Team # 52

CA. No. 11-1245

UNITED STATES COURT OF APPEALS
FOR THE TWELFTH CIRCUIT

STATE OF NEW UNION,
Appellant and Cross-Appellee,
v.

UNITED STATES,
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 APPELLANT AND CROSS-APPELLEE

STATE OF NEW UNION

Attorneys for the Appellant And Cross-Appellee
State of New Union

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ISSUE STATEMENT

The following are the issues presented before this Court:

1. Whether the State of New Union has standing under either its sovereign interest as the owner of the land of its state, or through its *parens patriae* capacity as protector of its citizens?
2. Whether the lower court was correct in determining that Lake Temp qualifies as a "navigable water?"
3. Whether the Administrator of the Environmental Protection Agency (hereinafter "EPA") had appropriate jurisdiction to issue permits pursuant to 33 U.S.C. § 1342, rather than the Secretary of the Army through the United States Army Corps of Engineers (hereinafter "COE") pursuant to 33 U.S.C. § 1344?
4. Whether the Office of Management and Budget (hereinafter "OMB") improperly exercised its authority by circumventing EPA and determining that the COE had appropriate jurisdiction under 33 U.S.C. § 1344 and instructing EPA not to exercise their veto authority pursuant to 33 U.S.C. § 1344(c)?

STATEMENT OF THE CASE

The State of New Union brings the present action to this Court for Review pursuant to 28 U.S.C. § 1331 and the Administrative Procedure Act (hereinafter "APA"), 5 U.S.C. § 702. New Union specifically contests the permit issued by the COE, pursuant to 33 U.S.C. § 1344, Clean Water Act (hereinafter "CWA") Section 404, to the Department of Defense (hereinafter "DOD") for the discharge of slurry into Lake Temp. (R. 3). New Union objects with the COE issuing the permit rather than the Administrator of EPA under specific authority granted in 33 U.S.C. §

1342. (R. 3). If this Court rules against New Union and determines that the lower court was correct in holding that the COE had authority to issue the permit, New Union urges a determination that the CWA Section 404 permit was invalid. The State of Progress has intervened in the present case. All parties—the State of New Union, the United States, and the State of Progress—have filed motions seeking summary judgment from the present court. (R. 3).

STATEMENT OF THE FACTS

Lake Temp is an oval-shaped body of water, whose location is entirely within the State of Progress. (R. 3 & 4). Near the southern edge of the Lake, there is a public highway 100 feet from the shoreline. (R. 4). The lake is supplied by surface water flowing from an 800 square-mile watershed, comprised of mountains located within the territorial boundaries of the State of Progress and the State of New Union. *Id*. During the rainy season, Lake Temp has reached its maximum size of three miles wide and nine miles long. *Id*. Lake Temp is an intermittent body of water, fluctuating from a dry lakebed to its highest level once every five years. *Id*. Although water from the lake does not egress through surface avenues, it percolates into the Imhoff Aquifer. *Id*.

In order to use the water from the Imhoff Aquifer located within the State of New Union, a State of New Union Department of Natural Resources permit is required. (R. 6). Dale Bompers owns and operates a ranch situated above the Imhoff Aquifer in New Union. (R. 4). The Aquifer draws water from Lake Temp, and is located approximately one thousand feet below ground level. *Id*. The Aquifer follows the general contours of the lake, extending beyond the boundaries of the State of Progress into the State of New Union. *Id*. The water within the Aquifer is naturally sulfuric, making the water not potable and unsuitable for agricultural use. *Id*. To render the water usable, the sulfur must be removed by a filtration system. *Id*.

In 1952, Lake Temp became part of a military reservation. (R. 4). The DOD posted signs along the Progress state highway, which runs along the southern edge of the lake at the reservation's border, warning that entry is both dangerous and illegal. *Id*. However, the DOD has never constructed a fence to restrict entry nor have they actively enforced security along the perimeter of the reservation. There are trails leading from the road to the lake created by rowboats and canoes being transported from the highway to Lake Temp, evidencing repeated public use. *Id*. Ducks will frequently stop in Lake Temp during their migration from the Arctic to southern climates. *Id*. As a result, hunters frequently use the surrounding land for recreational purposes. *Id*.

The DOD plans to use Lake Temp as a disposal site for liquid, semi-solid, and granular munitions waste. (R. 4). This waste will be prepared by mixing the explosive agent of the munition with neutralizing chemicals, thereby rendering the waste safe for disposal. *Id*. Any remaining solids, primarily metals, will be ground and pulverized. *Id*. The DOD will then add water to both forms of waste, creating a slurry to be sprayed evenly along the lakebed.[1] *Id*. The COE is charged with grading the edges of the lakebed to ensure that the natural flow of water from the watershed remains unimpeded. (R. 4). While the lake's location will remain fixed, the water level will gradually rise an estimated six feet from current levels, and the surface area will be an estimated two square miles larger. *Id*. Due to the natural flow of deposits from the watershed, the DOD anticipates that the lake will be restored to its original condition despite the overall elevation increase. *Id*.

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[1] The pipe will be continuous moved to ensure the slurry is deposited evenly on the entire lakebed. (R. 4).

SUMMARY OF THE ARGUMENT

New Union contends that the lower court erred in its decision to grant summary judgment and to dismiss the present claim against the United States. New Union argues that it has standing under either its sovereign interest as the owner of the land of its state, or through its *parens patriae* capacity as protector of its citizens. New Union agrees with the lower court's determination that Lake Temp qualifies as a "navigable water" of the United States, requiring a discharge permit to be issued to the DOD under the CWA, 33 U.S.C. § 1351 *et. seq*. New Union argues that the jurisdiction for issuing the required permit falls within the authority of the Administrator of the EPA under 33 U.S.C. § 1342, CWA Section 402, rather than the Secretary of the Army through the limited authority granted to the COE pursuant to 33 U.S.C. § 1344, CWA Section 404. Lastly, New Union argues that OMB's determination that the COE exercised appropriate authority in issuing the relevant permit and instructing the Administrator of the EPA not to veto the issuance of the permit under their explicit authority under 33 U.S.C. § 1344(c) was an improper intervention.

