not only the few individuals directly impacted, but also for “similar people in years to come as well as other individuals in [mental] institutions and the members of the community itself.” *Id.* at 39. The Court also considered the precedential effect of allowing housing discrimination to go unpunished: “were this kind of incident to be tolerated . . .others would be affected. The “sting” here is almost [universal]”. *Id.* at 39-40. Under this broad understanding of ‘indirect effects,’ New Union has alleged injury to a substantial segment of its population.

New Union need not base its claim for *parens patriae* standing on Dale Bompers alone. The detrimental effect of DOD’s proposed permit on Bompers’ property value will extend to all landowners in his community, albeit to a lesser extent. As discussed earlier, no potential landowner wants to live on *or near* an aquifer that is saturated with hazardous chemicals. Bompers’ economic interests will be most affected by contamination of the Imhoff Aquifer, but others in his community will see their property value drop as well. In addition to these “directly” impacted individuals, the court must consider the interests of those affected in less obvious ways. Per the reasoning in *Cornwell*, this would include “similar people in years to come” – future property owners in Bompers’ community. It would also those include those potentially affected by the precedential impact of denying standing in this suit. The consequences of allowing DOD to pollute aquifers that run underneath other citizens’ and states’ land could be serious. More

property owners might be unjustly deprived of the full economic value of their land, and the concept of state sovereign dignity that underlies our Federalist system of government would be greatly undermined. Given all of the direct and indirect effects that *Snapp* and subsequent cases have found proper to examine, New Union has alleged economic harm to a substantial segment of its population.

In conclusion, the District Court erred in several key ways in holding that New Union does not have standing to contest the DOD's permit. With respect to standing based on injury to New Union's proprietary interests, the District Court failed to consider that *risk* of injury has repeatedly been held a sufficient ground for standing, especially in the environmental context where injuries are "by nature probabilistic." *Gatson Copper*, 204 F.3d at 160. The District Court premised its dismissal on the fact that New Union never proved (1) that the discharges would reach its portion of the Imhoff Aquifer and (2) that they would be toxic if they did. However, case law makes it clear that New Union is not obliged to prove either of these to a certainty – it need only establish that there is a substantial risk of these possibilities occurring. The District Court also failed to consider crucial case law with respect to its denial of New Union's *parens patriae* argument. The Supreme Court held in *Snapp* that States may bring suit on behalf of their citizens to protect "quasi-sovereign" interests, a class that includes the economic well-being of citizens. New Union properly alleged economic harm to the property interests of Dale Bompers and others less directly affected. In view of the expansive judicial interpretation of what constitutes a "substantial segment" of a state's population, New Union alleged injury to an appropriate number of citizens. New Union satisfied all elements of the *parens patriae* test, as well as the widely accepted conventions for 'risk of harm' analysis in environmental suits. For

these reasons, the Court must find that New Union has standing in both its sovereign and *parens patriae* capacities.

II. The District Court erred in finding that the Proposed Project required a permit at all, because Lake Temp is not navigable water subject to the CWA

In order for the COE or EPA to have jurisdiction over the permitting process for the Lake Temp DOD project, Lake Temp must be "navigable" under the CWA. Lake Temp is not navigable, therefore neither the COE not EPA have jurisdiction.

The CWA makes it unlawful to discharge dredged or fill material into "navigable waters" without a permit, 33 U.S.C. §§ 1311(a), 1342(a), and defines "navigable waters" as "the waters of the United States, including the territorial seas", 33 U.S.C. § 1362(7). While Congress intended "navigable waters" under the CWA to have a more expansive reach than the traditional meaning of "navigable waters," the Court has also emphasized that the qualifier "navigable" is not devoid of significance and its meaning must be limited to some extent. *Rapanos v. United States*, 547 U.S. 715, 731 (2006). Waters have been found "navigable" under the CWA if they are navigable in-fact, traditionally, navigable, adjacent to navigable water, have a significant nexus to navigable water, or qualify as "other waters" that are intrastate but affect interstate commerce.

