UNITED STATES COURT OF APPEALS
FOR THE TWELFTH CIRCUIT

Team # 75

STATE OF NEW UNION,	**)**	
Appellant and Cross-Appellee,	**)**	
v.	**)**	
UNITED STATES,	**)**	**C.A. No. 11-1245**
Appellee and Cross-Appellant,	**)**	
v.	**)**	
STATE OF PROGRESS,	**)**	
Appellee and Cross-Appellant	**)**	

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

BRIEF FOR UNITED STATES – APPELLEE AND CROSS-APPELLANT

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The State of New Union and State of Progress both appeal the judgment imposed by the United States District Court for the District of New Union. The District Court properly exercised jurisdiction over this matter pursuant to 28 U.S.C. § 1331 and the Administrative Procedure Act, 5 U.S.C. § 702. The District Court granted Appellant United States' motion for summary judgment on June 2, 2011. Therefore, this Court has jurisdiction to hear this case on appeal from a final district court order pursuant to 28 U.S.C. § 1291.

STATEMENT OF THE ISSUES

I. Under Article III's constitutional minimum for standing does New Union satisfy the burden of pleading and proving an "injury in fact" that is *both* actual or imminent *and* concrete and particularized, or does New Union satisfy the burden of establishing any of its citizens have an interest or are injured because of the Department of Defense's proposed activity to qualify New Union for *parens patriae* standing?

II. Under the Clean Water Act's definition of navigable waters in §§ 301(a), 404(a), and 502(7) and the further refined definition by agency regulation and guidance, which encompasses Lake Temp, should a court defer to agency expertise in defining Lake Temp as navigable?

III. Under Section 404 of the Clean Water Act which authorizes the Corp of Engineers to issue permits for the discharge of fill material into waters of the United States after considering EPA regulations, should a court defer to Environment Protection Agency expertise in defining munitions discharge as fill material and its decision not to veto the Department of Defense's § 404 permit?

IV. Under the President's Article II powers and Executive Order 12,088 which requires disputes between the Environmental Protection Agency and another executive agency to be

resolved by the Office of Management and Budget, can the Office of Management and Budget's participation be deemed improper after the Environment Protection Agency decides to not veto a Corp of Engineers permit even though the Environmental Protections Agency's decision is consistent with The Supreme Court's holding in *Coeur*?

STATEMENT OF THE CASE

This is a challenge to U.S. Army's Corps of Engineers' (hereinafter COE) action in issuing a permit to allow munitions discharge into Lake Temp by the U.S. Department of Defense (hereinafter DOD) and agency interpretation of the Clean Water Act (hereinafter CWA) by the State of New Union and intervenor, the State of Progress. This action appeals the District Court's order granting summary judgments based on the merits to the United States on each of its motions: New Union lacked standing to challenge the permit; COE has jurisdiction to issue the permit to fill Lake Temp; and the Office of Management and Budget's (hereinafter OMB) actions and involvement were proper.

STATEMENT OF THE FACTS

The facts of this case have been fairly and accurately described by the District Court Order dated June 2, 2011. In summary, the District Court found that Lake Temp is a terminal lake about three miles wide and nine miles long located wholly in an arid area of the state of Progress. It dries out about every five years. Lake Temp is fed from an eight hundred square mile watershed of surrounding mountains which is also almost exclusively from Progress (with a small portion of inflow from mountains located in New Union). Lake Temp, located close to the border between the states of Progress and New Union, does not have any outflow of water; but it does sit about 1,000 feet above a large aquifer, known as the Imhoff Aquifer. Five percent of the

aquifer is located within New Union. A ranch within New Union sits above the Imhoff Aquifer but the owner, Dale Bompers, does not have a permit or use any of the aquifer's water. The water is not potable for livestock or usable in agricultural irrigation. The information about the aquifer is part of the original Environmental Impact Study (EIS) and is included as groundwater inventory for both the states of Progress and New Union.

Lake Temp lies wholly within the boundaries of a military reservation owned by the DOD since 1952. Annually, ducks have used Lake Temp as a migratory stopover on their journey south. Consequently, for the last one hundred years, duck hunters have used Lake Temp as a popular hunting venue. Approximately seventy-five percent of the hunters have come from Progress with the remaining twenty-five percent from out of state. On the south side of Lake Temp is a Progress state highway that runs within a hundred feet of the shore. Several roads intersect the highway and lead into New Union. The DOD has posted signs on the highway indicating entry is illegal but there are no fences or barriers keeping people off the property. Visible trails leading from the road to Lake Temp show signs that rowboats and canoes are dragged from the highway and used on the lake. The DOD has knowledge that the public continues to use Lake Temp for hunting and bird watching.

The DOD's proposed munitions project includes building a facility at Lake Temp to receive and process a variety of spent munitions. The processing involves separating the munitions into their liquid, semi-solid and granular internal contents and external casings (primarily metal). The internal contents will vary but include many of the chemicals listed on the CWA's § 311 list of hazardous substances. Additional chemicals will be used to diffuse the munitions contents of their explosive characteristics. The external casings will be ground and pulverized. The internal contents and casings will be mixed together after initial processing;

water will then be added to create a slurry which will be sprayed onto dried areas of Lake Temp. The spraying operation will be mobile and the slurry contents will dry quickly in the arid environment. The slurry will be sprayed evenly over the entire dry bed of the lake, eventually resulting in a six foot higher elevation of the lake bed and increasing Lake Temp's size by two square miles. The project is expected to take several years with the COE grading the edges of the new, higher lakebed to insure inflow from the surrounding mountains will be unimpeded. It is expected that the natural process of alluvial flow from precipitation and inflow will cover Lake Temp and return it to its original (although higher elevation) condition. Lake Temp will still be wholly located on DOD's reservation in the state of Progress and the COE's review under the initial EIS shows no impact to New Union.

SUMMARY OF THE ARGUMENT

Congress took bold and necessary action to protect the quality of the nation's waters and reduce the deadly impact of pollution and hazardous materials associated with human activity by passing the CWA in 1972. 33 U.S.C. § 1251, et seq (2006). The Environmental Protection Agency (hereinafter EPA) administers the Act. *Id.* The COE has direct authority for administering Section 404 permits. *Id.* Both agencies have reasonably asserted their jurisdiction over Lake Temp and the COE has issued a permit to the DOD for the discharge of spent munitions fill material into Lake Temp.

This Court's threshold issue is to determine whether the State of Union has standing. New Union has not satisfied the requirements of Article III standing; therefore, this case cannot be decided by this Court. New Union does not have special standing under *Massachusetts v. E.P.A.* because its interest is not comparable to its predecessors. Alternatively, if New Union did have special standing, it would still not satisfy the standing requirements because it fails to plead

or prove an "injury in fact." New Union has failed to plead or prove an "injury in fact" to satisfy the Constitutional minimum of standing because it has not suffered any injury that is *both* actual or imminent *and* concrete and particularized. New Union also fails to present it has derivative standing under a *parens patriae* capacity because it cannot establish any of its citizens have an interest or are injured because of the DOD's proposed activity.

Second, the Court must address the definition of navigable waters. The CWA authorizes the COE to issue permits regulating discharge into "the waters of the United States" which is defined as navigable waters. The Supreme Court has reviewed the COE's interpretation of the navigable waters standard on three occasions. Based on The Supreme Court's guidance, agency expertise, the Act's language and the broad purpose of the CWA, the EPA and COE have jointly issued revised guidance providing two tests for determining whether a terminal, intrastate body of water qualifies as navigable waters. Lake Temp meets both tests, therefore, is navigable water under the CWA.

