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David Sive Award for Best Brief Overall

Ricardo Bonilla
Texas Tech University School of Law

Cara Brewer
Texas Tech University School of Law

TWENTY-FOURTH ANNUAL PACE UNIVERSITY LAW SCHOOL NATIONAL ENVIRONMENTAL LAW MOOT COURT COMPETITION

David Sive Award for Best Brief Overall*
Appellant-Cross-Appellee

TEXAS TECH UNIVERSITY SCHOOL OF LAW
RICARDO BONILLA & CARA BREWER

CA. NO. 11-1246
UNITED STATES COURT OF APPEALS
FOR THE TWELFTH CIRCUIT

STATE OF NEW UNION,
Appellant-Cross-Appellee,
v.
UNITED STATES,
Appellee-Cross-Appellant,
v.
STATE OF PROGRESS,
Appellee-Cross-Appellant.

On Appeal from the United States District for the
District of New Union

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

* This brief has been reprinted in its original format. Please note that the Table of Authorities and Table of Contents for this brief have been omitted.

JURISDICTIONAL STATEMENT

This case involves an appeal from a judgment of the United States District Court for the District of New Union. R. at 1. The district court had proper subject matter jurisdiction over the case because the issues arise under the Clean Water Act (CWA), 33 U.S.C. §§ 1251-1387 (2006), a law of the United States, and federal district courts have original jurisdiction over any civil action arising under the laws of the United States. 28 U.S.C. § 1331 (2006). The United States Court of Appeals for the Twelfth Circuit has proper jurisdiction to hear appeals from any final decision of the United States District Court for the District of New Union. 28 U.S.C. § 1291 (2006).

STATEMENT OF THE ISSUES

Whether New Union has standing to bring this case either under its sovereign capacity as owner and regulator of its groundwater or its *parens patriae* capacity as protector of its citizens' interests in the groundwater when New Union has alleged that it and its citizens will suffer injuries due to the pollution of the Imhoff Aquifer, which is located beneath New Union.

Whether Lake Temp is a "navigable water" as defined under the CWA when it is an intermittent body of water that contains water four out of every five years, and there is evidence that interstate travelers use Lake Temp for hunting, bird watching, and boating.

Whether the correct agency to issue the permit in this case is the U.S. Army Corps of Engineers (COE) under CWA § 404 because the slurry is a fill material due to its effect on the bottom-level elevation of Lake Temp or the Environmental Protection Agency (EPA) under CWA § 402 because the slurry is a pollutant due to its contents, which include munitions and other hazardous chemicals.

Whether the Office of Management and Budget (OMB) violated the CWA when it instructed the EPA not to exercise its explicit veto power under CWA § 402(c) to invalidate the COE's permit.

STATEMENT OF THE CASE

The State of New Union filed a complaint in the United States District Court for the District of New Union seeking review under the Administrative Procedure Act, 5 U.S.C. § 702 (2006), of an individual permit issued by the COE to the U.S. Department of Defense (DOD) to discharge a slurry of spent munitions into Lake Temp. R. at 3. New Union alleged that the EPA, not the COE, was the proper agency to issue the permit, and because the EPA had not done so, the DOD's permit was invalid. R. at 3. The State of Progress, where the permitted activities will take place, intervened in the lawsuit. R. at 3.

After discovery, the Secretary of the Army, representing the United States, filed a motion for summary judgment, to which both New Union and Progress responded with cross-motions for summary judgment. R. at 5. On June 2, 2011, the district court granted the Secretary's motion and denied New Union's. R. at 10. The court held that: (1) New Union did not have standing to bring its claim; (2) the COE was the appropriate agency to issue the permit because Lake Temp is a navigable water and the slurry to be discharged is a fill material; and (3) OMB's involvement in the process did not violate the CWA. R. at 10-11.

New Union and Progress each filed a Notice of Appeal. R. at 1. New Union appeals the district court's holding that New Union lacked standing to bring its claim. R. at 1. New Union also appeals the court's finding that the slurry is a fill material, arguing that the slurry is a pollutant and thus required a permit from the EPA rather than the COE. R. at 1. New Union also takes issue with the court's holding that the OMB's involvement was proper. R. at 1. Progress appeals only the court's holding that Lake Temp is a navigable water. R. at 1. This Court granted review on September 15, 2011. R. at 2.

