Team # 61

IN THE UNITED STATES COURT OF APPEALS
FOR THE TWELFTH CIRCUIT

CASE NO. 11-1245

STATE OF NEW UNION,

Appellant and Cross-Appellee,

-vs-

UNITED STATES,

*Appellee and Cross-Appellan*t,

-vs-

STATE OF PROGRESS,

Appellee and Cross-Appellant

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

Initial Brief for STATE OF NEW UNION,
Appellant and Cross-Appellee

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STATEMENT OF JURISDICTION

Appellant, the State of New Union, sought review in the United States District Court for the District of New Union of a permit issued by the Army Corp of Engineers under section 404 of the Clean Water Act, 33 U.S.C. § 1344 (2006), pursuant to 28 U.S.C. § 1331 (2006). Section 1331 grants district courts original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States. New Union also claimed that the district court's jurisdiction was appropriate under the Administrative Procedure Act ("APA"), 5 U.S.C. § 702 (2006), which allows actions to be brought in United States courts by parties adversely affected by agency actions.

New Union seeks review of a final order by the United States District Court for the District of New Union on June 2, 2011, granting the United States' motions for summary judgment. This Court has jurisdiction to hear appeals from any final decision of the United States District Court for the District of New Union. 28 U.S.C. § 1291 (2006).

STATEMENT OF THE ISSUES

I. Whether the State of New Union has standing to challenge the permit issued by the COE under section 404 of the Clean Water Act in its Sovereign capacity and *parens patriae* capacity, where the action will cause injury to its sovereign territory and deprives it and its citizens of a statutory procedure set forth for its protection.

II. Whether Lake Temp falls under the Clean Water Act's broad definition of navigability, where the Lake covers several square miles and frequently accommodates interstate recreational visitors.

III. Whether the discharge of a slurry consisting of a wide variety of spent munitions and chemicals can reasonably be considered fill material for section 404 permitting purposes, even though a section 402 pollutant discharge permit explicitly covers the discharge of munitions.

IV. Whether the Office of Management and Budget's directive or the Environmental Protection Agency's response violated section 404(c) of the Clean Water Act, where it is clear that Congress conferred authority to decide a section 404(c) veto in only the Administrator of the Environmental Protection Agency.

STATEMENT OF THE CASE

The case at hand is a dispute between the State of New Union ("New Union"), the State of Progress ("Progress"), and the United States regarding the proper application of a federal statute, the Clean Water Act ("CWA"). New Union alleges that the slurry to be deposited by the Department of Defense ("DOD") into Lake Temp fits the profile of pollutant discharge requiring a permit issued by the Environmental Protection Agency ("EPA") pursuant to section 402 of the CWA, and that the Office of Management and Budget ("OMB") did not have the authority to intervene. Progress and the EPA assert that the slurry discharge is of the nature requiring a permit issued by the United States Army Corps of Engineers ("COE") under section 404 of the CWA, and that the OMB's involvement in settling the dispute was proper.

i. Course of Proceedings and Dispositions in the Court Below

New Union sought review in the United States District Court for the District of New Union of a permit issued by the COE under section 404 of the CWA, 33 U.S.C. § 1344. The district court issued an order on June 2, 2011 granting summary judgment in favor of the United States, holding that New Union lacked standing to challenge the permit issued by the COE to the DOD, that the COE had jurisdiction to issue the permit under CWA section 404, and that the OMB did not violate the CWA when it resolved a dispute between the COE and the EPA over whether the permit was to be issued by the EPA under section 402 or by the COE under section 404. Following that order, New Union and Progress each filed a timely Notice of Appeal, warranting the issues before this Court.

ii. Statement of the Facts

Lake Temp is an intermittent body of water located on a military reservation in the state of Progress that retains its surface water approximately four out of five years. R. at 3-4. At its

greatest capacity, Lake Temp is up to three miles wide and nine miles long. R. at 3-4. Almost one thousand feet below Lake Temp lies the Imhoff Aquifer, which generally follows the contours of the lake, but is more extensive. R. at 4. Five percent of the aquifer is located within the borders of New Union. R. at 4. The land between the lakebed and the aquifer is primarily unconsolidated alluvial fill, allowing contaminated water from the lake to enter the aquifer. R. at 5. Specific information such as the timing and severity of such contamination, is presently unknown. R. at 6. This evidence, however, can only be established by drilling and sampling from a grid of monitoring wells throughout the aquifer, a difficult and time-consuming task. R. at 6.

Dale Bompers owns, operates, and resides on a ranch above the Imhoff Aquifer in New Union. R. at 6. Due to naturally occurring sulfur within the aquifer water, it must be treated before use. R. at 4. Although Mr. Bompers has no definite plans to use the water in the future, he claims the value of his ranch will be diminished if the Imhoff Aquifer is contaminated. R. at 6. He did not, however, offer conclusive proof of this fact. R. at 6.

As many as thousands of duck hunters and bird watchers have come to Lake Temp for at least the last one hundred years, with one quarter of the visitors coming from out of state. R. at 4. In 1952, the DOD posted signs warning of danger and that entry to Lake Temp is illegal; however, there is no fence and there are clearly visible trails leading from the road to the lake showing indications of rowboats and canoes being dragged between the highway and the lake. R. at 4. The DOD has taken no other measures to restrict outsider access to the lake, even though it has knowledge that people continue to use the lake for hunting and bird watching. R. at 4.

The DOD is seeking to construct a facility on the shores of Lake Temp to receive and prepare a wide variety of munitions for discharge into the lake. R. at 4. First, preparation will

begin by emptying munitions of liquid, semi-solid and granular contents and mixing them with chemicals to assure they are not explosive. R. at 4. Then, the remaining solids, primarily metals, will be ground and pulverized. R. at 4. Finally, water will be introduced to both sets of waste to form a slurry, which will be sprayed from a movable multi-port pipe. R. at 4. The resulting slurry will be spread evenly only throughout portions of the lake that are dry. R. at 4. Eventually, the entire lakebed will be raised by several feet, causing the lake's top water elevation to be raised by approximately six feet. R. at 4.

Pursuant to section 404(c) of the CWA, the EPA was preparing to exercise its authority to veto the COE's section 404 permit. R. at 9. At some point during the EPA's decision-making process, it argued to the OMB that the nature of the discharge was significantly different from that which requires a section 404 permit. R. at 9. Thus, the EPA had already determined that the treatment and discharge of the slurry required a section 402 permit. R. at 9. Despite the EPA's position, the OMB directed the EPA not to veto the section 404 permit. R. at 9. The COE also admits the OMB's involvement in resolving the permit dispute. R. at 10.

iii. Standard of Review

Appellate Courts review an order of summary judgment *de novo*, applying the same legal standards as the district court. *Alvarez v. Royal Atl. Developers, Inc.*, 610 F.3d 1253, 1263 (11th Cir. 2010). Summary judgment is only appropriate when "there is no genuine issue as to a material fact … and the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). A genuine factual dispute exists "if the jury could return a verdict for the non-moving party." *Wilson v. B/E Aerospace, Inc.*, 376 F.3d 1079, 1085 (11th Cir. 2004).