The third task is a review of the jurisdiction between the EPA and COE as it relates to the proposed discharge of munitions into Lake Temp. Congress charged the EPA with carrying out the purposes of the CWA. The COE's responsibilities under the CWA are narrowly tailored to issuing permits for the discharge of fill material. The Supreme Court previously concluded that when the COE has authority to issue a permit under § 404, the EPA may not do so, but may veto the issuance of the permit. The COE issued the permit for the discharge of fill material into Lake Temp and the EPA did not veto the issuance of the permit. Because the decision to issue the permit and the decision to not veto the permit fall within agency expertise, this court should defer to the agency action.

Finally, a question has been raised whether the Executive Branch has interacted improperly in making its decision regarding the issuance of the permit. The President's Article II powers allow the President to carry out the laws of the Executive Branch in a uniform and unitary fashion. Several Executive Orders require the EPA to seek the assistance of the OMB to resolve interagency conflicts. The OMB's participation was nothing more than ensuring that the Executive's laws are carried out in a unitary and uniform manner. After conferring with the OMB, the EPA did not veto the COE permit. The EPA could have vetoed the permit after the meeting with the OMB, but chose not to. The EPA's actions were entirely consistent with a recent Supreme Court holding in *Coeur*, and the OMB's participation is consistent with the President's Article II powers.

ARGUMENT

The four issues this Court has requested briefs on are addressed below and the standard of review on each issue is the same. The District Court's grant of summary judgment on the three CWA claims should be reviewed de novo. *Carver v. City of Trenton*, 420 F.3d 243, 255 (3rd Cir. 2005). On appeal, courts must make an independent assessment of the lower court's ruling while applying the same legal standard to determine whether there is " no genuine issue as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c); *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986). The facts as outlined by the District Court's order dated June 2, 2011, are not in dispute and the case does not present any genuine issue of material fact so summary judgment is an appropriate ruling. *Nw. Motorcycle Ass'n v. U.S. Dept. of Agric.*, 18 F.3d 1468, 1472 (9th Cir. 1994).

This case however involves a review of final agency action under the Administrative Procedure Act (hereinafter APA), 5 U.S.C. §§ 701 *et seq.* (1976). The CWA does not

affirmatively provide the standard of review of EPA or COE's decisions, so the APA governs judicial inquiry. *Avoyelles Sportsmen's League, Inc. v. Marsh*, 715 F.2d 897, 904 (5th Cir. 1983). The APA provides that an agency's decisions and actions that are "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law," should be set aside. 5 U.S.C. § 706(2)(A). The Supreme Court has held that the standard of review under the APA is narrow, and the "court is not empowered to substitute its judgment for that of the agency." *Motor Vehicle Manufacturers Ass'n v. State Farm Mutual Ins. Co.*, 463 U.S. 29, 43 (1983).

For an agency decision to be arbitrary and capricious requires a finding that the agency considered factors not intended by Congress, failed to consider key factors, provided inconsistent and error-ridden feedback and rationale that precluded rational use of agency expertise. *Id.* A "searching and careful" review of the record is required to determine whether the agency's decision was rational, based on consideration of all relevant factors, and consistent with agency decisions. *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 416 (1971). But when an agency action relies on scientific and technical information within the agency's area of expertise, a court is particularly deferential. *Marsh v. Or. Natural Res. Council*, 490 U.S. 360, 377 (1989). Thus, the appropriate standard of review to apply to the record provided below is whether the agencies' actions were arbitrary or capricious or not in keeping with the charge of the CWA. The same standard of review is appropriate for each of the four issues that follow.

I. NEW UNION HAS NOT SATISFIED THE REQUIREMENTS OF ARTICLE III STANDING.

Article III standing doctrine "is built on a single basic idea - the idea of separation of powers." *Allen v. Wright*, 468 U.S. 737, 752 (1984). The standing doctrine requires judicial restraint and courts must accordingly "put aside" what may be a "natural urge to proceed directly to the merits" and, instead, "carefully inquire as to whether [the plaintiffs] have met their burden"

of establishing standing. *Raines v. Byrd*, 521 U.S. 811, 820 (1997). The importance of separation of powers principles "transcends the convenience of the moment." *Clinton v. New York*, 524 U.S. 417, 449-50 (1998) (Kennedy, J., concurring). If a court were to determine the merits of a case with no injury, that would "create the potential for abuse of the judicial process, distort the role of the Judiciary… and open the Judiciary to an arguable charge of … 'government by injunction.'" *Schlesinger v. Reservists Comm. to Stop the War*, 418 U.S. 208, 222 (1974).

All parties invoking the jurisdiction of the federal courts must "carry the burden of establishing their standing under Article III" of the Constitution. *DaimlerChrysler Corp. v. Cuno*, 126 S. Ct. 1854, 1860-61 (2006). This requirement is designed to "ensur[e] that the Federal Judiciary respects the proper - and properly limited - role of the courts in a democratic society." *Id*. at 1860. When a plaintiff fails to demonstrate standing to bring an action, "the courts have no business deciding it, or expounding the law in the course of doing so." *Id*. at 1861.

New Union has failed to carry their burden of establishing Article III standings. The District Court of New Union decided on the merits that New Union lacked standing to bring suit based on failure to allege "injury in fact" and failure to establish a foundation for *parens patriae*. Reviewing the standing issue anew, this Court must find that New Union failed to establish standing because they could not allege any cognizable "injury in fact" to satisfy the standing requirements or any justification for *parens patriae*.

A. New Union Does Not Have Special Standing Under *Massachusetts v. E.P.A.*. Alternatively, If New Union Did Have Special Standing, it Would Still Not Satisfy Standing Requirements Because it Fails to Establish an "Injury In Fact."

New Union argues it has a special interest as an affected state, subjecting it to a more favorable test for standing under *Massachusetts v. E.P.A.*, 549 U.S. 497, 518-20 (2007). New Union specifically states in *Massachusetts v. E.P.A.* that "[g]iven that procedural right and Massachusetts' stake in protecting its quasi-sovereign interests, the Commonwealth is entitled to *special solicitude* in our standing analysis." *Id.* at 520 (emphasis added). However, on this specific issue, four of the nine Supreme Court Justices dissented. Chief Justice Roberts's dissent disputes the majority's analysis that hinged on *Georgia v. Tennessee Copper Co.*, 206 U.S. 230 (1907), and emphasizes that the 1907 case was limited to available remedies and had nothing to do with Article III standing. *Id*. at 537 (Roberts, J. dissent). Furthermore, the dissent accuses the majority's "special solicitude" for Massachusetts as "an implicit concession that petitioners cannot establish standing on traditional terms. But the status of Massachusetts as a State cannot compensate for petitioners' failure to demonstrate injury in fact, causation, and redressability." *Id*. Chief Justice Roberts's dissenting opinion argued that Massachusetts should not have had standing to sue because Massachusetts's potential injuries from global warming were not concrete or particularized.

