Team No. 79

BRIEF FOR STATE OF NEW UNION

Team No. 79

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

IN THE UNITED STATES COURT OF APPEALS
FOR THE TWELFTH CIRCUIT

STATE OF NEW UNION,
Appellant – Cross-Appellee,

v.

UNITED STATES,
Appellee – Cross-Appellant,

v.

STATE OF PROGRESS,
Appellee – Cross-Appellant

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

Brief for STATE OF NEW UNION, Appellant – Cross-Appellee

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JURISDICTIONAL STATEMENT

The District Court for the District of New Union has jurisdiction to hear civil suits arising under the Clean Water Act (CWA). 33 U.S.C. § 1311; 5 U.S.C. § 706. This Court has jurisdiction to hear appeals from any final decision of the District Court, which is within its circuit. 28 U.S.C. § 1291; 28 U.S.C. § 1294.

STATEMENT OF THE ISSUES

I. Whether the State of New Union has standing in its sovereign capacity as owner and regulator of the groundwater in the state or in its parens patriae capacity as protector of its citizens who have an interest in the groundwater in the state.

II. Whether the Army Corps of Engineers has jurisdiction to issue a permit under the CWA Section 404, 33 U.S.C. § 1344, because Lake Temp is navigable water under CWA Sections 301(a), 404(a), and 502(7), 33 U.S.C. §§ 1331(a), 1344(a), 1362(7).

III. Whether the Armey Corps of Engineers has jurisdiction to issue a permit under CWA Section 404, 33 U.S.C. § 1344, or the Environmental Protection Agency has jurisdiction to issue a permit under CWA Section 402, 33 U.S.C. § 1342, for the discharge of slurry into Lake Temp.

IV. Whether the decision by the Office of Management and Business that the Army Corps of Engineers had jurisdiction under CWA Section 404, 33 U.S.C. § 1344, and that the Environmental Protection Agency did not have jurisdiction under CWA Section 402, 33 U.S.C. § 1342, to issue a permit to the Department of Defense to discharge slurry into Lake Temp and the Environmental Protection Agency's acquiescence in the Office of Management and Business's decision violated the CWA.

STATEMENT OF THE CASE

Three parties, the State of New Union (Appellant); the United States (Appellee), representing the Department of Defense (DOD) and the Army Corps of Engineers (COE); and the State Progress (Appellee); are appealing the issuance of an order dated June 2, 2011 by the District Court for the District of New Union granting the United States' motion for summary judgment. (R. at 1-2.)

The State of New Union sought judicial review, pursuant to 28 U.S.C. § 1331 and 5 U.S.C. § 702, of the permit issued by the COE to the DOD permitting the DOD to discharge slurry into Lake Temp, asserting that the authority to issue such a permit belongs to the Environmental Protection Agency (EPA), not the COE, under the CWA, 33 U.S.C. § 1342. (R. at 3.) The COE issued its permit pursuant to Section 404 of the Clean Water Act (CWA), 33 U.S.C. § 1344. (R. at 3.) The Office of Management and Budget (OMB) made the decision to issue a Section 404 permit rather than issue a Section 402 permit under the EPA's authority. (R. at 5.)

After discovery, the COE filed a motion for summary judgment. (R. at 5) New Union and Progress both filed separate cross-motions for summary judgment in response. (R. at 5.) The District Court granted the COE's motion for summary judgment on the CWA claims and dismissed both New Union's and Progress's cross-motions. (R. at 10.) New Union and Progress each filed a Notice of Appeal. (R. at 1.) Now, all three parties bring this appeal before the United States Court of Appeals for the Twelfth Circuit. (R. at 1).

STATEMENT OF FACTS

In 1952, Lake Temp, a landlocked, inland lake located entirely within the State of Progress, and in proximity to the State of New Union, became part of a military reservation under the DOD. (R. at 4.) Lake Temp is a relatively small body of water, approximately three miles wide and nine miles long during the rainy season and wholly dry about once every five years. (R. at 3-4.) The lake is located in the basin of a mountain range. (R. at 4.) The watershed from the surrounding mountain range, which extends across Progress and into New Union, provides the surface water, which flows into Lake Temp. *Id.* The Imhoff Aquifer, which is sulfurous and non-potable, is unconfined. *Id.* The Imhoff Aquifer is separated by alluvial deposits and is less than one thousand feet below Lake Temp with five percent extending into New Union. *Id.* New Union includes the aquifer in its groundwater inventory. *Id.* The portion of

the aquifer located within Progress is wholly within the bounds of the military reservation *Id.* Dale Bompers resides above the part of the aquifer located in New Union. *Id.* Mr. Bompers earns his livelihood from the ranch he owns and operates. *Id.*

Prior to Lake Temp becoming part of the DOD's military reservation, it was used for recreational purposes by people in the surrounding areas. *Id.* A Progress state highway, which connects to New Union roads, runs along the southern side of Lake Temp. *Id.* There are clearly visible trails leading from the highway to the lake that were caused by the dragging of canoes and rowboats. *Id.* The Lake has also historically been used by ducks as a stopover during their yearly migration. *Id.* Due to this semiannual migration, Lake Temp has also been used for recreational duck hunting. *Id.* Thousands of duck hunters from Progress and New Union, as well as other states, have flocked to Lake Temp during duck migration season. *Id.* When Lake Temp became part of the military reservation, the DOD posted a few signs warning of danger and that entry was illegal, but did not put up a fence to keep recreational users away. *Id.*

Currently, the DOD is proposing to build a facility which prepares a mixture of munitions, liquids, semi-solids, granular contents, chemicals classified as hazardous under the Clean Water Act (CWA), pulverized metals and water, which the DOD calls "slurry." *Id.* The DOD would like to construct this facility on Lake Temp's shore so that it may dump the slurry into the dry lakebed, which will cause the lakebed to be raised by six feet over the course of several years, forever changing Lake Temp. *Id.* The effects from the slurry deposit will cause the water level of the lake to rise and the lake to enlarge up to two square miles, however, the watershed from the mountains will not be affected and the lake will continue to hold water. (R. at 4-5) In order to build this facility and dispose of the slurry into Lake Temp, the DOD must get a

permit under the CWA. (R. at 1.) The DOD applied for, and was granted, a permit authorizing this conduct by the COE pursuant to the CWA Section 404, 33. U.S.C. § 1344. *Id.*

STANDARD OF REVIEW

When reviewing a district court's granting of a motion for summary judgment, the Court of Appeals must determine whether, upon review of the record in the light most favorable to the non-moving party, there is "no genuine issue as to any material fact and the movant is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c)(2). The standard of review is de novo and the same legal standards used by the district court will be applied. *Timmons v. White*, 314 F.3d 1229, 1232 (10th Cir. 2003).

SUMMARY OF THE ARGUMENT

The order of the District Court for the District of New Union should be reversed and the permit authorizing the DOD to discharge "slurry" into Lake Temp should be vacated. The District Court failed to properly assess New Union's parens patriae standing, especially the State's quasi-sovereign interest in securing observance of the terms by which it participates in the federal system of government. *Alfred L. Snapp & Son, Inc. v. Puerto Rico*, 458 U.S. 592, 607 (1982). Federal court jurisprudence indicates that states, suing in their sovereign capacity, are granted a special solicitude. *See e.g.* Massachusetts v. EPA 549 U.S. 497, 519 (2007). New Union has a quasi-sovereign duty to protect the natural resources used by its citizens. Water is inherently a public resource, subject to the public trust doctrine as made apparent by Congress and the enforcement provisions of the CWA. 33 U.S.C. § 1251(b). Here, New Union is suing in its sovereign capacity to obtain, as the protector of its citizen's welfare, the protections guaranteed by a federal statute and must be granted standing.

The District Court was correct in holding that Lake Temp, due to its size and use in interstate commerce, is a "water of the United States," bringing it within the jurisdiction of the CWA; the holding in *SWANCC* does not control this case. Additionally, even the Supreme Court's two navigability tests in *Rapanos* applied to non-wetlands, Lake Temp is navigable under each. *Solid Waste Agency of Northern Cook County v. United States Army Corps of Engineers*, 531 U.S. 159, 171-72 (2001).

