Team 31

C.A. No. 11-1245
Civ. No. 148-2011

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IN THE UNITED STATES COURT OF APPEALS
FOR THE TWELFTH CIRCUIT

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STATE OF NEW UNION,
Appellant-Cross-Appellee

v.

UNITED STATES,
Appellee-Cross-Appellant

v.

STATE OF PROGRESS,
Appellee-Cross-Appellant

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW UNION

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Brief for STATE OF PROGRESS,
Appellee-Cross-Appellant

## TABLE OF CONTENTS

## TABLE OF CONTENTS (CONT.)

## TABLE OF CONTENTS (CONT.)

## TABLE OF AUTHORITIES

**Cases**

## TABLE OF AUTHORITIES (CONT.)

## TABLE OF AUTHORITIES (CONT.)



**Statutes**

## TABLE OF AUTHORITIES (CONT.)



**Federal Register**



**Rules**



**Code of Federal Regulations**



**Constitutional Provisions**

**Secondary Sources**

## JURISDICTIONAL STATEMENT

It is the position of the State of Progress (Progress) that 28 U.S.C. § 1331 (2006) and the Administrative Procedure Act (APA), 5 U.S.C. § 702 (2006), granted jurisdiction to the district court to decide whether the issuance of an individual permit by the Secretary of the Army, acting through the U.S. Army Corps of Engineers (COE) under the authority of section 404 of the Clean Water Act (CWA), 33 U.S.C. § 1344 (2006), to the U.S. Department of Defense (DOD) to discharge slurry into Lake Temp is proper. The district court properly held that COE had jurisdiction to issue the permit under CWA section 404, 33 U.S.C. § 1344, and that the Office of Management and Budget (OMB) did not violate the CWA when it resolved the dispute between COE and the U.S. Environmental Protection Agency (EPA) over whether COE had jurisdiction to issue the permit to DOD. However, the district court incorrectly determined that New Union lacked standing to challenge the permit issued by COE to DOD pursuant to CWA section 404, 33 U.S.C. § 1344, to fill Lake Temp and that COE had jurisdiction to issue the permit under CWA section 404, 33 U.S.C. § 1344, because Lake Temp is not a navigable water. On June 2, 2011, the district court entered summary judgment in favor of the United States. This Court has jurisdiction to review the district court's decision. 28 U.S.C. § 1291 (2006).

## STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

I. Whether New Union has standing in its *parens patriae* capacity as the protector of the health and well-being of its citizens, or in its sovereign capacity as owner and regulator of the groundwater in the state.

II. Whether COE or EPA lack jurisdiction to issue a permit under either CWA section 404 or CWA section 402 for the discharge of slurry into Lake Temp because Lake Temp is an isolated, intermittent body of water, and is not navigable.

III. Alternatively, whether the district court correctly found that COE had jurisdiction to issue a permit to DOD under CWA section 404 for the discharge of slurry that will elevate the lakebed of Lake Temp.

IV. Whether the district court correctly found that OMB's resolution of a dispute between COE and EPA on which agency had jurisdiction to issue a permit to DOD, and EPA's reevaluation of its decision in light of OMB's advice are proper.

## STATEMENT OF THE CASE

New Union filed an action in the district court under 28 U.S.C. § 1331, and the APA, 5 U.S.C. § 702. New Union sought review of a individual permit issued by the Secretary of the Army, acting through COE, under the authority of CWA section 404, 33 U.S.C. § 1344, to the DOD to discharge a slurry of spent munitions into Lake Temp. (R. at 3.) New Union argued that any permit for the discharge must be issued by the EPA Administrator pursuant to her authority to issue permits for the discharge of pollutants under CWA section 402, 33 U.S.C. § 1342 (2006). (R. at 3.) Progress, within whose boundaries the permitted activities will take place, intervened. (R. at 3.) New Union, the United States, and Progress filed motions for summary judgment. (R. at 3.)

The district court granted COE's motion for summary judgment on the CWA counts. (R. at 10.) Specifically, the district court held that (1) New Union did not have standing, (2) COE had jurisdiction to issue a CWA section 404 permit for the addition of fill to Lake Temp because Lake Temp is a navigable water and the slurry is a fill material, and (3) OMB's dispute resolution between COE and EPA did not violate the CWA. (R. at 10–11.) Following the issuance of the Order of the District Court for the District of New Union, dated June 2, 2011, Civ. 148- 2011, New Union and Progress each filed a timely Notice of Appeal. (R. at 3.)

## STATEMENT OF THE FACTS

Lake Temp, located wholly within a military reservation owned by the United States in Progress, is an intermittent body of water. (R. at 3.) Its size varies from dry season to rainy

season,[1] and it is wholly dry one out of every five years. (R. at 3–4.) Lake Temp has no outflow, but is located almost one thousand feet above the Imhoff Aquifer (Aquifer). (R. at 4.) The land between the lakebed and the Aquifer is primarily unconsolidated alluvial fill, which implies that water from Lake Temp may eventually reach the Aquifer. (R. at 5.) Ninety-five percent of the Aquifer is located in Progress, under the boundaries of the military reservation, and five percent is located within New Union. (R. at 4.)

Migratory ducks historically use Lake Temp as a stopover. (R. at 4.) For the past one hundred years, duck hunters from both Progress and out of state, have used Lake Temp to hunt.[2] (R. at 4.) In 1952, Lake Temp became part of a military reservation, and DOD posted signs at intervals of one hundred yards, twenty-five feet from the Progress state highway that ran along the southern side of Lake Temp.[3] (R. at 4.) DOD knows people continue to use the lake for hunting and bird watching, but it has made no further efforts to restrict public entry. (R. at 4.)

In 2002, DOD completed an Environmental Impact Statement (EIS) under the National Environmental Policy Act (NEPA), 42 U.S.C. §§ 4321–4370H (2006), to assess the impact of the discharge of a slurry made from spent munitions into Lake Temp.[4] (R. at 3, 6.) The Secretary of the Army, acting through COE, under the authority of CWA section 404, subsequently issued a permit to DOD for the slurry's discharge onto Lake Temp's dry lakebed. (R. at 3.) As a result of the slurry, the lake's top water elevation will increase by approximately six feet. (R. at 4.) The process will take several years, but will not recur. (R. at 4.) COE will continually grade the edges of the new lakebed so that runoff from the surrounding mountains

[1] It can be up to 3 miles wide and 9 miles long during the rainy season, and is much smaller during the dry season. (R. at 3–4.)
[2] Visitors include "hundreds, perhaps thousands of duck hunters," about a quarter of which were from out of state. (R. at 4.)
[3] The Progress highway connects with several roads that lead into New Union. (R. at 4.)
[4] New Union did not comment on or object to the proposed EIS or final EIS. (R. at 6.)

will flow unimpeded onto the lakebed. (R. at 4.) The alluvial deposits from precipitation falling on the mountains and flowing into the basin will re-cover the lakebed, returning it to its pre-operation condition. (R. at 4–5.)

After COE issued a permit, EPA argued to OMB that EPA, rather than COE, had jurisdiction to issue the permit. (R. at 9.) COE and EPA both sent briefing papers to OMB, and attended a meeting with OMB officials. (R. at 9.) After carefully evaluating COE and EPA's arguments, OMB concluded that COE had acted properly in issuing a section 404 permit. (R. at 9.) Subsequently, EPA took no further action to veto COE's permit. (R. at 9.)

## STANDARD OF REVIEW

Summary judgment is appropriate when "there is no genuine issue as to any material fact." Fed. R. Civ. P. 56(c)(2). This Court reviews summary judgment issues under a *de novo* standard, Salve Regina Coll. v. Russell, 499 U.S. 225, 238 (1991), in which the moving party has the burden to show the absence of a genuine issue of material fact by establishing "an absence of evidence to support the nonmoving party's case." Celotex Corp. v. Catrett, 477 US. 317, 325 (1986). Under this standard of review, an appellate court must "examine the factual record and reasonable inferences therefrom in the light most favorable to the party opposing summary judgment." Adickes v. S.H. Kress & Co., 398 U.S. 144, 158–59 (1970).