STANDARD OF REVIEW

An appellate court reviews a lower court's decision *de novo*, thus the reviewing court analyzes the facts anew without showing deference to the lower court. *Salve Regina Coll. v. Russell*, 499 U.S. 225, 238 (1991). During appellate review, "summary judgment is appropriate if there is no genuine issue as to any material fact." *Universal Money Ctrs., Inc. v. Am. Tel. & Tel. Co.*, 22 F.3d 1527, 1529 (10th Cir. 1994) (quoting Fed. R. Civ. P. 56(c)). The party moving for judgment bears the burden of proof to show that there is no material fact at issue. *Id.* (quoting *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986)). The court examines the facts and the record "in the light most favorable to the party opposing summary judgment." *Adickes v. S.*

H. Kress & Co., 398 U.S. 144, 158-59 (1970). The court must determine whether the record as a whole supports a finding that there was no issue of material fact. *City of Chi. v. Envt'l Def. Fund*, 948 F.2d 345, 347 (7th Cir. 1991).

ARGUMENT

I. THE STATE OF NEW UNION HAS STANDING UNDER EITHER ITS SOVEREIGN INTEREST AS THE OWNER OF THE LAND OF ITS STATE, OR THROUGH ITS *PARENS PATRIAE* CAPACITY AS PROTECTOR OF ITS CITIZENS

Historically, the state has had the exclusive responsibility of caring for the wildlife, land, and water within its boundaries. Deborah G. Musiker et. al., *The Public Trust and Parens Patriae Doctrines: Protecting Wildlife in Uncertain Political Times*, 16 PUB. LAND L. REV. 87, 88 (1995). However, since the 1970s, the Federal government has enacted laws that have increased its presence in an area originally under the exclusive purview of the states. *Id.* at 89. Notwithstanding this new federal interest, states still play a significant role in ensuring that the rights of its citizens to enjoy the environment are held intact. Ultimately, the state has legal authority to pursue causes of action for either damages or injunctive relief against parties responsible for the pollution of natural resources based on the public trust doctrine and the *parens patriae* doctrine. Patrick S. Ryan, *Application of the Public-Trust Doctrine and Principles of Natural Resource Management to Electromagnetic Spectrum*, 10 MICH. TELECOMM. TECH. L. REV. 285, 361 (2004).

A. The public trust doctrine provides ample power to the state to litigate on behalf of its injured citizens.

The public trust doctrine refers to "the duty of sovereign states to hold and preserve certain resources...for the benefit of its citizens." 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, 61 (2005). In *Hughes v. Oklahoma*, while holding that the state does not have the same right and position as an owner of private property, the court stated that the "'ownership' language must be understood as a…legal fiction expressing 'the importance to

its people that a State have power to preserve and regulate the exploitation of an important resource.'" 441 U.S. 322, 334 (1979) (citing *Douglas v. Seacoast Products, Inc.*, 431 U.S. 265, 282 (1977)). Following the *Hughes* decision, courts began to formalize the "legal fiction" contract, giving states the power to dictate the use of the land as though it is the state's own private property. *See* Musiker et al., *supra*, at 94; *See also State ex rel Lopas v. Shagren*, 157 P. 31 (Wash. 1916); *O'Brien v. State*, 711 P.2d 1144 (Wyo. 1986).

Modern courts have recognized the relationship between a state and the land held in a public trust within its borders. In *Maine v. M/V Tamano*, the court considered a situation where Maine's Board of Environmental Protection brought suit against M/V Tomano, whose ship spilled roughly 100,000 gallons of oil into its waters. 357 F. Supp. 1097, 1098 (D. Me. 1973). The Federal District Court held that a state is entrusted to care for the environment within its borders because it has technical ownership over the land and "the State may for the common good exercise all the authority that technical ownership ordinarily confers." *Maine*, 357 F. Supp. at 1100 (citing *Toomer v. Witsell*, 334 U.S. 385, 408 (1948)). Although there was a clear aesthetic and environmental impact caused by the oil spill, the *M/V Tamano* court relied, as many other courts have, on the health and safety of the citizenry. *Maine*, 357 F. Supp. at 1100. This is further exemplified in *City of Milwaukee v. State*, where the court stated,

> [t]he trust reposed in the state is not a passive trust; it is governmental, active, and administrative. Representing the state in its legislative capacity, the Legislature is fully vested with the power of control and regulation. The equitable title to these submerged lands vests in the public at large, while the legal title vests in the state, restricted only by the trust, and the trust, being both active and administrative, requires the lawmaking body to act in all cases where action is necessary, not only to preserve the trust, but to promote it.

214 N.W. 820, 830 (Wis. 1927). *See also State of Md., Dept. of Natural Res. v. Amerada Hess Corp.*, 350 F.Supp. 1060 (D. Md. 1972) (court relied on sovereign ownership and public trust

theories to find that the state had standing to bring suit); *State of Louisiana v. State of Texas*, 176 U.S. 1 (1900) (court recognized that a state ownership of public resources is profound and creates a vested interest in its preservation).[2]

The public trust doctrine evolved to address new environmental threats and incorporate scientific advancements—including threats to ground water. Kanner, *supra*, at 82. While the traditional scope of the public trust doctrine was restricted to surface water, it is inherently flexible "due to the constant evolution of the state interests protected by the doctrine." *Id.* at 83. In the case at bar, the State of New Union exercised its rights as owner and protector of the land to bring forth the current suit. (R. 4). Though the land affected is private property, the dispersive quality of water renders the COE's proposed plan a considerable threat to all. Kanner, *supra*, at 82. The water from the Imhoff Aquifer could be used for farming, but in its current condition, consumption would endanger residents of New Union. (R. 4). As a result, New Union has a public interest in the safety and general cleanliness of the water.

In *State of Maine v. M/V Tamano*, the oil spilled from the defendant's tanker seeped into the water and destroyed both private and public property. 357 F. Supp. at 1100. There, the court held that the state had a sufficient independent interest to bring forth a suit. *Id.* This is applicable in the present case because the State of New Union's independent interest in the potential for the toxins to be siphoned from the aquifer is inherently unpredictable and affects the

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[2] *See* Deborah G. Musiker et. al., *The Public Trust and Parens Patriae Doctrines: Protecting Wildlife in Uncertain Political Times*, 16 PUB. LAND L. REV. 87, 96 (1995). Though not officially adopted by the courts, Musiker's article outlines judicial trends in the public trust doctrine. In aggregate, she asserts that the states will typically use the following characteristics in considering whether the public trust doctrine is appropriate: (1) consider the potential adverse impacts of any proposed activity over which it has administrative authority; (2) allow only activities that do not substantially impair the state's wildlife resources; (3) continually monitor the impacts of an approved activity on the wildlife to ensure preservation of the corpus of the trust; and (4) bring suit under the parens patriae doctrine to enjoin harmful activities and/or to recover for damages to wildlife.

citizens of New Union, not just Dale Bompers. (R. 4). Despite the fact that the majority of the aquifer is located in the State of Progress, the tangential effect of the DOD's conduct directly affects the State of New Union. (R. 4). As a result, the State of New Union has an unmitigated interest in protecting its water beneath the land within its boundaries.