SUMMARY OF THE ARGUMENT

New Union has standing in its Sovereign capacity because it meets the relaxed standard set out in *Massachusetts v. EPA*. Although a private litigant must meet a strict threshold to establish injury by alleging exactly how its use of the land is frustrated by the complained-of activity, a State establishes injury-in-fact by merely showing that its land is harmed in some way. This relaxed standard is proper because a State has a unique interest in the general preservation of the quality of its territory, eliminating the need for an exact elaboration of how the land was, but is no longer, beneficial to a private plaintiff.

New Union can show through objective, scientific circumstantial evidence that the disputed activity—the COE's permit improperly issued to the DOD allowing it to discharge munitions slurry—will cause harm to its territory by polluting the Imhoff Aquifer. A favorable declaratory judgment that the permit must be issued under the appropriate section of the CWA by the proper authority will redress this injury because it will subject the DOD's slurry discharge to the EPA's restrictions on the amount of pollutants it can release and the rate at which it can release them. Because New Union can show an injury-in-fact that is traceable to the disputed activity and that will be redressed by the requested relief, it can satisfy the standing requirements and show that it has a personal stake in the outcome of the dispute.

Furthermore, and in the alternative, New Union can establish standing in its *parens patriae* capacity by bringing a claim on behalf of its citizens. To maintain a *parens patriae* claim, a State must show that its citizens have standing and that it, as a State, has a distinct "quasi-sovereign" interest in the dispute. The citizens of New Union have standing because they have suffered a procedural violation, which will cause the property value of Mr. Bompers' ranch to diminish. New Union has a distinct quasi-sovereign interest in ensuring that it continues to have

federal protections applied fairly and accurately to it. Therefore, New Union has standing in its *parens patriae* capacity.

The COE's issuance of a permit under section 404 of the CWA was improper because Lake Temp is "navigable water" requiring a permit under section 402. The purpose of the CWA is to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters." To help accomplish this goal, the Supreme Court has recognized that the meaning of "navigable waters" in the CWA is broader than the traditional understanding of navigability. Recognizing a more expansive meaning of navigability, the Supreme Court in *Rapanos v. United States* included "relatively permanent" bodies of water as navigable under the CWA. Measuring several square miles and containing water approximately 292 days a year, Lake Temp sufficiently qualifies as a relatively permanent body of water. Additionally, Lake Temp's past and prospective recreational use by interstate travelers mirrors that of traditionally navigable waters.

The proposed discharge into Lake Temp squarely falls within the EPA's authority under section 402, and the COE has no authority to issue a permit. In issuing a section 404 fill material permit for the discharge of slurry containing munitions and hazardous chemicals, the COE ignored the clear language of pollutants falling under the jurisdiction of the EPA. Further, a section 404 permit should not be issued when the discharge only has an incidental filling effect. Because the slurry to be discharged into Lake Temp will only be deposited into dry areas of the lakebed, any change of the elevation of the lake due to the addition of the slurry will merely be incidental. Finally, the discharge of trash or garbage is not allowed for section 404 permitting purposes. Because the DOD's primary purpose for building the lake facility is to dispose of old

munitions, the proposed discharge effectively consists of trash. The COE cannot reasonably justify issuing a section 404 permit for the discharge of trash simply because it is created into a slurry. The COE's decision to issue a section 404 permit was an unreasonable construction of the CWA's statutes and regulations, and should not be entitled to deference.

Finally, the OMB's involvement and the EPA's reaction was improper. Despite the absence of information regarding whether the EPA requested the OMB to resolve a conflict, the OMB's directive to the EPA, requested or not requested, would violate the CWA because Congress' intent is clear—the decision to veto a section 404 permit rests with the Administrator alone. In addition, the EPA violated the CWA when it acquiesced to OMB's impermissible action. The EPA decision to remain idle while the OMB decided whether it should veto the COE's section 404 permit is arbitrary and capricious because the EPA knowingly retains sole veto power. Ultimately, the OMB exceeded its authority when it made the jurisdictional permit decision, the EPA's acquiescence to OMB's impermissible decision is arbitrary and capricious, and summary judgment is unwarranted due to unresolved factual determinations.

ARGUMENT

I. NEW UNION HAS STANDING IN BOTH ITS SOVEREIGN CAPACITY AND ITS *PARENS PATRIAE* CAPACITY.

Because the judiciary is constitutionally limited to deciding "cases" and "controversies," the court may refuse a complaint that is a mere hypothetical. U.S. Const. art. III § 2. To remove his claim from this hypothetical category and establish standing, a plaintiff must "allege personal injury fairly traceable to the defendant's allegedly unlawful conduct" that is "actual" or "imminent" and "likely to be redressed by the requested relief." *Allen v. Wright*, 468 U.S. 737 (1934). Therefore, the standing inquiry involves three variables: injury, causation, and redressability. *Id.*

Cases involving disputes over environmental issues have historically had notoriously high standards, making it difficult for a private citizen to establish standing. *See Lujan v. Defenders of Wildlife*, 504 U.S. 563 (1992). In *Lujan*, an environmental organization alleged that the Bureau of Land Management's "land withdrawal program" was opening up too much public land to mining, thereby destroying its natural aesthetic beauty. *Id.* The court held that this submission was too general, because the areas named in the affidavits extended over millions of acres, and the affiants had not specifically asserted that they made use of those portions. *Id.*

New Union, however, can establish standing because it is a sovereign State, which triggers a more relaxed standard for alleging injury than the specificity required of private litigants by *Lujan*. *See Massachusetts v. E.P.A.*, 549 U.S. 497, 518-20 (2007) (applying a relaxed standing standard because sovereign States are not "normal litigants"). Furthermore, and in the alternative, New Union can establish standing in its *parens patriae* capacity by bringing a claim

on behalf of its affected citizens. The district court erred in finding that New Union could not establish standing, and summary judgment on that issue should be reversed.

A. New Union Has Standing In Its Sovereign Capacity Because It Fulfills the Relaxed Standard for Sovereign Litigants.

The United States Supreme Court explained in 1907 that "the State has an interest independent of and behind the titles 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." *Georgia v. Tenn. Copper Co.*, 206 U.S. 230, 237 (1907). It again cited this language in deciding to allow Massachusetts standing to request the Court order the EPA to enforce the Clean Air Act. *Massachusetts*, 549 U.S. at 519-20. This analysis suggests that, due to the sovereign State's inherent interest in preserving its physical terrain, a more relaxed standing standard for States is applied instead of the strict specificity required of private litigants by *Lujan*.

i. New Union Satisfies the Injury-in-Fact Requirement.