The majority's opinion for the "relaxed test" on standing was based on *Georgia v. Tennessee Copper Co.,* 206 U.S. 230 (1907). *Id.* at 519. The majority noted that "Georgia's independent interest "in all the earth and air within its domain" supported federal jurisdiction a century ago, so too does Massachusetts' well-founded desire to preserve its sovereign territory today." *Id*. The majority argued that Georgia's interest in its domain was compare to Massachusetts's interest because it owned a great deal of the affected territory, i.e. the coast line,

and that interest "reinforces the conclusion that its stake in the outcome of this case is sufficiently concrete to warrant the exercise of federal judicial power." *Id*. However, New Union's interest in Lake Temp or the Imhoff Aquifer is not comparable to the interest of Georgia in *Georgia v. Tennessee Copper Co.*, or Massachusetts *in Massachusetts v. E.P.A.*. Unlike Georgia or Massachusetts, New Union does not own any part of the lake, none of the lake flows into New Union's territory, only five percent of the aquifer is located in New Union, it has failed to provide any evidence supporting its recreational interest, and the State does not use the water for any reason. Application of the majority's relax test to New Union is not warranted because its interest is not equivalent or remotely analogous to its predecessors and the relax test application to New Union would frustrate *Massachusetts v. E.P.A.*'s purpose of creating this special standard. Accordingly, this "special solicitude" test should not be applied to New Union because its interest in the disputed land is not comparable and because this particular relax test is questionable.

However, New Union cannot satisfy either the majority's or the dissent's test for standing because it cannot allege any injury in fact. Even if the "relax test" is applied to New Union, the courts must still perform the Article III standing analysis. New Union will not satisfy Article III standing because it cannot allege any injury in fact. Therefore, this Court would be violating the separation of powers clause, improperly expanding the role of the judiciary, and would be inappropriately deciding a case if it choose to evaluate the merits of New Union's case.

B. New Union Has Failed to Establish an "Injury in Fact" to Satisfy the Constitutional Minimum of Standing.

To invoke this Court's jurisdiction, petitioners must satisfy the three elements of the "irreducible constitutional minimum of standing." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992). A petitioner must plead and prove an "injury in fact" that is: (1) "concrete and

particularized" and "actual or imminent, not conjectural or hypothetical"; (2) fairly traceable to the defendant's conduct, not "the result [of] the independent action of some third party not before the court"; and (3) "likely" to be "redressed by a favorable decision." *Id*. at 560-61 (internal quotation marks omitted; brackets in original). Petitioners bear the burden of demonstrating that they have satisfied all three elements. *DaimlerChrysler Corp. v. Cuno,* 126 S. Ct. 1854, 1861 n.3 (2006) ("[T]he party asserting federal jurisdiction … has the burden of establishing it"). This is a burden New Union cannot meet.

New Union fails the first prong because it has not suffered any injury in fact that is *both* actual or imminent *and* concrete and particularized. In order to have standing, petitioners must allege an injury-in-fact that is *both* "actual or imminent" and "concrete and particularized." *Lujan*, 504 U.S. at 561; *Whitmore v. Arkansas,* 495 U.S. 149, 155 (1990) ("injury, we have emphasized repeatedly, must be concrete in both a qualitative and temporal sense"). The injuries New Union alleges cannot satisfy either prong of the injury in fact requirement.

1. New Union Cannot Plead Any Injury that is Actual or Imminent.

The injuries New Union alleges are too remote and distant in time to satisfy the "actual or imminent" requirement. To be "actual or imminent," the injury must be "palpable," *Gladstone, Realtors v. Village of Bellwood,* 441 U.S. 91, 100 (1979), "certainly impending," *Babbitt v. United Farm Workers*, 442 U.S. 289, 298 (1979), or "real and immediate." *City of Los Angeles v. Lyons*, 461 U.S. 95, 101-02 (1983). "Although 'imminence' is to ensure that the alleged injury is not too speculative for Article III purposes - that the injury is *certainly* impending." *Lujan*, 504 U.S. at 564 n.2 (quotations omitted); *Lyons*, 461 U.S. at 101-02 ("The plaintiff must show that he has sustained or is immediately in danger of sustaining some direct injury.").

"Allegations of possible future injury do not satisfy the requirements of Art. III." *Whitmore v. Arkansas*, 495 U.S. 149, 158 (1990). Although a plaintiff need not "await the consummation of threatened injury" before invoking a federal court's jurisdiction, the threatened injury must at least be "certainly impending." *Babbitt v. United Farm Workers*, 442 U.S. 289, 298 (1979) (quoting *Pennsylvania v. West Virginia*, 262 U.S. 553, 593 (1923)); *Lyons*, 461 U.S. 95, 101-02 ("the … threat of injury must be both 'real and immediate,' not 'conjectural or hypothetical'"). New Union's alleged injuries are neither certain nor impending.

The District Court found the contamination alleged by New Union was "completely speculative." New Union has presented only circumstantial evidence that contaminated water from the permitted activity will ever enter the Imhoff Aquifer. The Imhoff Aquifer is separated from Lake Temp by 1000 feet. New Union has presented no evidence as to when, if at all, the pollution will reach the edge, or what the concentration levels might be if the pollution reaches the aquifer beneath New Union. New Union admits as much, stating that the timing and severity of the pollution's impact on the portion of the Imhoff that underlies New Union depends on the direction and rate of flow of groundwater in the aquifer and the top and bottom elevations of the aquifer throughout its expanse, both of which are presently unknown.

New Union cannot present any evidence of actual or imminent harm thus cannot sustain an "injury in fact" for Article III standing. There is no evidence that the alleged pollution of the aquifer below owned New Union is imminent or ever will happen. The occurrence, timing and severity of such contamination are completely speculative. Any possible future injuries New Union asserts do not satisfy the requirements of Article III. *See Whitmore,* 495 U.S. at 158. The evidence of present and future injury of the State presented in *Massachusetts v. E.P.A.* was far less speculative than that presented here by New Union. In *Massachusetts v. E.P.A.*, the majority

found that Massachusetts pleaded and proved global warming had an actual or imminent affect on their shoreline, whereas here New Union fails to present any comparable data.

2. New Union Cannot Plead an Injury that is Concrete and Particular.

"The relevant showing for purposes of Article III standing … is not injury to the environment, but injury *to the plaintiff*." *Friends of the Earth, Inc. v. Laidlaw Environmental Services, Inc.*, 528 U.S. 167, 181 (2000) (emphasis added). Thus, claims about possibly polluted ground water due to the Imhoff Aquifer are not, by themselves, sufficient to confer standing upon New Union. Article III standing requires that New Union demonstrate "that the action injures [them] in a concrete and personal way." *See Lujan*, 504 U.S. at 581 (Kennedy, J., concurring).

The harms alleged by New Union are too speculative and remote in the future to satisfy the concrete and particular requirement. The potential seriousness of the harm alleged does not alter the analysis of injury. Even where the injury alleged is "one of the most serious injuries recognized in our legal system," the Supreme Court has recognized its obligation to ensure that the plaintiffs completely satisfy the requirements of Article III, as "the federal judiciary may not redress [any injury] unless standing requirements are met." *Allen*, 468 U.S. at 756-57.

As discussed previously, New Union fails to present any evidence that any concrete or particular injury is certain to occur because the elements identified, groundwater flow and aquifer elevation, are presently unknown.

New Union's concerns about alleged pollutants at the Imhoff Aquifer presents generalized grievances that are not concrete or particular. This Courts lacks jurisdiction to hear claims that consists of nothing more than "generalized grievance[s]." *Richardson*, 418 U.S. at 176. Courts can only exercise jurisdiction over the claim if the plaintiff has "a sufficient stake in

an otherwise justiciable controversy to obtain judicial resolution of that controversy." *See Sierra Club v. Morton*, 405 U.S. 727, 731 (1972).