A. Lake Temp is an intermittent, non-navigable, isolated and wholly intrastate body of water without any significant nexus to a navigable body of water and therefore not within the jurisdiction of the COE and EPA.

i. Lake Temp is an intermittent body of water that is not relatively permanent and is therefore not navigable under the CWA

To be navigable under the CWA, a body of water must be "relatively permanent, standing or continuously flowing." *Rapanos v. United States, 547 U.S. 715*, 733 (2006). Navigability does not extend to "channels through which water flows intermittently or ephemerally." *Id.*

In *Rapanos,* the waters at issue were Michigan wetlands lying near ditches and man-made drains that eventually emptied into traditional navigable waters, some of which dried up occasionally. *Rapanos,* 547 U.S. at 720. The *Rapanos* Court noted, "the Act's use of the traditional phrase 'navigable waters' further confirms that the CWA confers jurisdiction only over relatively permanent bodies of water." *Id.* at 734. "Traditionally, such 'waters' included only discrete bodies of water, and the term still carries some of its original substance." *Id.* (citing *Solid Waste Agency v. United States Army Corps of Eng'rs*, 531 U.S. 159, 172 (2001)). In *United States v. Moses,* the Ninth Circuit pointed out that there are exceptions implicit in *Rapanos,* explaining, "by describing 'waters' as 'relatively permanent,' [the *Rapanos* court] did not necessarily exclude streams, rivers, or lakes that might dry up in extraordinary circumstances, such as drought. *United States v. Moses*, 496 F.3d 984, 990 (9th Cir. 2007) *citing Rapanos v. United States*, 547 U.S. 715, 733 (2006). *Rapanos* did not necessarily exclude "seasonal rivers, which contain continuous flow during some months of the year but no flow during dry months." *Id.*

Lake Temp is not a seasonal body of water, nor is it a body of water that only disappears in "extraordinary circumstances." Lake Temp dries up for extended periods of time lasting more than a year. For approximately twelve months every five years Lake Temp dries up, completely disappearing. R. at 4. This makes it an intermittent body of water, not a "seasonal" one. Lake Temp also does not fit into the "extraordinary circumstance" category described in *Moses* because of the frequency with which it dries up and becomes and becomes nonexistent. It does not take require a severe drought to disappear. New Union argues that Lake Temp is different than the waters in *Rapanos* because Lake Temp is bigger. However, nothing in *Rapanos* or any subsequent opinion points to size as a definitive or important factor for determining whether

water is relatively permanent or intermittent. New Union is correct that *Rapanos* is not an absolute bar on navigability if water is to dry up, but the central factor is instead a question of frequency and length of intermittency. Lake Temp frequently dries up completely for approximately twelve months, making it an intermittent body of water that is not relatively permanent and therefore not itself 'navigable' for the purpose of the CWA.

ii. Lake Temp is Not Navigable Itself, Is Not Adjacent to Navigable Waters, and Has No Significant Nexus to Navigable Waters and Therefore is Not Covered by the CWA

Regulations promulgated under the CWA give the COE or EPA jurisdiction if "the body of water is actually navigable or is adjacent to an open body of navigable water." *See, e.g., D.E. Rice v. Harken Exploration Co.,* 250 F.3d 264, 269 (5th Cir. 2001), *U.S. v. Rapanos,* 190 F. Supp.2d 1011 (E.D. Mich. 2002). Jurisdiction may also exist when water has a continuous surface connection or significant nexus to navigable water, even when the body of water is not navigable and is not adjacent to navigable water. However, the "significant nexus" required must be more than a 'mere hydrological connection'. *Rapanos v. United States*, 547 U.S. 715, 742, 767 (2006).

In *Solid Waste Agency v. United States Army Corps of Eng'rs*, 531 U.S. 159 (2001) ("SWANCC"), the Supreme Court dealt with isolated intrastate ponds created in an abandoned mine wholly within Illinois. *Id.* at 162. The COE had claimed jurisdiction based on the *"*Migratory Bird*"* rule, a regulation promulgated by the COE extending their jurisdiction to isolated intrastate waters that had migratory bird populations. *Id.* The court held that waters covered by subsection (a)(3) that could affect interstate commerce solely by virtue of their use as habitat by migratory birds are no longer considered "waters of the United States. *Id.*