A State suffers injury-in-fact when its physical terrain is adversely affected because it has an inherent interest in the general conservation of its sovereign territory. *See Tenn. Copper Co.*, 206 U.S. at 237; *Massachusetts*, 549 U.S. at 519-20. In *Massachusetts v. E.P.A.*, the court held that Massachusetts had a "well-founded desire to preserve its sovereign territory," and in alleging physical harm to its coastal property due to the EPA's failure to enforce the Clean Air Act, Massachusetts alleged sufficient injury in its capacity as a landowner. *Massachusetts*, 549 U.S. at 522.

Similarly, New Union alleges harm to its underground property, the Imhoff Aquifer. R. at 5. Like the destruction of the coastal property in *Massachusetts*, the contamination of New

Union's aquifer will disturb its sovereign territory, the general conservation of which it has an inherent interest. It is unnecessary to assert exactly how the State uses the specified land, because its injury lies in its innate interest in simply preserving the quality of its physical terrain as a Sovereign. *See Alden v. Maine*, 527 U.S. 706, 715 (1999) (States "are not relegated to the role of mere provinces or political corporations, but retain the dignity, though not the full authority, of sovereignty.").

The fact that the severity of the pollution is presently unknown, R. at 6, is of no consequence for purposes of establishing sovereign standing because it is the *presence* of injury, not the *severity* of it, that is the dispositive issue when determining whether to decide a case on its merits. Severity of injury is certainly relevant to the merits of a case, but it is unnecessary to settle the extent of alleged injuries for the mere purpose of determining whether New Union's claims are concrete or hypothetical. The fact that New Union has alleged a concrete harm satisfies the injury-in-fact requirement, and it would be improper for the Court to go further.

Finally, this particularized allegation of harm is not the type of general grievance that *Lujan* rejects, because it does not "stretch the imagination" by alleging harm to unspecified portions of immense tracts of land due to a broad program. *Lujan*, 504 U.S. at 887-89. To the contrary, New Union's injury is particular to a specific action affecting a specific piece of property. Therefore, New Union has alleged an injury in its capacity as a sovereign landowner that is both concrete and particularized.

ii. New Union Satisfies the Causation Requirement.

To establish causation, a plaintiff must show that his alleged injury is "actual" or "imminent," and is "fairly traceable" to the defendant's activity. *Wright*, 468 U.S. at 760. Even a "small probability of injury" is sufficient to create a case or controversy and remove a claim

from the hypothetical category. *Vill. of Elk Grove Vill. v. Evans*, 997 F.2d 328, 329 (7th Cir. 1993) (holding that a municipality alleged sufficient injury to establish standing in its claim opposing the COE's issuance of a permit, even though the injury was not definite to occur).

The Supreme Court has accepted circumstantial evidence as sufficient to satisfy this causation requirement. In *Massachusetts*, the State showed that, if permitted, the disputed activity would likely cause harm to its land using empirical studies asserting that "sea levels rose between 10 and 20 centimeters over the 20th century." *Massachusetts*, 549 U.S. at 449. The court allowed evidence from an "objective and independent assessment of the relevant science" to show causation. *Id.* at 521 (referring to the NRC Report 16).

Like Massachusetts, New Union can show through circumstantial evidence from objective, scientific facts that contaminated water from the DOD's slurry will enter the Imhoff Aquifer, because the land between the lakebed and the aquifer is primarily unconsolidated alluvial fill. R. at 5. New Union need not drill a grid of monitoring wells throughout the aquifer to collect samples and gather conclusive results regarding the movement of pollutants in the Imhoff Aquifer, R. at 6, because the circumstantial evidence it has offered makes the injury sufficiently probable. The objective scientific facts show that the DOD's spraying of slurry is "fairly traceable" to the contamination of the aquifer.

It is improper to reject New Union's standing on the basis of the unknown timing of the injury. R. at 6. All that is required by precedent is a showing that injury is "imminent." *Wright*, 468 U.S. at 760. New Union has offered circumstantial evidence that shows that once the slurry is discharged, there is a high probability that it will seep into the aquifer—The fact that New Union is unable to point to a specific date on which the pollution will arrive in the aquifer does

not negate the fact that it will happen in the near future. An exact date is unnecessary to show that injury is probable and imminent.

iii. New Union Satisfies the Redressability Requirement.

A plaintiff satisfies the redressability requirement of the standing test when he shows that his injury is "likely to be redressed by the requested relief." *Wright*, 468 U.S. at 751. This is accomplished by showing that a favorable decision will relieve the complained-of injury; however, it is unnecessary to prove that it will relieve the plaintiff's *every* injury. *Larson v. Valente*, 456 U.S. 228, 244, n.15 (1982).

If the Court awards the requested relief of deciding that the slurry permit is to be issued under section 402, the EPA's requirements will govern the DOD's slurry discharge. The EPA's requirements would ensure that the slurry does not exceed certain limitations pertaining to the type and amount of hazardous pollutants emitted, and would compel the DOD to follow restrictions on the quantities, concentrations, and rates at which chemical constituents can be discharged. *See* 33 U.S.C. §§ 1311, 1313-14, 1316 (2006). These limitations on the discharge would cause the pollution to the Imhoff Aquifer to be minimal, curing the substantive harm to New Union. Minimizing the harm, while not eradicating all damage, is sufficient to satisfy the redressability requirement. *See Massachusetts*, 549 U.S. at 500 ("While regulating motor-vehicle emissions may not by itself reverse global warming, it does not follow that the Court lacks jurisdiction to decide whether EPA has a duty to take steps to slow or reduce it.").

That the Imhoff Aquifer's water already has a high level of sulfur, R. at 4, is immaterial for purposes of alleging injury because New Union only complains of the contamination by pollutants in the slurry. *See Larson*, 452 U.S. at 244 (a favorable decision need not relieve the plaintiff's *every* injury). That a prior defect exists does not take away from the fact that the

disputed activity will cause further harm to New Union's property. Furthermore, New Union is currently able to treat the water for its sulfur content, R. at 4, but it will suffer additional harm by other foreign pollutants introduced by the slurry if the discharge is permitted. Because a favorable decision will relieve the complained-of injury by minimizing the pollution to the Imhoff Aquifer, New Union successfully fulfills the redressability requirement.

B. New Union Has Standing in Its *Parens Patriae* Capacity Because Its Citizens Suffer From a Procedural Violation and New Union Has a Distinct "Quasi-Sovereign" Interest.

Parens patriae, literally meaning "parent of the country," is the authority of a State to bring an action on behalf of its citizens. To maintain a *parens patriae* action, a State must show that its citizens have suffered injury, and that it, as a State, has a separate "quasi-sovereign" interest. *Alfred L. Snapp & Son, Inc. v. Puerto Rico, ex rel., Barez*, 458 U.S. 592, 601 (1982) (Snapp). The "quasi-sovereign" interest is a concern unique to the Sovereign relating specifically to its role as a Sovereign in protecting the general well-being of its citizens. *See id.*

i. The Citizens of New Union Have Standing.

The citizens of New Union have standing in this matter because they have been deprived of a statutory procedural protection. A litigant to whom Congress has accorded a procedural right to protect his concrete interests "can assert that right without meeting all the normal standards for redressability and immediacy." *Massachusetts*, 549 U.S. at 517-18; *see also Sugar Cane Growers Co-op. of Fla. v. Veneman*, 289 F.3d 89 (D.C. Cir. 2002).

