Team # 63

C.A. No. 11-1245

THE UNITED STATES COURT OF APPEALS
FOR THE TWELFTH CIRCUIT

STATE OF NEW UNION

Appellant and Cross-Appellee,

UNITED STATES

v.

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

Civ. 148-2011

BRIEF FOR STATE OF NEW UNION, APPELLANT AND CROSS-APPELLEE

Table of Contents

Table of Authorities

CASES

UNITED STATES CONSTITUTION PROVISIONS

STATUTES

Clean Water Act

Administrative Procedure Act

REGULATIONS

MISCELLANEOUS

Jurisdictional Statement

The district court had jurisdiction under 28 U.S.C. § 1331(2006) and, as State of New Union (New Union) argues, under the Administrative Procedure Act (APA), 5 U.S.C. § 702 (2006). On June 2, 2011, the district court granted New Union's motion for summary judgment with respect to Lake Temp as a navigable water under section 404 of the Federal Water Pollution Control Act (CWA). 33 U.S.C. § 1344 (2006). The district court then granted the United States' (U.S.) motion for summary judgment on the remaining issues. The order was final because the decision "disposes of New Union's claim" and this Court has jurisdiction pursuant to 28 U.S.C. § 1291. Order p.10-11.

Following the district court's order, New Union and the State of Progress (Progress) each filed a Notice of Appeal pursuant to Rule 4(a)(1). FED. R. APP. P. 4(a).

Statement of the Issues

The issues presented on this appeal are as follows:

I. Should the district court's decision be reversed because New Union has standing?

II. Should the district court's decision classifying Lake Temp as a "navigable water" be affirmed?

III. Should the district court's decision that the Army COE of Engineers (COE) has jurisdiction under section 404 of the CWA be reversed?

IV. Should the district court's decision that the Office of Management and Budget's (OMB) intervention and EPA's (Environmental Protection Agency) acquiescence did not violate the CWA be reversed?

Statement of the Case and Facts

This case involves the authority to issue permits under the CWA. New Union seeks review of a permit issued by the COE to the DOD to discharge slurry of spent munitions into Lake Temp.

Lake Temp is a body of water that is up to three miles wide and nine miles long during the rainy season. Order p. 3. Lake Temp at its highest water level is wholly within Progress. Order p. 4. Surface water flows into Lake Temp from a watershed of surrounding mountains, located primarily in Progress, with a small amount in New Union. The Imhoff Aquifer is located below Lake Temp, with 95% located within Progress and five percent located in New Union. *Id.* Dale Bombers (Bompers), a citizen of New Union, owns and operates a ranch located above the Imhoff Aquifer. Lake Temp is not used for agricultural purposes, although the water has many other uses. Historically the lake has been used as a stopover for migratory ducks, providing a recreational activity for duck hunters. The lake is located on a military reservation, but has clearly visible trails leading from the road to the lake. *Id.* DOD has taken no measures beyond signs to restrict public entry. *Id.*

The DOD proposed to construct a facility on the shore of Lake Temp to receive and prepare munitions for discharge into the lake. The metals will be pulverized and introduced to chemicals to produce slurry, which will be sprayed from a movable multi-port pipe on the shore. *Id.* The DOD estimates that when the operation is complete, the lake's water elevation will be approximately six feet higher and its surface area will be two square miles larger. *Id.* The COE's EIS does not project that the Lake will intrude into New Union. Order p. 5.

New Union asserted that DOD could not proceed without the correct permit. The Secretary of the Army (Secretary) filed a motion for summary judgment on the basis that New Union lacked standing, the COE had jurisdiction to issue a permit for the discharge of fill under section 404, and the participation of OMB did not violate the CWA. Order p.

5. Progress, within whose boundaries the permitted activities will take place, intervened as a co-defendant with the United States.

New Union filed a cross-motion for summary judgment that it has standing to appeal the issue of the permit, Lake Temp is a "navigable water" for which the COE lacks jurisdiction to issue the permit and OMB's decision violated the CWA. *Id.* Progress also filed a cross-motion for summary judgment, arguing that New Union has standing, either Lake Temp is not within the jurisdiction of the CWA because it is not a "navigable water" or the COE has jurisdiction and OMB did not violate the CWA.

The district court granted New Union's motion classifying Lake Temp as a "navigable water." Order p. 10. The court granted U.S.'s motion for summary judgment on all other issues. Order p. 10-11. Following the issuance of the order, New Union and Progress each filed a Notice of Appeal. Order p. 1.

Summary of the Argument

New Union and its citizens are harmed by the imminent contamination of its groundwater. Principles of federalism justify the invocation of this Court's jurisdiction to remedy New Union's injury. As a state, New Union receives special solicitude for standing purposes based on its stake in the outcome of the case. New Union easily satisfies Article III standing requirements laid out in *Lujan*.

The CWA gives COE and EPA jurisdiction over discharges into "navigable waters" in order to effectuate the goal of the CWA, to restore and maintain the integrity of the nation's waters. The Supreme Court has narrowed this jurisdiction in regards to certain wetlands, but it did not affect COE and EPA jurisdiction over traditional bodies of water such as Lake Temp.

The district court erred when it applied *Coeur* without distinguishing the material from the material decided in *Coeur*. When the court in *Coeur* decided that materials changing a water's elevation classify as fill material, they did not intend for all materials to be classified as such. The slurry that the DOD proposes to use can be classified as a solid waste, thus, qualifying it under the EPA's authority to govern as pollutants under section 404.

OMB and EPA's actions in this case violate both the CWA and the APA. OMB has authority to "resolve" disputes under CWA, and such authority can only be based on an incorrect reading of executive orders and court decisions. Additionally, the district court erred when it found that discretionary EPA decisions made under section 404(c) are non-reviewable under the APA. OMB and EPA's actions in this case violate the APA is arbitrary and capricious prohibition. 5 U.S.C. § 706(2)(A) (2006).

Standard of Review

The questions of law to be evaluated by this Court should be reviewed *de novo*. *Theriot, Inc. v. United States,* 245 F.3d 388, 395 (5th Cir. 1998). Review of EPA action under the CWA requires this Court must "look to the [APA]." *Avoyelles Sportsmen's League, Inc. v. Marsh*, 715 F.2d 897, 905 (1983). The applicable scope of review under 5 U.S.C. § 706(2)(A) is narrow. *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983). Although a court cannot "substitute its judgment for that of the agency," they must nevertheless conduct a "thorough, probing, in-depth review" to ensure the agency's decision is rational and "based on a consideration of the relevant factors." *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 415-16 (1971).

Argument

I. New Union has standing as owner and regulator of its water and *parens patriae*

The district court erred in granting summary judgment on the issue of standing. Because New Union seeks to protect both its proprietary and sovereign interests in the public's right to beneficial use of its natural resources, this Court should reverse the lower court and allow New Union's suit to proceed.