The District Court erred in holding that the slurry constituted "fill material" subject to the COE's § 404 permitting authority; "fill material" is limited to mixtures of rock and construction debris, not spent munitions. 40 C.F.R. 232.2. *Coeur* does not hold that all slurries are "fill materials." *Coeur Alaska, Inc. v. Se. Alaska Conservation Council,* 129 S. Ct. 2468 (2009). The Court specifically differentiated the slurry in *Coeur* from future, more hazardous materials—like spent munitions. *See id*.

The OMB's dispute resolution decision concerning the EPA and the COE violated the CWA. The CWA authorizes the EPA and the COE, in limited circumstances, to issue permits for the discharge of pollutants. 33 U.S.C. §§ 1342, 1344. There is no statutory language in the CWA authorizing the OMB to issue or veto permits under the CWA, to review the decisions of the EPA or the COE granting or denying these permits, or resolving disputes between the EPA and the COE over the jurisdiction of such permits.

ARGUMENT

I. NEW UNION HAS STANDING, AS DEFINED BY *SNAPP*, IN ITS PARENS PATRIAE CAPACITY AS PROTECTOR OF ITS CITIZENS' WELFARE, WHO HAVE INTEREST IN THE GROUNDWATER AND AS A STATE DENIED RIGHTFUL PARTICIPATION WITHIN THE FEDERAL SYSTEM.

The District Court erred in finding that New Union does not have standing to challenge the permit issued by the COE to the DOD. The District Court failed to properly assess New

Union's parens patriae standing especially in regard to the state's quasi-sovereign interest in operating within the federal system of government. The court did not appropriately consider 1) the significant federalism concerns presented by the unique facts of this case; 2) the history of the parens patriae doctrine and its contemporary value as a prudential concept; 3) the regulation of water as an inherently public resource subject to the public trust doctrine; 4) the meaning and Congressional mandate of the Clean Water Act; or 5) New Union's quasi-sovereign interest as protector of the welfare of its populace generally.

Although the Constitution does not require that a plaintiff have standing to file a suit in federal court, the Supreme Court has imposed prudential standing requirements—which derive from the Article III phrase "cases and controversies"—to ensure that plaintiffs have a genuine interest and stake in a case. *E.g., Stark v. Wickard*, 321 U.S. 288, 304, 310 (1944) (explicitly applying standing requirements for the first time); U.S. Const. art. III, § 2. The standing doctrine requires that a plaintiff establish that the defendant's actions have caused him a concrete and particularized injury that is either actual or imminent and that a favorable decision will likely redress that injury. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992).

A. New Union's challenge of the permit aligns with the historical purposes of the parens patriae doctrine because the state is challenging the permit on behalf of its citizens who are powerless to prevent the realistic threat against their economic physical welfare.

The parens patriae doctrine, a means of conferring a special solicitude for states in federal courts, is the contemporary means by which states handle transboundary problems like the polluting dispute at issue here. New Union has a special position and interest in this case as a state in its parens patriae capacity litigating in federal court. For a state to have standing to sue in its parens patriae capacity, a state need only allege injury to a "quasi-sovereign interest." *Hawaii v. Standard Oil Co. of Cal.*, 405 U.S. 251, 258 (1972). A "quasi-sovereign" interest is an interest

of the sovereign that pertains to the state's responsibility to protect the "health, comfort and welfare" of its populace. *Pennsylvania v. West Virginia*, 262 U.S. 553, 592 (1923). Like standing, the parens patriae doctrine is of judicial creation. The parens patriae doctrine "creates an exception to the normal rules of standing applied to private citizens in recognition of the special role that a State plays in pursuing its quasi-sovereign interests in the 'well-being of its populace.'" *Estados Unidos Mexicanos v. DeCoster*, 229 F.3d 332, 335 (1st Cir. 2000); *see also Wyoming v. Oklahoma*, 112 S.Ct. 789 (1992) (stating that a claim of parens patriae standing is distinct from an allegation of direct injury).

The COE's issuance of a permit to dump slurry into Lake Temp has directly harmed New Union's parens patriae right to participate in the federal system of government by not allowing New Union the opportunity to determine the extent to which the polluting operation will affect their quasi-sovereign interests.

The Supreme Court has explained that "this prerogative…[is] often necessary to be exercised in the interests of humanity, and for the prevention of injury to those who cannot protect themselves." *Alfred L. Snapp & Son, Inc. v. Puerto Rico*, 458 U.S. 592 (1982). (citing *The Late Corp. of the Church of Jesus Christ of Latter-day Saints v. United States*, 136 U.S. 1, 57-8 (1890)). The first parens patriae cases concerning public nuisances generally involved disputes over pollution disposal. *See Georgia v. Tennessee Copper Co.*, 27 S.Ct. 618 (1907); *Missouri v. Illinois*, 26 S.Ct. 268 (1906). However, the Supreme Court made clear in *Snapp* that "parens patriae interests extend well beyond the prevention of…public nuisances." *Id*. at 605. *See Pennsylvania v. West Virginia*, 262 U.S. 553, 581, 591 (1923) (Pennsylvania in its parens patriae capacity sued on behalf of its citizens economically harmed by West Virginia natural gas laws); *Georgia v. Pennsylvania Railroad Co.*, 324 U.S. 439, 443-44 (1945) (Georgia, in its

parens patriae capacity, brought suit to protect its citizens economically harmed by alleged antitrust violations). By allowing states to vindicate generalized public harms in federal court, the federal courts made apparent that a state need not meet the standing requirements imposed on private parties—instead, the state's assertion of sovereignty interests would be sufficient to confer standing. *See, e.g.,* Ann Woolhandler & Michael G. Collins, *State Standing*, 81 Va. L. Rev. 387, 410-12 (1995).

New Union's interest in this case in fits exactly into the historical scheme of parens patriae jurisprudence. New Union is acting as protector of its populace and in the interest of humanity in a way that the citizens of the Lake Temp area cannot. Specially, New Union is challenging a future public nuisance. Parens patriae jurisprudence has historically allowed for federal courts to entertain suits challenging future harm. *See Missouri*, 200 U.S. at 497.

New Union citizens—notably Dale Bompers—are at risk of economic harm as well. A long line of parens patriae cases have involved states successfully challenging other states for harms to the economic welfare of their citizens. *See Pennsylvania*, 262 U.S. at 581; *Georgia v. Pa R.R. Co.*, 324 U.S. 439, 443-44 (1945). Indeed, recent Supreme Court decisions indicate that economic harm remains a compelling and important consideration in parens patriae cases. *See Monsanto Co. v. Geertson Seed Farms*, 130 S.Ct. 2743 (2010) (environmental plaintiff may sue without proof of actual environmental harm because plaintiff showed that he would face economic losses related to the threated harm); *see also* Bradford Mank, *Standing in* Monsanto Co. v. Geertson Seed Farms*: Using Economic Injury as a Basis for Standing When Environmental Harm is Difficult to Prove*, 115 Penn St. L. Rev. 307 (2010) (proposing that environmental plaintiffs who can show a plausible economic injury even where the environmental injury may be speculative will likely be granted standing due to the Court's

understanding of economic harm as capable of fulfilling injury prong). Dale Bompers and his cattle operation are at an economic risk of harm should the Imhoff Aquifer be polluted.

B. New Union's quasi-sovereign interest in the health and well being of its residents and in asserting its right as a sovereign fits into both of the modern quasi-sovereign interests articulated in *Snapp*.