STATEMENT OF THE FACTS

The DOD has a plan in place to receive and prepare a variety of munitions for discharge into Lake Temp, a body of water located in Progress. The DOD must secure a proper permit from a federal agency before it can implement its plan. The reason for New Union's lawsuit is its concern that the contents of the dis-

charge will contaminate an aquifer that is located beneath New Union. New Union's appeal is grounded in this same concern.

The Lake and its Visitors

Lake Temp is an oval-shaped body of water that is three miles wide and nine miles long at its high-water mark. R. at 3-4. Although the lake becomes much smaller during the dry seasons, it does contain water four out of every five years. R. at 4. Its boundaries are wholly within Progress, but almost one thousand feet below Lake Temp lies the Imhoff Aquifer, which is located beneath both Progress and New Union. R. at 4. The land between the lake and the aquifer is primarily unconsolidated alluvial fill, so the contents of the lake eventually filter into the aquifer. R. at 5.

Residents of Progress, New Union, and other states use Lake Temp for a variety of reasons. R. at 4. For example, people take rowboats and canoes to the lake to hunt and bird watch. R. at 4. Interstate hunters in particular have hunted from boats and canoes on the lake as well as navigated across the lake by rowing or paddling to hunt from its different shores. R. at 7. Dale Bompers, a resident of New Union, lives on a ranch above the Imhoff Aquifer, and although he does not presently use the aquifer, he could do so if he applied for a withdrawal permit from the New Union Department of Natural Resources. R. at 6. The Department would give Mr. Bompers a preference should he apply for such a permit, as he is an owner of land located directly above the groundwater. R. at 6.

The Department of Defense's Pollution Plan

The DOD plans to construct a facility to receive and prepare a wide variety of munitions for discharge into Lake Temp. R. at 4. The munitions will be combined with liquid, semi-solid, and granular contents to ensure that they are not explosive before being discharged. R. at 4. Along with the inherent dangers of the munitions, the contents they are to be combined with also include many chemicals that are on the CWA § 311's list of hazardous materials. R. at 4. The DOD will then spray the dry portions of the lake with this slurry, eventually covering the entire lakebed

and raising the lake's top water elevation by approximately six feet. R. at 4. The process will take several years to complete, after which Lake Temp should return to its pre-operation condition, albeit at a higher elevation. R. at 4-5. There is no evidence, however, that the slurry will not cause any harmful effects to either Lake Temp or the Imhoff Aquifer. R. at 4.

The Permit Process and the Office of Management and Budget's Interference

Before the DOD can begin its project, it must secure a permit to discharge materials into Lake Temp from either the COE or the EPA. R. at 7-8. The COE classified the slurry in this case to be a fill material, so it issued an individual permit to the DOD under § 404 of the CWA. R. at 8. The EPA, however, disagreed with the COE's characterization of the slurry, as it found the nature of the discharge would require a permit from the EPA under § 402 of the CWA because the slurry was a pollutant, not a fill material. R. at 9. But before the EPA could exercise its right to veto the COE's permit, the OMB interfered with the process and directed the EPA not to do so. R. at 9. The EPA took no further action after receiving this instruction from the OMB. R. at 9.

New Union is concerned with the potential ramifications of the DOD's project, for it believes the discharge of munitions and chemicals into Lake Temp will eventually pollute the Imhoff Aquifer, thereby injuring both New Union's and its residents' interests in the groundwater. R. at 6. New Union therefore filed this lawsuit in an effort to have the appropriate agency, the EPA, review the proposed project and ensure that the appropriate permit and review process is used before the DOD begins discharging potential pollutants into Lake Temp. R. at 3.

STANDARD OF REVIEW

This case involves an appeal from the district court's grant of summary judgment. Summary judgment is appropriate if "there is no genuine issue as to any material fact and . . . the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). Therefore, the issues before this Court are questions of law and should be reviewed de novo. *Pierce v. Underwood*, 487 U.S.

552, 557 (1988). Accordingly, this Court should afford no deference to the opinions and conclusions of the lower court. *See id*.