This Court's review of this action shall be in accordance with sections 701 through 706 of the APA. 5 U.S.C. §§ 701–706 (2006). APA section 704 provides for judicial review of any "[a]gency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court." § 704. However, judicial review is unavailable under the APA if the agency acts in accordance with a statute that "preclude[s] judicial review." § 701(a)(1). Additionally, APA section 706 states that this Court should set aside agency actions that it finds

to be "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law." § 706.

## SUMMARY OF THE ARGUMENT

The district court erred in finding that New Union lacks standing to challenge the permit issued by COE to DOD pursuant to CWA section 404, 33 U.S.C. § 1344, to fill Lake Temp. New Union has standing in its *parens patriae* capacity as the guardian of the health and well-being of its residents. Additionally, New Union has standing in its sovereign capacity because the permit will create a concrete and particularized injury that is actual or imminent, and is directly traceable to the issuance of COE's section 404 permit. It is likely that the injury may be redressed by a favorable decision of this Court.

Furthermore, the district court erred in determining that COE has jurisdiction to issue the permit under CWA section 404, 33 U.S.C. § 1344, because Lake Temp is not a "navigable water," and thus, is not covered by the CWA. Following both the plurality opinion in Rapanos v. United States, 547 U.S. 715 (2006), Lake Temp is not navigable because it is an isolated, intermittent body of water, and there is no permanent outflow. Additionally, following Justice Kennedy's concurring opinion in Rapanos, Lake Temp is not navigable because there is not a "significant nexus" to a traditionally navigable body of water.

The district court properly determined that COE is the authorized agency to issue a section 404 permit to DOD for the discharge of slurry over the dry lakebed of Lake Temp. COE and EPA both recognize slurry as a fill material, which is defined as any material that has the effect of changing the targeted water's bottom elevation. COE is authorized under CWA section 404 to grant permits for the discharge of fill material. Therefore, COE properly issued a section 404 permit to DOD because discharging the slurry into Lake Temp will raise the lakebed's

elevation by several feet.

The district court properly determined that OMB's mediation of a dispute between COE and EPA is proper because Executive Order No. 12,088 authorizes OMB to resolve disputes between executive branch agencies, and OMB's mediation is consistent with the CWA. The district court also properly determined that EPA's decision not to veto COE's permit complies with the CWA. Regardless of OMB's mediation of the dispute, EPA's decision not to veto COE's permit should not be subject to judicial review because EPA's decision is wholly discretionary under the APA. If this Court decides that EPA's decision is subject to judicial review, review is limited to whether EPA's decision is arbitrary or capricious. EPA's decision is neither arbitrary nor capricious because it is consistent with judicial precedent, and because the executive power of the United States lies with the President, not with the Administrator of EPA or the Secretary of COE.

## ARGUMENT

### I. New Union has standing to challenge COE's permit in its *parens patriae* capacity as protector of the health and well-being of its citizens, or, alternatively, in its sovereign capacity as owner and regulator of the groundwater in the state

Article III of the Constitution limits the jurisdiction of federal courts to cases or controversies. U.S. Const. art. III, § 2, cl. 1. This limitation ensures that parties have "such a personal stake in the outcome of the controversy as to assure . . . concrete adverseness. . . " Baker v. Carr, 369 U.S. 186, 204 (1962). New Union has standing to sue in its *parens patriae* capacity as protector of the health and well-being of its citizens whose groundwater may be affected by the issuance of the permit, and as the protector of the waters of its state. Alternatively, this Court may find that New Union has standing to sue based on the relaxed standard for sovereign states established by the Supreme Court in Massachusetts v. EPA, 549

U.S. 497 (2007). Furthermore, New Union satisfies the three requirements necessary for a private party to have constitutional standing under Article III of the Constitution. New Union has (1) a concrete and particularized injury that is actual or imminent, (2) an injury that is fairly traceable to the defendant, and (3) an injury that is likely to be redressed by a favorable decision of this Court. See Lujan v. Defenders of Wildlife. 504 U.S. 555, 560–61 (1992).

### A. New Union has standing to sue the federal government in its *parens patriae* capacity as protector of the health and well-being of its citizens because it has an interest in the water within its domain

This Court should reverse the lower court's decision that New Union does not have *parens patriae* standing. In order to have *parens patriae* standing, New Union must file suit based upon a quasi-sovereign interest in protecting a substantial number of its citizens. Under this standard, New Union has standing because it asserts two distinct quasi-sovereign interests: the health and well-being of its citizens, and "all the earth and air within its domain." Georgia v. Ten. Copper Co., 206 U.S. 230, 237 (1907). These interests affect a substantial portion of the population of New Union. Furthermore, New Union may sue the federal government because New Union is suing to enforce a federal statute, not to question the statute's constitutionality.

#### 1. New Union's two quasi-sovereign interests affect a substantial portion of the population of New Union

*Parens patriae* actions have English common law roots in the concept of the "royal prerogative." See e.g., Hawaii v. Standard Oil Co. of Cal., 405 U.S. 251, 257 (1972). The royal prerogative is the right or responsibility of the state to take care of persons who are legally unable to properly care for themselves and their property. Alfred L. Snapp & Son, Inc. v. Puerto Rico, 458 U.S. 592, 600 (1982). Under American law, states may bring *parens patriae* actions if they have a quasi-sovereign interest distinct from the interests of particular private parties. Id. at

607. Courts determine quasi-sovereign interests on a case-to-case basis; however, courts recognize the interest in the health and well-being of its residents as one category. Id.

New Union has standing to bring a *parens patriae* action because COE's permit threatens groundwater quality. Courts recognize environmental harm as a basis for *parens patriae* actions. See Missouri v. Illinois, 180 U.S. 208 (1901) (allowing Missouri to invoke *parens patriae* standing in order to protect its citizens from the discharge of sewage by Illinois). In Georgia v. Tennessee Copper, the Supreme Court noted that a "state has an interest independent of and behind the title of its citizens, in all the earth and air within its domain. It has the last word as to whether its mountains shall be stripped of their forests and its inhabitants shall breathe pure air." 206 U.S. at 237. The Supreme Court concluded similarly in cases involving the impairment of waterways. See North Dakota v. Minnesota, 263 U.S. 365, 373 (1923) (quoting Georgia v. Tennessee Copper); New York v. New Jersey, 256 U.S. 296, 301–02 (1921) (granting standing when the "health, comfort and prosperity of the people of the state" were allegedly injured by the defendant); Kansas v. Colorado, 185 U.S. 125, 142 (1902) (granting *parens patriae* standing for the "threatened pollution of the waters of a river flowing between states").

In this case, New Union has standing in its *parens patriae* capacity because it alleges a quasi-sovereign interest in the protection of the health and general well-being of its citizens. A state has the right to protect the groundwater of its citizens. Kansas v. Colorado, 185 U.S. at 146–47 (considering the injury on a subterranean stream when analyzing *parens patriae* standing). New Union asserts that pollution from the permitted activity will enter the Aquifer, which extends from beneath Lake Temp into New Union. (R. at 5–6.) While the groundwater is currently unfit for use without treatment due to naturally occurring sulfur, (R. at 6,) the groundwater quality does not preclude *parens patriae* standing, because New Union should have

the final say over "all the earth and air within its domain." Georgia v. Ten. Copper, 206 U.S. at 237.

Additionally, in order to maintain a *parens patriae* action, the alleged injury must affect a sufficiently substantial segment of New Union's population. See e.g., Alfred L. Snapp & Son, Inc., 458 U.S. at 607. A relevant factor in determining whether an issue affects the general population is if "the injury is one that the State, if it could, would likely attempt to address through its sovereign law making powers." Id. In this case, if the fill activity occurred within New Union, it is likely that New Union would regulate. The federal government regulates the discharge of fill material and pollutants into the nation's waterways under the CWA. 33 U.S.C. §§ 1342, 1344. However, the federal government may not supersede a state's authority to regulate its own waters. See 33 U.S.C. § 1251(b) ("It is the policy of the Congress to recognize, preserve and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution, [and] to plan the development of land and water resources . . ."). Furthermore, New Union already regulates groundwater withdrawal through a permitting system. (R. at 6.) Thus, it is likely that New Union would regulate Lake Temp's fill if it were possible in order to protect its groundwater and the health and well-being of its citizens. For these reasons, New Union has standing to bring suit in its *parens patriae* capacity.