The *Snapp* Court noted that there are two general categories of quasi-sovereign interests. *Snapp*, 458 U.S. at 607. First, "a State has a quasi-sovereign interest in the health and well-being—both physical and economic—of its residents in general." *Id*. The Court noted that there are "no definitive limits on the proportion of the population of the State that must be adversely affected by the challenged behavior." *Id*. The second type of parens patriae suit involves a state's "quasi-sovereign interest in not being discriminatorily denied its rightful status within the federal system." *Id*. at 608. Further, the Court wrote "a State does have an interest, independent of the benefits that might accrue to any particular individual, in assuring that the benefits of the federal system are not denied to its general population." *Id.*

New Union's quasi-sovereign interest in challenging the issuance of the permit fits into both of the categories articulated by the Supreme Court in *Snapp*. New Union has a quasi-sovereign interest in the health and welfare—both physical and economic—of its residents. Also, New Union has a great interest in asserting its rights as a quasi-sovereign in the federal system of government. In regard to the threat of future harm by the commencement of the DOD polluting operation, federal court jurisprudence has long recognized that a party does not need "to await the consummation of threatened injury to obtain preventive relief: If the injury is certainly impending that is sufficient to confer standing." *Babbit v. United Farm Workers Nat. Union*, 442 U.S. 289, 298 (1979) (quoting *Pennsylvania v. West Virginia*, 262 U.S. 553, 593 (1923)); *see also Friends of the Earth, Inc. v. Gaston Copper Recycling Corp.*, 204 F.3d 149, 160 (4th Cir.

2000) (noting that "the Supreme Court has consistently recognized that threated rather than actual injury can satisfy Article III standing requirements."). The Court's recognition that the injury requirement can be fulfilled by an impending injury is especially important in environmental cases where the actions that will cause the injury have been authorized but have yet to occur (as is the case here) or where an action has caused concern of future injury like the Court discussed in *Laidlaw*. *Laidlaw*. *Friends of the Earth, Inc. v. Laidlaw Environmental Services*, 528 U.S. 167 (2000).

The Supreme Court has utilized its decision in the civil rights case *Los Angeles v. Lyons* when assessing the reasonableness of a plaintiffs allegations' of future harm. *City of Los Angeles v. Lyons*, 461 U.S. 95 (1983) (holding plaintiff had no standing to challenge police policy because he could not establish a realistic threat of harm to himself from the policy). Several environmental Supreme Court and lower federal court cases have distinguished *Lyons* by conferring standing on a plaintiff premised on a realistic threat of future harm. These cases each involve an explicit or implicit assessment of "the reasonableness" of the plaintiff's fear of future harm. *E.g., Laidlaw*, 528 U.S. at 167 (Plaintiffs faced a realistic threat of future harm where defendant corporation had dumped pollutants into river and plaintiffs alleged avoidance of the river because of subjective fear of injury). The "reasonableness" analysis is essentially an assessment by the court of the probability that a realistic threat will culminate in future harm.

In *Lujan v. Defenders of Wildlife*, the preeminent federal standing case, the Supreme Court implicitly utilized the *Babbit* "impending" injuries analysis—which entails a probability (or "reasonableness") assessment—of the plaintiff's claim alleging "imminent" injury. However, the imminent injury test in *Lujan* does not clearly explain how probable a risk to a plaintiff must be or how soon it must occur for the litigant to have standing. Courts have differing

interpretations on the realistic threat analysis. *See Ecological Rights Found. v. Pac. Lumber Co.*, 230 F.3d 1141, 1151 (9th Cir. 2000) (interpreting "imminent" standing test to include an increased risk of harm). However, it is important to note that recent standing cases have articulated a very deferential standard in the probability analysis. *See Massachusetts v. EPA*, 549 U.S. 497, 522-23 (2007) (Massachusetts had standing to complain of a procedural failing even though harm from greenhouse gases might not occur for decades); *Summers v. Earth Island Institute*, 555 U.S. 488, 506 (2009) (Breyer, C.J., dissenting) (a threat of future harm may be realistic even where the plaintiff cannot specify precise times, dates, and GPS coordinates).

1. The polluting operation places New Union Citizens' recreational interests at a realistic threat of harm and the polluting operation presents an incalculable realistic threat of future injury to the area.

Here, New Union's citizens are at risk of certainly impending injury and at a realistic threat of future harm. If the permit is not revoked, New Union citizens face certain impending injury to their recreational interest in the use of Lake Temp. The DOD has knowledge that citizens greatly enjoy using the Lake and has neither taken steps to prevent citizens' use of Lake Temp since it has become a military reservation nor ceased their plans to pollute the Lake. Further, the DOD has owned the lake for more than five decades without using the area for any operation. The lake has been and is an integral part of the New Union and Progress area. Suddenly, DOD wants to substantially change the lake by conducting this polluting operation. While the disastrous results of the polluting operation cannot be fully determined, several results have a realistic threat of occurring: 1) a reduction in the rate of transfer of water from Lake Temp to the aquifer due to the hardened slurry coating the lakebed; 2) flooding and subsequent inability to use the Progress highway which is a part of the New Union transportation system; 3) pollution seepage through the alluvial fill that separates Lake Temp and the Imhoff Aquifer; and

4) the substantial likelihood that in the future the contours of the lake will extend into New Union territory because the lake serves as the drainage basin of the area's precipitation and the runoff of the surrounding mountains of New Union and Progress.

2. New Union has been harmed in its quasi-sovereign capacity and in its' parens patriae capacity as protector of its citizens by having its interests in the polluting operation ignored by the federal government.

New Union's interest in the health and well-being of its residents entwines with its interest in the second type of parens patriae capacity identified by the *Snapp* Court: New Union, as a state, has an interest in the means by which it participates in the federal system. Here, New Union is attempting to assert its rights as a quasi-sovereign in regard to an operation that puts New Union citizens at a realistic threat of future harm. However New Union has been prevented from asserting its rights as a quasi-sovereign in the federal system of government. Here, the COE, which is a subordinate to the DOD, issued the permit to the DOD for its slurry dumping operation. The entanglement presents special concerns because it is quite likely that no meaningful review of the permit issuance has occurred due to the posture of the organizations at issue here. Equity demands that New Union, in its sovereign status, has some consultation before the commencement of an operation that will significantly change the area.

C. New Union has greater standing rights in federal court as a state asserting its quasi-sovereign interests.

In *Massachusetts v. EPA*, the Supreme Court clearly stated that states deserve special protection of quasi-sovereign interests in parens patriae cases. *Massachusetts v. EPA*, 549 U.S. 497 (2007). In *Massachusetts*, the Court determined that the EPA has the statutory duty to issue regulations under the Clean Air Act regarding greenhouse gas emissions. *Massachusetts*, 549 U.S. at 527. Of primary concern in the case was Massachusetts's standing to challenge the EPA's denial of a petition to regulate greenhouse gas emissions. The Court held that Massachusetts had

a special interest because it was a sovereign state and not a private individual. *Id*. at 518. Discussing the history, the Court stated that "states are not normal litigants for the purposes of invoking federal jurisdiction." *Id.* (citing *Georgia v. Tennessee Copper Co.*, 206 U.S. 230, 237 (1907)). The Court explained that, like Georgia "Massachusetts' well-founded desire to preserve its sovereign territory today" conferred standing on the state. *Massachusetts*, 549 U.S. at 519.

Massachusetts based the standing analysis on the unique quasi-sovereign interests of a state asserting its rights under federal law. The importance of Massachusetts as a sovereign to the standing analysis is made apparent by footnote 17, which addresses and distinguishes *Massachusetts v. Mellon*. *Id*. at 520 n.17. *Mellon* states a general bar to a state's ability to sue the federal government presenting an apparent tension with the otherwise general deference towards states in their parens patriae capacity in federal court. *Id.* at 539. In *Mellon*, the Court stated "[i]t cannot be…that a state, as parens patriae, may institute judicial proceedings to protect citizens of the United States from operation of the statutes thereof…While the state…may sue in that capacity for the protection of its citizens, it is no part of its duty…to enforce their rights in respect of their relations with the federal government." *Massachusetts v. Mellon*, 262 U.S. 447 (1923). In *Massachusetts*, the Court distinguished *Mellon* stating "there is a critical difference between allowing a state 'to protect her citizens from the operation of federal statutes' (which is what *Mellon* prohibits) and allowing a state to assert its rights under federal law (which it has standing to do)." *Massachusetts*, 549 U.S. at 520 (quoting *Georgia v. Pa. R.R. Co.*, 324 U.S. 439 (1945)).