New Union's alleged injuries are too generalized to establish proper standing before this Court. New Union cannot establish any definite or identifiable harm that the discharge authorized by the permit will cause to it or its citizens to support standing. Similarly in *Lujan*, the Supreme Court dismissed the case, holding that the plaintiffs had failed to show the personalized injury necessary to create standing. *See Lujan*, 504 U.S. 555. New Union cannot establish that it has suffered any peculiar harm and can only assert generalized grievances. Lake Temp, at its highest water level, is wholly within the State of Progress. A small portion of watershed flows into Lake Temp, however, none of Lake Temp flows out into New Union. Ninety five percent of the aquifer is located within Progress, wholly under the boundaries of the military reservation, and only five percent of the aquifer is located within New Union. Even with that small interest, New Union fails to establish any specific injury by DOD's proposed activity. New Union does not use the water for drinking or agriculture, and has provided no proof of interest in recreational activity. New Union asserts general grievances against the DOD's proposed activity, and only that. Accordingly, New Union only has a general interest in either Lake Temp or the Imhoff Aquifer and cannot allege any particular harm whatsoever. New Union cannot allege any specific harm and can only assert general grievances, thus, New Union does not have proper standing before this Court.

C. New Union Does Not Have Standing to Sue Under its *Parens Patriae* Capacity.

A *parens patriae* case involves "the right of a State to sue ... to prevent harm to its 'quasi-sovereign' interests." *Hawaii v. Standard Oil Co.*, 405 U.S. 251, 258 (1972). "A state has a quasi-sovereign interest in the health and well-being--both physical and economic--of its

residents in general." *Alfred L. Snapp & Son, Inc. v. Puerto Rico ex rel Barez*, 458 U.S. 592, 607 (1982). *Parens patriae* is not a substitute for Article III's injury requirement and requires additional burden for a state litigant to satisfy. *Id.* at 607. The state litigant must articulate their "quasi-sovereign interest …. *apart* from the interests of particular private parties." *Id.* "A State asserting quasi-sovereign interests as *parens patriae* must still show that its citizens satisfy Article III." *Massachusetts v. E.P.A.* at 538. A state suing in its *parens patriae* capacity is presumed to adequately represent the position of all its citizens. *State of N.J. v. State of N.Y.*, 345 U.S. 369, 372-73 (1953) ("state in *parens patriae* role represents all of its citizens").

However, New Union cannot assert *parens patriae* capacity to sue on behalf of its citizens because New Union's citizens have no interest in Lake Temp or Imhoff Aquifer and cannot allege any injury because of the allege pollution. New Union's alleged *parens patriae* standing is exemplified by Dale Bompers. New Union's usage of Bompers as a representative is misplaced because even he cannot establish any injury to challenge the permit or DOD's proposed activity. Bompers owns, operates and resides on a ranch above the Imhoff Aquifer in New Union. Bompers claims the value of his ranch will be diminished if the Imhoff Aquifer below his ranch is contaminated by the permitted discharge. However, neither Bompers nor New Union presented any proof of a loss in property value due to possible contamination. Bompers does not presently use the Imhoff Aquifer, for it is not potable or fit for agricultural use without treatment, due to naturally occurring sulfur in the aquifer. He has no definite plans to use the Imhoff Aquifer in the future. Additionally, New Union by statute requires Bompers to be issued a withdrawal permit to withdraw ground water from the aquifer but he has never requested a permit. Based on these facts, Bompers cannot have suffered any injury to establish standing and New Union does not have derivative standing under a *parens patriae* theory.

Putting Bompers aside, New Union cannot have derivative standing under a *parens patriae* theory for its bird hunters and bird watchers. These citizens are actually trespassers on DOD land and New Union cannot assert *parens patriae* capacity for illegal activity. The facts are undisputed that when the lake became part of a military reservation in 1952, the DOD posted signs along highway warning of danger and that entry was illegal. Therefore, any rowboats and canoes not authorized by the DOD are trespassing on government land. Of this illegal trespassing population, New Union fails to present any evidence that any are citizens of their state. Additionally, the facts are undisputed that most of the bird hunters are residents of Progress and there are no records or representatives from New Union on this activity.

Accordingly, based on the arguments and facts presented above, New Union cannot satisfy Article III standing, even under *Massachusetts v. E.P.A.* majority's relax test, because it cannot plead or prove any injury in fact. New Union also fails to prove it has derivative standing under a *parens patriae* theory because none of its citizens have interest or suffer injury because of the DOD's proposed activities. Therefore, New Union lacks standing to bring suit and this Court cannot decide on the merits of this case.

II. THE DISTRICT COURT CORRECTLY DETERMINED THAT LAKE TEMP IS NAVIGABLE WATER AS DEFINED BY THE CLEAN WATER ACT AND AS INTERPRETED BY ITS REGULATORY AGENCIES.

In 1972, Congress drafted the CWA using the Constitution's Commerce Clause which grants Congress the power to regulate commerce among the States. U.S. Const. art. 1, § 8, cl.3. The CWA's objective is "to restore and maintain the chemical, physical and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a) (2006). It established a framework for cooperation between federal, state, and local government and industry to develop and implement

comprehensive plans to address pollution and overall water quality of navigable waters and both surface and underground waters. 33 U.S.C. § 1252 (2006).

The CWA defines navigable water as "*[t]he waters of the United States*, including the territorial seas." 33 U.S.C. § 1362(7)(2006) (emphasis added). Congress instructed the agency to give the term navigable waters the broadest constitutional interpretation possible. S. Conf. Rep. No. 1236, 92d Cong., 2d Sess. 144 (1972). Regulations drafted to implement the CWA provide jurisdictional guidance for the lead agencies enabled to administer the act, the EPA and COE. Under both agencies' current regulations, a body of water need not be navigable in the traditional meaning to be considered "waters of the United States." Pertinent to this case, COE regulations stipulate that navigable waters are those used, were used in the past, or could be used in interstate commerce, 33 C.F.R. § 328.3(1) (2006), or are intrastate lakes that the use or destruction could affect interstate commerce by affecting interstate travelers' recreational pursuits. 33 C.F.R. § 328.3 (3i) (2006).

The concept of navigable waters has been used to justify legal jurisdiction throughout our history. In England, the ebb and flow of tides in a body of water determined whether the water was deemed to be navigable and thus under control of the crown. *The Daniel Ball*, 77 U.S. 557, 563, (1870). The United States opted for a navigable-in-fact test. *Id.* In *The Daniel Ball*, the Court found that waters were "navigable in fact when they are used, or are susceptible of being used, in their ordinary condition, as highways for commerce." *Id.*

The federal government's definition of navigable water is different depending on the legal issue at stake. For example, a purely intrastate segment of a river between two dams was deemed not to be navigable to address an Admiralty issue while the court conceded it would still qualify as navigable for purposes under the Commerce Clause. *Fahnsestock v. Reeder*, 223 F.

Supp. 2d 618 (E.D. Pa. 2002). Similarly, different federal definitions of navigable waters provide different regulatory authority to the COE under the CWA, compared to its authority under the Rivers and Harbors Appropriation Act (hereinafter RHA); the definition is broader under the CWA (encompassing all "waters of the United States") versus under the RHA (using the mean high water line test). *See* 33 U.S.C.A. §§ 1311, 1344, 1362(7) (2006); 33 U.S.C.A. § 403 (2010). Justice Stevens noted in his dissent in *Solid Waste* (*SWANCC*), this difference is pertinent to show Congress's expansive intent that the COE's mission under the CWA is to protect "the quality of our Nation's waters for esthetic, health, recreational and environmental uses." *Solid Waste Agency of Northern Cook County vs. U.S. Army Corps of Engineers*, 531 U.S. 159, 175 (2001).