B. In addition to the public trust doctrine, the State of New Union has standing to litigate under its quasi-sovereign interest through the *parens patriae* doctrine.

Similar to the public trust doctrine, the *parens patriae* doctrine inherits its jurisprudential underpinnings from the notion that a state may act to protect common resources as the owner of those resources. Deborah G. Musiker et. al., *The Public Trust and Parens Patriae Doctrines: Protecting Wildlife in Uncertain Political Times*, 16 PUB. LAND L. REV. 87, 101 (1995). However, while the public trust doctrine is brought specifically on behalf of the state as the owner of those resources, a state bringing forth a *parens patriae* suit has standing to seek injunctive relief or damages "based on either the state's role as guardian of the entity, or the state's quasi-sovereign interest in the general welfare of its residents." [3] *Id.* This is based on a state's inherent right to be involved in interests related to either the physical or economic well being of the citizenry. 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

[3] The *parens patriae* doctrine was developed from English common law where the Crown was considered the "guardian of the people." The Crown's role was the "supreme guardian and superintendent," which obviates the literal translation "parent of the country." During early American common law, the doctrine allowed the state to bring suit when it could show that the state's harm was independent from the individual interest of the private citizen. Musiker et. al., *supra*, 103-105.

F. 57, 106 (2005). Governmental interests in natural resources based on its role as protector of its citizens as a whole is often termed "quasi-sovereign."[4] *Id.* at 107.

In analyzing the typical requirements of standing, courts express that the nature of the case is the important aspect, not merely the character of the party who is litigating.[5] *State of Missouri v. State of Illinois*, 180 U.S. 208, 239 (1901). In *State of Missouri v. State of Illinois*, the court had to decide whether Missouri had standing to pursue an injunction, on behalf of its citizens, to prohibit Illinois from dumping sewage into the Mississippi river. Realizing that there was a potential for harm to be done to farmers in Missouri, the court held that that "any person who has a watercourse flowing through his land, and sewage…is brought into that watercourse, has a right" to seek legal action to enjoin. *Id.* at 245-246. Additionally, the court stated that the farmer, an injured party on behalf of whom Missouri brought suit, did not have to wait for a discernable injury caused by the pollution to occur to bring suit. *Id.* at 247. In fact, while boundary rights or direct property rights were not implicated in the case "if the health and comfort of the inhabitants of a state are threatened, the state is the proper party to represent and defend them." *Id*. at 241.

Additionally, in *Georgia v. Tennessee Copper* the state of Georgia brought suit in an effort to prevent the defendant from discharging noxious gases that would eventually make its way across the border. 206 U.S. 230 (1907). In that case, the court held that while suits brought on behalf of the quasi-sovereign must be regarded with particular scrutiny, it is a "fair and

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[4] The term "quasi-sovereign" refers to the state's role that extends past it proprietary interests, and includes areas that promote the general well-being of its populace, including its "economic well-being, its environment, as well as the health, comfort, and welfare."

[5] *See also Lujan v. Defenders of Wildlife,* 504 U.S. 555 (1992). Stating the basic rule for standing, which requires an injury in fact, said injury must be traceable to the challenged action, and said injury must be relieved if a favorable decision is garnered. 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, 90 (2005).

reasonable demand on the part of a sovereign that the air over its territory should not be polluted" by sulphurous acid gas. *Id.* at 238. While the quasi-sovereign interest must be one that is "independent of and behind the titles of its citizens," the court ultimately concluded that the air shared by the citizens of Georgia near the border was sufficiently independent from any personal interest. *Id.*

While the *Tennessee Copper* case further exemplified the *parens patriae* doctrine that had already been had been well established, Justice Holmes clarified the sufficiency standard by stating,

> [t]he state owns very little of the territory alleged to be affected, and the damage to it capable of estimate in money, possibly, at least is small. This is a suit by a state for an injury to it in its capacity of quasi-sovereign. In that capacity the state has an interest independent of and behind the titles of its citizens, in all the earth and air within its domain.

Id. at 237. Though the actual area affected by the noxious fumes from the Tennessee Copper plant was small in size, it was nonetheless sufficient for Georgia to bring suit on behalf of its citizens. What can be gleaned from *Tennessee Copper* is that so long as the interests of the citizenry can be established to be independent of any individual claim, "then size truly does not matter." Kanner, *supra*, at 82.

Courts have shown a general acceptance towards the *parens patriae* doctrine. As it relates to the case at hand, the State of New Union has an unmitigated interest in protecting the well-being and safety of its citizens. In *State of Missouri v. State of Illinois*, the court's conclusion that the state of Missouri had a preemptive right to seek injunctive relief notwithstanding a discernable and tangible injury was perfectly acceptable. 180 U.S. at 239. Presently, the State of New Union should be similarly entitled to preemptive injunctive relief even though the COE has yet to commence discharge slurry into Lake Temp. (R. 4).

Furthermore, as in *Georgia v. Tennessee Copper*, where the Court held that Georgia had a right to seek injunctive relief for noxious fumes that emanated from a copper plant in Tennessee, so should the court rule in this case where the DOD's proposed conduct will negatively impact the inhabitants of New Union. 206 U.S. at 237. The fact that New Union brings this suit on behalf of Dale Bompers does not defeat New Union's standing to bring suit, as the nature of the claim is the important aspect, and not merely the character of the party who is litigating. (R. 4). The nature of the case is one of egregious environmental harm that could possibly inflict irreparable harm on the inhabitants of New Union. *Id.* The water from Imhoff Aqufier draws directly from Lake Temp and, as such, all pollutants discharged into Lake Temp could foreseeably enter the Aquifer underneath Lake Temp. *Id.* In this way, even though a very small part of the Imhoff Aquifer is located within New Union, this Court has held that so long as the interest is sufficiently independent from any personal claim, and that the nature of the state's interest is that of the protection of the population, the magnitude of the injury felt by that state is inconsequential. *Georgia*, 206 U.S. at 242. Based on the fact that New Union has a credible public safety and environmental concern that is separate from any of its citizen's individual claims, the size of the Aquifer within its bounds is irrelevant. As a result, New Union has a justifiable reason to seek injunctive relief.