Here, Congress included a citizen suit provision in the CWA to ensure statutory compliance. *See* 33 U.S.C. § 1365(a) (2006) (granting private citizens the right to bring civil actions against any person "alleged to be in violation" of any effluent standards or limitations).

Therefore, the procedural standing test is applied to determine if the New Union citizens can establish standing.

Veneman best illustrates the procedural standing test, where distributors of sugar cane sued the Secretary of the United States Department of Agriculture because it failed to comply with the Administrative Procedure Act and Food Security Act of 1985 in implementing a payment-in-kind ("PIK") program for the 2001 sugar crop, flooding the market with sugar cane. The court held that the sugar cane distributors had standing—even though the substantive harm of price decrease did not end up occurring—because "a plaintiff who alleges a deprivation of a procedural protection never has to prove that if he had received the procedure, the substantive result would have been altered. All that is necessary is to show that the procedural step was connected to the substantive result." *Veneman*, 289 F.3d at 94-95. Thus, a citizen does not need to prove substantive damages if the injury he asserts is a procedural violation, but he does need to show that the violation is more than a mere "general interest common to all members of the public" by showing that the "governmental act performed without the procedure in question will cause a distinct risk to a particularized interest" of the citizen. *Fla. Audubon Soc'y. v. Bentsen*, 94 F.3d 658, 664 (D.C. Cir. 1996).

The citizens of New Union suffered a procedural violation because the DOD's permit was issued under an improper section of the CWA, therefore omitting the procedural pollutant restrictions from the permit. The procedural step is connected to the substantive result and more than a mere "general interest" because, in failing to issue the DOD's permit properly under section 402, the pollutants contained in the slurry will be discharged without any of the EPA restrictions. *See* 33 U.S.C. §§ 1311, 1313-14, 1316. This contamination will cause the property

value of Mr. Bompers' ranch to diminish. R. at 6. Even if this result does not ultimately materialize, as was the case in *Veneman*, the claim of injury based on basic economic logic is sufficient to show the required "distinct risk." *Bentsen*, 94 F.3d at 664; *see also Veneman*, 289 F.3d at 94 (granting sugar cane growers standing because claim of injury was based on "basic economic logic" as set forth in affidavits).

A favorable decision—applying the statute to require the permit to be issued under section 402—would subject the slurry to the EPA restrictions, minimizing the pollution to the Imhoff Aquifer, and preventing the decrease in property value of Mr. Bompers' ranch. Since the procedural injury suffered by the New Union citizens is connected to a substantive harm and will be redressed by the requested relief, the citizens of New Union have standing.

ii. New Union Has a Distinct "Quasi-Sovereign" Interest in the Dispute.

The court in *Snapp* explained that the State has a quasi-sovereign interest in ensuring that it and its citizens are not excluded from the benefits of its participation in the federal system. *Snapp*, 458 U.S. at 607-08. Several courts have recognized the State's quasi-sovereign interest in ensuring compliance with federal statutes creating benefits or alleviating hardships for its residents. *Id.* at 608; *see also Georgia v. Pa. R.R. Co.*, 324 U.S. 439 (1945) (federal antitrust laws); *Maryland v. Louisiana*, 451 U.S. 725 (1981) (Natural Gas Act).

New Union's "quasi-sovereign" interest in ensuring that it continues to benefit from its participation in the federal system is implicated here because it requests that a federal statute be correctly construed to afford it the protections to which it is entitled. This sovereign interest is important because, "when a State enters the Union, it surrenders certain sovereign prerogatives." *Massachusetts*, 549 U.S. at 519. New Union cannot invade Progress to prevent the DOD's slurry discharge by force; it can only rely on the federalist system to guarantee compliance with rules

and regulations that have been set forth for its protection. Apart from its citizens' alleged injury due to the incorrect application of the CWA, New Union has an interest in ensuring that federal statutes are applied fairly to it in general, so that its interests are addressed by the federal system upon which it relies.

Because New Union will suffer a concrete, particularized injury to its sovereign territory due to the disputed activity, New Union has established standing in its Sovereign capacity. Furthermore, New Union has established standing in its *parens patriae* capacity because its citizens will suffer a procedural deprivation, and New Union as a State has a distinct "quasi-sovereign" interest in the dispute.

II. LAKE TEMP IS NAVIGABLE WATER BECAUSE OF ITS RELATIVE PERMANENCE AND ITS CURRENT AND POTENTIAL EFFECT ON INTERSTATE COMMERCE.

As one of the principal provisions of the CWA, section 1311(a) prohibits the addition of pollutants to navigable waters from any point source. 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). To help accomplish this goal, the Supreme Court has recognized that the meaning of "navigable waters" in the CWA is broader than the traditional understanding of navigability. *Rapanos v. United States*, 547 U.S. 715 (2006). In fact, "waters of the United States" under the CWA includes:

> All waters which are currently used, were used in the past, or may be susceptible to use in interstate or foreign commerce, including all waters which are subject to the ebb and flow of the tide; . . . . All other waters such as intrastate lakes, rivers, streams (including intermittent streams) . . . . the use, degradation, or destruction of which would affect or could affect interstate or foreign commerce including any such waters: Which are or could be used by interstate or foreign travelers for recreational or other purposes.

40 C.F.R. § 122.2(a)-(c)(1).

The district court correctly found that Lake Temp is a navigable water body under the CWA because it is a relatively permanent lake that has been and may be subjected to future use in interstate commerce for recreational purposes.

A. Lake Temp is Relatively Permanent, Navigable Water Under Rapanos' Plurality Test.

Lake Temp is navigable under the CWA because it is a relatively permanent, intrastate lake of significant proportions and usage. In *Rapanos v. United States*, a plurality of the Supreme Court decided that "waters of the United States" extended beyond traditionally navigable waters to include "relatively permanent, standing or flowing bodies of water." *Rapanos*, 547 U.S. at 739. Additionally, the plurality required that wetlands maintain a continuous and adjacent surface connection to bodies that are "waters of the United States" in their own right in order to be covered by the CWA. *Id*. at 757. Clarifying what it meant by waters that are relatively permanent, the Court stated:

> We do not necessarily exclude streams, rivers, or lakes that might dry up in extraordinary circumstances, such as drought. We also do not necessarily exclude *seasonal* rivers, which contain continuous flow during some months of the year but no flow during dry months-such as the 290-day, continuously flowing stream postulated by Justice Stevens' dissent. Common sense and common usage distinguish between a wash and seasonal river.

Id. at 732, n.5. Finally, the plurality explains "intermittent" and "ephemeral" streams as those that are "coming and going at intervals . . . broken, fitful . . . or existing only, or no longer than, a day; diurnal . . . short lived." *Id*.