**2. New Union can use *parens patriae* standing to sue the federal government because it is attempting to enforce a federal statute, instead of alleging that a statute is unconstitutional**

New Union may use *parens patriae* standing to sue the federal government because it attempts to enforce a federal statute. A state cannot use *parens patriae* standing to sue the federal government because the federal government acts as "the ultimate parens patriae of every American citizen." South Carolina v. Katzenbach, 383 U.S. 301, 324 (1966). See also Florida v.

Mellon, 273 U.S. 12 (1927); Massachusetts v. Mellon, 262 U.S. 447, 485–86 (1923). However, states are only precluded from challenging the federal government using *parens patriae* when the state is challenging the constitutionality of a certain regulatory regime. See Massachusetts v. Laird, 451 F.2d 26, 29 (1st Cir. 1971) (denying standing on the basis of *parens patriae* because the state was challenging the constitutionality of the Vietnam War).

In the instant case, New Union is not challenging the federal regime, but is requesting judicial review to ensure the federal regulatory system is properly carried out. See Alfred L. Snapp & Son, Inc., 458 U.S. at 609–10 (finding that the state has *parens patriae* standing to ensure that its residents enjoy full benefits of the federal employment service system). New Union has *parens patriae* standing because it is not challenging the federal regulatory system. New Union is asserting its residents' rights under the CWA.

### B. New Union has standing in its sovereign capacity under the relaxed standard in Massachusetts v. EPA, and because New Union alleges all three elements that a private party must prove for constitutional standing

If this Court does not find a sufficient generalized grievance for *parens patriae* standing, then this Court should find New Union has standing to sue in its sovereign capacity as owner and regulator of the groundwater in the state. New Union has standing under the relaxed standard set forth by the Supreme Court in Massachusetts v. EPA, and under the traditional three-prong standard set forth by the Supreme Court in Lujan. By issuing a permit to fill Lake Temp, COE potentially affected New Union's groundwater, an injury that is sufficient for standing, and that this Court can redress with a favorable opinion.

#### 1. New Union has standing under the relaxed test of Massachusetts v. EPA, which reduced the standard for redressability and immediacy, and put special emphasis on the fact that a state was suing in its own capacity

This Court should follow the standing analysis of the Supreme Court in Massachusetts v. EPA as it relates to a state's standing to enforce a procedural right established under an environmental law statute. The Court in Massachusetts v. EPA reduced the standard for state litigants in two ways. First, the Court found that there is a reduced standard for redressability and immediacy of harm when Congress grants a litigant a procedural right to protect its concrete interests. Massachusetts v. EPA, 549 U.S. at 518–19. See also Lujan, 504 U.S. at 572 (Kennedy, J., concurring). Second, the Court acknowledged that it is "of considerable relevance" if the party seeking review is a sovereign state and not a private individual. Massachusetts v. EPA, 549 U.S. at 518. The Court has repeatedly recognized that states are not normal litigants for the purposes of invoking federal jurisdiction, see Georgia v. Ten. Copper, 206 U.S. 230, and are thus deserving of a relaxed form of standing.

When Congress has granted a procedural right to protect the concrete interests of a litigant, the litigant can assert that right without meeting the normal standards for redressability and immediacy. Massachusetts v. EPA, 549 U.S. at 518; Lujan, 504 U.S. at 572 (Kennedy, J., concurring). The litigant must prove that the procedural step connects to the substantive result, not that the substantive result changes if the litigant received the procedure. Sugar Cane Growers Cooperative of Fla. v. Veneman, 289 F.3d 89, 94–95 (D.C. Cir. 2002). In Lujan, the Court stated that a litigant does not need to establish with certainty that an EIS will cause a license to be withheld or altered in order to have standing. 504 U.S. at 572 n.7. See also Fla. Audubon Soc'y v. Bentsen, 95 F.3d 658, 668–69 (D.C. Cir. 1996) (en banc) (stating that plaintiff must still show a "particularized injury resulting from the government's substantive action that breached the procedural requirement.").

New Union's allegations are procedural. See 33 U.S.C. § 1369 (2006) (providing for administrative procedure and judicial review of the EPA Administrator's actions under the CWA). Accordingly, this Court should apply the relaxed standard for redressability and immediacy found in Massachusetts v. EPA. 549 U.S. at 518–19. The APA provides judicial review to any person who has suffered a legal wrong, or is adversely affected or aggrieved by an agency action within the meaning of a relevant statute. 5 U.S.C. § 702. This is a procedural right granted by Congress, which allows New Union to allege a reduced form of redressability and immediacy. See Massachusetts v. EPA, 549 U.S. at 517–18 (stating that the right to challenge an agency action unlawfully withheld is a procedural right which does not require the normal standards of redressability and immediacy).

Additionally, New Union deserves this relaxed form of standing because "it is of considerable relevance" that New Union is "a sovereign State." Massachusetts v. EPA, 549 U.S. at 518. The Supreme Court has recognized the distinction between state litigants and private litigants when invoking federal jurisdiction as early as 1907 in Georgia v. Tennessee Copper. 206 U.S. at 237 ("[A] state has interests independent of and behind the title of its citizens, in all the earth and air within its domain."). See also supra I.A. For these reasons, New Union has standing to sue under the relaxed standard set forth in Massachusetts v. EPA.

**2. New Union has sufficiently alleged all three elements of constitutional standing as COE's permit may affect the groundwater of New Union's residents, and this Court can redress the injury with a favorable ruling**

After the Supreme Court found a relaxed form of standing for state litigants in Massachusetts v. EPA, the Court applied the traditional three-prong test for constitutional standing. Under this test, even if this Court does not follow the relaxed standard for standing set forth in Massachusetts v. EPA, this Court should find that New Union has standing to sue

because it has sufficiently alleged all three prongs set forth for private individuals in Lujan. 504 U.S. at 560–61. In order to have constitutional standing, New Union must prove three elements: (1) a concrete and particularized injury that is actual or imminent, (2) an injury that is traceable to COE's permit, and (3) that this Court can redress the injury with a favorable decision. Id.

**a. New Union has suffered an actual and imminent, concrete and particularized harm due to COE's permit to fill Lake Temp**

New Union has an injury in fact, which is concrete and particularized, as well as actual or imminent, because COE's permit to fill Lake Temp affects New Union's watershed. In order to have standing, New Union must allege a concrete and particularized injury that affects New Union in a personal and individual way. Lujan, 504 U.S. at 560 n.1. See also Allen v. Wright, 468 U.S. 737, 756 (1984); Warth v. Seldin, 422 U.S. 490, 508 (1975). In Sierra Club v. Morton, the Court denied standing when the Sierra Club failed to allege that its members used the area affected by the governmental action. 405 U.S. 727, 735 (1972). However, in Lujan, the Court recognized that even purely aesthetic purposes could be sufficient to form a cognizable interest for standing. 504 U.S. at 562–63.

While Lake Temp is within the boundaries of Progress, Lake Temp lies directly over the Aquifer, which extends into New Union. (R. at 4.) In Hodges v. Abraham, the court found that South Carolina's Governor had a concrete and particularized injury based on his proprietary interest in the land, streams, and drinking water of his state, and therefore had standing to sue DOE for failure to properly undertake a NEPA analysis. 300 F.3d 432, 444–45 (4th Cir. 2002). In this case, the permitted activity may affect the Aquifer, which lies directly under Lake Temp and stretches into New Union, because the land between the lakebed and the aquifer is primarily alluvial fill, meaning the water from the lakebed will eventually enter into the Aquifer. (R. at 5.)

Thus, New Union has a concrete and particularized injury, also exemplified by its citizen, Dale Bompers, who owns, operates and resides on a ranch directly above the Aquifer. (R. at 6.)