A. New Union has special solicitude under *Massachusetts v. EPA*

In *Massachusetts v. EPA*, the state sought review of an order of the EPA not to regulate greenhouse gas emissions from motor vehicles. 549 U.S. 497, 511-14 (2007). The Court found that Massachusetts had a special position and interest in the outcome of the case. *Id.* at 519-20. The Court emphasized the importance of Massachusetts as a sovereign state rather than a private individual, and decided certain constitutional principles of sovereignty afforded it "special solicitude" for standing purposes. *Id.*

Like the facts of *Massachusetts*, New Union is a sovereign state suffering a harm resulting from agency action. New Union's groundwater is threatened by the harm that the COE's action will cause, much like Massachusetts was harmed by the lack of EPA action that threatened to further deteriorate its coastline. *Id*. at 522-23. A second analogy to *Massachusetts* also supports granting New Union standing here, namely the fact that states are "not normal litigants for the purposes of invoking . . . jurisdiction." *Id.* at 518 (citing *Georgia v. Tenn. Copper Co.*, 206 U.S. 230, 237 (1907)). For these reasons, this Court should find that New Union is entitled to special solicitude for standing purposes.

B. New Union satisfies all three of *Lujan's* standing elements

For New Union to have standing it must "demonstrate that it has suffered a concrete and particularized injury that is either actual or imminent, that the injury is fairly traceable to the defendant, and that it is likely that a favorable decision will redress that injury." *Massachusetts*, 549 U.S. at 517 (citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992)). New Union addresses these elements here.

1. The discharge of spent munitions and chemicals threatens New Union with injury

For Article III standing, the injury complained of must be an injury in fact that is "(a) concrete and particularized and (b) actual or imminent." *Friends of the Earth, Inc. v. Laidlow Env't Serv. (TOC), Inc.*, 528 U.S. 167 (2000) (citing *Lujan*, 504 U.S. at 560-61).

a. New Union is injured in its capacity as owner and regulator of its natural resources

New Union has standing based on its proprietary interests as owner and regulator of the water, land, and air within its borders. *See Massachusetts*, 549 U.S. at 519 (noting state interest in "all the earth and air within its domain" (citing *Tenn. Copper Co.*, 206 U.S. at 237 (1907))). Indeed, if a state's interest includes the "earth and air," its interests would logically extend to the groundwater below. *Hodges v. Abraham,* 300 F.3d 432, 444-45 (4th Cir. 2002) (finding a sufficient state "proprietary interest[] in the land, streams, and drinking water"). *See also* 12 MOORE'S FEDERAL PRACTICE ¶ 350.02[3] at 3–20 (1993). Because New Union has a proprietary interest in its natural resources, damage to such resources causes injury for standing purposes. *Missouri v. Illinois*, 180 U.S. 208, 240-41 (1901); *State of Idaho By and Through Idaho Pub. Utilities Comm'n v. ICC*, 35 F.3d 585, 591–92 (D.C. Cir. 1994) ("Like any private landowner, a State suffers concrete injury if its property is despoiled.").

New Union residents generally will suffer an injury of loss of use of the aquifer. Currently, New Union residents may apply for permits to withdraw groundwater from the aquifer if the Department of Natural Resources determines withdrawal would be appropriate. Order p.6. When the groundwater is entirely contaminated due to the DOD's activity, no resident can make use of the water in the aquifer.

The Imhoff Aquifer is an important natural resource, and the discharge of munitions and chemicals classified as hazardous substances under section 311 of the CWA into Lake Temp will harm New Union because the pollutants will contaminate New Union's groundwater. Order p. 4. Studies by the EPA and others around the world have documented the health risks associated with discharges of munitions into water. *See* ENVTL PROT. AGENCY, BEST MGMT PRACTICES FOR LEAD AT OUTDOOR SHOOTING RANGES (2005), http://epa.gov/region2/waste/leadshot/epa_bmp.pdf. *See also* J. Beddington, & A.J. Kinloch, *Munitions Dumped at Sea: A Literature Review*, IC CONSULTANTS (June 2005), http://www.mod.uk/NR/rdonlyres/77CEDBCA-813A-4A6C-8E59-16B9E260E27A/0/ic_munitions_seabed_rep.pdf.

Additionally the character of the aquifer will exacerbate the damage caused by the spent munitions discharge, thus making harm all the more imminent. Because its groundwater contains a high level of sulfur and is thus more acidic, if the spent munitions include lead, that lead will migrate more quickly throughout New Union's portion of the aquifer. *See* ENVTL PROT. AGENCY, BEST MGMT PRACTICES FOR LEAD AT OUTDOOR SHOOTING RANGES at 14 (2005). Although New Union cannot predict precisely *when* contamination will occur, that alone should not defeat standing. Because environmental injuries are often purely probabilistic, some amount of speculation is inevitable. *See*

Natural Res. Def. Council v. EPA, 464 F.3d 1, 6 (2006) (determining 1 in 200,000 risk satisfied *Lujan's* injury in-fact element). Just as speculation did not preclude the plaintiff in *Natural Res. Def. Council* from proving injury, it should not preclude New Union here.

b. New Union is harmed in its *parens patriae* capacity to protect its citizens

New Union owns and regulates the public waters within its borders as trustee for the people and it is authorized to bring suits in order to protect and prevent harm to such resources. *New Mexico v. Gen. Electric Co.*, 467 F.3d 1223, 1243 (10th Cir. 2006). Although suits against the United States raise difficult standing issues, the facts of this case represent the type of suit courts have allowed to go forward. *See id*. (allowing suit regarding allocation of state waters). Furthermore, this suit does not resemble the type of suit precluded by *Massachusetts v. Mellon*, where *parens patriae* standing was denied because the state sought protection of its citizens *from* a federal statute. 262 U.S. 447 (1923). Such standing limitations were also discussed in the *Massachusetts v. EPA* dissent. *Massachusetts*, 549 U.S. at 538 (Roberts, C.J., dissenting). Here, New Union is not attempting to sue on behalf of its citizens, but is seeking to remedy harm to its capacity as protector of its citizens. *See Alabama v. U.S. Army Corps of Eng'rs*, 424 F.3d 1117, 1130 (11th Cir. 2005) (allowing state suit against COE where COE actions affected states waters); *Kansas v. United States*, 249 F.3d 1213, 1221–23 (10th Cir. 2001). The threatened harm to New Union's citizens is exemplified by Bompers, whose land sits directly above the aquifer and any contamination by chemicals would surface on Bompers' land and in the groundwater below. The district court itself noted that Bompers represents such citizens who would be harmed. Order p. 6.

The injuries New Union and its citizens stand to suffer are twofold. First, the discharge of spent munitions and chemicals into Lake Temp will contaminate the Imhoff Aquifer and New Union's groundwater, thus negatively impacting New Union citizens such as Bompers. Second, Lake Temp is used for canoeing, bird watching, and hunting. Order p. 4. The discharge of munitions into Lake Temp will negatively impact the "aesthetic and recreational values of the area," thus harming New Union's citizens who use the lake in that capacity. *Friends of the Earth*, 528 U.S. at 183. New Union's injury exceeds the threshold established in *Lujan* and clearly alleges harm to *persons*, not simply harm to the environment.

2. New Union's injury is caused by COE issuing a permit

The second *Lujan* requirement for standing is causation, or whether the plaintiff's injury is "fairly traceable" to the complained of actions. *Lujan*, 504 U.S. at 560-61 (citing *Simon v. Eastern Ky. Welfare Rights Org.*, 426 U.S. 26, 41-42 (1976)). New Union fully meets this requirement because New Union's injury is *directly traceable*, through a straight-forward chain. The COE decision to issue a permit to the DOD will result in the DOD discharging slurry into Lake Temp. Because these chemicals are chemicals listed on the CWA list of hazardous substances, this discharge threatens to contaminate the Imhoff Aquifer located below the lake. Order p. 4. The risk of harm depends on the rate and direction of flow of groundwater in the aquifer because part of the Imhoff Aquifer is located within New Union. The aquifer contains groundwater that New Union owns and regulates. The pollution therefore threatens to contaminate New Union's groundwater.