SUMMARY OF THE ARGUMENT

The district court erred in holding that New Union did not have standing, that the COE had jurisdiction to issue a § 404 permit, and that the OMB's dispute resolution between the EPA and the COE did not violate the CWA. In particular, New Union does have standing to bring its claims as owner and regulator of its groundwater and under its *parens patriae* capacity as the protector of its citizens' rights in the state's groundwater. Furthermore, although the district court was correct in holding that Lake Temp is a navigable water, it erred in concluding that the COE was the appropriate agency to issue the permit because the slurry in this case is a pollutant, not a fill material. Finally, the district court erred when it found that the OMB's involvement in this case was proper because Congress did not provide the OMB with the power to direct the EPA on whether to exercise the EPA's rights under the CWA.

The district court erred in holding that New Union did not have standing. The court found that New Union could not show that it would suffer any actual or imminent injury as a result of the DOD's proposed plan. But New Union explicitly pointed out its injury: the pollution of the Imhoff Aquifer, which is located beneath New Union. New Union also relies on the relaxed standing test the Supreme Court proffered in *Massachusetts v. EPA*, wherein affected states are subject to a more favorable test for standing if they can allege an injury to their sovereign interests. *Massachusetts v. EPA*, 549 U.S. 497 (2007). New Union has done so, alleging an injury to its sovereign interest as the protector and regulator of its groundwater.

Alternatively, even if this Court disagrees that New Union has standing under the *Massachusetts* test, New Union still has standing in its representative capacity under the *parens patriae* doctrine. Under that doctrine, a state has an interest in protecting its citizens from the pollution of the state's air and interstate waters. Here, New Union has a specific interest in protecting its citizens from the pollution of the Imhoff Aquifer. The state's in-

terest is exemplified by Mr. Bompers, who owns and operates a ranch above the aquifer but would not be able to use the groundwater if it becomes contaminated with the DOD's slurry.

New Union, however, does not take issue with all of the district court's holdings. The court was correct in holding that Lake Temp is a navigable water and thus discharges into the lake require a permit under the CWA. Congress meant for the term "navigable water" to have a very broad meaning; in fact, the main purpose of the CWA has nothing to do with navigability. Instead, the term is meant to cover all the waters of the United States, and Lake Temp qualifies as a navigable water under either of the tests established by the Supreme Court in *Rapanos v. United States*, 547 U.S. 715 (2006). Lake Temp meets Justice Scalia's test as a "relatively permanent body of water" because it contains water much more often than not, is used in interstate commerce, and is very different from the waters that the Court determined were not navigable waters in *Solid Waste Authority of Northern Cook County v. U.S. Army Corps of Engineers*. Lake Temp also qualifies as a navigable water under Justice Kennedy's test, which requires the body of water to have a significant nexus to a water of the United States. As Lake Temp is navigable-in-fact, it necessarily has a sufficient nexus to navigable waters to qualify under this test.

Although the court was correct in holding that discharge into the lake would require a permit, it erred in determining that the COE, and not the EPA, was the correct agency to issue this permit. The court found the slurry in this case to be a fill material, rather than a pollutant. This determination was in error because the slurry is a pollutant, not a fill material. First, the slurry contains munitions and hazardous chemicals, both categories of materials that are included in the CWA's definition of a "pollutant" but missing from the statute's definition of a "fill material." And second, classifying the slurry as a fill material rather than a pollutant would be contrary to the intent of the CWA. Congress' goal in enacting the CWA was to maintain the physical, chemical, and biological integrity of the nation's waters. Allowing the DOD to discharge munitions and other hazardous material into Lake Temp would not maintain the integrity of the lake; allowing the

DOD to continue with its project without the proper permit from the EPA would compromise the integrity of the CWA.