New Union, through the Department of Natural Resources (DNR), is responsible for permitting groundwater withdrawals. (R. at 6.) Statute requires DNR to ensure that permitted withdrawals do not deplete groundwater in the Aquifer. (R. at 6.) If Bompers obtains a permit to use the groundwater, he possesses unlimited withdrawal rights because he is situated directly above the Aquifer. (R. at 6.) Any potential effect to the Aquifer from the fill activity could make New Union's duty of regulating groundwater increasingly difficult, particularly if multiple parties choose to apply for withdrawal permits and there is limited water available. Because COE's permit affects New Union's ability to regulate its water withdrawals, New Union has a concrete and particularized injury. See West Virginia v. EPA, 362 F.3d 861, 868 (D.C. Cir. 2004) (finding that a state had standing to challenge EPA's actions because EPA's actions created difficulty for the state regulatory actions).

Additionally, New Union's injury is actual or imminent, and not conjectural or hypothetical. See Whitmore v. Arkansas, 596 U.S. 149, 155 (1990); Los Angeles v. Lyons, 461 U.S. 95, 102 (1983). The Supreme Court found standing when the members of a student organization suffered because an increase in freight rates affected the natural resources that they used. United States v. Students Challenging Regulatory Agency Procedures, 412 U.S. 669, 678 (1973). The students failed to provide a link showing that this injury was actual or imminent. Id. In the instant case, New Union alleged a hydrological connection between Lake Temp and the Aquifer, part of which extends into New Union, which is sufficient for standing. (R. at 5.)

COE granted DOD a permit based on its EIS, despite the fact that the scope of the damage remains largely unknown. (R. at 5–6.) DOD argues that New Union did not challenge

the EIS in a timely fashion, and has no concrete proof of imminent harm. (R. at 6.) However, that does not preclude New Union from obtaining standing to review the permit. DOD's argument that New Union cannot raise issues here that could have been addressed in the EIS is misleading. New Union was unable to conduct necessary tests because DOD would not grant access to the military reservation. (R. at 6.) Additionally, New Union challenges COE's right to grant a permit under CWA section 404, not the material provided by DOD's EIS.

**b. New Union's injury is directly traceable to COE's permit and this Court can redress the injury upon review**

The injury, harm to New Union's groundwater, is directly traceable to COE's permit and the injury is not the result of an independent action of a third party not before this Court. See Simon v. E. Ky. Welfare Rights Org., 426 U.S. 26, 41–42 (1976). Without the permit, DOD will not affect the elevation of Lake Temp's waters, or the water quality of the Aquifer through its fill activities. Furthermore, this Court is likely to redress the injury upon review. By reviewing the CWA section 404 permit, this Court will ensure that the litigants properly follow the CWA, and this Court may find that COE does not have the authority to issue the permit in the first place. It is unnecessary for New Union to show that it is certain that this Court can relieve its every injury. See Larson v. Valente, 456 U.S. 228, 244 n.15 (1982). For these reasons, New Union has standing to bring this action in its sovereign capacity as owner and regulator of the groundwater.

## II. COE does not have jurisdiction to issue a CWA section 404 permit because Lake Temp is an isolated, intermittent body of water with no significant nexus to navigable water

This Court should reverse the lower court's decision and find that Lake Temp is not navigable. The purpose of the CWA is to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a). The CWA prohibits the

"discharge of any pollutant," defined broadly as "any addition of any pollutant to navigable waters from any point source." 33 U.S.C. §§ 1311(a), 1362(12) (2006). Congress defined navigable waters as "the waters of the United States, including the territorial seas." 33 U.S.C. § 1362(7). Recently, in Rapanos v. United States, the plurality of the Supreme Court stated that the phrase "navigable waters" includes only "relatively permanent, standing or flowing bodies of water, not intermittent or ephemeral flows of water." 547 U.S. 715, 739 (2006). In his concurring opinion, Justice Kennedy stated that waters are navigable if there is a "significant nexus" to a body of water that is navigable-in-fact. Id. at 780. Lake Temp is not a navigable water, under either definition, as it is an intermittent, isolated body of water.

### A. Lake Temp does not satisfy any standard for navigability as set forth in Rapanos, and thus, is not a navigable water

Lake Temp is not navigable based on the "navigable water" definition found in either the plurality or concurring opinions of the Supreme Court's fractured opinion in Rapanos. 547 U.S. 715. Lake Temp is an isolated, intermittent body of water, with no significant nexus to any traditional navigable water. Thus, because Lake Temp is not a navigable water, it does not fall within the CWA, and COE does not have the authority to issue a fill permit.

#### 1. Lake Temp is not a navigable water according to the three-part test in the plurality opinion of Rapanos

In Rapanos, Justice Scalia, writing for the plurality, found that only three types of waters are covered by the CWA: (1) traditional navigable waters, (2) water bodies connected to traditional navigable waters that have a relatively permanent flow, and (3) wetlands that have a continuous surface connection to those waters. 547 U.S. at 739. This Court should refer to the plurality opinion in Rapanos when determining jurisdiction under the CWA. See e.g., United States v. Chevron Pipe Line Co., 437 F. Supp. 2d 605, 615 (N.D. Tex. 2006). The plurality

placed significant emphasis on the natural, or dictionary, definition of "waters," and found that "waters" should be interpreted narrowly. 547 U.S. at 731–35. The Court also focused on constitutional issues, as first mentioned in Solid Waste Agency of Northern Cook County v. Army Corps of Engineers. 531 U.S. 159 (2001) (hereinafter SWANCC) (finding that COE's regulation of a body of water that lies entirely within state boundaries is a significant intrusion on a state's "traditional and primary power over land and water use"). See infra II.B.

Lake Temp does not meet the Rapanos plurality's three standards for navigability. Lake Temp is an intermittent body of water. (R. at 3.) While it can be large in size during the rainy season in wet years, it is small during the dry season and is routinely completely dry. (R. at 3–4.) Lake Temp's intermittence does not demonstrate the type of permanence necessary to be considered navigable. See Rapanos v. U.S., 547 U.S. at 733–34 (stressing the permanence required for a body of water to be navigable). In SWANCC, the Supreme Court specifically held that isolated "permanent and seasonal ponds of varying size… and depth" are not navigable. 531 U.S. at 163. While some courts have found seasonal "washes and arroyos" to be navigable, see e.g., Save Our Sonoran, Inc. v. Flowers, 408 F.3d 1113, 1118 (9th Cir. 2005), in those instances, the washes and arroyos led to a navigable body of water. In this case, Lake Temp is not remotely connected to any body of water that is navigable-in-fact. (R. at 4.) Notwithstanding the fact that Lake Temp can occasionally reach a large size, it is not a navigable body of water.

**2. Alternatively, Lake Temp is not navigable based on Justice Kennedy's concurring opinion in Rapanos, because there is no "significant nexus" to a traditional navigable body of water**

Justice Kennedy's concurring opinion held that a body of water is navigable if it has a "significant nexus" to a navigable body of water, meaning it "significantly affect[s] the chemical, physical, and biological integrity of other covered waters more readily understood as navigable."

Rapanos, 547 U.S. at 780 (Kennedy, J., concurring). Several circuit courts follow Justice Kennedy's concurring opinion in Rapanos.[5] When a majority of the Supreme Court only agrees upon the outcome of a case and not on the grounds for that outcome, as was the case in Rapanos, lower courts should follow the narrowest grounds to which a majority of the Justices would assent if forced to choose. Marks v. United States, 430 U.S. 188, 193 (1977). Three circuits follow Justice Kennedy's opinion. See N. Cal. River Watch v. City of Healdsburg, 496 F.3d 993, 995 (9th Cir. 2007) (no in-depth analysis), United States v. Robison, 505 F.3d 1208, 1221 (11th Cir. 2007) (applying Marks analysis), United States v. Gerke Excavating, Inc., 464 F.3d 723, 724–25 (7th Cir. 2006) (same). Additionally, two circuits find that jurisdiction may be established under either Justice Kennedy's "significant nexus" test, or the plurality's opinion.[6] See United States v. Bailey, 571 F.3d 791, 799 (8th Cir. 2009) (following reasoning of 1st Circuit in United States v. Johnson), United States v. Johnson, 467 F.3d 56, 66 (1st Cir. 2006) (following Justice Steven's suggestion in his dissent in Rapanos that courts can establish jurisdiction under either test).