Five years later the Supreme Court again limited the jurisdictional reach of the COE and EPA under the CWA in *Rapanos v. United States*, 547 U.S. 715 (2006). The majority held, "*only* those wetlands with a continuous surface connection to bodies that are 'waters of the United States' in their own right, so that there is no clear demarcation between 'waters' and wetlands, are 'adjacent to' such waters and covered by the Act." *Rapanos* 547 U.S. at 742 (emphasis added). Justice Kennedy concurred in the judgment, but rejected the plurality's rationale. Instead, he concluded that jurisdiction extends to wetlands that "possess a 'significant nexus' to waters that are or were navigable in fact or that could reasonably be so made." *Id.* at 759. Wetlands "possess the requisite nexus" if "either alone or in combination with similarly situated lands in the region, significantly affect the chemical, physical, and biological integrity of other covered waters more readily understood as 'navigable.'" *Id.* at 780. Where the wetlands are adjacent to non-navigable tributaries, "absent more specific regulations . . . [the government] must establish a significant nexus on a case-by-case basis." *Id*. at 782. Some circuits find that jurisdiction exists if either test is met. *See States v. Johnson* 467 F.3d 56 (1st Cir. 2006); *United States v. Bailey* 571 F.3d 791 (8th Cir. 2009). Other Circuits apply Kennedy's Significant Nexus test. *See Northern California River Watch v. City of Healdsburg,* 496 F.3d 993 (9th Cir. 2007); *United States v. Gerke,* 464 F.3d 723 (7th Cir. 2006).

Both the *SWANCC* and *Rapanos* Courts considered the stated purpose of the CWA when deciding if the given body of water was in fact navigable under the CWA. Congress's purpose when passing the CWA was, "restoring and maintaining the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251. *Rapanos,* 547 U.S. at 721. In recognizing this stated purpose the *Rapanos* court also noted the CWA's stated policy "to recognize, preserve,

and protect the primary responsibilities and rights of the States . . . to plan the development and use. . . of land and water resources . . . ." § 1251(b). *Id.* at 723.

Similar to the ponds in *SWANCC* the pond involved here is located solely within the State of Progress, and further isolated on a military reservation. Like the water involved in *Rapanos* and *SWANCC,* Lake Temp is not itself navigable in the traditional sense of the word. R. at 4. Lake Temp is the low point of an 800 mile watershed, and is the collection spot for rainwater and snow melt in the area. *Id.* There is no outflow from the lake so it is not connected to navigable water. *Id.* It is not adjacent to navigable water. *Id.* The only water near Lake Temp is the Imhoff Aquifer, located 1,000 feet below Lake Temp. *Id.* They are not physically connected through water flow nor are there any ecological connections between the lake and other waters. *Id.* Additionally, the Court must consider the whether the water in question is navigable in light of the purpose of the CWA. Because Lake Temp is so isolated, within a military reservation, wholly within Progress, having no connection to the "waters of the United States," the jurisdictional power of the COE under the CWA cannot reach this far because the stated purpose of the CWA is "restoring and maintaining the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251. Regulatory permits for Lake Temp do not effectuate this purpose and are therefore beyond the scope of the statute.

Lake Temp itself is not itself navigable because it is intermittent, it is not adjacent to navigable water, and does not have a significant nexus to navigable water and therefore it is not covered by the CWA. Because Lake Temp is not navigable, and is not covered by the CWA, neither the COE nor EPA have jurisdiction and a permit is not required.

B. The COE Cannnot Assert Jurisdiction Under the "Other Waters" Rule because Trespassing Hunters on Lake Temp Do Not Constitute "Interstate Commerce" or Create a Potential for "Interstate Commerce"

The CWA does not cover waters that are not traditionally navigable, wholly intrastate, and isolated without a significant nexus to navigable waters unless they affect interstate commerce and are covered by the COE's "*other waters*" regulation which states:

> (3) 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 would affect or could affect interstate or foreign commerce including any such waters:
>
> (i) Which are or could be used by interstate or foreign travelers for recreational or other purposes; or
>
> (ii) From which fish or shellfish are or could be taken and sold in interstate or foreign commerce; or
>
> (iii) Which are used or could be used for industrial purposes by industries in interstate commerce.

33 C.F.R. § 328.3(a)(3).

Congress intended the COE and EPA to have jurisdiction over waters that truly involved interstate commerce, in order to carry out the stated purpose of the CWA. Sometimes significant interstate commercial activity takes place on otherwise isolated and intrastate lakes that would not be considered traditional navigable "waters of the United States." For example, an isolated and intrastate lake may be a major source for fishermen and shipping industries both from within and outside of the state. It is foreseeable that pollution issues affecting multiple states might arise from the transportation of a thriving fish market and would legitimately be within the scope of the CWA.