Here, Lake Temp is navigable water because it more closely resembles the plurality's definition of relatively permanent, standing bodies of water than its definition of intermittent waters. At its greatest capacity, Lake Temp measures three miles wide and nine miles long. R. at 4. On average, Lake Temp holds water for 292 days a year, or four out of five years. R. at 4.

Therefore, Lake Temp is distinguishable from intermittent flows of water as defined in note 5 of *Rapanos* because the average amount of time that Lake Temp is filled with water is more constant than to be considered "diurnal, short-lived, or existing only, or no longer than a day." Furthermore, the Supreme Court recognized that seasonal rivers, such as a 290-day continuously flowing stream, may be included as a "water of the United States," and that common sense and common usage distinguish between a wash and a seasonal river. *Rapanos,* 547 U.S. at 733, n.5. Because Lake Temp covers several square miles and is filled with water approximately 292 days a year, common sense and usage mandate Lake Temp's treatment as navigable water for purposes of the CWA.

In *Solid Waste Agency of Northern Cook County v. United States Army Corps of Engineers*, 531 U.S. 159 (2001) (*SWANCC*), the Supreme Court held that the COE had exceeded its authority by finding an abandoned gravel pit to be "navigable waters" under the CWA because of its use as a habitat for migratory birds. *SWANCC*, 531 U.S. at 174. The COE's justification for navigability in *SWANCC* was based on the Migratory Bird Rule. Having invalidated the Migratory Bird Rule, the Court found no other grounds for navigability.

Here, Lake Temp is a relatively permanent body of water, unlike the ponds and mudflats in *SWANCC*. Unlike *SWANCC*, where an abandoned gravel pit evolved into ponds ranging in size (from under one-tenth of an acre to several acres) and depth (from several inches to several feet), Lake Temp is a solitary lake comprising several square miles.

While the Court in *SWANCC* found the Migratory Bird Rule to be insufficient grounds for navigability, Lake Temp relies on the definition of "waters of the United States," 40 C.F.R. § 122.2(c)(1), to establish its navigability. Under § 122.2(c)(1)-(3), "waters of the United States"

include "intrastate lakes . . . in which the use, degradation, or destruction of which would affect or could affect interstate or foreign commerce including any such waters . . . which are or could be used by interstate or foreign travelers for recreational or other purposes." Based on common sense and usage, Lake Temp is navigable because of its recreational use by interstate travelers. Lake Temp has been used over the past one hundred years by as many as thousands of people for purposes of hunting and bird watching. R. at 4. An estimated one quarter of these visitors come from out of state. R. at 4. Additionally, there are visible trails leading into the lake that show signs of rowboat and canoe usage. R. at 4. Lake Temp's recreational usage fits squarely into the definition of "waters of the United States" in § 122.2(c)(1).

Finally, although conclusive determinations of navigability can be made only by federal courts, those made by federal agencies are nevertheless accorded substantial weight by the courts. 33 C.F.R. § 329.14. In issuing a permit for the discharge of material into Lake Temp, the COE made an affirmative finding that Lake Temp is in fact navigable. This determination, taken with all other factors that suggest navigability, indicate that Lake Temp is navigable water for purposes of the CWA.

B. Justice Kennedy's "Significant Nexus" Standard Does Not Apply to Lake Temp.

Justice Kennedy's alternative test for navigability cannot apply to Lake Temp because the lake is isolated from other waters. Justice Kennedy's concurrence in *Rapanos* sets out a standard for determining navigability, also known as the "significant nexus standard," which is distinct from the test in the plurality opinion. Under the significant nexus test, the connection between nonnavigable water or wetlands and navigable water may be so close that the water or wetland may be deemed "navigable water" under the CWA. *Rapanos*, 547 U.S. 715, 767 (2006)

(Kennedy, J., concurring). Wetlands possess the requisite "significant nexus" if they significantly affect the chemical, physical, and biological integrity of navigable waters. *Id*. at 780.

The significant nexus test focuses on the relation of tributaries or wetlands to adjacent navigable water. The EPA and the COE apply this standard to decide CWA jurisdiction for nonnavigable tributaries and other wetlands adjacent to nonnavigable tributaries to determine whether they have a significant nexus to traditional navigable waters. Clean Water Act Jurisdiction Following the U.S. Supreme Court's Decision in *Rapanos v. United States* & *Carabell v. United States*, 1, 12 (Dec. 2, 2008), http://www.epa.gov/owow/wetlands/pdf/CWA_Jurisdiction_Following_Rapanos120208.pdf.

Here, the Imhoff Aquifer is the only water feature adjacent to Lake Temp; however, courts have consistently refused to recognize groundwater for purposes of the CWA. *See Town of Norfolk v. U.S. Army Corps of Eng'rs.*, 968 F.2d 1438 (1st Cir. 1998); *Umatilla Waterquality Protective Ass'n., Inc. v. Smith Frozen Foods, Inc.*, 962 F. Supp. 1312 (D. Or. 1997) (holding that groundwaters are not "navigable waters" protected by the Clean Water Act, even if they are hydrologically connected to surface waters). Because Lake Temp does not affect the chemical, physical, or biological integrity of other nearby navigable waters, its application to Justice Kennedy's significant nexus test is inappropriate. Navigability, however, is established by meeting the requirements of either Rapanos' plurality standard or Justice Kennedy's standard. *Rapanos*, 547 U.S. at 810 (2006) (Stevens, J., dissenting).

III. THE COE'S DECISION TO ISSUE A SECTION 404 PERMIT FOR FILL MATERIAL CONTAINING MUNITIONS AND MANY HAZARDOUS CHEMICALS WAS UNREASONABLE BECAUSE THE DISCHARGE OF DEFINED POLLUTANTS CLEARLY REQUIRES A SECTION 402 PERMIT FROM THE EPA.

Section 404(a) of the CWA grants the COE the authority to issue permits for the discharge of fill material into navigable waters. 33 U.S.C. § 1344(a). Examples of fill material include "rock, sand, soil, clay, plastics, construction debris, wood chips, overburden from mining or other excavation activities, and materials used to create any structure or infrastructure in the waters of the United States." 40 C.F.R. § 232.2. Not included in the definition of fill material is trash or garbage. *Id*. The EPA has the authority under section 402 of the CWA to issue permits for the discharge of pollutants. 33 U.S.C. § 1342(a). Under the CWA, pollutants include "solid waste . . . sewage, garbage . . . munitions, chemical wastes, biological materials . . . wrecked or discarded equipment, rock, sand, cellar dirt and industrial, municipal, and agricultural waste discharged into water." 33 U.S.C. § 1362(6) (2006). Under *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), an agency's construction of a statute will be entitled to deference if Congress has not directly spoken to the precise question at issue and the agency's answer is based on a permissible construction of the statute. *Chevron*, 467 U.S. at 842-43. Because the proposed discharge into Lake Temp consists of munitions and hazardous chemicals—clearly within the definition of section 402 permit pollutants—Congress has spoken on this issue, and the COE's issuance of a section 404 permit was impermissible.