II. LAKE TEMP IS A "NAVIGABLE WATER" OF THE UNITED STATES

This Court should affirm the District Court's finding that Lake Temp is a "navigable water of the United States." (R. 4). Based on a textual and rhetorical analysis of the CWA, Lake Temp satisfies the elements of a "navigable water" of the United States within the State of Progress. When Congress' intent is clear, as exhibited through legislation, the courts generally show deference to the decision of a government agency. *Chevron USA, Inc. v. Natural Res. Def.*

Council, Inc., 467 U.S. 837, 842-43 (1984). The Supreme Court has found that if the "intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguous expressed intent of Congress." *Id*. The Supreme Court will not alter an agency's decision "unless it appears from the statute or legislative history that the accommodation is not one that Congress would have sanctioned." *United States v. Shimer*, 367 U.S. 374, 382-83 (1961).

A. "Navigable water" is a clear and unambiguous term and properly includes Lake Temp within its definition.

The CWA was enacted on October 18, 1972 with the objective "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters."[6] The Clean Water Act, 33 U.S.C. §1251(a) (1972). Under the authority granted by the CWA, the federal government granted the power to the Executive Branch, through the Environmental Protection Agency and the United States Army Corps of Engineers, to regulate the discharge of pollutants into the "navigable waters" of the United States. *Id.* While there has been debate around the definition of the term "navigable waters," an analysis of the term's statutory definitions and rhetorical structure reveals that the intent of Congress is clear and unambiguous.

While the term "navigable water" can be conceived as inherently vague, the first step of interpretation is to parse the phrase into its two basic elements. Once broken down to the

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[6] Initially vetoed by President Richard Nixon, the Clean Water Act was enacted into law by a supermajority of both the House of Representatives and the Senate. Representative John A. Blatnik, Chairman of the House Committee on Public Works, described the law as a statute that "stands as a landmark in the history of environmental legislation. It sets as a national goal the elimination of all pollution from America's waters by 1985. The law requires secondary treatment for all municipal wastes by mid-1977, and the application of more advanced disposal methods by mid-1983. For industry, the law established a two-phase cleanup program, with increasingly tight restrictions on industrial pollution, backed up by penalties of fines and imprisonment for violators." Laws of the United States Relating To Water Pollution Control and Environmental Quality, Pub. L. No. 92-500, 70 Stat. 498, 84 Stat. 91.

individual words, a standard definition of each word provides clear insight into the intent of Congress when they authored the CWA. "Navigable" is defined as a waterway that is "deep and wide enough to be passed by ships." *Merriam-Webster Dictionary*, 827 (11th ed. 2004). "Navigable" is further defined in *Black's Law Dictionary* as "capable of allowing vessels or vehicles to pass, and thereby usable for travel or commerce." 1050 (9th ed. 2009). The word "water" can be described in two distinct definitions. First, "water" is defined as "a particular quantity or body of water: as the water occupying or flowing in a particular bed." *Merriam-Webster Dictionary*, 1412-13 (11th ed. 2004). "Water" can further be defined as "a quantity or depth of water adequate for some purpose." *Id.*

Under the CWA, the discharge of any pollutant from a point source into "navigable water" is illegal.[7] Based on both the common language and statutory definitions, the Lake fits within the category of a "navigable water" of the United States. The Lake is "navigable" as evidenced by the generations of boaters and sportsmen who have operated their vessels in the lake. (R. 4). The evidence of worn trails from hunters dragging watercrafts from the Progress state highway to the banks of Lake Temp indicates the consistent use of various recreational watercrafts in the lake. *Id.*

Additionally, Lake Temp satisfies the definition of "water." The Lake is a body of water, with a quantity and depth adequate for certain purposes. The Lake has been used by waterfowl as part of their migratory pattern from the Arctic to southern climates. (R. 4). Due to the presence of a large number of ducks, Lake Temp has been used for years for recreational hunting, thus fulfilling the definition of a body of water thereby giving it a purpose. *Id.*; *See*

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[7] A "point source" is defined as "any discernible, confined, and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation, or vessel or other floating craft, from which pollutants are or may be discharged." 33 U.S.C.A. §1362(14).

Merriam-Webster Dictionary, 1412-13 (11th ed. 2011). By analyzing the term by its rhetoric components, Lake Temp satisfies the requirements of a "navigable water."

B. Because Congress' definition is clear, this Court must defer to the statute and the corresponding agency's interpretation.

While the wide variety of definitions that exist for a single word can propel a reader into a state of intellectual bewilderment, statutes provide a clear and cohesive source for explaining Congress' intent. When certain fundamental terms are vague, the Court has held that "a fair warning should be given to the world in language that the common world will understand, of what the law intends to do if a certain line [of legislation] is passed." *McBoyle v. United States*, 283 U.S. 25, 27 (1931). Many statutes are enacted to clarify definitions that could potentially be vague. Courts have stated that when multiple definitions exist for a certain word, especially when that word is essential to the enactment of the legislation, Congress' definition will reign supreme. *See United States v. Reid*, 206 F.Supp.2d 132, 138 (2002). Congress provided a clear and unambiguous definition of the "navigable water" at the creation of the CWA by defining "waters of the United States, including the territorial seas." 33 U.S.C.A. §1362(7). The Supreme Court further clarified that a "navigable water" is a relatively permanent body of water, typically found in the form of streams, oceans, rivers and lakes, that are located within the territorial boundaries of the United States. *Rapinos v. United States*, 547 U.S. 715, 716 (2006).

The Supreme Court requires the judiciary to grant deference to the reasonable actions of a government agency. *Chevron USA, Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842-43 (1984). When Congressional intent in drafting a statute is vague, the judiciary must abide by the appropriate agency's decision, assuming that such decision is reasonable. *Id.* In the present case, Congress anticipated the possible ambiguity in the interpretation of the term "navigable water" and thus Congress provided a clear and unfaltering definition. 33 U.S.C.A.

§1362(7). Based on Congress' definition, Lake Temp satisfies the elements of being a "navigable water" for the purposes of the CWA. The Lake is a "water" that is found within the sovereign boundary of the State of Progress. (R. 4).