Additionally, the definition of navigable waters was critical in implementing the "Equal Footing" doctrine, whereby the United States held the territorial lands under navigable waters in trust for future States. *Pollard's Lessee v. Hagan*, 44 U.S. 212 (1845). Later as State creation slowed, the Supreme Court affirmed Congress could still 'take' a State's navigable waters but warned that, "we do not lightly infer a congressional intent to defeat a State's title to land under navigable waters." *Utah Div. of State Lands v. United States*, 482 U.S. 193, 197 (1987). Here, the Equal Footing doctrine most likely allowed State of Progress to obtain title to Lake Temp (as a navigable water) at the time they entered the Union. While not explored by the lower court, Progress is now arguing Lake Temp is not navigable; this brings up the issue of whether Progress has standing. Lake Temp is wholly owned by the DOD and if Progress did not have a previous claim of title under the Equal Footing doctrine then they may also lack standing to challenge COE's issuance of the 404 permit.

The Supreme Court has weighed in on the definition of navigable waters in the CWA on three occasions. The first time was in 1985 where the issue presented was whether the CWA and the COE's regulations required a permit prior to a landlord discharging material into wetlands adjacent to navigable waters. *United States v. Riverview Bayview Homes, Inc.*, 474 U.S. 121, 123 (1985). The Court concluded that Congress intended the CWA to be applied broadly and "that the term 'navigable' as used in the Act is of limited import." *Id.* at 133. The Court reaffirmed that the COE's interpretation of the CWA was entitled to deference under *Chevron* if its interpretation was reasonable in light of the CWA's language, policy and Congressional intent. *Id.* at 131 (citing *Chevron U.S.A v. Natural Resource Defense Council, Inc.*, 467 U.S. 837 (1984)). Unanimously, the Court agreed with the COE that "navigable waters" included wetlands adjacent to navigable waterways concluding they were "inseparably bound up with the 'waters' of the United States." *Id.* at 134.

The second direct interpretation of the CWA's navigable waters requirement involved the COE's requirement for a permit for discharge into an abandoned sand and gravel operation with a scattering of permanent and seasonal ponds. *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers*, 531 U.S. 159, 163 (2001). Here, The Supreme Court rejected the COE's interpretation that their jurisdiction reached to "ponds that are *not* adjacent to open water" based on the seasonal use by migratory birds. *Id.* at 168. The COE had extended their jurisdictional reach in 1986 to cover intrastate waters used by birds protected under the Migratory Bird Treaties. *Id.* at 164; 51 Fed Reg. 41,217 (1986). The Court declined to extend deference to the COE without a clear statement of Congress's intent to support the migratory bird rule. *Id.* at 172.

In the final navigable waters case, The Supreme Court again limited the scope of the jurisdictional waters under the CWA. *Rapanos v. United States*, 547 U.S. 715 (2006). In a plurality decision, the Court vacated the Sixth circuit's decision and remanded the case for further review under two possible tests. *Id.* at 757. Justice Scalia's opinion (joined by four justices) held the CWA authorizes federal jurisdiction only over "relatively permanent, standing or continuously flowing" waters connected to traditional interstate navigable waters. *Id.* at 739. But Justice Scalia also noted that, "[b]y describing waters as 'relatively permanent', 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 . . ." *Id.* at 733, n.5. Justice Kennedy's concurrence focused on finding a "significant nexus" of the wetlands to the navigable water instead of the adjacency standard analyzed in the lower court. *Id.* at 786.

The Supreme Court's three cases dealing with the scope of agency authority under the CWA has left a considerable amount of confusion for lower courts. Courts can apply the *Rapanos* plurality's standard or Justice Kennedy's "significant nexus" test. *Rapanos* at 810. Or, as suggested by Justice Stevens in dissent, apply both tests and if one test justifies the water qualifying as navigable, comply with CWA jurisdiction. *Id.* Recognizing that the varied opinions would cause vexing problems for lower courts, Justice Breyer's dissent in *Rapanos* called, "for the Army Corps of Engineers to write new regulations, and speedily so." *Id.* at 812.

In May 2011, the EPA and COE issued a draft guideline outlining their current interpretation of their jurisdiction under the CWA (following *SWANCC* and *Rapanos*). EPA and Army Corps of Engineers Guidance Regarding Identification of Waters Protected by the Clean Water Act, 76 Fed. Reg. 24,479-02 (May 2, 2011). This draft guideline applies to all programs authorized under CWA, not just section 404 permits. *Id.* The draft guidance lists waters that are

categorically protected by the CWA and provides that the "significant nexus" test be applied in a fact-specific analysis for determination whether tributaries and/or adjacent wetlands to traditional navigable waters or interstate waters fall under the CWA. *Id.*

In the case of an isolated, intrastate lake, for example Lake Temp, falling under section 328.3(a)(3) of the CWA, the draft guidance provides agency field agents direction to review relevant federal court opinions and conduct a project-specific analysis. *See* 76 Fed. Reg. 24,479-02 (May 2, 2011). The test for qualifying as navigable water is: (1) whether Lake Temp is used, was used in the past or could be used in interstate commerce, or (2) whether Lake Temp is navigable-in-fact.

Lake Temp qualifies as navigable water for purposes of the CWA. The newest draft guidance limits the extent pure intrastate, isolated waters may qualify; but with the agencies' instruction to look at federal court decisions, there is enough evidence to show a substantial connection between the Lake and interstate commerce, and its qualification as navigable-in-fact. Lake Temp meets both tests.

A. The District Court was Correct in Recognizing Lake Temp has a Well Established History of Interstate Commerce.

Similar to Lake Temp, The Great Salt Lake is an intrastate water body. In 1971, The Supreme Court declared The Great Salt Lake navigable for federal purposes while recognizing that it "is not part of a navigable interstate or international commercial highway." *Utah v. United States*, 403 U.S. 9 (1971). The Court found that the lake's use in transporting animals in ranching operations was enough of a connection to interstate commerce to be considered navigable. Similarly, in 1979 the Tenth Circuit found a Colorado intrastate river, while not navigable-in-fact, had enough of a connection with interstate commerce because it had a viable

trout fishery, supported beavers and provided water for agricultural irrigation. *United States v. Earth Sciences, Inc.*, 599 F. 2d 368, 375 (10th Cir. 1979).

In *Lopez,* the Supreme Court limited Congress' use of the Commerce Clause but affirmed that Congress may exert its commerce powers based on channels, instrumentalities or substantial affects. *United States v. Lopez,* 514 U.S. 549, 560 (1995) ("Where economic activity substantially affects interstate commerce, legislation regulating the activity will be sustained"). The *Wirtz* court held "where a general regulatory scheme bears a substantial relation to commerce, the de minimis character of individual instances arising under that statute is of no consequences." *Maryland v. Wirtz,* 392 U.S. 183, 197 (1968).