As the majority recognized in *Massachusetts*, *Mellon* prohibits state suit against the government to protect its citizens from the operation of a federal statute. New Union is not protecting its citizens from the operation of a federal statute; rather, New Union is seeking

protection pursuant to a federal statute (The Clean Water Act) but must seek such protection in a quasi-sovereign capacity in this litigation because the harm has yet to occur. *Massachusetts* most strongly supports the view that states deserve special protection of quasi-sovereign interests in parens patriae cases. New Union qualifies for the special protection of its quasi-sovereign interests, especially in light of the unique facts of this case, and the Court must recognize this.

D. The control of water pollution is mainly the duty of the states as indicated by the history of water as a resource held by government in the public trust and the enforcement provisions of the Clean Water Act.

The unique history of water regulation and use requires that New Union be able to challenge the permit. Water is legally and historically a public resource subject to the public trust. Although property rights may be conferred upon the use of water, it remains in its essence a public resource by which private rights are always subject to the public's needs. The control of water pollution is the primary responsibility of states. 33 U.S.C. § 1251(b). This concept is known as the public trust doctrine, which refers to the duty of the sovereign states to hold and preserve certain resources for its citizen's benefit.

The modern parens patriae doctrine and the modern public trust doctrine each authorize states to seek protection of natural resources in federal court for the public good. The doctrines are separate and distinct. The Supreme Court has long recognized that states have a quasi-sovereign interest in protecting their water resources. *See*, *e.g., New York v. New Jersey*, 256 U.S. 296 (1921); *Missouri v. Illinois*, 180 U.S. 208 (1901). In *Ill. Century R.R. Co. v. Illinois* the Supreme Court made apparent that the public trust doctrine imposes an affirmative duty on the state to protect natural resources. *Ill. Central R.R. Co. v. Illinois*, 146 U.S. 387 (1982). Many states have adopted the public trust doctrine legislatively or constitutionally. *See*, *e.g.* Alaska Const. art. VIII, § 3; N.C. Gen. Stat. § 113-133.1 (2000).

The Supreme Court has made apparent that the public trust doctrine is a contemporary and viable concept by broadening the geographic protections and range of activities that can be considered under the public trust. *See* Allan Kanner, *The Public Trust Doctrine, Parens Patriae, and the Attorney General as the Guardian of the State's Natural Resources*, 16 Duke Envtl. L. & Pol'y F. 57, 71 (2005) (suggesting that it is more efficient for states to protect their sovereign environmental interests by utilizing the public trust and parens patriae doctrines rather than waiting for Congress to develop laws); *Phillips Petroleum Co. v. Mississippi*, 484 U.S. 475 (1988) (holding that states have the right to determine the extent of their public trust). States can utilize both the parens patriae and public trust doctrines to protect their environmental resources. Once in federal court, the Attorney General need only prove an "unreasonable interference with the use and enjoyment of trust rights" to indicate an infringement upon the public trust. William H. Rodgers, *Hornbook on Environmental Law* 176 (1977 & Supp. 1984).

Citizens of New Union have a recreational interest in Lake Temp, which has been going on for year and will continue. New Union also has an interest in the groundwater of its state, notably the Imhoff Aquifer. New Union recognizes no private ownership rights in groundwater and considers it subject to management as a public resource. The DOD's polluting effort threatens New Union citizen's current and future interest in Lake Temp and New Union's sovereign interest in the Imhoff Aquifer—part of New Union's groundwater—beneath it. The public trust doctrine only allows conversion of the water if it will suit a public purpose. Dumping of old munitions is hardly a public purpose and likely can be achieved through alternate means. Also, while the public trust doctrine is generally considered applicable to states, the federal government should be held to a higher standard in this instance as it is reasonably foreseeable that pollution of Lake Temp could result in pollution of the Imhoff Aquifer.

Here, the EPA did not issue the permit that New Union is challenging. As mentioned, there is an apparent agency-principal problem presented by the issuance of the permit by the COE, a subordinate to the DOD. Regardless, Congress has defined injury, articulated chains of causation, and explicitly provided means by which others may help the EPA in enforcing environmental protection statutes. *See generally* 33 U.S.C. § 1365. Because the pollution has yet to occur, New Union is not bringing this challenge explicitly under the CWA but the Act indicates that Congress has specifically requested help from states to identify situations like this.

New Union qualifies for standing as a state whose quasi-sovereign interest in participating in the federal government have been harmed. *Massachusetts* and the history of federal court jurisprudence regarding sovereign interests indicates that states obtain special solicitude when suing on behalf of their citizens in their quasi-sovereign capacity. Additionally, the CWA indicates that Congress has expressly provided for suits by others to enforce the provisions of the Act. New Union is fulfilling its parens patriae duty to its citizens for which the Imhoff Aquifer is held in public trust and as a sovereign by challenging the COE permit allowing for the pollution of Lake Temp. The permit issuance has caused injury to New Union's quasi-sovereign interests in participating in the federal system of governance and the polluting operation puts New Union citizens at a realistic threat of harm. Therefore, New Union must be conferred standing in this case.

II. LAKE TEMP FALLS UNDER THE JURISDICTION OF CWA SECTION 404, 33 U.S.C. § 1331(a) AND CWA SECTION 402, 33 U.S.C. § 1334 BECAUSE LAKE TEMP IS NAVIGABLE WATER UNDER CWA SECTION 301(a), 404(a), AND 502(7), 33 U.S.C. §§ 1331(a), 1344(a), 1362(7).

The District Court was correct in holding that Lake Temp is a "water of the United States," bringing it within the jurisdiction of CWA. Lake Temp's size and use for interstate hunting and recreation bring it within the purview of the CWA through 40 C.F.R. § 122.2. The

Supreme Court's holding in *SWANCC* is not controlling here, as the Court was ruling on a series of small ponds whose only connections to interstate commerce were migratory birds. *Solid Waste Agency of Northern Cook County v. United States Army Corps of Engineers,* 531 U.S. 159, 171-72 (2001) ("*SWANCC*"). Lake Temp is notably larger, navigable-in-fact, and has its own connections to interstate commerce.

The Supreme Court, in a plurality decision, released two tests to determine if wetlands constitute "water of the United States." *Rapanos v. United States*, 547 U.S. 715, 759 (2006). Although these tests are not meant to be applied to water bodies that are navigable-in-fact, Lake Temp is navigable under each.

A. Lake Temp is navigable, as it is a water of the United States as defined by the plain language in the regulations put forth by both the EPA and the COE.

The CWA gives the EPA and COE jurisdiction over various discharges into "navigable waters." 33 U.S.C. §§ 1311(a), 1344(a). The CWA defines "navigable waters" as "waters of the United States." *Id.* § 1362(7). The lack of further statutory definition of "waters of the United States" indicates that Congress delegated this policy-making authority to the EPA and COE, who have each issued nearly identical regulations on the matter. *San Francisco Baykeeper v. Cargill Salt Div.*, 481 F.3d 700, 704 (9th Cir. 2007). When such authority is implicitly granted to an agency, "a court may not substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator of an agency." *Id*. (quoting *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 844, 837 (1984)).

The EPA defines "waters of the United States" to include "all waters which are currently used, were used in the past, or may be susceptible to use in interstate or foreign commerce" and "[a]ll other waters such as intrastate lakes…the use, degradation, or destruction of which would affect or could affect interstate…commerce," specifically including interstate recreation. 40

C.F.R. § 122.2. The COE's definition is substantively identical. *San Francisco Baykeeper*, 481 F.3d at 704.

Under the plain language of this regulation, entitled to deference by this court under *Chevron*, Lake Temp is within the jurisdiction of the CWA. Although Lake Temp is entirely within the State of Progress, it is explicitly within the regulation's scope, as it is used by interstate hunters, recreational boaters, and bird watchers. (R. at 4.) The District Court agreed, holding that Lake Temp "is well within the description of water bodies that have traditionally been held navigable because of use by interstate travelers." (R. at 7.)