Finally, the district court erred in holding that the OMB's involvement in this case was proper. The EPA was preparing to veto the COE's issuance of the permit to the DOD on the basis that the slurry contained materials that required a permit for the discharge of pollutants. But the OMB interfered with the process and instructed the EPA not to exercise its right. The CWA explicitly gives the EPA the right to veto the COE's decision, but it does not give any other agency the power to interfere with the EPA's decisions. Furthermore, when the EPA decided not to take any further action, its decision was contrary to Congress' original intent in enacting the CWA. The Supreme Court held in *Chevron U.S.A., Inc. v. NRDC* that the judicial branch must reverse administrative constructions that run contrary to Congress' clear intentions with enacting statutes. Here, if the EPA does not veto the COE's issuance of the permit, it will be acting contrary to Congress' clear intent, which is to maintain the integrity of the nation's waters. Allowing the DOD to proceed with its COE-issued permit when the slurry contains munitions and hazardous materials would severely compromise Lake Temp's integrity and essentially negate Congress' intent in enacting the CWA.

ARGUMENT

I. THE STATE OF NEW UNION HAS STANDING TO CHALLENGE THE PERMIT IN ITS SOVEREIGN CAPACITY AS OWNER AND REGULATOR OF ITS GROUNDWATER AND IN ITS *PARENS PATRIAE* CAPACITY AS THE PROTECTOR OF ITS CITIZENS' RIGHTS IN THE STATE'S GROUNDWATER.

Article III of the United States Constitution limits the power of the federal courts to "cases" and "controversies." U.S. Const. art. III, § 2. Plaintiffs must meet several elements to satisfy the case-or-controversy requirement of Article III. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992). "[T]he core component of standing is an essential and unchanging part" of this requirement. *See id.* To establish standing, a plaintiff must prove

(1) it has suffered an injury-in-fact (2) that is causally connected to the defendant's alleged conduct and (3) that will likely be redressed by a favorable decision. *Id.* at 560-61. New Union has established that it has standing under the two theories of standing available to states as plaintiffs. First, New Union has standing in its sovereign capacity under the "special solicitude" analysis established by the Supreme Court in *Massachusetts v. EPA*, 549 U.S. 497 (2007). Second, New Union has standing under its "right [as] a State to sue as *parens patriae* to prevent or repair harm to its 'quasi-sovereign' interests." *Hawaii v. Standard Oil Co. of Cal.*, 405 U.S. 251, 258 (1972). Thus, this Court should reverse the district court's holding and find that New Union has established standing sufficient to satisfy the requirements of Article III.

a. New Union has standing in its sovereign capacity because it is entitled to special solicitude in the standing analysis given its procedural right to bring this claim and its stake in protecting its quasi-sovereign interests.

The Supreme Court has held that a state is entitled to "special solicitude . . . in [the] standing analysis" when it has a procedural right to bring its claim and it seeks to protect a stake in its quasi-sovereign interests. *Massachusetts*, 549 U.S. at 520. Congress has accorded New Union such a procedural right under the Administrative Procedure Act. 5 U.S.C. § 702 (2006) ("A person suffering legal wrong because of agency action, or adversely affected by agency action within the meaning of a relevant statute, is entitled to judicial review thereof."). And New Union is asserting a stake in its quasi-sovereign "interest independent of and behind the titles of its citizens, in all the earth and air within its domain." *Georgia v. Tenn. Copper Co.*, 206 U.S. 230, 237 (1907). Therefore, New Union need only pass the relaxed test established by *Massachusetts v. EPA* to have standing in this action.

To meet the Article III requirement of standing, "a litigant 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 (quoting *Defenders of Wildlife*, 504 U.S. at 560-61). A litigant in whom Congress has vested a procedural right to protect his interests, however, "can assert that right without meeting all the normal standards for redressability and immediacy." *Massachusetts*, 549 U.S. at 517-18 (quoting *Defenders of Wildlife*, 504 U.S. at 572 n.7). Such a litigant would have "standing if there is some possibility that the requested relief will prompt the injury-causing party to reconsider the decision that allegedly harmed the litigant." *Massachusetts*, 549 U.S. at 518 (citing *Defenders of Wildlife*, 504 U.S. at 572 n.7). New Union is such a litigant because Congress vested in it the procedural right to seek judicial review of an agency's action, and the DOD would at a minimum have to reconsider its implementation of its plan if this Court were to grant New Union's requested relief. Therefore, New Union needs to establish only the injury requirement to have standing in this case.