If this Court decides to follow Justice Kennedy's interpretation of "significant nexus," Lake Temp is not navigable. In order for a body of water to be navigable it must be connected to a traditional navigable water. Although New Union presented circumstantial evidence that water from Lake Temp may eventually enter the Aquifer, located almost one thousand feet below Lake Temp, this does not provide proof of a nexus to traditional navigable waters because underground aquifers are not historically navigable for commerce. Village of Oconomowoc

[5] No circuit courts have followed Justice Stevens' dissenting opinion in Rapanos. However, if this Court follows the broad reasoning of the dissenting opinion, Lake Temp is still not navigable because it does not contain the ecological factors necessary to be navigable.

[6] Additionally, two circuits have avoided the question when determining jurisdiction under the CWA. United States v. Cundiff, 555 F.3d 200, 208 (6th Cir. 2009), United States v. Lucas, 516 F.3d 316, 326–27 (5th Cir. 2008).

Lake v. Dayton Hudson Corp., 24 F.3d 962, 965 (7th Cir. 1994) ("Neither the [CWA] nor the EPA's definition asserts authority over ground waters, just because these may be hydrologically connected with surface waters."). See also, Exxon Corp. v. Train, 554 F.2d 1310, 1325–29 (5th Cir. 1977) (discussing Congress' history of groundwater regulation in which Congress considered regulating groundwater, but did not because of the complexities involved). This Court should not find a significant nexus because a significant nexus only exists when flow from underground aquifers leads to navigable-in-fact streams. Quivira Mining Co. v. EPA, 765 F.2d 126, 130 (10th Cir. 1985). For these reasons, this Court should find that Lake Temp is not navigable.

### B. Additionally, COE does not have the authority to issue a permit to fill Lake Temp because it would be a significant intrusion on land use regulation

Allowing COE to issue a permit in a situation where the body of water lies entirely within state boundaries would result in a significant intrusion on New Union's "traditional and primary power over land and water use." SWANCC, 531 U.S. at 174. Land use regulation is a quintessential state and local power. Rapanos v. U.S., 547 U.S. at 738; Hess v. Port Auth. Trans-Hudson Corp., 513 U.S. 30, 44 (1994); and FERC v. Mississippi, 456 U.S. 742, 767–68 (1982). In order to stray from that traditional order of authority, there must be a clear manifestation of intent from Congress. BFP v. Resolution Trust Corp., 511 U.S. 531, 544 (1994); Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council, 485 U.S. 568, 575 (1988). This is particularly relevant when the administrative construction of a statute alters the "federal-state framework by permitting federal encroachment upon a traditional state power." SWANCC, 531 U.S. at 173. See also United States v. Bass, 404 U.S. 336, 349 (1971).

The Supreme Court held in SWANCC that COE's jurisdiction does not extend to ponds that are not adjacent to open water because there is no significant nexus between the ponds and

traditional waters that are navigable-in-fact. 531 U.S. at 167, 171. In so holding, the Court rejected COE's "Migratory Bird Rule," which had extended COE's jurisdiction to any intrastate waters "which are or would be used as habitat" by migratory birds that cross state lines. 51 Fed. Reg. 41,206-1, 41,217 (Nov. 13, 1986) (codified at 33 C.F.R. pt. 320–30). Although the Court found that the protection of migratory birds is a "national interest of very nearly the first magnitude," Missouri v. Holland, 252 U.S. 416, 435 (1920) (determining the constitutionality of a migratory bird treaty with Great Britain), this rule was too far-reaching to remain constitutional under the Commerce Clause. The Court held that while Congress' authority under the Commerce Clause is broad, it is not unlimited. United States v. Morrison, 529 U.S. 598 (2000); United States v. Lopez, 514 U.S. 549 (1995).

In the instant case, Lake Temp is not navigable because there is no significant interstate commerce connection. The lower court incorrectly held that Lake Temp is navigable because of its interstate commerce connection. (R. at 7.) The lower court's finding that there is a sufficient interstate commerce connection because of the interstate travelers who came to view and hunt the migratory birds is not in accordance with SWANCC. In SWANCC, the Court found an insufficient interstate commerce connection, even though there was evidence that "millions of people spend over a billion dollars annually on recreational pursuits relating to migratory birds." 531 U.S. at 174. Additionally, the Court found that there was no clear statement that Congress intended to reach ponds falling within the "Migratory Bird Rule." Id. Thus, because an interstate commerce connection cannot be based on the "Migratory Bird Rule," Lake Temp cannot be considered navigable. For these reasons, this Court should find that Lake Temp is not navigable.

## III. Alternatively, COE has jurisdiction to issue a CWA section 404 permit, regardless of the permittee's relationship to COE, because the slurry to be discharged into Lake Temp is a fill material, and this Court is bound by Southeast Alaska Conservation Council v. Coeur Alaska, Inc.

If this Court finds that Lake Temp is a navigable water, this Court should affirm the lower court's finding that COE is the authorized agency to issue a permit to DOD for the depositing of slurry over Lake Temp's dry lakebed. COE and EPA both recognize slurry as a fill material, which is defined as any material that increases the targeted water's bottom elevation. The CWA authorizes COE to grant section 404 permits for the discharge of fill material, and in the instant case, COE properly issued such a permit to DOD, because discharging the slurry into Lake Temp raises the lakebed's elevation by several feet.

### A. COE's issuance of a section 404 permit is proper because the slurry is a fill material, and under Coeur Alaska, COE has blanket authority to permit the discharge of fill material

This Court should find that COE's decision to grant DOD a section 404 permit is proper because the slurry will elevate Lake Temp, thereby falling under both COE and EPA's regulatory definitions of fill material. COE's decision also comports with the Supreme Court's reasoning in Southeast Alaska Conservation Council v. Coeur Alaska, 129 S. Ct. 2458 (2009) (hereinafter Coeur Alaska), and EPA's interpretation of fill material in the Regas Memorandum.

#### 1. COE must issue a section 404 permit because the slurry is a fill material that will raise the elevation of Lake Temp

This Court should affirm the lower court's decision to dismiss New Union's claim that EPA should have issued a section 402 permit for the discharge of the slurry into Lake Temp. COE acted properly by issuing a section 404 permit because DOD will use the slurry as a fill material and COE is empowered to "issue permits … for the discharge of … fill material." 33 U.S.C. § 1344(a). In 2002, in order to ensure regulatory consistency between COE and EPA, the

agencies jointly issued regulations defining "fill" and "discharge of fill material." Final Revisions to the Clean Water Act Regulatory Definitions of "Fill Material" and "Discharge of Fill Material," 67 Fed. Reg. 31,129 (May 9, 2002) (codified at 33 C.F.R. pt. 323 (COE); 40 C.F.R. pt. 232 (EPA)). Both agencies define fill as "material placed in waters of the United States ... [that] has the effect of … changing the bottom elevation of any portion of a water of the United States." 33 C.F.R. pt. 323 (2011); 40 C.F.R. pt. 232 (2011). The regulations also define "discharge of fill material" as including the "placement of overburden, *slurry*, or tailings or similar mining-related materials." 33 C.F.R. pt. 323; 40 C.F.R. pt. 232 (emphasis added).

In this case, DOD proposes to turn munitions into slurry, and to spray the slurry evenly across the dry lakebed of Lake Temp from a movable multi-port pipe. (R. at 4.) New Union does not contest that discharging slurry into Lake Temp will "elevate and change the bottom elevation of Lake Temp." (R. at 8.) Therefore, because the slurry changes the elevation of Lake Temp, the slurry fits the regulatory definition of fill. Thus, COE is authorized to issue a section 404 permit.

Notwithstanding this fact, New Union insists that EPA should have permitted the discharge of the slurry, comprised primarily of munitions, under section 402, and points to CWA section 502(6), which defines a pollutant to include "munitions, chemical wastes, … [and] rock." 33 U.S.C. § 1362(6). However, since COE has sole permitting authority under CWA section 404 to regulate activities involving fill, a discharge of fill material that includes pollutants will nevertheless fall under the jurisdiction of COE, not EPA. See Robert B. Moreno, Filling the Regulatory Gap: A Proposal for Restructuring the Clean Water Act's Two Permit System, 37 Ecology L.Q. 285, 303 (2010) (noting that the discharge of a pollutant is lawful if it raises the bottom of a water body, and that fill material is not regulated by EPA).