Further analysis would only be required if "Lake Temp" were a misnomer and the lake was not actually navigable-in-fact. If that were the case, its justiciability under the CWA would need to be analyzed under the jurisprudence of *SWANCC*, *Riverside Bayview Homes*, and *Rapanos*. Those opinions address whether bodies of water that would not traditionally be considered navigable are nevertheless covered under the broad scope of the CWA. *See San Francisco Baykeeper*, 481 F.3d at 707. In *Rapanos* and *Riverside Bayview Homes*, the Court addressed the CWA's applicability to wetlands while, in *SWANCC,* it addressed the CWA's applicability to isolated ponds, whose only interstate use was by migratory birds. *Rapanos*, 547 U.S. 715 at 759; *U.S. v. Riverside Bayview Homes*, 474 U.S. 121 (1985); *SWANCC*, 531 U.S. at 159.

Nevertheless, analysis of Lake Temp's navigability under these cases would still fall within the scope of the CWA. In *Rapanos*, a divided court provided two tests: the plurality's two-part test and Justice Kennedy's "Significant Nexus" test. *Rapanos v. United States*, 547 U.S. 715, 759 (2006) (Kennedy, J., concurring). Currently, the circuits are split on which

represents the Court's true holding. *United States v. Robison*, 505 F.3d 1208, 1219 (11th Cir. 2007).

1. Lake Temp is navigable water even under the significant nexus test endorsed by Justice Kennedy's concurrence in *Rapanos*.

The "significant nexus" test states that in order to be considered "navigable" under the CWA, "a water or wetland must possess a 'significant nexus' to waters that are or were navigable in fact or that could reasonably be so made." *Rapanos*, 547 U.S. at 759 (Kennedy, J., concurring). Justice Kennedy, opining about wetlands' navigability, deemed a nexus to be significant "if the wetlands, either alone or in [a] combination…significantly affect the chemical, physical, and biological integrity of other covered waters more readily understood as "navigable." *Id*. at 759. If a wetland's effect on water quality is merely "speculative or insubstantial," it falls outside the scope of "navigable waters." *Id*. Finally, "[t]he required nexus must be assessed in terms of the statute's goals and purposes…to 'restore and maintain the chemical, physical, and biological integrity of the Nation's waters.'" *Id*.

The "significant nexus" test originated in *SWANCC,* which decided whether isolated ponds, some of which were merely seasonal and all of which were located within the state of Illinois, were navigable because they functioned as a habitat for migratory birds. *SWANCC,* 531 U.S. at 171-72. The Court overturned the "Migratory Bird Rule," which previously allowed the COE and EPA to assert jurisdiction over waters solely on the basis of migratory bird habitation. *Id*. The *SWANCC* Court distinguished its holding from that in *Riverside Bayview Homes*, 474 U.S. at 121, where it said its rule was based on "the significant nexus between the [wetlands in *Riverside Bayview Homes*] and 'navigable waters'." In *Riverside Bayview Homes*, the Court found that wetlands adjacent to navigable water could be regulated as "navigable" water under the CWA. *Id*. at 138.

The "significant nexus" test is a means of extending CWA jurisdiction to waters that are not traditionally understood as navigable but have an effect on such waters. *See Rapanos*, 547 U.S. at 759. The Court often refers to traditionally navigable waters as being "navigable-in-fact," *see id*., and interprets to the CWA as being "broader than the traditional understanding of [navigable waters]." *Id*. at 731. It follows that, if a body of water is such that it is traditionally understood as navigable, it need not have a significant nexus to *other* navigable waters. While Lake Temp has no outflow that would constitute a significant nexus to another navigable water, it certainly has a significant nexus to itself.

The ponds at issue in *SWANCC* did not pass muster under the "significant nexus" test because their only hook was their usage as a stopover for migratory birds; they were otherwise intrastate, non-navigable, and isolated. *Am. Petroleum Inst. v. Johnson*, 541 F. Supp. 2d 165, 179 (D.D.C. 2008) (summarizing *SWANCC*). This can clearly be differentiated from the current set of facts, as Lake Temp is frequented by interstate hunters and travelers, and is, itself, navigable by watercraft; *SWANCC* addressed mere ponds. Lake Temp, though located within a single state, is a part of interstate commerce. *SWANCC* held that migratory birds alone could not confer CWA jurisdiction over water that was otherwise outside the scope of the CWA. *Id*. With Lake Temp, migratory birds are one of many interstate hooks.

2. Lake Temp is navigable water even under the two-part test endorsed by the plurality in *Rapanos*.

The two-part test, laid out by the plurality in *Rapanos*, suggested that, in order to fall under CWA jurisdiction, wetlands must 1) be adjacent to a "relatively permanent body of water connected to traditional interstate navigable waters" and 2) have "a continuous surface connection with that water." *Precon Dev. Corp., Inc. v. U.S. Army Corps of Engineers*, 633 F.3d 278, 288 (4th Cir. 2011) (citing *Rapanos*).

The first prong of this test requires relative permanence of the water body, which is contrasted with "transitory puddles or ephemeral flows of water." *Rapanos*, 547 U.S. at 732. The Court 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*. n.5. The Court's goal with this footnote was to ensure that those bodies of water colloquially referred to as "streams," "oceans," "rivers," and "lakes" were included within the scope of the CWA to the exclusion of areas where, for example, rainfall occasionally collected. *See id*.

The Court went out of its way to ensure "ordinary parlance" was not ignored in interpreting the CWA. *Rapanos*, 547 U.S. at 715. In this case, outside of the present litigation, Lake Temp is clearly identified a lake. While "navigable" is a defined term in the CWA, Lake Temp is obviously navigable-in-fact; it can be, and is, sailed upon. The fact that Lake Temp dries up approximately one out of every five years does not affect its navigability under the plurality's test. The plurality recognized exactly this situation in its footnote, where it stated that it did not exclude bodies of water that dried up in droughts or seasonally. *Id*. at n.5.

The second prong of the plurality's test requires "a continuous surface connection" with that water. *Id*. at 717. In other words, this test "requires a topical flow of water between a navigable-in-fact waterway or its tributary with a wetland." *United States v. Cundiff*, 555 F.3d 200, 212 (6th Cir. 2009) *cert. denied,* 130 S. Ct. 74 (2009).

Lake Temp, while having no outflows connecting it to other navigable waterways is, in its own right, navigable-in-fact. As stated earlier, both tests in *Rapanos* are intended to help determine whether or not wetlands are covered under a broader reading of the CWA's definition of "navigable." *See San Francisco Baykeeper*, 481 F.3d at 707. The tests are not intended to

exclude navigable-in-fact lakes that attract interstate attention. While Lake Temp has no outflow connecting it to *other* navigable waterways, it is, in its own right, navigable. In addition, it has continuous surface water flows from its eight hundred square mile watershed, located within both Progress and New Union. Under this second prong, Lake Temp need not be connected to another navigable waterway.

III. EPA HAS JURISDICTION UNDER § 402 TO ISSUE THE PERMIT FOR THE DISCHARGE OF SLURRY INTO LAKE TEMP BECAUSE THE COE DOES NOT HAVE AUTHORITY UNDER § 404, AS THE SLURRY IS A POLLUTANT, NOT A "FILL MATERIAL."

The District Court erred in holding that the munitions slurry constituted "fill material" subject to permitting by the COE under § 404 rather than by the EPA under § 402. The joint regulation, offered by the EPA and the COE, limit fill material to various mixtures of rock and construction debris, not spent munitions from the military. 40 C.F.R. 232.2. The District Court erred when it found that the Supreme Court's holding in *Coeur* required it to find all slurries as "fill material." The parties in *Coeur* conceded that their mining materials constituted "fill material;" the Court opined on what would or would not constitute "fill material." *Coeur Alaska, Inc. v. Se. Alaska Conservation Council,* 129 S. Ct. 2458, 2468 (2009). Regardless, the slurry in *Coeur* clearly fell within the regulatory definition of "fill material," unlike the spent munitions in the present case. The Court specifically discussed the possibility of the attempted discharge of more hazardous materials, like in the present case, and that they could be properly challenged when the situated arose. *Id*.

A. The holding in *Coeur* does not control this court's decision because, unlike in *Coeur*, the slurry in the present case in not a "fill material" as defined by 40 C.F.R. § 232.2.