While the "affecting interstate commerce" rationale of the "other waters" regulation is appropriate, it does not apply to the occasional trespasser on the military reservation's isolated pond. The "other water's regulation based on an "affecting interstate commerce" should apply only when there is an actual effect on interstate commerce. The occasional trespasser, usually a local, who enters the military reservation in violation of the law cannot constitute "interstate commerce" under the purpose of the regulation, or the CWA or the scope of jurisdiction would be limitless and unconstitutional.

C. Alternatively, If the Court Finds the Presence of Trespassers to Constitute "Interstate Commerce" Under the "Other Waters" Rule, This Portion of the "Other Waters" Rule, Must Be Held Invalid Because It is Beyond the COE's Authority under the CWA

SWANCC eliminates CWA jurisdiction over isolated waters that are intrastate and non-navigable where the sole basis for asserting CWA jurisdiction is the actual or potential use of the waters as habitat for migratory birds. Read in its entirety, however, the opinion of the Court may be read broader than the immediate holding in the *SWANCC* case, and may be read to exclude from CWA jurisdiction all "isolated waters."

The majority stated that allowing the Corps and EPA to claim jurisdiction over isolated waters such as ponds and mudflats would result in a "significant impingement of the state's traditional and primary power over land and water use." *SWANCC*, 531 U.S. at 174 (2001). Rather than readjusting the federal-state balance under the CWA, Congress chose to "recognize, preserve, and protect the primary responsibilities and rights of states . . .to plan the development and use . . .of land and water resources" as expressed in Section 101(b) of the CWA. *Id.* According to the Court, "[w]here an administrative interpretation of a statute invokes the outer

limits of Congress' power, we expect a clear indication that Congress intended that result." *Id.* at 172-173.

In *Rapanos,* the Court recognized land use planning as a traditional state activity where Congress's commerce power is limited. The Court stated that the CWA's use of the term "the waters of the United States" hardly qualifies as the clear and manifest statement from Congress needed to authorize intrusion into such an area of traditional state authority as land-use regulation; and to authorize federal action that stretches the limits of Congress's commerce power. *Rapanos*, 547 U.S. at 738; *See also SWANCC* at 173. Where an otherwise acceptable construction of a statute would raise serious constitutional problems, the Court will construe the statute to avoid such problems unless such construction is plainly contrary to the intent of Congress." *Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988).

Here, the COE has claimed jurisdiction of isolated intrastate waters that are neither adjacent to, or have a significant nexus to, navigable waters if they "affect interstate commerce". The rationale behind the "other waters" regulation, if found valid, would allow the COE or EPA to have access potentially to any pond that a person "traveled" to, regardless if there is any impact on interstate commerce. As noted in *SWANNC* when considering reach of the commerce clause in relation to isolated ponds, "Congress's power 'to regulate commerce . . . among the several states . . ." is, like all enumerated powers, subject to outer limits. *SWANNC* at 173. See *United States v. Lopez*, 514 U.S. 549, 556-557 (1995); *GDF Realty Invs., Ltd. v. Norton*, 362 F.3d 286, 287-288 (5th Cir. 2004) (reiterating that "the grant of authority to Congress under the commerce clause, though broad, is not unlimited"). The commerce clause "may not be extended so as to embrace effects upon interstate commerce so indirect and remote that to embrace them,

in view of our complex society, would effectually obliterate the distinction between what is national and what is local and create a completely centralized government." *NLRB v. Jones and Laughlin Steel*, 301 U.S. 1, 37, (1937).

The *SWANCC* Court did not specifically speak to the "other waters" regulations but read broadly shows that CWA jurisdiction cannot be based on other “affecting commerce” rationales in the Corps’ existing "other waters" regulations at 328.3(a)(3)(i)-(iii). These factors, like the Migratory Bird Rule, are founded on an “affecting commerce” theory of jurisdiction, not on Congress’ commerce power over navigation. Like the Migratory Bird Rule, Congress does not give any indication that the agency may have jurisdiction over such a traditional state activity. Whether Congress could have granted broader jurisdiction to the COE or the EPA is a constitutional question the court need not arrive at. This is analogous to *SWANCC* where the court declined to address the constitutional issue of whether Congress *could* grant broad power over isolated intrastate lakes through the Migratory Bird Rule, finding that Congress did not grant that power. Here, the Court need not consider the constitutional implications of the COE's "other waters" regulation because Congress did not expressly or implicitly grant the agency’s jurisdiction over *all* activities affecting interstate commerce. Therefore, the "other waters" regulation, like the Migratory Bird Rule, must be held invalid because it is beyond the authority granted to the COE by Congress under the CWA.