New Union's injury is also directly traceable to OMB's decision to step in and instruct the EPA to not exercise its veto under section 404(c). Had OMB not prevented

the Administrator from complying with her statutory duties under the CWA, EPA would have vetoed the permit and DOD would not have permission to discharge pollutants into Lake Temp.

3. A favorable decision will remedy a discrete injury to New Union

New Union satisfies the redressiblity requirement by showing that a favorable decision is substantially likely to relieve a discrete injury to the state. *Lujan*, 504 U.S. at 560-61. A favorable decision in this Court will mean that the EPA, and not the COE, has jurisdiction over the discharge here. *Coeur Alaska, Inc. v. Se. Alaska Conservation. Council*, 557 U.S. 261 (2009). If the EPA has jurisdiction over Lake Temp, it is substantially likely to regulate the DOD's discharge because the discharge qualifies as a non-fill pollutant under section 402.

The Court in *Massachusetts* found that shoreline erosion from global warming would likely be remedied by a positive judicial outcome because the EPA would take regulatory action. 549 U.S. at 525-26. New Union has an even stronger argument for redressibility. In that case, the EPA's regulation of vehicle emissions would grant little relief from the overall effects of global warming, whereas revocation of the COE's permit here will result in relief because EPA has already shown its desire to exercise its veto under section 404 and thus either completely prevent or limit DOD's discharge.

While New Union is *not* representing Bompers, his position satisfies *Lujan's* elements, and epitomizes the type of harm to New Union's citizens. *Alfred L Snapp & Son v. Puerto Rico ex rel. Barez*, 458 U.S. 592, 607 (1982). In *Lujan*, the plaintiff had no definite plans to travel to the affected area, whereas Bompers lives and works on his land

every day. Thus, he suffers greater harm than the plaintiffs in *Lujan* and constitutes exactly the kind of plaintiff *Lujan* identified as truly being harmed. 504 U.S. at 565.

C. Estoppel does not apply to New Union's suit brought under the CWA

DOD argues that New Union should be estopped from "raising issues here that could have been dealt with" in DOD's Environmental Impact Statement (EIS). Order p. 6. This is a laches argument; but for laches to apply (1) "inexcusable delay," and (2) there must be "prejudice to the defendant." *Gardner v. Panama R.R. Co.*, 342 U.S. 29, 31 (1951). Additionally, the Supreme Court has cautioned against the "mechanical application of the statute of limitations" when the elements of laches have not been met. *Id.*

The elements of DOD's laches argument are not present in this case. First, DOD has had nine years since its completion of its EIS to obtain a permit and begin discharging spent munitions into Lake Temp. Order p. 6. Such delay by DOD contradicts its claim that New Union's suit would be prejudicial. Secondly, there must be "inexcusable delay." *Gardner*, 342 U.S. at 31. New Union's delay is entirely excusable because it was barred from conducting scientific tests which would have given it grounds to object to DOD's EIS. Order p. 6. New Union should not be punished for failing to object to DOD's EIS, when DOD itself was the party who prevented New Union from obtaining the necessary info to support such objections.

In addition to the elements of laches not being met, an analysis of suits brought challenging EISs under the National Environmental Protection Act supports New Union's argument that it should not be barred from bringing this suit under a *different statute*. In a suit against DOD for failing to comply with EIS requirements, the district court in *Nat'l*

Ass'n of Gov't Emp. v. Rumsfeld allowed the claim to go forward on equity grounds despite finding sufficient evidence of prejudice and inexcusable delay. 418 F. Supp. 1302 (E.D. Penn. 1976). Additionally, other courts have allowed environmental suits challenging EISs despite lengthy delays. *See Save Courthouse Comm. v. Lynn*, 408 F. Supp. 1323 (S.D.N.Y 1975) (ten year lapse). Because this suit is brought under a *different* statute, standing should be granted, despite DOD's prior completion of an EIS.

II. Lake Temp is a "water of the U.S." and subject to the jurisdiction of the CWA

The district court correctly held that Lake Temp is within the jurisdiction of the CWA and is therefore subject to the permitting requirements found in section 404. Under section 404 of the CWA, Congress gave the COE authority to issue permits for the discharge of fill into "navigable waters." 33 U.S.C. § 1344. Congress defined "navigable waters" broadly, as "waters of the United States." The "waters of the United States" was further defined in COE regulations as:

> *(1) All waters which are currently used, or were used in the past, or may be susceptible to use in interstate or foreign commerce, including all waters which are subject to the ebb and flow of the tide;* (2) All interstate waters including interstate wetlands; *(3) All other waters such as intrastate lakes, rivers, streams (including intermittent streams), mudflats, sandflats, wetlands, sloughs, prairie potholes, wet meadows, playa lakes, or natural ponds, the use, degradation or destruction of which could affect interstate or foreign commerce including any such waters:(i) Which are or could be used by interstate or foreign travelers for recreational or other purposes; or* (ii) From which fish or shellfish are or could be taken and sold in interstate or foreign commerce; or (iii) Which are used or could be used for industrial purpose by industries in interstate commerce.

Definition of Waters of the United States, 33 C.F.R. § 328.3 (2010).

The court did not err in its holding because Lake Temp is a "navigable water" for the purposes of the CWA, and "navigable waters" are within the jurisdiction of section 404. 33 U.S.C. § 1344(a). The district court properly held that Lake Temp is a water of

the United States for three reasons: First, Lake Temp fits within Congress' broad definition of "navigable waters" as well as within the COE's more specific definition of "waters of the United States." Second, Lake Temp has an affect on interstate commerce. Third, both *Solid Waste Agency of N. Cook Cnty. v. U.S. Army Corps of Eng'rs (SWANCC)*, 531 U.S. 159 (2001), and *Rapanos v. United States*, 547 U.S. 715 (2006), do not control this case.

A. Lake Temp as a "water of the U.S." is consistent with congressional intent

Section 404 gives authority to the COE to regulate discharges of "fill material" into "navigable waters." 33 U.S.C. § 1344(a) (2006). "Navigable waters" are defined only as "waters of the United States." 33 U.S.C. § 1362 (2006). By refusing to further define the term "navigable waters," Congress intended to give breadth to the waters covered by the CWA, and therefore subject to COE's jurisdiction under section 404. 118 CONG. REC. 33,699 at 33,756-757 (1972). The Conference Committee intended that "navigable waters" be given the broadest possible constitutional interpretation. S. REP. NO. 92-1236 (1972). The term "navigable waters" means all waters of the United States in a geographical sense, thus clearly encompassing Lake Temp. *Id*.