Section 402 of the CWA gives the EPA the authority to regulate the discharge of pollutants into waterways by allowing it to issue "permit[s] for the discharge of any pollutant,"

with the exception of "fill material," which is instead regulated by the COE under § 404. CWA §§ 402, 404, 33 U.S.C. §§ 1342, 1344. That is, if the COE has the permitting authority under § 404, the EPA lacks the permitting authority under § 402. *Coeur Alaska, Inc. v. Se. Alaska Conservation Council*, 129 S. Ct. 2458, 2467 (2009). Therefore, to determine if the EPA has the authority to regulate the slurry discharge, one must first determine if the slurry is "fill material" falling within the scope of § 404. *Id*. at 2468.

The CWA does not define "fill material," creating ambiguity. *Kentuckians for Commonwealth Inc. v. Rivenburgh*, 317 F.3d 425, 441 (4th Cir. 2003). This silence is an implicit delegation of the authority to define the term to the regulating agencies. *San Francisco Baykeeper*, 481 F.3d at 704. The EPA and COE took this opportunity and issued a joint regulation defining "fill material." 40 C.F.R. § 232.2. (*See appendix item 1)*. "The question for the court is whether the agency's answer is based on a permissible construction of the statute." *Chevron, U.S.A., Inc. v. Natural Res. Def. Council,* 467 U.S. 837, 838 (1984).

In *Coeur Alaska*, the Court decided that a slurry, consisting of crushed rock and water from a gold mine, conceded by both parties to be a "fill material," was within the § 404 permitting authority of the COE to the exclusion of the EPA. *Coeur Alaska*, 129 S. Ct. 2468. Because the parties in *Coeur* conceded that the slurry was a fill material, the status of all slurries as fill materials was not part of the Court's holding. *Coeur*'s binding authority is limited to the balance of § 402 and § 404 permitting authorities. Even so, the Court opined that "[i]ts concession on this point is appropriate because slurry falls well within the central understanding of the term 'fill,' as shown by the examples given by [40 C.F.R. § 232.2]." *Id*. The examples the Court was referring to were "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. The Court explicitly recognizes the possibility of a party trying to suspend more hazardous materials than rocks into a slurry mixture, labeling it as "fill material," and seeking a § 404 permit instead of a § 402 permit. *Coeur*, 129 S. Ct. at 2468. The Court acknowledged that an "extreme instance," like a slurry composed of "feces and uneaten feed" or "waste produced in 'battery manufacturing'," would pose an entirely different scenario, and could be challenged as "an unlawful interpretation of the fill regulation" or " an unreasonable interpretation of § 404." *Id*. Such "difficulties," however, were not before the Court in *Coeur*. *Id*.

The District Court erred in concluding *Coeur* bound it to find that explosive munitions mixed with chemicals to "assure they are not explosive," suspended into a slurry along with a mixture "primarily of metals," constituted a "fill material" under § 404 COE permitting authority for two reasons: First, this conclusion was not part of *Coeur*'s holding; and second, the mixture in the present case clearly falls within one of the potential "extreme instance[s]" recognized in *Coeur*. *See id*. If a slurry of animal waste and uneaten food or "waste produced in battery manufacturing" could be challenged as outside the scope of § 404, surely a slurry of formally explosive munitions and metals would fall outside the scope as well.

When interpreting a regulation, courts should first look toward that regulation's plain language. *Solis v. Summit Contractors, Inc.*, 558 F.3d 815, 823 (8th Cir. 2009) (citing *Robinson v. Shell Oil Co.,* 519 U.S. 337, 340 (1997)). Additionally, a court should avoid interpreting a regulation in such a way that would render any part of that regulation superfluous. *Id*. (citing *United States v. Stanko*, 491 F.3d 408, 413 (8th Cir.2007)). Also, "in determining whether a particular regulation carries out the congressional mandate in a proper manner, we look to see

whether the regulation harmonizes with the plain language of the statute, its origin, and its purpose." *Nat'l Muffler Dealers Ass'n, Inc. v. U. S.*, 440 U.S. 472, 477 (1979).

The examples enumerated in § 232.2, though not an exhaustive list, give some insight into what sorts of things the EPA and COE believe constitute fill materials: 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. The regulation provides further examples in its definition of the phrase "discharge of fill material." 40 C.F.R. § 232.2. (*See appendix item 2).* As regulations should not be interpreted in such a way that renders a part superfluous, these lists of examples needs to be considered when determining if something constitutes a "fill material." Improperly assuming that these lists do not circumscribe the limits of "fill material" would be rendering this clear regulatory language as superfluous.

In this case, formally explosive munitions suspended with metal particles and chemicals are entirely unlike anything else laid out in the examples. While the lists are not exhaustive, they plainly exist to show what sorts of things can qualify as "fill materials." If the agencies meant to allow the DOD to bury its old munitions in lakes, they would have mentioned that in their regulation.

IV. THE OMB'S DECISION CONCERNING THE EPA AND THE COE VIOLATED CWA 33 U.S.C. §§ 1342 AND 1344 WHEN THE OMB RESOLVED THE DISPUTE BETWEEN THE EPA AND THE COE OVER WHETHER THE EPA HAD JURISDICTION TO ISSUE THE PERMIT TO THE DOD TO DISCHARGE SLURRY INTO LAKE TEMP UNDER CWA SECTION 402 OR WHETHER THE COE HAD JURISDICTION TO ISSUE THE PERMIT TO THE DOD UNDER CWA SECTION 404.

Under the CWA, the Administrator of the EPA (Administrator) may issue a permit for the discharge of any pollutant if all applicable requirements are met or if the Administrator

determines conditions are met which are necessary to carry out the goals of the CWA. 33 U.S.C. § 1342. The CWA grants broad authority to the Administrator over issuing, vetoing, limiting, and setting condition for permits. § 1342.

However, a limited authority to issue permits is granted to the Secretary of the Army, acting through the COE, in certain circumstances, for the discharge of fill material. 33 U.S.C. § 1344. While the EPA has final authority to review the COE's permit, the Act mandates that the EPA consult with the COE before making any final determinations. § 1344. There is no statutory language in the CWA authorizing the OMB to issue or veto these permits, to review the decisions of the EPA or the COE granting or denying these permits, or resolving disputes between the EPA and the COE over the jurisdiction of such permits.

A. The OMB did not have authority to make the dispute resolution decision between the EPA and the COE over whether the EPA had jurisdiction to issue the permit to the DOD to discharge slurry into Lake Temp under CWA Section 402 or whether the COE had jurisdiction to issue the permit to the DOD under CWA Section 404.

Nowhere in the statutory language of the CWA does the Act authorize the OMB to resolve permitting disputes between the EPA and the COE. However, the OMB has been given limited authority to resolve conflicts between executive agencies. Exec. Order No. 12,088, 43 Fed. Reg. 47,707 (Oct. 17, 1978). The Executive Order mandates that the head of each executive agency comply with pollution control standards, such as those established in the CWA. *Id.* The Order further mandates that each executive agency cooperate and consult with the Administrator of the EPA (Administrator) regarding its compliance. *Id.* If there is a conflict between executive agencies concerning compliance with pollution control standards, such as the CWA, "the Administrator shall make every effort to resolve...such conflicts between executive agencies," and if the Administrator cannot resolve the conflict, it shall request the help of the Director of the

OMB (Director) to resolve it. *Id.* at 2. The Director shall only consider unresolved conflicts "at the request of the Administrator" and shall consult the Administrator's expert judgement. *Id.*

The power to issue executive orders over executive agencies is granted to the President of the United States by the United States Constitution as part of the array of vested executive powers. U.S. Const. art. II, § 1. Additionally, deference must be accorded to the President to supervise executive decision-making. *See, e.g., Sierra Club v. Costle,* 657 F.2d 298, 405-406 (D.C. Cir. 1981) (stating that "the Court recognizes the...need of the President...to monitor the consistency of executive agency regulations...In the particular case of EPA, Presidential authority is clear since it has never been considered an 'independent agency,' but always part of the Executive Branch...The authority of the President to control and supervise executive policymaking is derived from the Constitution); Exec. Order No. 12,291, 43 Fed. Reg. 13,193 (Feb. 17, 1981) (increases agency accountability for regulatory actions by providing presidential oversight to the regulatory process, which will be done through the OMB).