A. The COE's Interpretation of Section 404 Was Unreasonable in Light of the Clear Language in Section 402.

While the COE's decision to issue a section 404 permit in *Coeur Alaska, Inc. v. Southeast Alaska Conservation Council*, 129 S. Ct. 2458 (2009), constituted a reasonable interpretation of section 404, its decision to issue a permit for the discharge of pollutants into Lake Temp was

unreasonable, and therefore, unlawful. In *Coeur*, the discharge concerned mining waste, or slurry, consisting of a mixture of crushed rock and water. *Id*. at 2464. Coeur Alaska, Inc. sought a section 404 permit for the discharge of slurry into a lake, and a section 402 permit for the discharge of water from the lake into a downstream creek. Southeast Alaska Conservation Council ("SEACC") argued that the COE permit was not in accordance with the law for two reasons. *Id*. at 2466. First, SEACC argued that the EPA, and not the COE, should have issued a permit for the discharge into the lake, just as they had done for the discharge of water into the downstream creek. *Id*. Second, SEACC argued that the discharge was unlawful because of EPA standards restricting mining discharges similar to Coeur's. *Id*. The Court found the COE's interpretations of CWA statutes and regulations were reasonable, and were therefore entitled to deference under *Chevron*, *Auer v. Robbins*, 519 U.S. 452 (1997), and *United States v. Mead Corp.*, 533 U.S. 218 (2001). *Coeur*, 129 S. Ct. at 2477. Unlike *Coeur*, the COE's decision to issue a section 404 permit for the discharge of slurry into Lake Temp was an unreasonable interpretation of both section 404 and section 402 regulations.

***i. The Nature of the Discharge Differs From* Coeur.**

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. *Id*. at 2467. While the EPA has no authority to issue permits where COE authority exists, the EPA does write guidelines for the COE to follow when determining whether to issue a permit, and the EPA may also veto any decision by the COE to issue a permit. 33 U.S.C. § 1344(b)-(c). COE authority exists when the slurry fits the definition of fill material and has the effect of changing the bottom elevation of water. 40 CFR § 232.2. In *Coeur*, the crushed rock and water slurry fit into both section 404 and section 402 definitions, making the COE the primary permitting authority. *Coeur* at 2467-68.

Here, the slurry at issue does not meet the definition of fill material. None of the ingredients comprised in the slurry are included in the examples of fill material. To the contrary, several of the ingredients, such as munitions, solid waste, chemical waste, and wrecked or discarded equipment, are squarely defined as section 402 pollutants. Because the slurry in *Coeur* fit both section 404 and section 402 definitions, the EPA lacked authority to issue a permit. Here, no such COE authority exists due to the nature of the proposed discharge.

Section 404's definition of fill material also explicitly excludes trash or garbage. 40 C.F.R. § 232.2. The DOD seeks to dispose of munitions by emptying them into Lake Temp. The munitions are to be emptied and mixed with chemicals to ensure that they are no longer explosive. R. at 4. The remaining solids will be ground and pulverized, reintroduced with the emptied munitions, and then discharged into the lake. R. at 4. Because the DOD's primary purpose for discharging fill material is the disposal of munitions, the discharge effectively consists of trash. The COE cannot reasonably justify issuing a section 404 permit for the discharge of trash simply because it is created into a slurry.

Finally, the COE's issuance of a permit was unreasonable because of the hazardous and potentially toxic pollutants found in the discharge. The COE is required to deny a section 404 permit for any discharge that includes toxic pollutants. 40 C.F.R. § 230.10(b)(2). The munitions contents of the proposed slurry include many hazardous chemicals, and the metals to be pulverized and mixed into the slurry may also contain several toxic pollutants. All military munitions contain metals, and certain munitions only contain metals. Military Munitions Center of Expertise Technical Update, 1,17 (March 2005). Common metals found in munitions include antimony, arsenic, cadmium, chromium, copper, lead, mercury, nickel, selenium, silver,

thallium, and zinc, all of which are defined as toxic pollutants under the CWA. *Id*.; 40 C.F.R. § 401.15. Because all munitions contain metal, many of which are toxic, the likelihood that toxic pollutants will be introduced into Lake Temp is substantial. A section 404 permit is inappropriate.

***ii. The Location of the Discharge Differs From* Coeur.**

The discharge of slurry into Lake Temp would have an incidental filling effect because of the DOD's proposed discharge onto dry areas of the lakebed. The DOD proposes to spray slurry only on portions of the lakebed that are dry, speculating that eventually the entire lakebed will be raised by several feet. R. at 4. In *Coeur*, placement of slurry into a lake was reasonable in light of other alternatives, namely discharging slurry into nearby wetlands. There, the Court acknowledged that placing the slurry in the lake would cause less damage to the environment than storing them above ground. *Coeur*, 129 S. Ct. at 2465. Unlike *Coeur*, where the fill material placed into the lake had the direct effect of changing its bottom elevation, placement of slurry above ground at dry areas of Lake Temp may pose greater harm to the environment and only incidentally raise the lake's bottom elevation.

B. The COE's Actions Contradict the Regas Memorandum.

The COE's actions conflict with the language of its own interpretive memorandum, to which the Supreme Court in *Coeur* accorded deference. In *Coeur*, the court determined that the Regas Memorandum, written by one of the EPA's own Directors, was a reasonable interpretation of CWA regulations. *Id*. at 2473. The court found that although not procedurally adequate to be accorded *Chevron* deference, the memorandum was entitled to a measure of deference because it interpreted the agencies' own regulatory scheme in accordance with *Auer*. *Id*. The court relied on the memorandum because of the ambiguity present in the agencies' regulations. One of the

memorandum's interpretations states that when a discharge has only an incidental filling effect, the EPA's performance standards govern the discharge. *Id*. Here, and as mentioned earlier, the discharge is to take place on dry ground, only to eventually raise the lakebed over a period of several years. The Memorandum also does not allow toxic pollutants to enter navigable waters. *Id*. at 2474. The DOD's actions seeking a section 404 permit violate the CWA because of the substantial likelihood that metal pollutants from pulverized munitions will enter the waters of Lake Temp. Finally, the Court found the Regas Memorandum to be a rational construction of the applicable statutes and regulations. *Id*. Here, the COE's actions conflict with several statutes and regulations. The COE has ignored examples and definitions of fill materials and pollutants, it has issued a permit for the incidental filling of a lake, and it has approved the discharge of hazardous and potentially toxic pollutants that require them to deny permit requests.

The factual distinctions between the discharge materials here and in *Coeur* mandate the issuance of different permits. The court in *Coeur* stated that "when a permit is required to discharge fill material, either a § 402 or a § 404 permit is necessary. Here, we now hold, § 404 applies, not § 402." *Coeur*, 129 S. Ct. at 2474. Because the fill material in *Coeur* fell under both section 404 and section 402 definitions, the COE retained permitting authority; however, nothing in the nature of this discharge grants the COE permit authority. This fill material consists of pollutants expressly defined under section 402, pulverized munitions often contain toxic pollutants prohibited from the COE's jurisdiction, and this discharge will only have an incidental filling effect. The COE has violated the express statutory language of the CWA and has acted contrary to the EPA's interpretation of regulations under the CWA. The COE's actions in issuing a permit to the DOD, therefore, were unreasonable and not entitled to deference.