New Union has shown that the agency action will cause an imminent injury to the state. An injury sufficient to establish standing must be "actual or imminent, not conjectural or hypothetical." *Defenders of Wildlife*, 504 U.S. at 560; *see also Los Angeles v. Lyons*, 461 U.S. 95, 102 (1983) (stating the injury must be "real and immediate"); *Whitmore v. Arkansas*, 495 U.S. 149, 158 (1990) (stating the injury must be "certainly impending"). The Supreme Court, however, established that a fairly attenuated injury could still establish standing with its holding in *United States v. Students Challenging Regulatory Agency Procedures*, 412 U.S. 669 (1973). In that case, an environmental group asked the Court to enjoin the enforcement of Interstate Commerce Commission orders allowing railroads to collect a surcharge on freight rates. *Id.* at 678. The plaintiffs argued that

> a general rate increase would allegedly cause increased use of nonrecyclable commodities as compared to recyclable goods, thus resulting in the need to use more natural resources to produce such goods, some of which resources might be taken from the Washington area, and resulting in more refuse that might be discarded in national parks in the Washington area.

Id. at 688. The Court admitted that the plaintiffs' line of causation to the eventual injury was attenuated, but it nonetheless

held that the plaintiffs had shown an injury sufficient to establish standing. *See id.*

Here, New Union's injury is much less attenuated, so it necessarily is sufficient to establish standing. Portions of the Imhoff Aquifer are located within New Union's boundaries. R. at 4. New Union has provided evidence that the contaminated water from Lake Temp will enter the aquifer and consequently contaminate its waters "because the land between the lakebed and the aquifer is primarily unconsolidated alluvial fill." R. at 5. As the Supreme Court held in *Georgia v. Tenn. Copper Co.*, a state has an interest in "all the earth and air within its domain." 206 U.S. at 237. Therefore, New Union at least has an interest in keeping its portion of the aquifer uncontaminated.

Furthermore, New Union has provided sufficient proof of its injury to establish its standing. To invoke federal jurisdiction, "each element must be supported in the same way as any other matter on which the plaintiff bears the burden of proof, *i.e.*, with the manner and degree of evidence required at the successive stages of the litigation." *Defenders of Wildlife*, 504 U.S. at 561. This case is at the summary judgment stage. R. at 5. At this stage, "the plaintiff . . . must 'set forth' by affidavit or other evidence 'specific facts,' which for purposes of the summary judgment motion will be taken as true." *Defenders of Wildlife*, 504 U.S. at 561 (citing Fed. R. Civ. P. 56(e)); *see also Scott v. Harris*, 550 U.S. 372, 380 (2007) ("At the summary judgment stage, facts must be viewed in the light most favorable to the nonmoving party . . . .").

Thus, New Union need only point to specific facts that support its injury to establish standing, and it has done so. The Secretary of the Army may claim that New Union should provide more proof for its allegations, but at this stage of the litigation, New Union is not required to provide the type of evidence that would be required at trial. *Cf. Gladstone Realtors v. Village of Bellwood*, 441 U.S. 91, 115 (1979) (At the trial stage, the facts necessary to establish standing must be "supported adequately by the evidence adduced at trial."). The Secretary of the Army may further argue that New Union must drill and sample from a grid of monitoring wells to establish the necessary proof of its injury, but again, at this stage, New Union only has to point out that the

pollutants from the permitted activity *will* contaminate the aquifer to establish its injury. New Union has done so. R. at 5. Therefore, this Court should reverse the lower court and hold that New Union has standing to bring its claim.

b. New Union has standing in its *parens patriae* capacity to protect its citizens against pollution of the Imhoff Aquifer, an interstate water system in which the state has rights.