Lake Temp has the characteristics of a traditional, geographic body of water. It is large at three miles wide and nine miles long. Order p. 3. Water flows into it from an eight hundred square mile watershed of surrounding mountains. Ducks use the lake in their migration, and people use it for a variety of recreational activities, including hunting, bird watching, canoeing and row boating. Lake Temp is navigable in fact 80 percent of the time. Post-Rapanos Guidance http://www.usace.army.mil/CECW/Documents/cecwo/reg/cwa_guide/app_d_traditional_

navigable_waters.pdf. The CWA's traditional jurisdiction is over waters that are or have been navigable in fact. SWANCC, 531 U.S. at 172.

B. Lake Temp is well within the description of water bodies traditionally held to be navigable based on their affect on interstate commerce

After the enactment of the CWA, the COE promulgated regulations defining "navigable waters." 33 C.F.R. § 328.3. The COE's definition is due deference by this Court because "an agency's construction of a statute it is charged with enforcing is entitled to deference if it is reasonable and not in conflict with the expressed intent of Congress." *United States v. Riverside Bayview Homes*, 474 U.S. 121 (1985); *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984). Not only is the COE's inclusion of an "intrastate lake" as a "water of the United States" not in conflict with Congress' intent, the two are congruous. The legislative history of the CWA offers proof that Congress intended for traditional bodies of water, such as lakes, to be within the jurisdiction of the CWA. 118 CONG. REC. 33,699 at 33,756-757 (1972).

The COE's "affects interstate commerce" definition includes more than just those waters which are presently used or are susceptible to use in their natural condition or by reasonable improvement as a means to transport interstate commerce; it also includes a lake which the degradation or destruction of could affect interstate commerce. 33 U.S.C. 1344(g)(1) (2006). "A wide spectrum of economic activities affect interstate commerce and thus are susceptible of congressional regulation under the commerce clause irrespective of whether navigation, or indeed, water, is involved." *Kaiser Aetna v. United States*, 444 US 164,174 (1979).

Lake Temp is a lake which affects interstate commerce. In addition to the fact that a wide spectrum of activities affect interstate commerce, the COE regulations

explicitly name waters that "are or could be used by interstate or foreign travelers for recreational or other purposes" as affecting interstate commerce. 33 C.F.R. § 328.3(3)(i). There is a highway from New Union that runs by Lake Temp, drawing out-of-state residents to the Lake for recreation. Order p. 4. Therefore, Lake Temp is a water of the United States.

Although Lake Temp is military property, it is accessible to and used by the general public. Order p. 4. There are trails going to and from the Lake and the military is aware of its use, but does not take any action to prevent its use. *Id*.

C. The district court properly found that *SWANCC* does not apply

The district court did not err in holding that *SWANCC* is inapplicable. Order. p. 7. The facts and circumstances of *SWANCC* are distinguishable from this case. The water in *SWANCC* differed greatly in size and use from the size and use of Lake Temp. The ponds in *SWANCC* were sometimes-wetlands which the COE justified their navigability only by reference to the "migratory bird rule." 531 U.S. at 159. The ponds vary in size (from under one tenth of an acre to several acres) and depth (from several inches to several feet), but even at their largest, were significantly smaller than Lake Temp. *Id*. at 163. Unlike Lake Temp, the ponds in *SWANCC* were not used for interstate recreation; rather, they were sand and gravel pits. *Id.* at 677. These factors clearly distinguish *SWANCC* from this case.

D. The district court properly found that *Rapanos* does not apply

Rapanos is distinguishable from this case and therefore not controlling. *Rapanos* concerned land with "sometimes-saturated soil conditions." *Rapanos*, 547 U.S. at 720. The focus of *Rapanos* was to narrow the CWA's jurisdiction over wetlands that were not directly connected to navigable in fact waters. *Id.* The *Rapanos* circumstances do not

apply to the case before the Court because Lake Temp is not a wetland. "Wetlands" include "those areas that are inundated or saturated by surface or groundwater at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions." Wetlands generally include swamps, marshes, bogs and similar areas." ENVTL PROT. AGENCY, Wetland Definitions, http://water.epa.gov/lawsregs/guidance/wetlands/definitions.cfm (last visited Nov. 28, 2011). Lake Temp does not have the characteristics of a swamp.

Rapanos modified the definition of "navigable waters" in one specific way that does not apply here—wetlands that are not directly connected to navigable in fact waters are not "navigable waters." *Rapanos*, 547 U.S. at 750. *Rapanos* does not have an affect on Congress' intent regarding the jurisdiction over a traditional lake, or on the COE's regulations regarding a lake whose degradation affects interstate commerce. Traditional lakes that have an affect on interstate commerce—such as Lake Temp—remain within the language of the regulations as well as within Congress' explicit intent.

Following EPA and COE guidance post-*Rapanos*, the agencies retain jurisdiction over "traditional navigable waters." ENVTL PROT. AGENCY & U.S. ARMY CORPS OF ENG'RS, Clean Water Act Jurisdiction Following the U.S. Supreme Court's Decision in Rapanos v. United States & Carabell v. United States (June 5, 2007), *available at* http://www.epa.gov/owow/wetlands/pdf/RapanosGuidance6507.pdf. (Post-Rapanos guidance) These waters include waters which are "navigable-in-fact." *Id.* at 5 n.19. Lake Temp is navigable in fact at least 80 percent of the time. "Navigable-in-fact" waters include waters capable of being used for purposes of commerce or trade, but they need

not be continuously navigable during all seasons. *Utah v. United States*, 403 U.S. 9 (1971); *Alaska v. Ahtna, Inc*., 891 F.2d 1404 (9th Cir. 1989). Lake Temp is used for recreational purposes by out-of-state visitors, making it navigable-in-fact.

E. Alternatively, Lake Temp is still navigable within the *Rapanos* framework

Even though *Rapanos* does not control this case, because Lake Temp is not a wetland, if the Court chooses to apply its limiting language to this case, Lake Temp is still navigable within the *Rapanos* framework. The *Rapanos* framework is comprised of narrowing language that seeks to restrict jurisdiction over wetlands that are not adjacent to navigable in fact waters. *Rapanos* defines "waters of the United States" as only "those relatively permanent, standing. . .bodies of water," not ephemeral flows of water." 547 U.S. at 732.

The district court described Lake Temp as "intermittent" based on the fact that it is dry one out of every five years. Order p. 4. This usage of "intermittent" is not the same as the *Rapanos* Court's usage. When the *Rapanos* Court discussed "intermittent" waters, it used extreme examples of "ephemeral" waters, for instance roadside ditches. *Id.* at 722. This is quite different in severity from the "intermittent" nature of Lake Temp. The water in Lake Temp does not occasionally flow or stand; rather, eighty percent of the time this lake is navigable in fact. Post-Rapanos Guidance. This usage of intermittent is also not in line with post-*Rapanos* caselaw. *See United States v. Moses*, 496 F.3d 984 (9th Cir. 2007) (finding a creek constituted a water of the United States notwithstanding the fact that it was seasonally intermittent). At the most, Lake Temp could be classified as "seasonally intermittent," because it is dry 20% of the time, and a seasonally intermittent creek is arguably dry 25% of the time. *Id* at 733.

Rapanos also held that "waters" includes bodies of water forming geographic features that are described in ordinary parlance as streams, oceans, rivers, and lakes. 547 U.S. at 716. Based on Lake Temp's size and use, Lake Temp is a lake within ordinary parlance. Even after *Rapanos*' narrowing of the COE's jurisdiction under section 404, as a traditional lake, Lake Temp is still a "navigable water."