### 2. This Court is bound by the Supreme Court's holding in Coeur Alaska

In Coeur Alaska, the Supreme Court limited EPA's section 402 authority over the discharge of slurry that serves as fill material. 129 S. Ct. 2458. The Court held that COE possesses the authority to issue permits for the discharge of fill material, regardless of whether the fill qualifies as a pollutant under the CWA. Id. at 2473. In doing so, the Court made it clear that fill material does not fall under EPA's section 402 jurisdiction.

This case is analogous to Coeur Alaska. In Coeur Alaska, COE issued a section 404 permit for Coeur Alaska's discharge of slurry into a lake. Environmental groups sued, arguing that EPA should have issued a CWA section 402 permit because the slurry, made primarily of crushed rock, was a pollutant.[7] Coeur Alaska, 129 S. Ct. at 2464, 2466. The Court found that COE properly issued the section 404 permit because the slurry fit the regulatory definition of fill by elevating the lake. Id. at 2468.

The CWA is "best understood to provide that if the [COE] has authority to issue a permit for a discharge under Section 404, then the EPA lacks authority to do so under Section 402." Coeur Alaska, 129 S. Ct. at 2467. This finding is buttressed by the language of section 402, which authorizes EPA to issue a permit for the discharge of any pollutant "[e]xcept as provided in [section 404]." 33 U.S.C. § 1342(a). Furthermore, EPA's own regulations provide that "[d]ischarges of . . . fill material . . . which are regulated under section 404 . . . do not require [EPA section 402] permits." 40 C.F.R. § 122.3 (2011). Therefore, if slurry is made of a material that is a pollutant and has the effect of elevating the bottom of a lake, COE has jurisdiction to issue a section 404 permit.

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[7] See supra Part III.A.1. Definition of 'pollutant' under CWA Section 502(6) includes rock. In Coeur Alaska, the slurry also contained aluminum, copper, lead and mercury. See infra Part III.B.2.

The Court in Coeur Alaska reconciled the regulatory conflict between sections 404 and 402 by deferring to EPA's interpretation, as expressed in the Regas Memorandum (Memo).[8] See Coeur Alaska, 129 S. Ct. at 2473. The Court did not apply Chevron deference to the Memo,[9] see Chevron v. Natural Res. Def. Council, Inc., 467 U.S. 837 (1984). However, the Court still deferred to the Memo's interpretation pursuant to Auer v. Robbins, 519 U.S. 452, 461 (1997), because EPA was interpreting its own regulatory scheme. Coeur Alaska, 129 S. Ct. at 2473. The Memo advised that the pollution standards of section 402 should not apply because the slurry "[had] the immediate effect of filling the areas of water in which [it is] discharged," and therefore the issuance of a section 404 permit was proper. In this case, COE's reasoning in granting DOD a section 404 permit is in accordance with the Supreme Court's reasoning in Coeur Alaska, as guided by the Memo. The slurry will have the effect of filling Lake Temp's bottom, and accordingly, COE's issuance of a section 404 permit is proper.

New Union claims that the slurry is a toxic pollutant, and that section 402 applies, despite the fact that the slurry will serve as fill material. (R. at 8.) If a material is toxic and in violation of CWA section 307's toxic-effluent limitations, 33 U.S.C. § 1317 (2006), COE may not issue a section 404 permit. 40 C.F.R. § 230.10(b)(2) (2011). New Union's claim that the slurry is toxic is baseless for two reasons. First, New Union fails to offer any facts to prove such a charge. Second, in Coeur Alaska, the Supreme Court determined that slurry is not a toxic pollutant. 129 S. Ct. at 2474. Thus, in this case, section 307 does not bar COE from issuing a section 404 permit for the slurry. Furthermore, the slurry at issue in Coeur Alaska contained aluminum, copper, lead and mercury. Id. at 2480 (Ginsburg, J., dissenting). These substances are listed on

[8] The Regas Memorandum was drafted in May 2004 by EPA's Director of the Office of Wetlands, Oceans and Watersheds, to advise the regional director of EPA's Office of Water, who was overseeing the mine and lake at issue in Coeur Alaska.
[9] See infra Part IV.D.1.

CWA section 311's list of hazardous substances. 40 C.F.R. § 116.4 (2011). The Supreme Court still found that section 404 applied to the slurry discharge, because the slurry served as fill material. Therefore, in this case, while the contents of the munitions include chemicals found on section 311's list, (R. at 4,) under Coeur Alaska, the COE's issuance of a section 404 permit is proper.

Ultimately, New Union's objection to the section 404 permit contradicts COE and EPA's joint regulatory definitions of fill, the Supreme Court's holding in Coeur Alaska, and EPA's interpretation of fill as expressed in the Memo. The COE's issuance of the 404 permit is proper because the discharge qualifies for the regulation's definition of fill: "[I]f the discharge is fill, the discharger must seek a Section 404 permit from the [COE]; if not, only then must the discharger consider whether any EPA performance standard applies . . . " Id. at 2468. The slurry that DOD plans to deposit over Lake Temp's lakebed fits the regulatory definition of fill, because the slurry will elevate Lake Temp's bottom. (R. at 4, 8.) For these reasons, this Court should affirm the lower court's finding that COE's issuance of a section 404 permit is proper.

### B. COE exercised its expertise and adhered to its statutory duties in issuing a CWA section 404 permit to DOD

COE exercised its expertise[10] and complied with both the CWA and NEPA to correctly determine that filling Lake Temp with slurry is preferable. Under the CWA, COE must issue section 404 permits in accordance with 404(b)(1) guidelines (Guidelines).[11] 33 U.S.C. § 1344(b)(1). Under NEPA, when a federal agency undertakes a "major Federal action

[10] See Coeur Alaska, 129 S. Ct. at 2473 ("The Memorandum's interpretation preserves the Corps' authority to determine whether a discharge is in the public interest . . . The Corps has significant expertise in making this determination.").

[11] EPA's 404(b)(1) guidelines require COE to "[d]etermine the nature and degree of effect that the proposed discharge will have . . . " 40 C.F.R. § 230.11(e) (2011); COE's regulations also include EPA's guidelines. See, e.g. 33 C.F.R. § 320.4(b)(4) (2011).

significantly affecting the quality of the human environment," it must prepare an EIS that details alternatives to the proposed action. 42 U.S.C. § 4332(2)(C) (2006). See also Ohio Valley Envtl. Coal. v. U.S. Army Corps of Eng'rs, 479 F. Supp. 2d 607, 626 (S.D. W. Va. 2007) ("At the heart of an EIS is the requirement to explore and evaluate reasonable alternatives to the proposed action."). DOD's EIS[12] provided COE with the necessary information to evaluate treatment alternatives in accordance with both the CWA and NEPA. 40 C.F.R. § 230.10(a)(4) (2011) ("For actions subject to NEPA, where the [COE] is the permitting agency, the analysis of alternatives required for NEPA . . . will . . . provide the information for the evaluation of alternatives under these [404(b)(1)] Guidelines.").

New Union attempts to distinguish Coeur Alaska by arguing that in Coeur Alaska, the lake's use as a treatment pond served as a preferable alternative by avoiding additional environmental damage from the construction of a new lake. New Union alleges that, despite the lower court's finding to the contrary, Lake Temp's use for the discharge of slurry is not a treatment alternative. (R. at 8.) The lower court recognized that depositing fill material into Lake Temp is "in effect creating zero discharge of pollutants, the goal of the [CWA]." (R. at 8.) In 1990, COE and EPA signed a Memorandum of Agreement stating that section 404's regulatory goal is "no overall net loss." Memorandums of Agreement, 55 Fed. Reg. 9210 (Mar. 12, 1990). In this case, there is no outflow from Lake Temp, thus, depositing the slurry into Lake Temp will prevent the potential discharge of any of the slurry's pollutants to other navigable waters. (R. at 4.)