As stipulated in the facts of this case, bird hunters and watchers have used Lake Temp for over a hundred years and there is sufficient evidence that this includes not only hunters from Progress but other surrounding states as well. This represents interstate commerce not because of bird population changes and the migratory bird rule overturned in *SWANCC*, but rather on the fact Lake Temp has a significant impact to interstate travelers (hunters and bird-watchers). There is good infrastructure to support this travel, despite being on a military base as there are no barriers or gates blocking access to the lake. The DOD confirms there are ongoing birding activities at Lake Temp. The dissent in *SWANCC* argued that millions of people regularly participate in birding activities thereby generating substantial economic benefits. *SWANCC,* 531 U.S. at 194-95. The birding activity at Lake Temp meets the third prong of the *Lopez* test of substantial affects on interstate commerce.

Additionally, in terms of the possible affect on interstate commerce, the current munitions reclamation project planned for Lake Temp is evidence of the lake's economic capacity. The DOD's military reservation surrounds the lake and the current plan is to use Lake

Temp for munitions discharge. While the government is undertaking this activity, it could just as easily be a service provided by the private sector thus, the character of the activity is commerce. Likewise, the munitions to be decommissioned will arrive from storage facilities presumably located throughout the country and possibly from all over the world, thereby directly establishing Lake Temp's involvement in interstate commerce.

Both the proposed munitions reclamation project and Lake Temp's affect on interstate travel and recreation, establish that Lake Temp, in its past, currently, and into the future, substantially affects interstate commerce and thus, is eligible for protection under the CWA.

B. Lake Temp is Navigable-in-fact as Defined by the Agency and Through Judicial Interpretation.

The Daniel Ball established the waters are navigable-in-fact when they are used or could be used in their ordinary state for commerce. *The Daniel Ball*, 77 U.S. at 563. In 1935, The Supreme Court applied the test to all watercourses. *United States v. Oregon*, 295 U.S. 1, 14 (1935). The Court held that a waterway need not be continuously navigable and can have a seasonal or water level component to its make-up and still be navigable in fact. *Economy Light & Power*, 256 US 113, 122 (1921). The size and type of vessel that can be used on waterways is not determinative to the analysis. *United States v. Holt State Bank*, 270 U.S. 49 (1926); *see also The Montello*, 87 U.S. 430, 442 (1874) (indicating that the use of canoes on waterways was sufficient in showing navigability). The Court confirmed body of water is navigable-in-fact as long as it is susceptible to navigation whether it is currently or previously utilized as a highway of commerce. *United States v. Appalachian Elec. Power Co.*, 311 U.S. 377 (1940).

The Supreme Court cases cited above are part of the draft guidance released by the EPA and COE in May 2011. Draft Guidance, WOUS TNWs Attachment, Waters that Qualify as Waters of the United States Under Section (a)(1) of the Agencies' Regulations, Docket No. EPA-

HQ-OW-2011-0409-0005. The agencies also cite a District of Columbia Circuit case, where the court affirmed a waterway of being navigable-in-fact even though there was no actual commercial boating use, but rather a "*capacity of a water to carry commerce* could be shown through physical characteristics and experimentation." *FPL Energy Marine Hydro LLC v. FERC*, 287 F.3d 1151, 1157 (D.C. Cir. 2002) (emphasis added). The court upheld the Federal Energy Regulatory Commission's determination based on three canoe trips taken to prove the river's navigability. Additionally, the Ninth Circuit held that a purely intrastate commercial boating business was sufficient evidence of navigable waters because the intrastate river had "the capacity to support such navigation." *Alaska v. Ahtna Inc.*, 891 F.2d 1404 (9th Cir. 1989).

Lake Temp meets the definition of navigable water under the recently issued draft guidance standard on navigable-in-fact. 76 Fed. Reg. 24,479. For over a hundred years, Lake Temp has been used for recreation and the ground shows conclusive evidence that canoes and rowboats were and still are regularly launched from its banks. While Lake Temp can be dry at certain times of the year, this is similar to the allowance made for a waterway with seasonal or intermittent presence in *Economy Light & Power*. The use of canoes meets the standards laid out in *The Montello* and the experiment in *Appalachian Electric*. And, the fact that the activity is confined to just Lake Temp is similar to the business operated on the river in Alaska under *Ahtna*. Lake Temp meets the parameters established to be navigable-in-fact and qualifies for COE jurisdiction under the CWA.

Lake Temp is navigable under both the interstate commerce test and the navigable-in-fact test and therefore is a "water of the United States" subject to regulations under the CWA.

III. THE COE PROPERLY ISSUED THE § 404 PERMIT BECAUSE THE SPENT MUNITIONS ARE FILL MATERIAL AND DEFERENCE MUST BE GIVEN TO COE AND EPA EXPERTISE.

Congress charged the EPA with administering the CWA and prescribing regulations. 33 U.S.C. §§ 1251(d), 1361(a) (2006). Additionally, Congress empowered the COE to issue permits for the discharge of fill material into the waters of the United States in accordance with EPA regulations. 33 U.S.C. § 1344(a) (2006). Section 404(b) requires the COE to consider the environmental consequences of every discharge it allows. 33 U.S.C. § 1344(b) (2006). The COE must follow the environmental impact guidelines written by the EPA when making a determination to issue a permit. *Id*.

The EPA is prohibited from issuing a § 404 permit because Congress specifically granted that power to the COE. *Coeur Alaska, Inc. v. Southeast Alaska Conservation Council*, 129 S. Ct. 2458, 2467 (2009). Because Congress charged the EPA with carrying out the purposes of the CWA, yet prescribed the COE with the authority to issue § 404 permits, Congress defers to the expertise of both agencies to decide when to issue a § 404 permit. *See Id.*

> *Section 404* assigns the EPA two tasks in regard to fill material. First, the EPA must write guidelines for the Corps to follow in determining whether to permit a discharge of fill material. Second, the Act gives the EPA authority to 'prohibit' any decision by the Corps to issue a permit for a particular disposal site. . . . The Act is best understood to provide that if the Corps has authority to issue a permit for a discharge under § 404, then the EPA lacks authority to do so under § 402.

Id. (citations omitted). In *Coeur*, after considering the environmental factors required by § 404(b), the COE issued a permit to a mining company to discharge mining tailings into a lake which would raise the water level of the lake by fifty feet. *Id*. at 2464. Environmental groups intervened and contended the tailings were pollution, and, therefore, the EPA should veto the § 404 permit and require a § 402 permit. *Id*. at 2466. The Supreme Court determined the EPA does not have authority to issue a permit for the discharge of fill material because that authority

has been specifically provided to the COE under CWA § 404. *Id*. at 2469. The only role the EPA can play in the issuance of a § 404 permit is through its veto power and when the EPA declines to veto the permit, the EPA essentially defers to the judgment of the COE. *Id*. at 2465.

The pivotal question for determining which agency holds the authority to issue a permit for fill material turns on the regulation's definition of "fill material." *Id*. If the discharge is fill material as defined in the regulations, then the discharger must seek a permit from the COE. *Id*. If not, the discharger must seek a § 402 permit from the EPA. *Id*. "[T]he term fill material means material placed in waters of the United States where the material has the effect of . . . [c]hanging the bottom elevation of any portion of a water of the United States. Examples of such fill material *include, but are not limited to*: . . . clay, plastics, construction debris . . ." 40 C.F.R. § 232.2 (2010) (emphasis added). The term "fill material" within the regulation is not inherently limited to non-pollutant fill material because § 404 refers to all "fill material" without qualification. *Coeur*, 129 S. Ct. at 2469. The EPA guidelines do not strip the COE of power to issue permits for fill in cases where the fill is also subject to EPA standards due to the fact that the fill material contains some pollutants. *Id*. "In contrast to the pollutants normally covered by the permitting requirement of [§ 402], 'dredge or fill material,' . . . is typically deposited for staying put." *Rapanos*, 547 U.S. at 744 (2006).