III. EPA has jurisdiction to issue a permit for the slurry pursuant to section 402

The district court cited the recent decision in *Coeur Alaska, Inc. v. Se. Alaska Conservation Council* in granting summary judgment to the U.S. 129 S. Ct. 2458, 2468 (2009). The district court granted defendant's motion for summary judgment based on *Coeur* and as New Union argues, *Coeur* is inapplicable because of differences between the two types of materials.

A. The district court incorrectly applied *Coeur*

The district court incorrectly relied on *Coeur* when it determined that the COE had the authority to issue the permit by classifying the spent munitions as "fill material." The district court relied on precedent that all materials that legitimately classify as "fill material" should be governed by the COE. New Union argues that material the COE intends to disperse throughout Lake Temp is very different from the material in *Coeur* and as a result, this Court must determine if the material in question is the type of material that the COE has authority to regulate.

1. <u>The material in *Coeur* correctly fell within the definition of "fill material"</u>

In *Coeur*, the Supreme Court solidified the understanding of the CWA by explaining the extent of each government agencies' authority over which types of materials. Before the Court decided *Coeur* it was established that pursuant to section 404, the COE had authority to issue permits for the incorporation of dredged or "fill material" into a body of

water. For all other materials, the EPA pursuant to section 402 was authorized to "issue a permit for the discharge of any pollutant, or combination of pollutants" into a body of water. 33 U.S.C. § 1342 (2006). These definitions provided by the statute did not, however, determine which agency had final authority when a material met both requirements. Thus, before *Coeur* there was a discrepancy when a material was considered to be both "pollutant" and "fill." This gray area was attended to in 2002 when the EPA and the COE in a joint regulation defined "fill material" as "any 'material [that] has the effect of [c]hanging the bottom elevation' of water- a definition that includes "slurry, or tailings or similar mining related materials." *Coeur*, 129 S. Ct. at 2468. This definition allowed the COE to regulate, rather than the EPA, certain technically qualified "pollutants" to be discharged into a body of water because the effect of elevating the bottom of the water ultimately classified it as a "fill material." The types of "fill material" that the joint regulation specifically stated, "slurry, or tailings or similar mining related materials." *Id.*

The question presented in *Coeur* was whether a mixture of crushed rock and water considered both "pollutant" and "fill material" should be governed by the COE or the EPA. The parties agreed that the material was not specifically defined by the 2002 definitions and therefore was not previously decided. *Coeur*, 129 S. Ct. at 2468. The material in *Coeur* was determined to be "[This mixture is called] slurry. Some 30 percent of the slurry's volume is crushed rock, resembling wet sand, which is called tailings. The rest is water." *Id*. at 2464. The slurry material defined in *Coeur* was determined to meet the "regulation's definition of fill material. . . because slurry falls well within the central understanding of the term 'fill' as shown by the examples given by the regulation." *Id*. at

2468. The Code of Regulations construed by both the EPA and the COE defines dredge or fill materials as the following:

> (1) 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…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.

40 C.F.R. § 232.2 (2008). Thus, the Supreme Court in *Coeur* decided that the slurry material was the type of material that the statute was authorized to govern and that, "as long as it is legitimate fill material, it is subject to a section 404 permit, not a section 402 permit." *Coeur*, 129 S. Ct. at 2467. *Coeur* implied through its decision that the COE has authority to issue a permit if the material had the tendency to be qualified as a "fill material."

2. The slurry material fits within the EPA's definition of trash and garbage

New Union argues that this case can be distinguished because the material is very different from the material described in *Coeur*. Instead of immersing a rock and sand like slurry into a body of water, here the DOD proposes on,

> empty[ing] munitions of liquid, semi-solid and granular contents and mixing them with chemicals to assure they are not explosive. The remaining solids, primarily metals will be ground and pulverized. Finally water will be introduced to both sets of waste to form a slurry, which will be sprayed from a movable multi-port pipe.

Order p. 4. Thus, the material makeup of this slurry is more analogous to the material that was at issue in *Conn. Coastal Fishermen's Ass'n v. Remington Arms Co., Inc.,* when the court examined lead shot and clay target debris to determine whether they fall within

the statutory definition of solid waste, which includes trash or garbage-like material. 989 F.2d 1305, 1314 (2d Cir. 1993). The court in *Remington Arms* defined solid waste as "any discarded material" and further defined discarded material as that which is "abandoned," which was further described as materials that had been "disposed of." *Id.*

If the material qualifies as "disposed of" material and solid waste under the Resource Conservation and Recovery Act, then the EPA should likewise have jurisdiction over spent munitions under section 402 of the CWA. The CWA regulations defining "fill" support this position by exempting "trash or garbage" from the definition of fill. *See* 33 C.F.R. § 323.2(e)(3) (2010); 40 C.F.R. § 232.2 (2010). Thus, by EPA and COE's own standards, the DOD's munitions resemble trash and garbage more than they resemble traditional "fill material."

3. The material here is too dissimilar from *Coeur* to apply it here

The decision made by the Supreme Court in *Coeur* should not be interpreted to imply that in any situation where the "fill material" elevates the bottom of the body of water, the COE has jurisdiction because the "fill material" could be so egregious that the EPA must govern in these circumstances. Since the material has no resemblance to the material proposed previously decided to fit within the meaning of "fill material," it does not seem possible that the court should blindly follow the precedent set out in *Coeur*. The mining materials that *Coeur* held fit within the definition of "fill" were purely organic and had no probability of exploding.

The "fill material" definition is too broad and should not be construed by the court to mean anything that has the ability to change the elevation of the water. The EPA wishes to have the COE conform to the requirements set out in section 306's new source performance standard where the statute categorizes pollutants within the proposed

material to ensure that the "fill material" is not damaging the environment. Justice Kennedy in *Coeur* states,

> To literally apply these performance standards so as to forbid the use of any of these substances as 'fill,' even when say they constitute no more than trace elements in dirt, crushed rock, or sand that is clearly being used as fill to build a levee or to replace dirt removed from a lake bottom may prove unnecessarily strict.

Coeur, 129 S.Ct. 2458 at 2477. Justice Kennedy was not envisioning the type of material that the COE is using to raise the elevation of Lake Temp. The type of material at issue here was not addressed in *Coeur* because *Coeur* involved inert mining tailings which were already specifically included in EPA and COE's fill regulations. 33 C.F.R. § 323.2(f) (2010); 40 C.F.R. § 232.2. Therefore, *Coeur* could only decide what was in front of them rather than speculating what the future might hold. Additionally EPA and COE *agreed* in *Coeur* that the material qualified as "fill." *Coeur*, 129 S.Ct.. at 2464. Such a situation is not present here.