Lake Temp is intermittent, isolated and intrastate and therefore is not itself navigable. Lake Temp is not adjacent to, has no continuous connection to, and has no significant nexus to navigable water. The occasional trespasser does not constitute “interstate commerce” for the purpose of the “other waters” regulation and therefore the CWA does not give either the COE or the EPA jurisdiction over the permitting process at Lake Temp.

III. If a permit was required for the discharge, the District Court correctly concluded that the COE had jurisdiction to issue such a permit pursuant to Section 404 of the CWA, not Section 402

Even if Lake Temp was navigable and subject to the CWA, COE was the proper authority to issue the permit under Section 404. Congress enacted the CWA "to restore and maintain the chemical, physical and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a). The CWA prohibits the discharge of any "pollutant" into navigable waters unless the EPA issues a permit under the NPDES permitting program, 33 U.S.C. §§ 1311(a), 1342. The permitting program constitutes an exception to the Clean Water Act's prohibition on pollutant discharges into the Nation's waters. 33 U.S.C. §§ 1311(a), 1342; 40 C.F.R. § 122.3. Thus, if a party obtains a permit, the discharge of pollutants in accordance with that permit is lawful. *Id.*

The CWA authorizes the COE to "issue permits. . .for the discharge of. . . fill material." 33 U.S.C. § 1344(a). The COE and the EPA together define "fill material" as any "material [that] has the effect of. . .[c]hanging the bottom elevation" of a body of water. 40 C.F.R. § 232.2. The definition of fill expressly includes slurry. *Id.* The material to be discharged into Lake Temp is slurry, and will change the elevation of the lake by approximately six feet or more. R. at 4. As such, if the court finds Lake Temp is navigable, the COE is the proper authority to issue a permit pursuant to Section 404 of the CWA.

A. Section 404 was the proper permitting provision according to Supreme Court authority

New Union argues that the District Court erroneously concluded the COE had jurisdiction to issue a permit pursuant to Section 404 of the CWA, and that instead a permit was required by the EPA pursuant to Section 402 of the CWA. R. at 7-9. They base this argument on the assertion that the slurry to be discharged is a pollutant, and the EPA is empowered to issue

permits for the discharge of any pollutants. *Id. See also* 33 U.S.C. § 1342(a). Indeed, Section 502(6) of the CWA includes "munitions" in the definition of pollutant, and the slurry to be discharged into Lake Temp will be mixture of semi-solids and chemicals, with a munitions base. R. at 4.

However, the Supreme Court has already confronted this precise issue and found that Section 404 applies in such situations. *Coeur Alaska v. Southeast Alaska Conservation Council*, 129 S.Ct. 2458 (2009). *Coeur* involved a set of facts strikingly similar to the Lake Temp case. In *Coeur*, several environmental groups challenged the COE's authority to issue a 404 permit for discharge into a lake. *Id.* at 2463-65. The Plaintiffs argued that the material, mainly crushed rocks and water, was a pollutant and thus should fall within EPA permit authority under Section 402. *Id.* The court held that when discharge falls within both the definitions of pollutant and fill material, Section 404 will prevail as the proper provision and the COE is the proper permit issuing authority. *Id.* at 2468-69. The *Coeur* Court found this to be so for several reasons. First, the language of the statute itself supports that the COE is the proper issuing authority for fill material. This is because the CWA itself expressly exempts the EPA from issuing permits when the discharge material is considered fill. It reads: "*Except as provided in*…[CWA § 404, 33 U.S.C. § 1344], the Administrator [of the EPA] may issue a permit for the discharge of any pollutant. . . ." 33 U.S.C. § 1342(a) (emphasis added). As *Coeur* correctly stated, Section 402 explicitly forbids the EPA from issuing permits when the material is fill and thus within the jurisdiction of the COE under Section 404. *Coeur*, 129 S.Ct. at 2467. Similarly, the EPA's own regulations mandate that "[d]ischarges of. . .fill material into waters of the United States. . .do not require [§ 402] permits." 40 C.F.R. § 122.3; *See also Coeur*, 129 S.Ct. at 2468. Because the material to be discharged into Lake Temp is slurry that will change the elevation of the lake, it is

in fact fill material and therefore subject to a Section 404 permit from the COE, not a Section 402 permit.