Here, both agencies axiomatically determined that the spent munitions are fill material under the regulations, therefore the COE has authority to issue a § 404 permit. The COE considered the environmental consequences of issuing the permit and determined the discharge was the least environmentally damaging way to dispose of the munitions. The COE determined the spent munitions are fill material under the regulations promulgated by the EPA and the EPA did not veto the permit. Therefore, this Court should defer to the expertise of both agencies.

Filling the bottom of Lake Temp with spent munitions will raise the bottom elevation of the lake by six feet and increase Lake Temp's surface area by two miles. DOD plans to spray the fill material over the dry portions of the lake bed. The material will dry before the lake fills again which will decrease the opportunity for any pollutant to mix with water. Because the munitions will dry before the lake fills with runoff and simply raise the bottom elevation of Lake Temp, the munitions are considered fill material within the meaning the regulation.

The regulation does not explain that fill material needs to be toxic free; the regulations simply state fill material includes material that will raise the bottom elevation of a body of water. The munitions will dry before coming into contact with water. 40 C.F.R. § 232.2 does not provide an exhaustive list of materials considered to be fill material. The regulation is significantly broad to allow for both the EPA and the COE to exercise discretion and draw on their expertise before issuing a permit. If Congress does not approve of the EPA regulations, it can take appropriate action. However, Congress has not taken action to modify EPA regulations for almost forty years which provides good evidence of Congress's implicit support.

Congress granted authority to the COE to issue permits for the discharge of fill material in the waters of the United States; however, the EPA still holds authority to veto the COE permit. The EPA could have vetoed the COE permit, but did not.

Congress provided the EPA with the power to veto a COE permit because the EPA is charged with the responsibility of carrying out the CWA. The EPA has not exercised that power and has deferred to the judgment of the COE. This Court should defer to the expertise of both agencies because both the EPA and the COE have determined the permit to be appropriate. The Supreme Court has explained that courts should be particularly deferential to agency actions

when the actions rely on the scientific and technical information within the agency's area of expertise. *Marsh v. Or. Natural Res. Council*, 490 U.S. at 377.

New Union's collateral attack on the validity of COE's authority to issue a permit to the DOD is both meritless and frivolous. New Union's contention is not based in any type of controlling authority. As explained above, Congress provided the EPA with authority to veto the issuance of a COE permit because the EPA is charged with carrying out the purposes of the CWA. Congress requires the EPA to oversee the issuance of § 404 permits. This safety check ensures the appropriate amount of review is conducted and accordingly deference is due.

IV. OMB PARTICIPATION IS CONSISTENT WITH THE PRESIDENT'S ARTICLE II POWERS AND EPA'S DECISION TO NOT VETO THE PERMIT IS CONSISTENT WITH THE SUPREME COURT'S HOLDING IN *COEUR*.

The CWA authorizes the Administrator of the EPA to veto permits that will have an unacceptable adverse effect on the environment. Clean Water Act § 404(c), 3 U.S.C.A. § 1344(c) (2006). It states:

> The Administrator is *authorized* to prohibit the specification . . . of any defined area as a disposal site, and he is *authorized* to deny or restrict the use of any defined area for specification (including the withdrawal of the specification) as a disposal site, whenever he determines, after notice and opportunity for public hearings, that the discharge of such materials into such area will have an unacceptable adverse effect on municipal water supplies . . . and fishery areas . . . wildlife, or recreational areas. Before making such determination, the Administrator shall consult with the Secretary.

Id. (emphasis added). "An agency's decision not to prosecute or enforce . . . is a decision generally committed to an agency's absolute discretion." *Cascade Conservation League v. M.A. Segale, Inc*., 921 F. Supp. 692, 699 (W.D. Wash. 1996) (quoting *Heckler v. Chaney*, 470 U.S. 821, 831 (1985)).

Agencies must weigh the need for enforcement against the chances of success and the resources it would require when deciding not to take enforcement action. *Heckler*, 470 U.S. at

831. Courts are not well-suited to balance such considerations, "[t]he agency is far better equipped than the courts to deal with the many variables involved in the proper ordering of its priorities." *Id.*

In balancing its interests, the EPA is required to seek assistance from the Director of the OMB when a conflict exists between the EPA and another executive agency. Exec. Order No. 12,088, 43 Fed. Reg. 47,707 (Oct. 13, 1978). It states in pertinent part:

> 1-602. The Administrator shall make every effort to resolve conflicts regarding such violation between Executive agencies and, on request of any party, such conflicts between an Executive agency and a State, interstate, or a local agency. If the Administrator cannot resolve a conflict, the Administrator shall request the Director of the Office of Management and Budget to resolve the conflict.
>
> 1-603. The Director of the Office of Management and Budget shall consider unresolved conflicts at the request of the Administrator. The Director shall seek the Administrator's technological judgment and determination with regard to the applicability of statutes and regulations.

Id. "A certain degree of deference must be given to the authority of the President to control and supervise executive policymaking." *Envtl. Def. Fund v. Thomas*, 627 F. Supp. 566, 570 (D.D.C. 1986) (citing *Sierra Club v. Costle*, 211 U.S. App. D.C 336 (D.C. Cir. 1981)).

Primary jurisdiction is a prudential doctrine designed to allocate authority between courts and administrative agencies. *S. Utah Wilderness Alliance v. Bureau of Land Mgmt.*, 425 F.3d 735, 750 (10th Cir. 2005) (citing *United States v. Western Pac. R.R. Co.*, 352 U.S. 59, 64 (1956)). When Congress delineates a regulatory scheme for resolving interagency conflicts, and places that power within the special competence of an administrative body, doctrine of primary jurisdiction allows a court to direct the parties to seek a decision before the appropriate administrative agency. *Id.* at 750 – 51.

The EPA properly consulted the OMB to resolve a dispute between the EPA and the COE before deciding not to veto the § 404 permit. Further, the EPA's decision not to veto the

permit is consistent with the Supreme Court's holding in *Coeur Alaska, Inc. v. Se. Alaska Conservation Council*.

A. The OMB Acted Appropriately When it Resolved a Conflict Between Two Executive Agencies. Further, the EPA Did Not Acquiesce to an OMB Directive.

"The executive power shall be vested in a President of the United States of America." U.S. Const. art. II, § 1, cl. 1. Article II charges the President of the United States with the duty to "take Care that the Laws be faithfully executed." U.S. Const. art. II, § 3. The Supreme Court has interpreted the President's Article II powers:

> The ordinary duties of officers prescribed by statute come under the general administrative control of the President by virtue of the general grant to him of the executive power, and he may properly supervise and guide their construction of the statutes under which they act in order to secure that *unitary and uniform execution of the laws* which Article II of the Constitution evidently contemplated in vesting general executive power in the President alone.

Myers v. U.S., 272 U.S. 52, 135 (1926) (emphasis added).

The executive branch has consistently attempted to ensure unitary and uniform execution of environmental protection laws promulgated by the executive branch. Executive Order 12,088 requires every agency to "cooperate with the Administrator of the Environmental Protection Agency . . . in the prevention, control, and abatement of environmental pollution." Exec. Order No. 12,088, 43 Fed. Reg. 47,707, § 1-201 (October 13, 1978). In carrying out the Order, the EPA is required to "make every effort to resolve conflicts . . . between Executive agencies. If 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.