IV. THE OMB'S DECISION AND DIRECTIVE AND THE EPA'S RESPONSE TO THAT DIRECTIVE VIOLATED THE CWA.

Despite the absence of information regarding whether the EPA requested the OMB to resolve a conflict, the OMB's decision and directive to the EPA, requested or not requested, would violate the CWA because Congress' intent is clear—the decision to veto a section 404 permit rests with the Administrator alone. In addition, the EPA violated the CWA when it acquiesced to the OMB's impermissible action. The EPA's decision to remain idle while the OMB directed whether it should veto the COE's section 404 permit is arbitrary and capricious because the EPA knows it retains sole veto power. In reviewing the lower court's grant of summary judgment in favor of the appellees, this Court should reverse because the OMB exceeded its authority when it made the jurisdictional permit decision and because the EPA's acquiescence to OMB's impermissible decision is arbitrary and capricious.

A. Only The Administrator of the EPA Has the Authority to Decide Whether to Veto a Section 404 Permit.

If the intent of Congress is clear, the court must "give effect to the unambiguously expressed intent of Congress." *Chevron,* 467 U.S. 837, 842-43. In addition, the "judiciary is the final authority in issues of statutory construction and must reject administrative constructions which are contrary to clear congressional intent." *Id.* at 843, n.9. Further, "agency interpretations must fall to the extent they conflict with statutory language." *Pub. Emp. Ret. Sys. of Ohio v. Betts*, 492 U.S. 158, 171 (1989).

The Supreme Court has previously declined to accept authority asserted by the OMB when the OMB acted beyond the clear intent of Congress. *See Dole v. United Steelworkers of Am.*, 494 U.S. 26, 42 (1990). In *Dole*, The Department of Labor ("DOL") promulgated a hazard communication standard that imposed various requirements on manufacturers aimed at ensuring

their employees were informed of hazards in their workplace. *Id.* at 28-29. Pursuant to the Paperwork Reduction Act ("PRA"), the DOL submitted the standard to the OMB for review of any paperwork requirements, and the OMB disapproved three provisions because it determined that the requirements were not necessary to protect employees. *Id.* at 30. The court held that the PRA did not give the OMB authority to review agency rules because the PRA, as a whole, clearly expresses Congress' intent. *Id.* at 42. The PRA stated that it applied to "information collection requests," and no part of the PRA expressly declared whether Congress intended it to apply to disclosure rules. *Id.* at 39-40. However, the language, structure, and purpose of the PRA revealed that Congress did not intend for it to encompass third-party disclosure rules. *See id.* at 40.

In addition to *Dole*, the United States District Court for the District of Columbia held that it was impermissible for the OMB to assert authority under an executive order ("EO") to delay actions of the EPA. *Envtl. Def. Fund v. Thomas*, 627 F. Supp. 566, 571 (D.D.C. 1986) (EDF). In *EDF*, the EPA's ability to promulgate regulations pursuant to the Hazardous Solid Waste Amendments of 1984 was significantly delayed by the unlawful interference of the OMB. *Id.* at 567. The OMB argued that an EO required agencies to submit all proposed and final rules to the OMB for pre-publication review. *Id.* at 567-68. In addition, the EO also limited the OMB's authority by authorizing the OMB to exercise its review only to the extent permitted by law. *Id.* at 568. During the promulgation and review process, it became clear that the OMB had serious differences with the EPA, which lead to the delay of the final proposed rules. Three months after the legislation's requirement, the rules were proposed and announced. *Id.* at 569.

The *EDF* court found that the EO should be narrowly interpreted and the OMB would only have its authority within the timeframe expressed in the legislation. *See id.* at 570-71. The court was also concerned that if the EO was used improperly, the OMB could use its authority to ultimately "[encroach] upon the independence and expertise of the EPA." *Id.* at 570. This abuse of authority granted to the OMB by executive order is "incompatible with the will of Congress and cannot be sustained as a valid exercise of the President's Article II powers." *Id.* at 570.

Furthermore, the United States is incorrect in its assertion that the OMB resolution of the dispute between the EPA and the COE was permissible pursuant to procedures proscribed by the executive branch. In October 1978, President Carter issued Executive Order 12088, 43 Fed. Reg. 47,707 (October 13, 1978) ("EO 12088"). Section 1-602 of EO 12088 set forth guidance that "[i]f the Administrator cannot resolve a conflict, the Administrator shall request the Director of the Office of Management and Budget to resolve the conflict." *Id.* at § 1-602. Moreover, section 1-603 stated that the Director of the OMB "shall consider unresolved conflicts *at the request* of the Administrator" *Id.* at § 1-603 (emphasis added). After a request to resolve a conflict, the Director is to seek the "technological judgment and determination" of the Administrator with regard to the "applicability of statutes and regulations." *Id.* EO 12088 explicitly stated that these procedures were "in addition to, *not in lieu of*," other procedures for the "enforcement of applicable pollution control standards." *Id.* at § 1-604 (emphasis added). Further, nothing in EO 12088 "shall be construed to *revise or modify* any applicable pollution control standard." *Id.* at § 1-605 (emphasis added). In addition, President Reagan issued Executive Order 12580, 52 Fed. Reg. 2,923 (January 23, 1987) ("EO 12580"). EO 12580 modified section 1-602 of EO 12088 by

adding, "[t]he Director of the Office of Management and Budget shall *facilitate* resolution of any issues." Executive Order 12580, 52 Fed. Reg. at 2,928 (emphasis added).

Even following the Executive Orders, the OMB's involvement in deciding whether the current circumstances require a section 402 or a section 404 permit would require the EPA Administrator to *request* for the OMB Director's assistance in resolving a conflict. Further, section 1-602 grants the condition "*if* the Administrator cannot resolve a conflict" then he shall make the request. Here, the Administrator is not compelled to make the request because the Administrator *can* resolve the conflict by issuing a veto under section 404(c).

Even if the Administrator of the EPA did request assistance of the OMB's Director, the OMB exceeded its authority because section 404(c) of the CWA reveals Congress' express intent that the Administrator, not the OMB Director, retains the power to veto a section 404 permit. The text of section 404(c) of the CWA is clear that the authority would reside with only the Administrator. Section 404(c) says,

> *The* Administrator is authorized to prohibit . . . , and *he* is authorized to deny or restrict . . . , whenever *he* determines, ... Before making such determination, *the* Administrator shall consult with the Secretary. *The* Administrator shall set forth in writing and make public *his* findings and *his* reasons for making any determination under this subsection.