New Union argues that *Coeur* should not apply because the discharge material in that case was rock, whereas the slurry here is made up partially of munitions that will have a higher toxicity. R. at 8. However, as the district court correctly pointed out, the CWA does not distinguish materials by degrees of toxicity or inertness, and thus that distinction is completely irrelevant to our analysis. *Id.* Furthermore, rock (the substance of the discharge at issue in *Coeur*) is defined as a pollutant, just as munitions are. 33 U.S.C. § 1362(6). The Supreme Court held that when material to be discharged into a CWA protected body of water can be classified as both fill and a pollutant, it is the COE that has jurisdiction under Section 404. *Coeur*, 129 S.Ct. at 2468-69. Therefore, because the slurry is fill material, the toxicity of the material is irrelevant; the COE is still the proper issuing authority according to *Coeur*.

New Union seeks to distinguish *Coeur* because the body of water at issue in that case operated as a treatment pond, eliminating the need to build a new treatment pond, and thus diminished overall environmental impact. R. at 8. This argument lacks merit for several reasons. First, although New Union attempts to distinguish *Coeur*, both cases involved using an existing lake to discharge fill material rather than building an entirely new treatment pond. As the district court properly stated, Lake Temp will absorb the discharge, rather than emptying it into other navigable waters, preventing pollution into other waters. *Id.* One of the goals of the CWA is to eliminate the discharge of pollutants into navigable waters. *Id.*; 33 U.S.C. § 1251(a)(1). As such, using Lake Temp in this way actually furthers the purpose of the CWA. Moreover, the *Coeur* Court did not factor into its analysis whether the lake at issue was a treatment pond; the court was primarily concerned with the statutory interpretation of the relevant CWA provisions and the

classification of the material to be discharged. *Coeur*, 129 S.Ct. at 2467-69. Thus, whether or not a treatment pond is part of a proposed project is not relevant to whether a Section 404 permit is proper.

B. Any potential relationship between the DOD and the COE is irrelevant to whether the COE had authority to issue a 404 permit

Lastly, New Union takes issue with the fact that the COE was not necessarily an uninterested intervenor, as the applicant for the fill project is a subsidiary of the COE. R. at 8. The district court properly rejected this argument on the basis that it is common practice for regulating agencies to issue permits to themselves. R. at 9. Indeed, the EPA frequently issues permits to its own laboratories and facilities. *Id.* While the COE is not allowed to issue itself permits for its own discharge of fill material, it is authorized to issue 404 permits to "*any Federal agency*, other than the Corps of Engineers." 33 C.F.R. § 323.3(b); 40 C.F.R. § 230.2(a)(2) (emphasis added). Nothing in the statutes forbids it, and to hold that self otherwise would essentially amount to a judicial rewriting of the statute. R. at 9. The applicant for the 404 permit, the DOD, is a federal agency wholly separate and distinct from the COE. As such, the COE has authority to issue 404 permits to the DOD pursuant to 33 C.F.R. § 323.3(b). Even if this court were to find that such a relationship made the issuance of a 404 permit by the COE inappropriate, the point is moot because the DOD could simply obtain a permit from the proper state authority pursuant to 33 C.F.R. 336.1(a)(1). Needless to say, the State of Progress would be more than willing to issue such a permit.