Along with being appropriately classified as a "navigable water," Lake Temp is also a "water of the United States." (R. 4). The Supreme Court found that the COE's current regulations interpret the phrase "water of the United States" to include, *inter alia*, various types of waters such as intrastate lakes, rivers, streams, and intermittent streams, etc. *Rapinos*, 547 U.S. at 724, *quoting*, 33 CFR § 328.3(a)(5) (2004). The use of these waters could lead to the "degradation or destruction of which could affect interstate or foreign commerce." *Rapinos*, 547 U.S. at 724. This addendum modifies the Court's original holding that

> Congress evidently intended to repudiate limits that had been placed on federal regulation by earlier water pollution control statutes and to exercise its powers under the Commerce Clause to regulate at least some of the waters that it would not have deemed 'navigable' under the classical understanding of that term.

U.S. v. Riverside Bayview Homes, Inc., 474 U.S. 121, 133 (1985), *quoting*, S.Conf.Rep. No. 92-1236, p. 144 (1972).

In light of Congress' interpretation, the CWA was tasked with the regulation of all waters involved in interstate activities. In the present case, Lake Temp is a body of water with interstate impact. Since the Lake has no surface egress, the water of the Lake flows exclusively into the Imhoff Aquifer, located approximately one thousand feet below the bottom elevation of the lakebed. (R. 4). The Aquifer, which follows the natural contours of the Lake, spans beyond the territorial boundaries of the State of Progress, and into the State of New Union. *Id.* The multi-state reach of the Imhoff Aquifer rendering it a matter of federal responsibility, this makes the Aquifer's primary source of water, Lake Temp, a body of water requiring interstate regulation. *Id*.

Additionally, the Supreme Court of the United States has further refined the definition of "navigable water." *Rapinos*, 547 U.S. at 716. Based on the *Rapinos* definition, Lake Temp remains a "navigable water." *Id*. Lake Temp is a relatively permanent body of water, only becoming dry once every four years. (R. 4). At issue in the present case, the body of water is found in the form of a lake within the "territorial boundaries of the United States," more precisely, within the boundaries of the State of Progress. *Id.*; (R. 4). Therefore, Lake Temp survives the more stringent interpretation of "navigable water" imposed by the Supreme Court.

Based upon the common language definitions, in conjunction with the Congress' and the Supreme Court's definition of "navigable waters," this Court must affirm the District Court's finding that Lake Temp is a "navigable water." Congress' intent is clear as exemplified in the creation, debate, and enactment of the CWA, thus this Court would be unjustified in overturning the Lake's classification, as it fully satisfies Congress' definition. Under the power authorized to the federal government through the CWA to manage and regulate "navigable waters," the federal government is the sole authority capable of issuing permits relating to the discharge of pollutants. Therefore, this court should affirm the lower court's decision that Lake Temp falls squarely under federal jurisdiction and control as it is a "navigable water."

III. SINCE THE SLURRY DISCHARGED INTO LAKE TEMP FALLS UNDER THE DEFINITION OF A POLLUTANT, THE EPA IS THE APPROPRIATE AUTHORITY IN ISSUING A PERMIT UNDER CWA SECTION 402, 33 U.S.C. § 1342.

The determination of whether the material being discharged into navigable water of the United States is "fill material" is crucial to properly understanding the appropriate regulating authority of DOD's proposed plan. *Coeur v. Se. Ala. Conservation Council*, 557 U.S. 261 (2009). The munitions discharged by the DOD's facility on the shore of Lake Temp includes both pollutant and fill material, referred to as slurry. (R. 7). The general grant of authority for

issuing discharge permits lies within the purview Administrator of EPA. *Coeur*, 557 U.S. 261 (2009); 33 U.S.C. § 1342. Even if this Court determines that the lower court was correct in concluding that the COE was the appropriate permitting authority in the present case, the permit was wrongfully issued because there is no indication that the DOD's plan is the least destructive to the environment. *Bersani v. U.S. Envtl. Prot. Agency*, 850 F.2d 36, 39 (2nd Cir. 1988).

A. Under the definitions used by the Clean Water Act, the munitions the DOD wishes to discharge into Lake Temp qualify as pollutant.

Generally, the CWA serves to prohibit the discharge "of any pollutant by any person" unless the discharge is specifically permitted under the Act. *Nw. Envt'l. Def. Ctr. v. Envt'l. Quality Comm'n*, 223 P.3d 1071, 1076 (Sup. Ct. Or. 2009), *citing*, 33 U.S.C. § 1311(a). The permitting authority is granted to the EPA, except "fill material," which the CWA grants permitting authority to the COE. 33 U.S.C. § 1342. The determination of whether the munitions to be discharged into Lake Temp under the DOD's plan qualify as "fill material" governed under 33 U.S.C. § 1344, or as "pollutants" governed under 33 U.S.C. § 1342, is crucial under the statutory scheme of the CWA.[8] *Coeur*, 557 U.S. 261. If the material to be discharged under a proposed permit is classified as "fill material," the permit must be issued by the COE in compliance with the CWA. *Id*. Conversely, if the discharged material is defined under the CWA as a "pollutant," the Administrator of the EPA is authorized to issue permits under 33 U.S.C. § 1342.[9] *Id*. at 263.

Presently, the Court is urged to determine that the munitions DOD proposes to discharge into Lake Temp within the State of Progress qualify as a pollutant, thus falling under the

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[8] Fill material is defined as "material that has the effect of…[c]hanging the bottom elevation of water." *Coeur*, 557 U.S. at 262, *quoting*, 40 C.F.R. § 232.2.

[9] "The term 'pollutant' means dredged spoil, solid waste, incinerator residue, sewage, garbage, sewage sludge, munitions, chemical wastes,…rock, sand." 33 U.S.C. 1362(6).

authority of the EPA, not COE. (R. 8). The lower court defined the munitions to be discharged into Lake Temp as "liquid and semi-solid chemicals and pulverized metals, a toxic pollutant rather than an inert fill material." *Id*. Additionally, if allowed to discharge the munitions under this permit, the DOD will be required to mix various chemicals with the munitions for the purpose of ensuring that the slurry is not explosive. *Id*.

Under the COE's regulations, "fill material" is defined as "any material used for the primary purpose of replacing an aquatic area with dry land or of changing the bottom elevation of a waterbody." *Coeur*, 557 U.S. at 262. It is important to recognize that "whole categories of regulated industries can thereby gain immunity from a variety of pollution-control standards" by adding "sufficient solid matter" to a pollutant in order to raise the bottom of the body of water. *Coeur*, 557 U.S. at 271 (Ginsburg, dissenting). With this public policy concern in mind, this Court is urged to consider the content of the material being discharged under the permit and the clear presence of pollutants in this material. (R. 8).