Additionally, Courts have previously decided which agency should issue a permit. *See, e.g., Se. Alaska Conservation Council v. U.S. Army Corps of Eng'rs*, 486 F.3d 638, 654-655 (9th Cir. 2007) (concluding that it is the job of the Courts to decide which permit to use when both seem to apply, but conflict); *Coeur Alaska, Inc. v. Se. Alaska Conservation Council,* 129 S. Ct. 2458, 2467 (2009) (answering the question of "which agency has authority to consider whether to permit slurry discharge").

In the present case, the OMB did not have authority to resolve the conflict between the EPA and the COE regarding which executive agency had the jurisdiction to issue a permit under the CWA to the DOD to discharge slurry into Lake Temp because the language of the CWA does not grant this authority to the OMB. Under Executive Order 12,088, the President gave the

authority to resolve disputes between executive agencies regarding compliance with pollution control standards to the Administrator of the EPA. Exec. Order No. 12,088, 43 Fed. Reg. 47,707 (Oct. 17, 1978). Included under these pollution control standards is the CWA, which means that the Administrator has the authority to resolve executive agency disputes arising under the CWA.

The present dispute between the EPA and the COE, two executive agencies, arose under the CWA. The issue is who has jurisdiction to grant a permit under the CWA to the DOD to discharge slurry into Lake Temp—the EPA under § 1342 of the CWA or the COE under § 1344 of the CWA. Since this is a dispute between executive agencies under the CWA, the authority falls to the Administrator to resolve the conflict. Here, the Administrator was not given the opportunity to exercise her authority, but was told that the OMB was to resolve the dispute instead. If there is further conflict between the two agencies over which permit to use, the issue should then be decided by the Court, as in *Se. Alaska Conservation Council* and *Coeur Alaska*, not the OMB.

Although the COE may argue that Executive Order 12,088 authorizes the OMB to resolve the dispute between the EPA and the COE pursuant to the procedures for reconciling disputes within the executive branch, the Executive Order itself states that the OMB has this power only if the Administrator cannot resolve the conflict. *Id.* Only once the Administrator has made every effort to resolve the dispute shall she request the help of the Director of the OMB (Director) to resolve it. *Id.* In this case, the Administrator has not made every effort to resolve the dispute between the EPA and the COE; in fact, the Administrator had not had a chance to act at all. Nor did the Administrator request the help of the OMB. The EPA and the COE were directed to the OMB so that the Director could make the final decision. Executive Order 12,291 does not authorize this dispute resolution either, for, while it directs agencies to submit final rules to the

OMB to review, the scope of review of the OMB is primarily to ensure that the rule will be cost-effective and beneficial to society. *See, e.g., Envtl. Def. Fund v. Thomas,* 627 F. Supp. 566, 567-568 (D.D.C. 1986)*;* Exec. Order No. 12,291, 43 Fed. Reg. 13,193 (Feb. 17, 1981).

Furthermore, while the COE may argue that the OMB had jurisdiction under Presidential authority, the Council on Environmental Quality, in a memorandum to heads of executive agencies, disagrees. The memorandum defines the OMB's role as the entity that will authorize funding for proposed projects under the CWA, specifically § 404, and direct the budget processes. Memorandum on Applying Section 404 of the Clean Water Act from Exec. Office of the President, Council of Envtl. Quality to the Heads of Agencies (Nov. 17, 1980) *available at* ceq.hss.doe.gov/nepa/regs/cwa404rguidance.pdf. Additionally, the memorandum states that the EPA and the COE are "the two agencies with special expertise and jurisdiction over Section 404 of the Clean Water Act." *Id.* This suggests that the EPA and the COE are the only two agencies with power under the CWA and that the OMB is not one of them.

While the COE may argue that the OMB was given the authority to resolve this dispute pursuant to the President's executive powers, which include directing dispute resolution between executive branch agencies, the power to resolve such disputes in this context was given first and foremost to the Administrator of the EPA, not to the Director of the OMB. Differences of interpretation of regulations can and do occur between executive agencies and it is up to the President, who has the power and duty to ensure the resolution of disputes amongst executive agencies pursuant to his Constitutional powers, to decide the matter before it comes to litigation. *See, e.g., Sierra Club,* 657 F.2d at 405.

Therefore, the OMB did not have authority to make the dispute resolution decision between the EPA and the COE over who had jurisdiction to issue the permit under the CWA to

the DOD to discharge slurry into Lake Temp because there is no language authorizing this power in the CWA and executive orders give the power to the Administrator of the EPA. Hence, the OMB violated the CWA when it made the decision for the EPA and the COE.

B. The OMB does not have authority to issue a permit to the DOD to discharge fill into Lake Temp or to veto a permit to the DOD to discharge slurry into Lake Temp pursuant to the CWA 33 U.S.C. §§ 1342 or 1344.

Under the CWA, the Administrator may issue or veto a permit for the discharge of any pollutant if all applicable requirements are met or if the Administrator determines conditions are met which are necessary to carry out the goals of the CWA. 33 U.S.C. § 1342. Additionally, limited authority to issue permits is granted to the Secretary of the Army, acting through the COE, in certain circumstances, for the discharge of fill material, which the EPA has the power to review and veto. 33. U.S.C. § 1344. Neither section of the CWA grants authority to the OMB to issue or veto a permit pursuant to the CWA.

Beyond the CWA, Congress has further bestowed administrative powers to the expertise of the Administrator of the EPA to protect, restore, and maintain the national waters. *See, e.g.,* 33 U.S.C. § 1251 (stating the Administrator of the EPA shall administer all restoration); *Thomas,* 627 F. Supp. at 570 (stating that Congress purposely delegates administrative authority to issue regulations in accordance with enacted environmental legislation to the "expert judgment of the EPA Administrator" and that the OMB, if improperly using its power to review regulations, thus "encroaching upon the independence and expertise of the EPA," is not acting in accordance with the intent of Congress).

Additionally, it is understood that the EPA has broad powers to issue, modify, revoke, terminate and veto permits under the CWA. *See, e.g.,* 40 C.F.R. § 124.1 (2005) (defining the general scope of EPA procedures regarding permits); 40 C.F.R. § 124.5 (stating that permits may

be terminated upon the Administrator's initiative); *Natural Res. Def. Council, Inc. v. U.S. Envtl. Prot. Agency,* 859 F.2d 156, 184 (D.C. Cir. 1988) (citing the legislative history of the Administrator's veto power which shows Congress's clear intent that "[n]o permit shall issue until the Administrator is satisfied that the conditions to be imposed...meet the requirements of [the CWA]"). The COE also has the power to issue, modify, suspend or revoke the permits it is authorized to issue pursuant to the EPA. *See* 33 C.F.R. § 325.7.

The Supreme Court of the United States has also recognized the authority of executive agencies to interpret and carry out laws affecting their agency. *See Chevron, U.S.A., Inc. v. Natural Res. Def. Council,* 467 U.S. 837, 844 (1984) (holding that great deference should be accorded to an agency's reasonable interpretation of a statute because of the agency's expertise).

In the present case, the OMB did not have the authority to issue or veto a permit to the DOD to discharge slurry into Lake Temp because neither section of the CWA, nor any other statutory provision, grants authority to the OMB to issue or veto such permits. Congress granted direct authority to the expertise of the Administrator of the EPA to manage and regulate the CWA generally. *See, e.g.,* 33 U.S.C. § 1251; *Thomas,* 627 F. Supp. at 570. The Administrator here did not get a chance to exercise her veto power over the COE's decision. While the COE has the power to issue a permit pursuant to the CWA, the Administrator still has the power to review and veto that permit. 33. U.S.C. § 1344.

However, before the EPA was able to exercise this veto power, the OMB instructed the EPA not to do so. The power that the OMB exercised over the EPA has never been given to the OMB. Nowhere in the statutory language of the CWA or in any of its administrative regulations does Congress confer authority, directly or indirectly, to the OMB to issue or to veto permits. By doing so, the OMB has acted in a way that is incompatible with the clear intent of Congress,

which granted broad veto power to the Administrator. *See, e.g., Natural Res. Def. Council, Inc.,* 859 F.2d at 184.