Further, while the regulations enacted pursuant to NEPA mandate that an agency shall disclose any financial or other interests in the outcome of a project, no such disclosure requirements exist under the Clean Water Act. 40 C.F.R. § 1506.5(c). Indeed, any potential

conflict of interest basis for challenging agency action in the environmental realm is typically analyzed under NEPA requirements. *See e.g. Life of the Land v. Brinegar*, 414 U.S. 1052, 1053 (1973) (affirming the United States District Court for the District of Hawaii's holding that NEPA regulations do not prevent the employment of a private contractor with a financial interest in a project to draft an EIS); *Associations Working for Aurora's Residential Environment v. Colorado Dept. of Transp.*, 153 F.3d 1122, 1128 (10th Cir. 1998) (holding that a contractor with an enforceable agreement for future work on a proposed project has a conflict of interest under NEPA regulations with respect to preparing EIS); *Essex County Preservation Ass'n v. Campbell*, 536 F.2d 956, 959-960 (1st Cir. 1976) (holding that direct participation of a state's design engineering firm in preparation of an EIS does not invalidate the EIS where the EIS draft was reviewed independently by the proper federal agency). New Union does not allege that the COE in any way violated the disclosure requirements of NEPA, therefore they have no basis to allege the CWA was violated by COE's ties to the project applicant.

Moreover, many federal courts have held that interested parties are not necessarily barred from participation in the environmental administrative process. *See Life of the Land*, 414 U.S. at 1053; (finding a private contractor with a financial interest in a project may draft an EIS); *Essex County Preservation Ass'n v. Campbell*, 536 F.2d 956, 959-960 (1st Cir. 1976) (holding that direct participation of a state's design engineering firm in preparation of an EIS does not automatically invalidate the EIS); *Center for Biological Diversity v. Federal Highway Admin.*, 290 F.Supp.2d 1175, 1186 (U.S. Dist. S.D. Cal. 2003) (the preparation of an EIS by a financially interested consultant did not automatically destroy the objectivity of the EIS, especially when said interest was fully disclosed).

New Union's attempts to distinguish *Coeur* are without merit, and the CWA itself, its regulations, and precedent mandate that Section 404 was the proper permitting provision in this case.

IV. The District Correctly Concluded that the OMB's Actions in intervening were Proper

A. The OMB's actions were not arbitrary or capricious, and thus are not subject to judicial reversal

A court may only set aside agency action that was arbitrary or capricious, an abuse of discretion, or otherwise not in accordance with law under 5 U.S.C. § 706(2)(a). Agency action is arbitrary and capricious where the agency has relied on factors that Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency experience. *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.,* 463 U.S. 29, 43 (1983). "The court is required to make a 'searching and careful review' in its assessment of the agency action, but 'the ultimate standard of review is a narrow one.' " *Citizens to Preserve Overton Park, Inc. v. Volpe,* 401 U.S. 402, 416 (1971).

It cannot be legitimately argued that the EPA's decision not to veto the permit, or the OMB's decision to intervene, was arbitrary or capricious. This is because it was both rational under the Executive Orders discussed above, and required by the Court's ruling in *Coeur*. Not only did the *Coeur* Court's holding expressly mandate that the COE is the proper authority, *See Coeur*, 129 S.Ct. at 2468-69, but the court also held that interpreting the CWA to mean that the COE is the proper authority to issue permits for slurry and fill discharge is not a plainly erroneous or inconsistent with the regulation. *Id.* As such, neither the OMB's intervention nor

the EPA's action to adhere to the OMB and not veto the COE permit can be considered arbitrary or capricious, and thus it is not proper for this court to overturn.

B. The OMB's intervention was proper pursuant to Executive directives

New Union argues that the OMB improperly intervened and was without authority when it directed the EPA not to veto the 404 permit. R. at 9-10. Although it is true that 33 U.S.C. § 1251(d) designates the EPA administrator the CWA, it is also true that the OMB is entrusted with resolving disputes between executive agencies pursuant to Exec. Order No. 12,088, 43 Fed. Reg. 47,707 (Oct. 13, 1978). Executive Order 12,088 provides, in relevant part, "if the Administrator [of the CWA] cannot resolve a conflict, the Administrator shall request the Director of the Office of Management and budget to resolve the conflict." Thus, the OMB's action in intervening and resolving the conduct was precisely what the OMB is required to do under the Executive's directive. *See also* Exec. Order No. 12,580, 52 Fed. Reg. 2923 (Jan. 23, 1987) ("[t]he director of the Office of Management and Budget shall facilitate resolution of any issues [between executive agencies]". The OMB has consistently been recognized by federal courts as the proper dispute facilitator among executive agencies. *Tennesse Valley Authority v. U.S. E.P.A.*, 278 F.3d 1184, 1201-02 (11th Cir. 2002) (discussing the OMB's role as conflict dispute facilitator under Exec. Order 12,088), *opinion vacated in part on other grounds by Tennesse Valley Authority v. Whitman*, 336 F.3d 1236 (11th Cir. 203); *Electronic Data Systems Federal Corp. v. General Services Admin. Bd. Of Contract Appeals*, 792 F.2d 1569, 1581-82 (5th Cir. 1986) (discussing the OMB's proper role as resolution facilitator for inter-agency disputes under the Brooks Act); *Meyer v. Bush*, 981 F.2d 1288, 1295 (D.C. Cir. 1993) (discussing the OMB's role as mediator of inter-agency disputes in relation to the task force's role under the Freedom of Information Act).