COE may not issue a section 404 permit "unless appropriate and practicable steps have been taken which will minimize potential adverse impacts of the discharge [of fill material] on

[12] As a federal agency, DOD's proposal is subject to NEPA. 42 U.S.C. § 4321. In 2002, DOD completed an EIS on the project. (R. at 6.)

the aquatic ecosystem." 40 C.F.R. § 230.10(d). Here, as in Coeur Alaska, the environmental damage is temporary and COE will take steps to minimize environmental impacts. 129 S. Ct. at 2456. COE plans to continually grade the edges of the new lakebed so that "alluvial deposits . . . will cover the lakebed, returning it to its pre-operation condition." (R. at 4–5.) Therefore, COE's decision to grant DOD a section 404 permit is proper, because filling Lake Temp is a preferable treatment, COE was sufficiently informed of alternatives by DOD's EIS, and COE's decision complies with CWA's Guidelines.

New Union further argues that COE, a subsidiary of DOD, may not issue a 404 permit to DOD. (R. at 8.) However, COE is the sole agency authorized to issue permits for the discharge of fill material. 33 U.S.C. § 1344(a). Congress has made clear that EPA has only a limited role in the issuance of a section 404 permit and "nothing in Section 404 [of the CWA] gives the EPA the authorization to . . . expand its role." NMA v. Jackson, 768 F. Supp. 2d 34, 50 (D. D.C. 2011). Yet, New Union suggests that EPA would cure the conflict by issuing a section 402 permit. (R. at 8.) However, administrative agencies routinely issue permits to themselves or to their supervising agencies. For instance, EPA issues permits to EPA laboratories that have discharges requiring section 402 permits.[13] Additionally, even if COE's issuance of a section 404 permit is improper, EPA maintains final authority to veto COE's permitting decisions. See 33 U.S.C. § 1344(c). In this case, EPA independently chose not to veto COE's section 404 permit. For these reasons, COE's issuance of a section 404 permit to DOD is proper.

## IV. OMB's mediation of the dispute between COE and EPA in which OMB concluded that COE had jurisdiction to issue a permit to DOD is entirely proper and in accordance with the CWA

[13] See Enforcement and Compliance History Online (ECHO), Environmental Protection Agency, http://www.epa-echo.gov/echo/compliance_report_water_icp.html (under "Facility Characteristics" select "Environmental Protection Agency" as "Federal Agency" and search; select a specific facility by following hyperlink for NPDES permit) (last visited Nov. 28, 2011).

This Court should affirm the lower court's decision in finding that OMB's mediation of the dispute between COE and EPA is proper because Executive Order No. 12,088 (Order 12,088) authorizes OMB to resolve disputes between executive branch agencies, and OMB's mediation of the dispute is consistent with the CWA. Likewise, EPA's decision not to veto COE's permit is proper because EPA's decision is consistent with the CWA. Regardless of OMB's involvement, EPA's decision should not be subject to judicial review because EPA's decision is wholly discretionary under the APA. However, if this Court decides that EPA's decision is subject to judicial review, this Court should uphold EPA's decision under Chevron, and limit its review to whether EPA's decision is arbitrary or capricious. EPA's decision is proper because it is neither arbitrary nor capricious.

### A. OMB's mediation of the dispute between COE and EPA is proper because Order 12,088 authorizes OMB to resolve disputes between executive branch agencies and because OMB's mediation of the dispute is consistent with the CWA

Order 12,088 authorizes OMB to resolve disputes within the executive branch. Exec. Order No. 12,088, 43 Fed. Reg. 47,707 (Oct. 17, 1978). Specifically, Order 12,088 states that, "[t]he Director of [OMB] shall consider unresolved conflicts at the request of the [EPA] Administrator." 43 Fed. Reg. 47,707. In the instant case, COE and EPA disagreed on the type of permit that DOD should receive to discharge slurry into Lake Temp. (R. at 9.) As is customary when disputes arise between two executive branch agencies, OMB carefully evaluated the arguments of both agencies, (R. at 9,) and exercised its authority under Order 12,088 to mediate a dispute between COE and EPA. 43 Fed. Reg. 47,707.

OMB's resolution of the dispute between COE and EPA is also proper because it is "to the extent permitted by law" and consistent with the CWA. While Order 12,088 authorizes

OMB to mediate disputes between executive agencies, Executive Order No. 12,866 (Order 12,866) notes that, "[t]o the extent permitted by law, OMB shall provide guidance to agencies…" 58 Fed. Reg. 51,735 (Sept. 30, 1993). Thus, OMB cannot direct a result contrary to relevant law. 58 Fed. Reg. 51,735. Generally, EPA has the responsibility "to administer" the CWA, 33 U.S.C. § 1251(d), however, CWA section 404 explicitly names COE as the sole permitting authority for the "discharge of dredged or fill material." 33 U.S.C. § 1344. See also NMA v. Jackson, 768 F. Supp. 2d 34, 56 (D.D.C. 2011) (noting that "nothing in Section 404 [of the CWA] gives the EPA the authorization to . . . expand its role."). As the lower court noted, COE has jurisdiction to issue a section 404 permit to DOD because the slurry will elevate Lake Temp's lakebed, and therefore qualifies for the regulatory definition of "fill." See supra Part III. Thus, OMB's resolution of the dispute is consistent with the CWA.

New Union argues that the instant case is analogous to Environmental Defense Fund v. Thomas. 627 F. Supp. 566 (D.D.C. 1986). In that case, the court held that OMB could not delay EPA from promulgating regulations beyond a statutory deadline. Id. at 571. While the court noted that Executive Order No. 12,291 (Order 12,291) authorizes OMB to review all proposed and final rules of executive agencies, the court reasoned that OMB had exceeded its authority by delaying EPA from promulgating its regulations. Id. at 570.

Contrary to New Union's claims, the instant case is distinguishable from Environmental Defense Fund. Unlike Environmental Defense Fund, this case concerns OMB's authority under Order 12,088 to mediate disputes between two executive branch agencies, not OMB's authority under Order 12,291 to review agency regulations.[14] Here, OMB did not create delays or impose

[14] As further evidence that the court in Environmental Defense Fund was specifically talking about OMB's actions in regards to delaying promulgation of EPA's regulations, the court cited the testimony of James C. Miller, then administrator of OMB's Office of Information and

substantive changes; it merely resolved a dispute between two executive agencies. (R. at 9.) Additionally, this Court should not involve itself in this issue because it requires assessing the extent of OMB's authority over executive agencies, a question that at least one court has noted is not one for the judiciary to resolve. See Pub. Citizen Health Research Group v. Tyson, 796 F.2d 1479, 1506 (D.C. Cir. 1986) (declining to review the issue of OMB's authority by deciding the case on other grounds, and noting that OMB's role in the decision presented difficult constitutional questions). For these reasons, OMB's mediation of the dispute between COE and EPA is proper.

### B. EPA's decision not to veto COE's permit in light of OMB's mediation is entirely proper because EPA exercised its expertise in accordance with the CWA

EPA's decision not to veto COE's permit is proper and in accordance with EPA's duties under the CWA, because the CWA does not mandate that EPA veto all permits proposed by COE. 33 U.S.C. § 1344(c). Rather, it provides that the EPA Administrator may veto permits "whenever he determines . . . that the discharge of such materials . . . will have an unacceptable adverse effect." § 1344(c). The CWA notes that in making such a determination, "the [EPA] Administrator shall consult with the Secretary [of the Army]." § 1344(c). In this case, EPA still maintained its authority to veto COE's permit even after OMB's mediation of the dispute between the agencies. However, EPA independently made the decision to take no further action. (R. at 9). In doing so, EPA exercised its own expertise in accordance with its duties under the CWA.

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Regulatory Affairs, in which he noted that OMB had authority to review regulations only "to the extent permitted by law," and only to the extent that its terms would not "conflict with deadlines imposed by statute or by judicial order." Id. at 570.

In New York v. Reilly, the court noted that EPA's decision to reevaluate its conclusions in light of OMB's advice did not equate to a failure by EPA to exercise its own expertise. 969 F.2d 1147, 1148 (D.C. Cir. 1992). In Reilly, OMB declined to approve two proposed rules that EPA submitted to OMB for review pursuant to OMB's authority under Order 12,291. Id. at 1149. After a failed appeal to the President's Council on Competitiveness (Council),[15] EPA subsequently abandoned the provisions. Petitioners brought suit claiming that EPA improperly relied on the Council's opinion rather than exercising its own expertise. Id. at 1152.[16] Specifically, the court noted, "[t]he fact that EPA reevaluated its conclusions in light of the Council's advice . . . [did] not mean that EPA failed to exercise its own expertise in promulgating the final rules." Id. The court reasoned that although the procedural history demonstrated that the Council's views were important in formulating EPA's final policy, EPA exercised its expertise. Id. at 1152.