The munitions do not include any pollutant discharged into the water primarily to dispose of waste, as that activity is regulated under section 402 of the Clean Water Act. 33 C.F.R. § 323.2(e). The munitions to be discarded are not intended to replace the lakebed to increase the elevation of the lake, but rather these are only incidental results of the discharge of the slurry. (R. 4). If a substance is to be classified as "fill material," it can have only "minimal adverse environmental effects." 40 C.F.R. 232.2(3). The fact that the materials have the potential to be explosive prior to mixing the chemicals, the potential harmful effect on migratory birds, any aquatic life, and the potable nature of the water results in the correct classification of the munitions as pollutant. (R.8).

Finally, the proposed munitions to be discharged are properly regulated under 33 U.S.C. § 1342, CWA Section 402, because of the contents within the waste to be discharged into Lake Temp under DOD's proposal. (R. 4). The materials within the munitions waste comprised of many "chemicals on the Clean Water Act § 311 list of hazardous substances, and mixing the contents with chemicals to assure they are not explosive." (R. 4). This classification under the CWA as hazardous substances to be discharged in the lakebed of Lake Temp effectively ensures that the appropriate authority to regulate this project is EPA under 33 U.S.C. § 1342, rather than the COE. *Nw. Envt'l. Def. Ctr.*, 223 P.3d at 1077. EPA is given the broad authority to issue permits for discharge into navigable waters of the United States in all circumstances, except for the one category of "dredged or fill material into the navigable waters at specified disposal sites" which are to be regulated by the COE. *Id*.

Although the COE is given authority in circumstances where fill material is being discharged into navigable waters, this power is not absolute. *Nw. Envt'l. Def. Ctr.*, 223 P.3d at 1082. If questionable material is classified as dredge, but the purpose is to remove desired elements from the material, it is removed from COE's jurisdiction and into the jurisdiction of EPA. *Id*. Additionally, COE jurisdiction is limited again when "any pollutant is discharged into the water primarily to dispose of waste, as that activity is regulated under section 402 of the Clean Water Act." *Res. Inv., Inc. v. U.S. Army Corps of Eng'r*, 151 F.3d 1162, 1166 (9th Cir. 1998) (discussing 33 C.F.R. § 323.2(e)). Under this interpretation, when pollutants are contained within material to be discharged, even if originally classified as "fill material," as in the present case, EPA is better equipped to issue permits to ensure the goals of the CWA are upheld through each permit issued for discharge into the nation's navigable waters. *Id*.

B. Even if this court determines that the COE had authority to issue the permit, the permit is invalid as it violates the CWA.

Under 33 U.S.C. § 1344(c), the EPA is given authority to exercise a veto over any permit issued by the COE as well as limiting COE's jurisdiction. *Bersani v. U.S. Envtl. Prot. Agency*, 850 F.2d 36, 39 (2nd Cir. 1988). Therefore, even if this court determines that authority was properly held by the COE in issuing this particular permit pursuant to 33 U.S.C. § 1344, the EPA is still required to review the permit to ensure full compliance with the CWA. *Id*. If EPA determines that the COE improperly issued a permit in opposition to the goals of the CWA, EPA has authority and jurisdiction to ultimately veto the permit. 33 U.S.C. § 1344(c). Thus, Congress granted EPA the authority to issue specific permits under the CWA, to delegate authority to another agency or state, while retaining the power to oversee all actions and decisions related to the CWA. 33 U.S.C. § 1342; 33 U.S.C. § 1344(c).

When issuing a permit under the CWA, the issuing party, here the COE, must determine if a practicable alternative existed at the time when the permit was issued. *Bersani*, 850 F.2d at 39. If the court determines that one or more practical alternatives with a less environmentally adverse result were in existence at the time the permit was issued, then the COE would not be authorized to issue the specific permit. *Id*. (citing 40 C.F.R. 230.10(a)(2)). When there is no evidence presented showing that no such alternative existed, then the permitting agency is required to presume that a practical alternative with less adverse impact was available and must deny the requested permit pursuant the CWA.[10] *Utahns for Better Transp. v. U.S. Dept. of Transp.*, 305 F.3d 1152, 1187 (10th Cir. 2002) (*discussing* 40 C.F.R. § 230.10(a)). Therefore, if an agency seeking permit approval from either the EPA or COE pursuant to the CWA fails to

[10] "Practicable is defined as 'available and capable of being done after taking into consideration cost, existing technology, and logistics in light of overall project purposes.'" *Utahns for Better Transp.*, 305 F.3d 1187 (10th Cir. 2002)(quoting 40 C.F.R. § 230.3(q)).

produce proper evidence to the permitting agency that no practical alternative was available, then that permitting agency is not authorized to issue said permit. *Id.* In fact, doing so would be in opposition to the directives of the CWA. *Id*.

Neither the DOD or COE present evidence on the issue of whether or not a practical alternative for the proposed discharge by DOD existed at the time when the COE issued the current permit. (R. 8). With this in mind, the COE is required by the mandates of the CWA to assume that a practical alternative existed and must promptly deny the issuance of the permit to the DOD.[11] *Bersani*, 850 F.2d at 39; 40 C.F.R. § 230.10(a)(3). As there is no evidence presented by the DOD in the present case as to whether this discharge plan has practical and less adverse alternative, it is presumed that such alternatives existed at the time DOD requested the permit from COE. *Id*.

In other circumstances where the COE was the appropriate agency charged with issuing a fill material discharge permit, a variety of factors contributed to the proper issuance. *Coeur*, 557 U.S. at 264. As already discussed, no practical alternative may exist, but other protections were instituted that minimized the damaging effects of the proposed discharge. *Id*. at 2470. For example, in a prior instance where the COE properly issued a permit for discharge into a lake, there was an additional CWA Section 402 permit issued by EPA for the treatment of the water

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[11] "Except as provided under section 404(b)(2), no discharge of dredged or fill material shall be permitted if there is a practicable alternative to the proposed discharge which would have less adverse impact on the aquatic ecosystem, so long as the alternative does not have other significant adverse environmental consequences. (1) For the purposes of this requirement, practicable alternatives include, but are not limited to: (i) activities which do not involve a discharge of dredged or fill material into the waters of the United States or ocean waters…(3) Where the activity associated with a discharge which is proposed for special aquatic sites are presumed to be available, unless clearly demonstrated otherwise. In addition, where a discharge is proposed for a special aquatic site, all practicable alternatives to the proposed discharge which do not involve a discharge into a special aquatic site are presumed to have less adverse impact on the aquatic ecosystem, unless clearly demonstrated otherwise." 40 C.F.R. § 230.10(a).

flowing into a downstream creek. *Id*. In the case at hand, there is no additional permit for the treatment of the water seeping into the Imhoff Aquifer. (R. 8). In *Coeur*, EPA took precautionary steps to protect the discharge from adversely affecting any downstream waters and the citizens relying on that water. 129 U.S. at 264. This is an important distinction from the case at bar where the pollutants will seep into the Aquifer extending into New Union. (R. 8). The EPA's failure to issue a permit protecting the Aquifer from the pollutants to be discharged into Lake Temp serves as an additional reason why the DOD permit was improper under the present circumstances. (R. 8).