33 U.S.C. § 1344(c) (emphasis added).

The use of the singular words "the," "he," and "his" is a clear indication that the power under section 404(c) was conferred by Congress to the Administrator of the EPA alone. Moreover, the Senate committee report reviewing the most recent amendments of the CWA indicated "the authority of the Administrator . . . which is provided in sections 402(c) through (k) and 404(c) is in no way diminished." S. REP. 95-370, at 78 (1977). Like the PRA in *Dole*, the

CWA does not give the OMB authority to make a decision for the EPA. The text of section 404(c) and Senate committee report clearly express Congress' intention; this Court should decline to accept the COE or OMB's interpretation. *See Bd. of Governors of the Fed. Reserve Sys. v. Dimension Fin. Corp.*, 474 U.S. 361, 366 (1986) ("The traditional deference courts pay to agency interpretation is not to be applied to alter the clearly expressed intent of Congress."). Therefore, the United States' interpretation of EO 12088 and EO 12580 should fail because it conflicts with section 404(c) of the CWA.

Further, holding that the OMB could decide on behalf of the EPA is inconsistent with the holding of *EDA*. In *EDA*, the OMB's actions impermissibly inhibited the EPA's authority, and the EO only extended the OMB's authority to that which was permissible within the statute. Any delay or review by the OMB outside the time restrictions dictated by the statute was held to be impermissible interference. Here, the CWA affords the decision to veto to the EPA, and EO 12088 conflicts with the express will of the statute by permitting the OMB to make the decision to resolve a dispute. The only authority that the OMB could exercise is the ability to *facilitate* the dispute pursuant to EO 12580. Because the authority given to the OMB by EO 12088 is outside the permissible realm of the CWA, the OMB violated the CWA by directing the EPA not to veto.

However, the COE argues that the Constitution charges the President with the duty to "take Care that the Laws be faithfully executed." U.S. Const. art. II, § 3. This gives the President both the power and the duty to assure that all discretionary decisions are made within the executive branch, and that power and duty necessarily includes the authority to resolve legal and policy disputes between executive branches. Thus, the COE concludes that the President, Attorney General, and the OMB could settle this dispute under Article II powers. Nonetheless,

the COE's argument is flawed because it is contrary to the U.S. Supreme Court's rule in *Chevron*. "If the intent of Congress is clear," as it is here, "that is the end of the matter; for the court as well as the agency, must give effect to the unambiguously expressed intent of Congress."

B. The EPA's Reaction to the OMB's Directive Fails the Arbitrary and Capricious Standard.

There are two possible descriptions of the EPA's veto decision. The first is that the EPA acquiesced to the OMB's directive. The second is that the EPA independently decided not to veto. Under the former description, the EPA's action was arbitrary or capricious; under the latter, this matter should have never survived summary judgment.

i. The EPA Arbitrarily Followed the Impermissible Directive of the OMB.

Under the APA, agency action must be set aside if it is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law," or if it fails to meet statutory, procedural, or constitutional requirements. 5 U.S.C. § 706(2)(A)-(D) (2006). This standard of review is "highly deferential," *Avoyelles Sportsmen's League, Inc. v. Marsh*, 715 F.2d 897, 904 (5th Cir. 1983), and the agency's decision is presumed to be valid. *See Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 415 (1971); *Ethyl Corp. v. E.P.A.*, 541 F.2d 1, 34 (D.C. Cir. 1976) (en banc).

Yet, the deference accorded to the agency, the "arbitrary and capricious" standard, still requires that the court "immerse" itself in the evidence in the record, *Ethyl Corp*, 541 F.2d at 36, and conduct a thorough, probing, and in-depth review. *City of Alma v. United States*, 744 F. Supp. 1546, 1557 (S.D. Ga. 1990). To be upheld, the agency must have "examine[d] the relevant data and articulate[d] a satisfactory explanation for its action including a rational connection

between the facts found and the choice made." *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (quoting *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168 (1962)). The court will find an agency action to be arbitrary if

> [T]he agency relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that was counter to the evidence before the agency, or is so implausible that it would not be ascribed to a difference in view or the product of agency expertise.

City of Alma, 744 F. Supp. at 1557 (quoting *State Farm*, 463 U.S. at 43).

Here, the EPA's action is arbitrary and capricious because it relied on factors that Congress had not intended the EPA to consider—the OMB's directive. The EPA has made it explicitly clear that it is aware that it retains the authority to decide a section 404(c) veto. *See* 40 C.F.R. § 231.1 ("Under section 404(c) the Administrator may exercise a veto . . . . "); *id.* at § 231.6 ("The Administrator shall make a final determination affirming, modifying, or rescinding . . . ."); *see also* Clean Water Act Section 404(q) Memorandum of Agreement Between The EPA and The Dep't. of the Army at 9 (Aug. 11, 1992), http://water.epa.gov/lawsregs/guidance/wetlands/upload/1992_MOA_404q.pdf ("The EPA reserves the right to proceed with Section 404(c)."). By surrendering to the OMB's directive, the EPA's actions were "without observance of procedure" that is required by section 404(c); thus the EPA is in violation of the CWA.

ii. After the OMB's Directive, the EPA Decided Not to Veto the COE's* Section *404 Permit.

When the issue of the reasonableness of a section 404(c) veto is intimately tied to factual determinations, granting summary judgment on the issue would be inappropriate. *See Russo Dev. Corp. v. Thomas*, 735 F. Supp. 631, 635 (D.N.J. 1989) (Russo). In *Russo*, the plaintiff contended

that a "sudden flip-flop" of the EPA in changing its characterization of a property was arbitrary and capricious and an abuse of discretion. *Id.* at 637. The defendants countered that there was a sufficient basis in the record for the determination, based on studies of the unfilled portions of the properties, adjacent properties, maps, interviews, and aerial photographs of vegetation taken prior to the development of the land. *Id.* at 637-38. Yet the court concluded that whether the EPA's change in characterization of the properties was justified depends on the underlying factual determination of whether the properties were wetlands and, if so, then what "type" of wetlands they were prior to their development. *Id.* at 38. Thus, the court could not resolve the underlying factual dispute on this motion for summary judgment, and the motion was denied. *Id.* at 38.

Here, there are sufficient issues of fact that are intimately tied to the EPA's decision of veto; thus, summary judgment was inappropriate. The EPA's actions resemble the "sudden flip-flop" within *Russo*. At one point, the EPA was arguing for a veto, and after deliberations, the EPA suddenly accepted the OMB's directive or decided not to veto. R. at 9. The EPA was arguing to veto the section 404 permit because the circumstances were "significantly different" from the discharge in *Coeur*. R. at 9. Like the defendants in *Russo*, the United States argues that the EPA's action was required by or consistent with *Coeur*; however, this justification relies on underlying factual determinations. Thus, summary judgment was inappropriate.

CONCLUSION

For the foregoing reasons, this Court should reverse in part and affirm in part the district court's order granting summary judgment for the following reasons: (1) New Union has standing in its sovereign and *parens patriae* capacity, (2) Lake Temp is navigable water, (3) the discharge of the slurry requires a section 402 permit, and (4) the OMB's directive to the EPA and the EPA's reaction to the OMB's directive violates the CWA.

Respectfully submitted,

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Council for the State of New Union