Further, Executive Order 12,146 requires agencies to submit interagency disputes to the Attorney General prior to proceeding in any court. Exec. Order No. 12,146, 44 Fed. Reg. 42,657, §§ 1-401 and 1-402 (July, 18, 1979). "If the matter can be resolved as a matter of

Administration policy . . . it is altogether appropriate to dejudicialize the dispute and allow the Executive an opportunity to act." *Tennessee Valley Auth. v. United States*, 13 Cl. Ct. 692, 700-01 (1987).

"Congress enacts environmental legislation after years of study and deliberation, and then delegates to the expert judgment of the EPA administrator the authority to issue regulations carrying out the aims of the law." *Envtl. Def. Fund v. Thomas*, 627 F. Supp. at 570. The *Thomas* Court determined that the OMB acted "highly irresponsible" when it delayed approval of an EPA regulation. *Id*. at 569. Nonetheless, the court concluded that "enjoining OMB from interacting at all with EPA simply because OMB *might* cause delay . . . is premature and an unwarranted intrusion into discretionary executive consultations." *Id*. at 571.

The doctrine of primary jurisdiction allows courts to direct the parties to the consult an administrative body that has been charged with special competence. *S. Utah Wilderness Alliance v. Bureau of Land Mgmt.*, 425 F.3d 735, 750 (10th Cir. 2005). The doctrine serves two purposes. First, it promotes regulatory uniformity by preventing courts from interfering with an efficient regulatory scheme. *Id.* at 751. Second, the doctrine promotes deference to agency expertise by allowing courts to consult agencies on issues not within the conventional experience of judges. *Id.*

"Within the OMB, the Office of Information and Regulatory Affairs (OIRA) is the repository of *expertise* concerning regulatory issues, including methodologies and procedures that affect more than one agency, . . . and the *President's regulatory policies*." Exec. Order No. 12,866, 58 Fed. Reg. 51735, § 2(b) (Sept. 30, 1993) (emphasis added).

Here, the OMB's participation is nothing more than ensuring the Executive's laws are carried out in unitary and uniform manner. The OMB acted as an instrument of efficiency by

resolving the conflict between the agencies before the conflict would have been taken to the Attorney General. Additionally, a prudent court would have likely directed the agencies to the OIRA before attempting to determine issues solely within the expertise of both agencies.

New Union's argument asserts that OMB participation will taint agency decisions, and requiring judicial inquiry into OMB actions, which is contrary to the intent of the Executive Orders. The Orders are in place to provide an efficient mechanism for resolving interagency conflicts. New Union is proposing that not only will a court need to investigate the substance of the interagency conflict, but will also have to investigate the nature of the OMB's participation in assisting to resolve the conflict. New Union's proposal is entirely inefficient and contrary to the Orders promulgated by the President under his Article II powers.

New Union has not provided evidence of inappropriate action on the part of the OMB or the EPA. New Union is making collateral attacks on the EPA's decision not to veto the permit which is contrary to The Supreme Court's holding in *Coeur*. New Union is simply grasping at straws. Had the EPA decided the to veto the permit after conferring with the OMB, New Union would be arguing that OMB's participation was entirely appropriate.

New Union's argument that OMB participation prevents the Court from properly interpreting the statute using a *Chevron* test is wholly misdirected. *Chevron* sets forth a two-part test for determining whether to grant deference to an agency's interpretation of a statute which it administers. *Chevron v. NRDC, Inc.*, 467 U.S. 837 (1984). Here, the EPA interpreted the applicable sections of the CWA in 2008 when it promulgated 40 C.F.R. § 232.2, defining fill material. The OMB was not interpreting the CWA when it resolved the interagency conflict. It was simply providing guidance to the two agencies with expertise in the discharge of fill material and its impact to the environment.

The EPA could have vetoed the permit after receiving guidance from the OMB. Nothing in the Executive Orders states that the OMB's decision is binding. The Orders simply provide an efficient procedural mechanism for resolving interagency conflicts. Once the EPA's concerns were resolved, the EPA did not act. Therefore, the OMB's participation was ideal because it resolved a conflict in a timely, cost-efficient manner; exactly the way the President intended.

Finding that OMB participation requires judicial review anytime the OMB resolves a conflict will work directly against the President's Article II powers and work against judicial efficiency. The courts should defer to the President's Article II powers when the conflict can be resolved within the Executive Branch. Courts should only intervene once the agencies have exhausted their Executive remedies and cannot resolve their own conflicts.

Second-guessing the OMB's participation will deter agencies from candidly participating in conflict resolution. Agencies will not give credibility to OMB conflict resolution if they know it is nothing more than a procedural hurdle on the way to eventual litigation. By deferring to OMB conflict resolution under the primary jurisdiction doctrine, courts will encourage agencies to act in good faith, with an eye towards resolving the interagency conflict.

The OMB participation in resolving an interagency conflict was nothing more than an exercise of the President's Article II powers ensuring executive laws are carried out in a uniform and unitary fashion.

B. EPA Decision Not to Veto Permit is Consistent with The Supreme Court's Holding in *Coeur*.

The Supreme Court has explicitly resolved any question about which agency holds the authority to issue a permit for the discharge of fill material. *Coeur Alaska, Inc. v. Se. Alaska Conservation Council*, 129 S. Ct. at 2467. As mentioned in Part III above, The Supreme Court deferred Congress's unambiguous writing of the CWA and determined Congress specifically

provided authority to the COE to issue a § 404 permit once discharged is determined to be fill material.

In *Coeur*, the EPA did not veto a § 404 COE permit for discharge of fill material into a natural pond, but instead issued a § 402 permit to restrict the amount of water discharged from the pond. *Coeur*, 129 S. Ct. at 2465-66. The EPA did not veto the COE permit even though it determined that placing the tailings in the lake was not the "environmentally preferable" means of disposing of them. *Id.* The Supreme Court concluded, "[b]y declining to exercise its veto, the EPA in effect deferred to the judgment of the Corps on this point." *Id*.

An agency's decision not to take enforcement action is presumed immune from judicial review under the APA because Congress delegates to the expert judgment of the agency to carry out executive law. *Heckler*, 470 U.S. at 832. This presumption may be overcome by a showing that the statute provides "guidelines for the agency to follow in exercising its enforcement powers." *Id.* at 833.

Here, this Court should defer to the EPA's judgment in deciding not to veto the COE permit. The EPA has done nothing wrong. The EPA merely exercised its discretion and decided not to veto the permit. The EPA conflicted with the COE regarding which agency would issue the permit. However, the EPA consulted with the OMB to resolve a conflict between the two agencies before ultimately deciding not to veto the COE permit.

Deference to the EPA's inaction is consistent with the Supreme Court's holding in *Coeur* because the EPA decided that the discharge of munitions is fill material, therefore the DOD must seek a § 404 permit from the COE. The EPA wrote guidelines for the COE to follow to determine whether discharge is fill material, and the EPA has exclusive authority to veto the issuance of a § 404 permit. The EPA could have decided to veto the permit after determining

that the fill material is harmful to the environment, but it did not. Therefore, deference needs to be given to the EPA's decision not to veto the permit which is consistent with the APA and *Coeur*.

CONCLUSION

Based upon the foregoing reasons, this Court should affirm the decision of the District Court below.