If the COE fails to properly apply the statutory requirements found under the CWA for issuing permits, EPA is required to exercise its veto over the permit in order to further the goals of protecting the navigable waters of the United States. 33 U.S.C. § 1344(c). Therefore, even if this Court determines that the COE was the appropriate issuing authority, the present permit issued was adverse to the statutory requirements of the CWA, and should have been vetoed by EPA under the express authority granted by the legislature under 33 U.S.C. § 1344(c). When the language of a statute is clear, courts need not look to EPA's interpretation of the statute, as the lack of veto was clearly adverse to the mandatory duties of EPA. *Chevron USA, Inc. v. Natural Res. Def. Council, Inc.*, 467 US 837, 842-43 (1984); 33 U.S.C. § 1344(c).

C. The issuance of the permit presents a conflict of interest as the COE is closely related to the DOD.

Although the lower court emphasizes that EPA has the ability to issue permits for EPA laboratories and other facilities requiring a permit under 33 U.S.C. § 1342, the facts of this case are different than allowing the COE to issue a permit to the DOD under 33 U.S.C. § 1344. (R. 9). EPA is a government organization with the purpose of protecting the environment against various harms that are either naturally occurring or created by the citizens of the country. As the

purpose of EPA as an organization is directly related to the protection of the water at issue, the EPA was instituted for circumstances created by the very facts of this case. (R. 4).

It is appropriate for EPA to issue permits under the CWA and to veto those issued by the COE under the limited capacity carved out of the overall EPA authority. 33 U.S.C. § 1342, 33 U.S.C. § 1344(c). Although 33 U.S.C. § 1344 grants the authority to the COE for issuing "fill material" permits, it is unlikely that this authority was granted without restrictions. The statute specifically confers EPA veto authority over a COE permit, reducing the COE's overall authority in granting "fill material" permits. 33 U.S.C. § 1344(c).

Although the language of the CWA allows COE to issue permits in certain situation, the facts in the present situation presents a special conflict of interest. (R. 9). It is unlikely that Congress in drafting the CWA intended for an outside authority to issue permits within subdivisions of its own department and to regulate the compliance of those permits. EPA is the appropriate authority, as an agency's interpretation of ambiguous statutes are granted deference by the court in various circumstances. *Chevron*, 467 U.S. at 837. Here, EPA should be the issuing authority to prevent the conflict of interests between the COE and the DOD from precluding the proper application and enforcement of the discharge of munitions into Lake Temp. With EPA as the ultimate authority to issue, regulate, and withdraw CWA permits, their experience and knowledge is unmatched and, in the present situation, would be the only assurance of an objective permitting process. *U.S. v. Mead Corp.*, 533 U.S. 218, 229 (2001).

IV. THE LOWER COURT ERRED IN DETERMINING THAT THE OMB HAD AUTHORITY TO CIRCUMVENT THE EPA AND THAT THE EPA'S ADHERENCE TO THIS DIRECTIVE WAS PROPER.

As an administrative agency, the EPA has independence to make decisions separate from the President. Intervention by the Executive into decisions that are within the sole purview of an administrative agency, such as the EPA, are deemed to be improper. As it relates to this case, the OMB's participation and directive to EPA to abstain from vetoing the COE's CWA Section 404 permit to the DOD is an invalid exercise of authority. The OMB's order to EPA followed by EPA's adherence to the OMB's instructions are both an improper use of executive power and outside the legislatively defined jurisdiction of the agencies under the CWA.

A. As Congressional intent in the CWA is clear in granting the EPA the sole authority in executing the statute, the OMB's involvement is improper.

Courts must defer to Congress' specific intent in granting authority to administrative agencies. *Chevron USA, Inc. v. Natural Res. Def. Council, Inc.*, 467 US 837 (1984). When Congress' intent is clear in the language of the statute, unless patently unreasonably, courts are required to adhere to the statute. See *U.S. v. Mead Corp.*, 533 U.S. 218, 229 (2001) (applying the Chevron doctrine to implied statutory authority). This guiding principal was solidified in *Chevron* where the court instituted a two-prong analysis to resolve conflicts between Congressional language and agency interpretation of a statute. *Chevron USA, Inc.*, 533 U.S. at 842-843. In applying the *Chevron* Doctrine, the court must first determine if Congress speaks directly to the precise question to be addressed. *Id*. at 842. If the court finds that this is not the case, "the question for the Court is whether the agency's answer is based on permissible construction of the statute." *Id*. at 843. A court will grant deference to an agency and vacate its decision unless it is evident that the agency considered factors on which Congress did not intend

for it to rely, did not anticipate to be plausible in any circumstance, executes a decision contrary to the facts presented before the agency, or is contrary to goals of the agency. *Nat'l Ass'n of Home Builders v. Defenders of Wildlife*, 551 U.S. 644, 658 (2007) (quoting *Motor Vehicle Mfrs. Assn. of United States, Inc. v. State Farm Mut. Automobile Ins. Co.*, 463 U.S. 29, 43 (1983)).

As previously discussed, the CWA grants explicit authority to the Administrator who acts under the authority of EPA. 33 U.S.C. § 1251 *et. seq*. The Administrator has expansive power to define and determine appropriate sites for waste disposal into navigable waters of the United States. 33 U.S.C. § 1342; 33 U.S.C. § 1344(c). EPA has the ability to authorize a state it deems capable of fulfilling the objectives of the CWA when issuing permits for discharge into navigable waters located within the State's jurisdiction. 33 U.S.C. § 1342(a)(5). EPA may grant permitting authority to a state agency through 33 U.S.C. § 1342(b). If dissatisfied with the state's compliance with the CWA, the Administrator has authority to apply sanctions and seek judicial measures to ensure enforcement of the CWA's directives. 33 U.S.C.A. § 1319(a)(2)(A)-(B); 33 U.S.C. § 1344 (i)(1)(G). Following an adjudication of the facts, if the EPA determines that the permit fails to meet the standards found within the CWA, the Administrator of EPA has authority to terminate or modify the program for cause. 33 U.S.C. § 1342(c)(3).