Due to the OMB's invalid exercise of power, the OMB's interpretation of the CWA is the interpretation presented before the Court in the present litigation, rather than the interpretation on the EPA, or even that of the COE. Since the OMB is not the proper administrator of the statute, the Court will not be able to properly apply the *Chevron* deference standard for interpreting the CWA. Under *Chevron* deference, the interpretation of the law to be implemented by a specific agency is to be interpreted by that agency. *Chevron, U.S.A., Inc.,* 467 U.S. at 844. In this case, the implementation of the CWA was explicitly given to the Administrator of the EPA by Congress. Therefore, the Administrator should have interpreted the law here, not the OMB. Because the Administrator did not interpret the CWA, the Court is effectively prevented from properly interpreting the law under the *Chevron* test, which is the appropriate test to use in this instance.

Although the COE may argue that the OMB's participation did not affect the COE's decision to issue a permit or the terms of the permit under the COE's authority granted to it by Congress, the language of the CWA still authorizes the EPA to have final review power over the COE's decisions. Therefore, the EPA should still have had the final determination, not the OMB.

Additionally, while the COE may argue that the Court can still use the *Chevron* deference standard based on its interpretation of the CWA, the EPA is the administrator of the CWA and so its interpretation is the one that should be deferred too. While it is true that the COE has interpretative authority under the CWA and could be considered an administrator for purpose of *Chevron*, the EPA is still the administrator generally and oversees the COE, making its interpretation the ultimate interpretation to be deferred to under the *Chevron* test.

Therefore, the OMB did not have authority to issue or veto a permit under the CWA to the DOD to discharge slurry into Lake Temp because neither section of the CWA, nor any other statutory provision, grants authority to the OMB to issue or veto such permits. Hence, the OMB violated the CWA when it did not allow the EPA to exercise its veto power, but acted for the EPA instead.

C. The EPA's acquiescence to the OMB's dispute resolution decision between the EPA and the COE concerning whether the EPA had jurisdiction to issue the permit to the DOD to discharge slurry into Lake Temp under CWA section 402 or whether the COE had jurisdiction to issue the permit to the DOD under CWA section 404 violated the CWA 33 U.S.C. §§ 1342 and 1344.

The CWA authorizes the EPA to issue or veto a permit for the discharge of any pollutant, as well as the power to review and veto permits issued under the COE's limited authority. 33. U.S.C. §§ 1342 and 1344. The Supreme Court of the United States has reaffirmed and further explained that this power is granted to the EPA. *See, e.g., Coeur Alaska, Inc.,* 129 S. Ct. at 2465 (reaffirming the EPA's power to veto a COE permit, as well as its power to defer to the judgment of the COE by affirmatively not vetoing a permit after considering the COE's findings and its power to issue a permit alongside a COE permit); *Ky. Riverkeeper, Inc. v. Midkiff,* No. 05-181-DLB, 2011 WL 2789086 at 2 (E.D. Ky. July 14, 2011) (reaffirms); 33 C.F.R. § 320.2(f).

Additionally, the judicial review process for the permit decisions of the EPA has been defined by Congress. When someone has suffered because of action or inaction of an agency, such as the EPA, that person is entitled to judicial review. 5 U.S.C. § 702. "The reviewing court shall decide all relevant questions of law...and it shall... hold unlawful and set aside agency actions...found to be […] arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 703 (2)(A). However, this review by the Court will not apply if the "agency action is committed to agency discretion by law." 5 U.S.C. § 701(a)(2).

In the present case, the EPA's acquiescence to the OMB's dispute resolution decision between the EPA and the COE concerning who had jurisdiction to issue the permit under the CWA to the DOD to discharge slurry into Lake Temp violated the CWA because it was the job of the EPA to affirmatively veto or accept the COE's permit. As Courts have repeatedly confirmed, the EPA has the power to veto or accept a COE permit. *See, e.g., Coeur Alaska, Inc.,* 129 S. Ct. at 2465; *Ky. Riverkeeper, Inc.,* No. 05-181-DLB, 2011 WL 2789086 at 2.

In *Coeur*, the EPA did not veto the COE's permit, but affirmatively accepted its issuance. The EPA demonstrated its agreement with the COE by actively participating in the COE's interpretation of the CWA when the EPA issued its own Section 402 permit in addition to the COE's issuance of the Section 404 permit. The present case, however, is distinguishable from *Coeur*. First of all, the nature of the discharge of slurry is different here than in *Coeur*—in *Coeur* the discharge was fill material, whereas here it is not. *Coeur Alaska, Inc.,* 129 S. Ct. at 2469. Second, in *Coeur,* the EPA agreed with and participated in the COE's decision to issue a permit; the EPA made a positive decision not to veto the COE's permit and issued its own permit in accordance with the COE's. In this case, the EPA never made a positive decision to veto the COE's permit because that choice was taken from it by the OMB. By acquiescing to this denial of its power by the OMB, the EPA violated the CWA. Additionally, in this case, the EPA did not issue its own Section 402 permit as a companion permit and as an additional means of showing deference to the COE's permit.

Although the COE may argue that the EPA made an affirmative decision not to veto, the absence of the companion permit suggests that the EPA would have vetoed the COE's permit if it had the chance. Because the COE argues that the EPA made a decision not to veto the COE's permit and that decision was a discretionary decision by the agency, the COE argues that the

EPA's decision is not subject to judicial review. 5 U.S.C. § 701(a)(2). However, the EPA's inaction can be reviewable under § 702 because, by not acting on the COE permit, the permit could get issued, meaning the DOD's discharge proposal will be implemented and that people, such as Mr. Bompers and other recreational users of Lake Temp, could suffer and be adversely affected. 5 U.S.C. § 702.

While the COE may concede that the EPA's decision not to veto the COE's permit is subject to judicial review, the COE may still argue that the review would be limited to determining whether the EPA's decision was arbitrary and capricious. 5 U.S.C. § 703 (2)(A). The COE will argue that the EPA's decision was not arbitrary or capricious because it was acting pursuant to *Coeur*. However, even if the Courts hold that the EPA in fact made a decision not to veto the COE's permit, the EPA's decision was arbitrary and capricious because it was not acting consistently with *Coeur*; the EPA did not affirmatively defer to the COE in this case.

Therefore, the EPA's acquiescence to the OMB's dispute resolution decision between the EPA and the COE concerning who had jurisdiction to issue the permit under the CWA to the DOD to discharge slurry into Lake Temp violated the CWA because it was the job of the EPA to affirmatively veto or accept the COE's permit.

CONCLUSION

For the aforementioned reasons, the State of New Union respectfully requests that this Court reverse the decision of the District Court for the District of New Union granting summary judgment to Appellee and vacate the permit allowing the DOD to dump slurry into Lake Temp.

Respectfully Submitted,

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Counsel for New Union

APPENDIX

1) 40 C.F.R. § 232.2.

> (1) Except as specified in paragraph (3) of this definition, the term fill material means material placed in waters of the United States where the material has the effect of:
> (i) Replacing any portion of a water of the United States with dry land; or
> (ii) Changing the bottom elevation of any portion of a water of the United States.
> (2) Examples of such fill material include, but are not limited to: 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.
> (3) The term fill material does not include trash or garbage.

2) 40 C.F.R. § 232.2.

> The term discharge of fill material means the addition of fill material into waters of the United States. The term generally includes, without limitation, the following activities: Placement of fill that is necessary for the construction of any structure or infrastructure in a water of the United States; the building of any structure, infrastructure, or impoundment requiring rock, sand, dirt, or other material for its construction; site-development fills for recreational, industrial, commercial, residential, or other uses; causeways or road fills; dams and dikes; artificial islands; property protection and/or reclamation devices such as riprap, groins, seawalls, breakwaters, and revetments; beach nourishment; levees; fill for structures such as sewage treatment facilities, intake and outfall pipes associated with power plants and subaqueous utility lines; placement of fill material for construction or maintenance of any liner, berm, or other infrastructure associated with solid waste landfills; placement of overburden, slurry, or tailings or similar mining-related materials;" after the words "utility lines; and artificial reefs.