4. <u>The requirements for the COE when issuing a permit</u>

Section 404(e)(1) assigns certain tasks to the Secretary when issuing a permit for fill or dredged material. The statute requires that,

> [Secretary may… issue general permits…for any category of activities involving discharges of dredged or fill material if] the Secretary *determines that the activities in such category are similar in nature*, *will cause only minimal adverse environmental effects when performed separately, and will have only minimal cumulative adverse effect on the environment.*

33 U.S.C. § 1344 (2006). The statute requires that the Secretary prove that the permit requested complies with the three-part test set forth in the statute. New Union contends that all of the elements necessary cannot be met and therefore this permit cannot be authorized under the COE. The first element of this three-part test is that the activities are similar in nature. The statute requires that this fill material must resemble other slurry

materials that have previously been issued a permit under this statute. The statute requires this similarity because otherwise anything could be considered fill material. This distinction is important to make, otherwise the COE would have the discretion to add almost anything into the water that, "elevates and changes the bottom elevation" of the body of water. Order p. 8. As the dissent in *Coeur* noted, "[w]ould a rational legislature order exacting pollution limits, yet call all bets off if the pollutant, discharged into a lake, will raise the water body's elevation? To say the least, I am not persuaded, that is not how Congress intended the Clean Water Act to operate." *Coeur*, 129 S. Ct. at 2484 (2009) (Ginsburg, J., dissenting). The second element is that issuing this permit will only cause minimal adverse environmental effects when performed separately. The effect that the slurry will have on the environment cannot be calculated only by looking at the effect that this material will have on the Imhoff Aquifier. The surrounding environment and the people that use Lake Temp will also be effected. The third element states that by issuing this permit, it will only have minimal cumulative adverse effect on the environment. As stated previously, this material will have a major effect on New Union.

B. EPA has veto authority over section 404 permits

In *Coeur*, Justice Breyer recognized that not every elevation changing material is subject to section 404. Justice Breyer wrote,

> [I]t is not the case that any material that has the effect of changing the bottom elevation of the body of water is automatically subject to §404, not §402. The EPA has never suggested that it would interpret the regulations so as to turn §404 into a loophole, permitting evasion of a performance standard simply because a polluter discharges enough pollutant to raise the bottom elevation of the body of water.

Coeur, 129 S. Ct. at 2478 (Breyer, J., concurring). Although the EPA does not have standing to issue a 404 permit, section 402 gives the EPA authority to issue permits for

the discharge of "pollutants." *Id*. at 2467. However, Justice Breyer suggests that the EPA, in accordance with section 402, has the ability to overrule 404 permits in a narrow sense if the permit will adversely affect municipal waters, shellfish beds and fishery areas, wildlife and recreational areas.

The current uses of Lake Temp are not minimal and in this respect, such effects could have a substantial effect on the environment and the people that come into contact with Lake Temp. Lake Temp has been known to be a stopover for migrating ducks. Order p. 4. Lake Temp, although contrary to the Army's wishes, has been used for recreational purposes. Order p. 4 Thus, the uses of Lake Temp, whether authorized or not by the DOD, should pre-empt the 404 permit because the EPA has the authority to prevent pollutants from affecting the people and animals that inhabit the area.

C. The COE should not have final authority involving an interested subsidiary

New Union seeks to distinguish the relationship between the COE and the DOD from the relationship between the entities in *Coeur*. In *Coeur* the COE made its decision to issue the permit as an uninterested regulator, while here the COE is an interested subsidiary. Allowing the COE to issue permits for self-serving agencies promotes a back door approach and a conflict of interest for the agencies involved.

New Union argues that in situations where this conflict of interest arises, the COE should not be permitted to authorize the permits of fellow agencies. The EPA is authorized to issue permits to fellow agencies. In these situations the EPA always has the full authority to issue the permits and does not have the fear of losing the authority. The COE should not be permitted to issue permits in situations where there is a conflict of interest because if there is a fear of losing authority, the COE might classify anything under "fill material" and allow harsh pollutants to harm citizens.

IV. OMB's decision, and EPA's acquiescence, violated the CWA

With respect to OMB's involvement, New Union argues that the district court committed reversible error in several ways. First, by instructing EPA not to exercise its veto under section 404(c), OMB impermissibly prevented the EPA Administrator from complying with her statutory duties under the CWA. Such interference by OMB, in addition to the EPA's acquiescence, is not only in all likelihood unconstitutional;[1] it also violates the CWA's mandate that "the Administrator . . . *shall* administer this Act." 33 U.S.C. § 1251(d) (2006). The language of the CWA explicitly makes it a non-discretionary duty that even discretionary decisions, such as whether or not to exercise veto power under section 404 be made *by the Administrator* unless "otherwise expressly provided in this Act." *Id*.

Alternatively, in the event that this Court agrees with the district court's conclusion that OMB and EPA's actions did not violate the CWA's express provisions, such action is nevertheless subject to judicial review. 5 U.S.C. § 702 (2006). Under § 706(2)(A), EPA's "decision" not to veto the COE permit was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A) (2006). This is because the Supreme Court's recent decision in *Coeur* does not stretch so far as to require a section 404 permit in this case. Additionally, EPA's own regulations weigh against granting a section 404 permit on the facts in *this case*, and the President does not have the authority resolve the dispute between the COE and EPA.

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[1] New Union's argument on appeal rests on the contention that OMB's actions here are violative of the CWA, APA, and substantive law without having to address the constitutional question of OMB's actions. *Ashwander v. Tenn. Valley Auth.,* 297 U.S. 288, 347 (1936) (Brandeis, J., concurring) (stating "if a case can be decided on either of two grounds, one involving a constitutional question, the other a question of statutory construction or general law, the Court will decide only the latter").

Finally, both arguments made by New Union pertaining to OMB and EPA's actions support finding that there exists a clear genuine dispute as to several material facts, and that the district court's granting of summary judgment on the issue was improper. FED. R. CIV. P. 56(c).

A. EPA violated its duty to administer the CWA by bowing to OMB

The district court characterized OMB's involvement as mere "participation." Order p.10. However, the only party actually involved in the communications between OMB and the EPA who has expressed a view admits OMB did more than that. The COE admits OMB actually *resolved* the dispute under authority to under Executive Order 12,088. Order p. 10. Additionally, a factual comparison of OMB's involvement in this case with OMB's actions in *Envt'l Def. Fund v. Thomas*, provides additional circumstantial evidence that OMB's "involvement" transgressed acceptable bounds. 627 F. Supp. 566 (D.D.C. 1986).

In *Thomas*, OMB differed with EPA's proposed permitting standards relating to underground tanks. *Thomas*, 627 F. Supp. at 567. Additionally, OMB sought changes to EPA's already existing position and at a time when EPA was ready and about to take action. *Thomas*, 627 F. Supp. at 568-70. In this case, like *Thomas*, OMB differed with EPA's view regarding the appropriate permit and sought to change EPA's position. Order p. 9. OMB also took action at a time when the EPA was already prepared to act. *Id.* at 570. Based on these facts, and the non-discretionary duty of EPA to act within a certain timeframe, the district court in *Thomas* determined that OMB's actions constituted impermissible interference with EPA's duties. One noticeable difference between this case and *Thomas* is that *Thomas* involved the promulgation of rules

mandated by RCRA, and under Executive Order 12,991 EPA was required and affirmatively *sought* review of its proposed rules. *Id.* at 568. In this case EPA is not required to seek OMB review and the evidence is unclear as to whether OMB acted as a result of solicitation from EPA to explicitly resolve the issue. Order p. 9. This difference, taken together with factual similarities in *Thomas*, reveal that it was OMB, and not EPA, that made the decision to forego vetoing the COE's Section 404(a) permit.