Similarly, in the instant case, EPA's reevaluation of its conclusions in light of OMB's mediation is proper. Here, EPA independently made the decision not to veto COE's permit. Thus, as in Reilly, although OMB's views were important in EPA's decision, EPA independently exercised its own expertise in accordance with its duties under the CWA. Additionally, this case involves a dispute between two executive agencies, COE and EPA. Unlike Reilly, in the instant case, OMB is authorized under Order 12,088 to resolve disputes between executive agencies. See supra Part IV.A. For these reasons, this Court should affirm the lower court's finding that

[15] The Vice President chairs the Council, and its members include other executive branch officials. Agencies whose regulations have not been approved by OMB may appeal OMB's decision to the Council. Id. at 1150.

[16] The court remanded one of the provisions back to EPA but upheld the other, noting that EPA had adequately supported its decision to abandon the provision.

EPA's decision not to veto COE's permit in light of OMB's mediation is proper and consistent with the CWA.

### C. EPA's decision not to veto COE's permit is not subject to judicial review because EPA's decision is wholly discretionary and "committed to agency discretion"

Regardless of OMB's mediation of the dispute, EPA's decision not to veto COE's permit is not subject to judicial review because EPA's decision is wholly discretionary. While the APA favors judicial review for persons adversely affected or aggrieved by final agency action, Abbott Labs. v. Gardner, 387 U.S. 136, 140 (1967), section 701(a)(2) of the APA specifically excludes agency action from judicial review "to the extent" that the action is "committed to agency discretion by law." 5 U.S.C. § 701(a). The "committed to agency discretion" exception applies if "the statute is drawn so that a court would have no meaningful standard against which to judge the agency's exercise of discretion." Heckler v. Chaney, 470 U.S. 821, 821 (1985). Additionally, an agency decision "not to prosecute or enforce, whether through civil or criminal process, is a decision generally committed to an agency's absolute discretion," and therefore, not reviewable. Id. at 831.

In the instant case, EPA exercised its expertise in its independent decision not to veto COE's permit. See supra Part IV.B. The CWA does not require EPA to exercise its veto authority. 33 U.S.C. § 1344(c). Rather, EPA's decision not to veto COE's permit is wholly discretionary. In this case, EPA's decision not to veto the permit is proper under the CWA because the slurry qualifies as "fill" and the CWA specifically confers authority on COE to issue permits for "fill." See supra Part III. For these reasons, because EPA's decision not to veto the COE permit is "committed to agency discretion," EPA's decision is not subject to judicial review.

### D. This Court should apply Chevron deference to EPA's decision, and uphold it because EPA's decision is neither arbitrary nor capricious

Even if EPA's decision not to veto COE's permit is subject to judicial review, this Court should uphold it under Chevron v. Natural Resources Defense Council, Inc. 467 U.S. 837 (1984). Additionally, this Court should limit its review to whether EPA's decision is arbitrary or capricious. EPA's decision is proper because it is neither arbitrary nor capricious.

#### 1. This Court should apply Chevron deference to EPA's decision because whether the slurry is regulated by CWA sections 404 or 402 is ambiguous, and EPA's re-evaluation of its interpretation is reasonable

Unless Congress has directly spoken to the precise issue in question, courts should defer to agencies on pure questions of statutory interpretation, as long as the agency arrives at a reasonable or permissible construction of the statute. Chevron, 467 U.S. 837. Contrary to New Union's claim that OMB interpreted the CWA, in the instant case, COE and EPA both interpreted whether the slurry qualified as "fill" under the CWA. (R. at 9.) Both agencies presented their differing interpretations to OMB. Id. As noted above, OMB properly mediated the dispute in finding that COE had jurisdiction to issue a permit because the slurry qualified under the regulatory definition of "fill." See supra Part IV.A. Thus, since COE's interpretation is reasonable, this Court should give Chevron deference to EPA's decision not to veto COE's permit. See Rust v. Sullivan, 500 U.S. 173, 186–87 (1991) (interpreting Chevron to hold that a revised interpretation deserves deference, and upholding the agency action on this ground). Additionally, this Court should defer to COE's interpretation because the decision to issue a permit involves the evaluation of uncertain technical information. See Pub. Citizen Health Research Group, 796 F.2d at 1505 (emphasizing that courts should defer to agency decisions based on uncertain technical information). For these reasons, this Court should affirm the lower court's finding that EPA's decision not to veto COE's permit is proper.

**2. This Court must limit its review to whether EPA's decision not to veto COE's permit is arbitrary or capricious, and EPA's decision is neither arbitrary nor capricious**

Section 706(2)(a) of the APA states that courts shall hold unlawful and set aside agency action that is "arbitrary, capricious, [or] an abuse of discretion." 5 U.S.C. § 706. This standard of review requires this Court to make "a substantial inquiry" and consider "the relevant factors" to determine "whether there has been a clear error of judgment." Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402, 403 (1971). Additionally, this standard is "narrow" and this Court must refrain from substituting its "judgment for that of the agency." Id. In the instant case, EPA's decision not to veto COE's permit is neither arbitrary nor capricious because EPA's decision is consistent with Coeur Alaska. See supra Part III.A.2 (noting that COE's issuance of a section 404 permit is proper because the slurry will elevate Lake Temp's bottom and therefore is fill material). Additionally, EPA's decision not to veto COE's permit is neither arbitrary nor capricious because the Constitution vests all of the executive power of the United States in the President, not the Administrator of EPA or the Secretary of COE.

EPA's decision not to veto COE's permit is neither arbitrary nor capricious because Article II of the Constitution vests all of the executive power of the United States in the President. U.S. Const. art. II, §1. Article II also requires that the President "take Care that the Laws be faithfully executed." U.S. Const. art. II, § 3. While the President cannot direct a result that is contrary to law, Kendall v. United States, 37 U.S. 524, 540 (1838), the President is constitutionally authorized to supervise executive policymaking. See Free Enter. Fund v. Pub. Co. Accounting Oversight Bd., 130 S. Ct. 3138, 3152 (2010). In Sierra Club v. Costle, the court recognized the desirability of such presidential oversight. 657 F.2d 298 (D.C. Cir. 1981). In particular, the court noted that the EPA Administrator "needs to know the arguments" of White

House staff, even though she may not ultimately adopt them. Id. at 406. Thus, not only did the court recognize the constitutional authority of the President to supervise executive policymaking, but it also noted the desirability of such presidential oversight. Id. at 405–08.

In the instant case, OMB lawfully mediated policy making between two executive branch agencies, COE and EPA. As the lower court noted, the President has the authority to resolve legal and policy disputes between executive branch agencies because differences of interpretation often occur between such agencies. (R. at 10.) Additionally, the President must reconcile such disputes before the government takes a litigation position. (R. at 10.) Thus, if OMB had not resolved the dispute between COE and EPA, the Attorney General would have decided the matter prior to filing responses in this case. (R. at 10.) Hence, EPA's decision to reevaluate its conclusions in light of OMB's resolution is also proper to ensure uniformity and consistency in interpretation in the executive branch before the government takes a litigation position. For these reasons, this Court should affirm the lower court's finding that EPA's decision not to veto COE's permit is proper because it is neither arbitrary nor capricious.

## CONCLUSION

For the foregoing reasons, Progress respectfully requests this Court to reverse the lower court's findings that New Union does not have standing, and that COE has jurisdiction to issue a CWA section 404 permit because Lake Temp is not navigable. Alternatively, Progress respectfully requests this Court to affirm the lower court's findings that COE, not EPA, has authority to issue a permit for the discharge of slurry into Lake Temp, and that OMB's mediation of the dispute between COE and EPA, as well as EPA's decision not to veto COE's permit in light of OMB's mediation is also proper and in accordance with the CWA.