The issue presently before the court arises from Sections 402 and 404 of the CWA. These statutes explicitly confer authority to the Administrator of EPA to issue discharge permits into the navigable waters of the United States. 33 U.S.C. § 1342; 33 U.S.C. § 1344. While the Administrator of EPA delegates permitting authority to the COE for permits of disposal of fill material into navigable waters, EPA retains the express ability to veto any permit issued by the COE. 33 U.S.C. § 1344(c). Congress intended for the EPA to be the final arbiter on matters of environmental policy and enforcement as evidenced through the language of the CWA. While

Congress specifically outlines EPA's extensive authority, there is neither an explicit nor an implicit reference to OMB involvement in permitting programs under the CWA. 33 U.S.C. § 1251 *et. seq*. In fact, the "OMB's environmental role is mainly in federal funding." Stan Millian, *Federal Facilities And Environmental Compliance: Towards A Solution*, 36 LOY. L. REV. 319, 373 (1990). There is no language within the CWA to indicate that EPA must take heed to OMB or any other governmental agency's request, contrary to the lower court's holding that OMB's actions were proper. (R. 11).

The United States Supreme Court held in *U.S. v. Mead Corp.* that an agency's interpretation of a statute under their purview receives deference due to the specialized knowledge and experience of said agency. 533 U.S. 218, 234 (2001). The EPA is uniquely situated in that it does not seek to prohibit all conduct that could be detrimental to the environment. Instead, it searches for the solution that strikes the appropriate balance between promoting economic growth and ensuring the safety and health of the public. *Chevron USA, Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 851 (1984); *See also Envt'l Def. v. E.P.A*, 489 F.3d 1320, 1334 (D.D.C. 2007); *Envt'l Def. v. E.P.A.*, 898 F.2d 183, 189 (D.D.C. 1990); *S. La. Envt'l Council, Inc. v. Sand*, 629 F.2d 1005, 1011 (5th Cir. 1980). Only EPA has the particularized knowledge necessary to appropriately weigh these competing concerns to properly determine whether a given action that could potentially impact the environment should be permitted. *Mead Corp*, 533 U.S. at 234. The OMB's goal and overall expertise is geared towards government efficiency, and not towards adjudicative decisions that require technical decisions involving both environmental and public safety matters. To maintain consistency with the Supreme Court's holding in *Mead*, this Court is urged to treat EPA, rather than the OMB as the ultimate authority on the issues before the court. *Id*.

B. Congress intended to have EPA act as the ultimate arbiter of the CWA, therefore EPA's adherence to OMB's order was improper.

As discussed above, when Congress' intent is clear and unambiguous in the language of a statute, the agency with authority to uphold and enforce the statute must adhere to the provisions of the legislation. *Chevron USA, Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984). EPA was given explicit power and direction under the CWA as well as the COE in terms of directives for issuing and regulating permits for discharge disposal into navigable waters of the United States. 33 U.S.C. § 1342; 33 U.S.C. § 1344. As previously discussed, OMB's interference was improper because OMB lacked authority to rectify foreseeable conflicts between the COE and EPA. CWA Sections 402 and 404 are sufficiently clear when delineating the roles of each agency in granting permits. 33 U.S.C. § 1342; 33 U.S.C. § 1344. Thus, any directive or instruction given to EPA by OMB is not only improper, but contradicts the entire concept of separation of powers guaranteed by the Constitution.

Presently, EPA failed to veto the CWA Section 404 permit issued by COE because the Administrator was following the directive of the OMB. (R. 9). However, the OMB is unauthorized to prevent an agency from exercising a legal duty imposed for which it is charged to execute. *Meyer v. Bush*, 981 F.2d 1288, 1290 (D.D.C. 1993) (quoting Exec. Order No. 12,291 (1981)). As Congress specifically grants EPA the exclusive authority to veto a COE fill material discharge permit, the agency is entrusted with the legal duty to ensure the goals of the CWA are followed. 33 U.S.C. § 1344(c). Congress intentionally gave this authority to EPA, without mentioning OMB in any capacity; therefore, OMB's circumvention of EPA's authority was improper as it frustrates Congressional intent and the goals of the CWA.

In the case at bar, the OMB held a meeting attended by both the COE and EPA, "which culminated in OMB's oral decision and directive." (R. 9 n.1). Rather than analyzing the COE

permit and its compliance with the COE, EPA adhered to the OMB's directive. As mentioned before, the EPA is the agency best suited to deal with environmental issues that affect public health and safety. Additionally, as the CWA was clear on its manifest intent to grant the EPA the power to deal with these types of environmental issues, the legal duty rests with the EPA alone, not the OMB. Not only is the OMB interference improper, but the EPA's adherence to the OMB's adjudication goes against the fundamental purpose of the EPA and the clear intent of Congress. Such a position by the EPA violates its own charter and EPA's action is subject to judicial review as it was "arbitrary and capricious." While deference is typically given to an administrative agency's decision, 5 U.S.C § 701(a)(2) establishes that when a decision is "arbitrary and capricious," this Court has the right to review and ultimately strike down an agency's judgment. *See also United States v. Morton*, 467 U.S. 822, 834 (1984) (stating that when Congress explicitly delegates authority to an agency through statute, the court must give the agency "legislative and hence controlling weight unless they are arbitrary, capricious, or plainly contrary to the statute.") Therefore, as Congress' intended the EPA to be the ultimate authority of the CWA, the EPA's adherence to OMB was improper.

CONCLUSION

WHEREFORE, New Union respectfully requests that this Court determines that New Union has standing to bring the current case, that Lake Temp is appropriately classified as a "navigable water" of the United States, that the Army Corps of Engineers did not have jurisdiction under 33 U.S.C. § 1344 to issue the relevant permit, that the appropriate jurisdiction is conferred pursuant to 33 U.S.C. § 1342 where the Administrator of the Environmental Protection Agency is granted exclusive authority, that the Office of Management and Budget improperly decided which Clean Water Act permit was necessary, and that Environmental

Protection Agency's adherence to the Office of Management and Budget's directive not to exercise their veto power exclusively granted to them within 33 U.S.C. § 1344(c) was improper.