The differences between EPA's action in this case and OSHA's action in *Nat'l Grain and Feed Ass'n v. OSHA* also support Appellant's claim that OMB violated the CWA by displacing the EPA Administrator. 866 F.2d 717 (5th Cir. 1989). Unlike *Nat'l Grain*, where OSHA rejected OMB's "behind the scenes" recommendations, OMB's actions here ended in the result it sought. Such a result supports New Union's argument that OMB gave *instructions* to EPA.

Finally, OMB's actions are consistent with its decades long practice of appropriating EPA's decision making authority. On numerous occasions spanning several presidencies OMB has consistently obstructed EPA's proper administration of the nation's environmental laws. *See* Robert V. Percival, *Checks Without Balance: Executive Office Oversight of the Environmental Protection Agency*, 54 LAW & CONTEMP. PROBS. 127, 128-55 (1991). Additionally, OMB's hostility to EPA is evidenced by its own data. *See* OFFICE OF MGMT. AND BUDGET, OFFICE OF INFORM. AND REGULATORY AFFAIRS, www.reginfo.gov (last visited Nov. 26, 2011). OMB's action here is yet another attempt to push an agenda inconsistent with the congressional design of the CWA. It should not be allowed to do so.

B. Neither the language of the CWA itself, federal case law, nor executive orders, permit OMB to assume EPA's non-discretionary administering authority

OMB and EPA's actions constitute violations of both congressional mandates and judicial decisions. The district court's reasoning supporting OMB authority to "resolve" is critically undermined by (1) the language of the statute itself; (2) the explicit limitations of Executive Order No. 12,088; (3) additional executive orders addressing executive branch disputes; and (4) the logical extension of the Attorney General's own interpretation of section 404's allocation of authority. Additionally, Supreme Court decisions pertaining to differing agency interpretations refute the contention that OMB has authority to make jurisdictional judgments under the CWA.

1. CWA's language grants no authority to OMB to resolve disputes with EPA

The CWA affirmatively states under its declaration of goals and policy that unless the Act states otherwise "the Administrator of the Environmental Protection Agency . . . shall administer the Act." 33 U.S.C. § 1251(d). Nowhere in section 404 is there an allocation of authority to OMB to make jurisdictional decisions. The only explicit mention of OMB in the CWA comes in section 320(k), which commands the Administrator to transmit a list to OMB relating to "assistance programs and development projects." 33 U.S.C. § 1329 (2006). This indicates that Congress knew how to grant authority to OMB and because OMB's authority to determine the existence defining "fill material" was absent, OMB has no role in determining this material.[2]

[2] Permits for Activities in Navigable Waters or Ocean Waters, 40 Fed. Reg. 31,320 (July 25, 1975); Discharge of Dredge or Fill Material, 40 Fed. Reg. 41, 292 (Sept. 5, 1975); Regulatory Progams of the COE of Enginers, 42 Fed. Reg. 37,122 (July 19, 1977); Consolidated Permit Regulations: CWA Section 404 Dredge or Fill Programs, 45 Fed. Reg. 33,290 (May 19, 1980); Memorandum of Agreement of Solid Waste, 51 Fed. Reg. 8871 (Mar. 14, 1986); 404 Program Definitions; Exempt Activities Not Requiring 404 Permits, 40 C.F.R. § 232.2 (2010); Permits for Discharges of Dredged or Fill Material into Waters of the United States, 33 C.F.R. § 323.2 (2010).

2. No executive orders allow OMB to "resolve" disputes with EPA

a. Executive Order 12,088

An analysis of Executive Order 12,088, cited as authority for OMB to resolve disputes within the executive branch, reveals two things. First, OMB's purported authority is designed to resolve interagency disputes arising *after* a violation of the CWA occurs. Exec. Order No. 12,088, 3 C.F.R. 243 §1-601 (1978). Second, OMB's authority, if it exists, was exercised prematurely, before EPA could make its own resolution.

The first element necessary for appropriate OMB action is that there be a "violation of an applicable pollution control standard" and a conflict between executive agencies "regarding such violation." *Id.* at §1-602. Here, no "violation of an applicable pollution control standard" had taken place at the time of OMB action. *Id.* at §1-601. Instead there was a difference of opinion between EPA and the COE regarding the nature of the discharge which would dictate the appropriate exercise of agency jurisdiction. Furthermore, the second element allowing for OMB arbitration has not been met. OMB may resolve conflicts only if the conflict cannot be resolved and only if the Administrator *requests* OMB's involvement. *Id.* at §1-603 (stating that OMB "shall consider unresolved conflicts at the request of the Administrator"). *See also* Application of the Resource Conservation and Recovery Act to the Dep't of Energy's Atomic Energy Act Facilities, 8 Op. Off. Legal Counsel 6 (1984). Nothing in the district court's opinion demonstrates that either element was satisfied. Furthermore, the fact that EPA was preparing to exercise its veto authority suggests that EPA was in the active stages of resolving its difference of opinion with the COE when OMB stepped in. Therefore, contrary to the district court's opinion, OMB actually acted *inconsistently*.

b. Executive Order 12,146

The district court incorrectly assumed that all legal disputes, if not resolved by OMB, would have to be settled by the Attorney General prior to proceeding in court. Order p. 10. The district court failed to acknowledge, however, that Executive Order 12,146's instruction pertaining to the Attorney General's review requires that agency be unable to resolve their differences, and that there not be "specific statutory vesting of responsibility for a resolution elsewhere." Exec. Order 12,146, 3 C.F.R. 409 §1-402 (1979), *reprinted in* 28 U.S.C. § 509 (1982). Analysis of Order 12,146 and the rationale behind it weakens the argument that OMB is vested with authority to "resolve" under the facts of this case. The fact that EPA was in the *process* of resolving it pursuant to authority already existing under CWA as interpreted by the Attorney General in 1979 undermines the contention that EPA and the COE could not resolve their differing opinions. Administrative Authority to Construe § 404 of the Federal Water Pollution Control Act, 43 Op. Att'y Gen. 197, 201 (1979). Furthermore, EPA's steps to veto viewed in light of the Attorney General's 1979 opinion, support a finding that CWA already vests responsibility for conflict resolution with the EPA.

3. The Attorney General acknowledges EPA's authority over the COE

The Attorney General has already acknowledged EPA's authority to interpret "navigable waters" under section 404. This 1979 opinion is instructive as to which agency has final authority to determine jurisdiction based on a similarly vague statutory term—i.e. fill material. *Id*. This begs the question as to why Congress would give EPA ultimate authority to interpret "navigable waters" under section 404, but deprive it of final authority when it came to the term "fill material." Indeed, EPA authority to regulate non-fill pollutants under section 402, would seem to necessitate an EPA threshold determination that such pollutants fail to qualify as fill under section 404. The Attorney

General reasoned that EPA has final "authority" to interpret "navigable waters" because "it is the Administrator who has overall responsibility for administering the Act's provisions," and because the Secretary is "not expressly charg[ed] with responsibility for deciding when a discharge . . . into navigable waters takes place." *Id*. Final authority to determine jurisdiction based on the presence of "fill material" should likewise rest with EPA. To deprive the EPA of such authority would be inconsistent with the statute's design, as the Attorney General acknowledged in 1979.