The President has power over the executive branch to "take care that the laws be faithfully executed." U.S. Const. Art. II, § 3. In doing so, he certainly has the power to designate how disputes between executive agencies are resolved. *Building and Const. Trades Dept., AFL-CIO v. Allbaugh*, 295 F.3d 28, 32 (D.C. Cir. 2001) (finding that the President's duty to execute laws necessarily encompasses control of administrative bodies throughout the Executive Branch); *Sierra Club v. Costle*, 657 F.2d 298, 406 n. 524 (D.C. Cir. 1981) (holding that the President may supervise and guide his subordinates in construction of statutes under in order to secure unitary and uniform execution of the law).

New Union cites *Envtl. Def. Fund v. Thomas*, 627 F.Supp. 566 (D.C. Cir. 1986) in support of their contention that the OMB's intervention was an invalid exercise of the President's Article II powers. However, that case is easily distinguishable from the case at hand. The *Thomas* Court held that although the President must be afforded a certain degree of deference to control and supervise its own agencies' policymaking, Exec. Order 12291 exceeded the President's constitutional powers by allowing the OMB to create delays and impose substantive changes to policies that Congress clearly intended the EPA to have authority over. However, when Exec. Order 12291 was passed, the Justice Department explicitly emphasized its intention that the order be construed narrowly. Testimony of James C. Miller III, in *Role of OMB in Regulation: Hearing Before the Subcomm. on Oversight and Investigation of House Comm. on Energy & Commerce*, 97th Cong., 1st Sess 46 (1981). Moreover, *Thomas* stood for the proposition that statutory delay *caused* by OMB intervention shall not be tolerated. *Thomas*, 627 F.Supp. at 571. Here, the OMB was merely acting as referee among feuding agencies who were themselves causing a delay. Thus, the OMB properly intervened pursuant to their role as mediator under the relevant Executive Orders and New Union's arguments are meritless.

CONCLUSION

The Court must find New Union has standing in its sovereign capacity to contest the proposed project because it threatens to increase the risk of groundwater contamination, which is a legally cognizable threat to New Union's proprietary interests. New Union is also entitled to standing in its *parens patriae* capacity to bring suit on behalf of its citizens who will suffer serious economic injuriy if the permit is issued.

The CWA does not apply to Lake Temp because Lake Temp is not navigable itself, is not adjacent to navigable water, and does not share a significant nexus with navigable water. Furthermore, Lake Temp fails to qualify for the other waters rule because the occasional trespasser does not constitute interstate commerce under the CWA. If Congress intends to invoke the outer bounds of the Commerce Clause's power, it must be explicit in doing so. Congress did not give any explicit or implicit indication in the CWA that it intended the COE or EPA's jurisdiction to reach any insolated or intrastate pond. Thus, no permit is required because neither the COE nor the EPA have jurisdiction over this wholly interstate and isolated body of water. If, however, the Court finds that Lake Temp is navigable, the COE is the proper permitting authority under Section 404 of the CWA. The Supreme Court's recent decision in *Coeur* is dispositive; it held that when discharge material can be classified as both 'pollutant' and 'fill,' Section 404 applies.

Finally, the OMB's role in mediating disputes between the EPA and COE has no relevance to the determination of this case. OMB was acting pursuant to executive directives, and its decisions were neither arbitrary nor capricious. OMB was simply fulfilling its normal obligations as agency mediator in full compliance with the law.

For all of the foregoing reasons, the State of Progress respectfully requests that this Court reverse the order of the district court and find in favor of Progress on all counts.