4. Precedent supports EPA having final authority during disputes

When two agencies disagree, the agency in the "best position to develop" familiarity and policymaking expertise is the agency Congress intended "to be invest[ed" with interpretive power." *Martin v. OSHRC*, 499 U.S. 144, 153 (1991). *See also Gonzales v. Oregon*, 546 U.S. 243, 914-22 (2006). The facts in *Martin* included Congress dividing authority among the Secretary of Labor (SOL) and the Occupational Safety and Health Review Commission (OSHRC). *Martin*, 499 U.S. at 151. When a jurisdictional dispute arose between the two agencies the Court held that final authority rested with SOL because "enforcement of the [OSH] Act is the sole responsibility of the Secretary" and "[t]he Commission's role . . . does not extend to overturning the Secretary's decision." *Id.* at 152 (internal quotations omitted). The same methodology of inference the Court utilized in *Martin* supports New Union's argument that OMB cannot "resolve" disputes between the COE and EPA by giving to COE that which the Act reserves to the EPA—namely, findings of unacceptable adverse effects and making final decisions as to whether material qualifies as "fill." Indeed, the Court's reasoning in *Martin* mirrors the Attorney General's reasoning in 1979 as to why EPA retains ultimate authority under Section 404. *Compare id* (inferring authority based on "structure and

history of the statute" that SOL's interpretive authority is a "'necessary adjunct' of the Secretary's powers to promulgate and enforce national health and safety standards") *with*, 43 Op. Att'y Gen. 197, 201 (stating that "the structure of the Act as a whole . . . [shows] it is the Administrator who has overall responsibility for administering the Act's provisions"). *Martin* also warned against allowing OSHRC to "substitute its reasonable interpretations for the Secretary's." *Martin*, 499 U.S. at 156. Such action "would clearly frustrate Congress' intent to make a single administrative actor" accountable. *Id*. at 156. By directing the Administrator to administer the CWA, Congress expressed its intent that accountability be with the EPA, not with behind-the-scenes agencies like OMB. 33 U.S.C. § 1251(d).

The Court utilized the same logic in *Gonzales* when it determined that the Attorney General could not substitute its judgment for the Secretary of Health and Human Services who had been delegated authority under the Controlled Substances Act to make medical decisions. *Gonzales*, 546 U.S. at 266-67. Analogizing *Martin* and *Gonzales* to the facts at issue here crystallize the issue. Clearly EPA reasoned that these spent munitions are not fill. *Martin* and *Gonzales* require OMB to accept EPA's determination, even if OMB disagrees.

C. OMB's actions violated the APA, which governs review of agency actions

Part IV.A-B provides several reasons why this Court should determine that OMB's decision and EPA's acquiescence violated the CWA and reverse the judgment of the district court. If, however, this Court decides that OMB and EPA did not violate the express terms of the CWA, it should still hold their actions to be "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A).

1. Discretionary EPA inaction under section 404 is reviewable under the APA

The district court found that EPA's decision not to veto constituted discretionary action and was therefore non-reviewable under the APA. 5 U.S.C. § 701(a)(2) (2006). However, the D.C. district court has held that EPA's failure to veto under section 404 is not the type of discretionary action normally non-reviewable under the APA. *Alliance to Save the Mattaponi v. U.S. Army Corps of Eng'rs*, 515 F. Supp. 2d 1, 7-8 (D.D.C. 2007) (holding that, because section 404(c) provides a minimal standard by which agency action can be judged, review under the APA is proper). *Mattaponi* thus distinguished *Heckler v. Chaney*, 470 U.S. 821 (1985) and allows for judicial review of EPA inaction in this case. *Mattaponi*, 515 F. Supp. 2d at 8.

Furthermore, the court in *Mattaponi* reasoned that *Chaney* should be read narrowly where agency inaction would have the same effect as agency action. *Id.* at 9. Such circumstances are present in this case where EPA's acquiescence to OMB has the same effect as if EPA had affirmatively stated its decision not to veto. *Mattaponi* addresses the issue directly and allows for judicial review in such circumstances. *Id.* ("[T]he decision not to veto the permit had the same impact on the parties as an express denial of relief." (citing *Her Majesty the Queen in Right of Ontario v. EPA*, 912 F.2d 1525, 1531 (D.C. Cir. 1990))).

2. EPA & OMB's actions violated 5 U.S.C. § 706(2)(A)

The district court first reasoned that EPA and OMB's actions were not arbitrary or capricious under the APA because the "EPA's decision is required by or consistent with *Coeur*." Order p. 10. As demonstrated by New Union's arguments above, the munitions at issue here cannot be considered fill material because (1) *Couer* does not require it; (2) it would be contrary to existing regulations; and (3) would lead to absurd inconsistencies

among the nation's environmental laws. *See* Part III. A. Secondly, the district court erred in determining that OMB's actions were not violative of 5 U.S.C. § 706(2)(A), because the President, as the head of the Executive Branch, has the power to resolve disputes among executive agencies pursuant to his constitutional duty to ensure the nations laws are faithfully executed. U.S. CONST. art. II, § 3. Because Part III.A has already shown *Coeur's* inapplicability, only the second rationale will be challenged here.

The district court's decision adopts the theory of the "unitary executive," which has been questioned by the Supreme Court. *See Morrison v. Olson*, 487 U.S. 654 (1988). Additionally, the Supreme Court has determined that the President cannot usurp an agency head's congressionally authorized role under a statute vesting authority with that official. *See Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 166 (1803); *Kendall v. United States*, 37 U.S. (12 Pet.) 524, 612-13 (1838). The district court's rationale, if carried through to its logical extent, would allow the President to exempt any entity from the CWA indefinitely and for any reason. Furthermore, the President cannot "resolve" his particular intra-branch dispute because EPA's veto authority, while discretionary, is nonetheless vested in the Administrator alone. *See United States ex rel Accardi v. Shaughnessy*, 347 U.S. 260 (1954); *Portland Audobon Soc'y v. Endangered Species Comm.*, 984 F.2d 1534 (9th Cir. 1993). Additionally, one of the seminal cases supporting the unitary executive theory, *Myers v. United States* acknowledged that "there may be duties so peculiarly and specifically committed to the discretion of a particular officer as to raise a question whether the President may overrule or revise the officer's interpretation of his statutory duty." *Myers v. United States*, 272 U.S. 52, 135 (1926). Given the express language of the CWA, combined with the scientific complexity

surrounding determinations of "fill material," this court should find EPA's discretionary authority is of the type exempt from presidential interference.

Reversing the lower court, however, would not leave the President powerless. Congress has already described the procedure whereby the President can exert his or her authority when it disagrees with agency decisions made pursuant to the CWA. 33 U.S.C. § 1323(a) (2006) (allowing President to exempt if he deems it to be in the "paramount interests of the United States"). The district court, by allowing OMB's action under the theory of a unitary executive, renders nugatory this provision of the CWA. As a result, the President can, by acting through OMB, avoid decisions from which political accountability would flow—namely, making decisions under 33 U.S.C. § 1323(a), or by removing an Administrator with whom he disagrees pursuant to his removal power. *See Myers*, 272 U.S. at 163-64. This Court should allow the President to be politically accountable for his actions and reverse the lower court on this point.

Conclusion

For the foregoing reasons, the judgment of the district court should be reversed except insofar as that court determined Lake Temp constituted navigable water under the CWA.