Even if this Court were to disagree that New Union has standing because of an injury to its sovereign interests, the Court should still uphold New Union's standing as a result of its *parens patriae* capacity. "'*Parens patriae*' means 'parent of his or her country,' and refers to . . . the state in its capacity as provider of protection to those unable to care for themselves." *Steele v. Hamilton Cnty. Cmty. Mental Health Bd.*, 736 N.E.2d 10, 19 n.5 (Ohio 2000), *cert. denied*, 121 S. Ct. 1376 (2001); *see also Estados Unidos Mexicanos v. Decoster*, 229 F.3d 332, 336 n.3 (1st Cir. 2000) (stating that a state's interest under the doctrine of *parens patriae* "is distinct from its sovereign interest in protecting and maintaining its boundaries and its proprietary interest in owning land or conducting a business venture."). Under the *parens patriae* doctrine, a state can sue to protect its citizens against pollution of the air over its territory or of the interstate waters in which the state has rights. *See Satsky v. Paramount Commc'ns, Inc.*, 7 F.3d 1464, 1469 (10th Cir. 1993). Here, New Union is suing to protect its citizens like Dale Bompers from the pollution of its groundwater, particularly the Imhoff Aquifer.

New Union is suing to protect not only the rights of its citizens but also its own quasi-sovereign interests. The Supreme Court has recognized the right of a state to sue as *parens patriae* but only if the state can also articulate an interest separate from the interests of private parties. *See, e.g.*, *Alfred L. Snapp & Son, Inc. v. P.R., ex rel. Barez*, 458 U.S. 592 (1982). In *Alfred L. Snapp*, the Commonwealth of Puerto Rico sued in *parens patriae* to challenge what it considered to be discrimination toward its citizens by east coast apple growers in their employment practices. *Id.* at 594-95. The Court held that Puerto Rico had standing in its *parens patriae* capacity because it was representing its citi-

zens' interests along with its quasi-sovereign interest in the mental, physical, and economic well-being of its citizens. *Id.* at 608.

In addition, the Supreme Court has long recognized that a "state is entitled to seek relief [when] the matters complained of affect her citizens at large." *Missouri v. Illinois*, 180 U.S. 208, 237 (1901). Other courts have also expressly held that a state can sue in *parens patriae* to protect its citizenry from damage to the state's groundwater. *See New Hampshire v. Hess Corp.*, 20 A.3d 212, 215 (N.H. 2011) (holding that a state can sue to recover damages to its groundwater under *parens patriae*); *United States v. Hooker Chem. & Plastics Corp.*, 739 F. Supp. 125, 132 (W.D.N.Y. 1990) (holding that the state of New York could sue on behalf of the general public as the trustee of the natural resources of the state, including its groundwater). The Court of Appeals for the Tenth Circuit, in particular, has stated there is no doubt that states manage the public waters within their borders as trustees for their people and are thus authorized to institute lawsuits to protect those waters on the people's behalf. *New Mexico v. Gen. Elec. Co.*, 467 F.3d 1223, 1243 (10th Cir. 2006).

Similarly, New Union is suing to protect its citizens' interests, exemplified by Dale Bompers, and its own quasi-sovereign interests in the economic well-being of its citizens. Dale Bompers owns, operates, and lives on a ranch located above the Imhoff Aquifer. R. at 6. The contamination of the aquifer would lower the property value of his land, causing him economic harm. R. at 6. New Union's quasi-sovereign interest in the economic well-being of its citizens establishes its standing to sue as Bompers' representative to maintain his property's value.

Furthermore, New Union also has an interest in protecting its interstate waters from pollution because it could affect the physical health of New Union's citizens. As the Tenth Circuit held in *Satsky v. Paramount Communications, Inc.*, a state has the right to sue under *parens patriae* to protect its citizens from the pollution of the state's waters. 7 F.3d at 1469. The pollution of the aquifer would essentially prohibit Bompers from ever using the groundwater in any capacity, and if he were ever to use the aquifer, it could adversely affect his health. New Union's interest in protecting Bompers, and citizens like him, is sufficient to establish its standing under the *parens patriae* doctrine. Therefore,

this Court should reverse the district court's holding and hold that New Union has standing to bring its claim.

II. THE DEPARTMENT OF DEFENSE'S PLAN TO DISCHARGE SLURRY INTO LAKE TEMP REQUIRES A PERMIT UNDER THE CLEAN WATER ACT BECAUSE LAKE TEMP IS A NAVIGABLE WATER.

The CWA makes it unlawful to discharge dredged or fill material into navigable waters without a permit. 33 U.S.C. §§ 1311(a), 1342(a) (2006). The CWA defines "navigable waters" as "the waters of the United States, including the territorial seas." 33 U.S.C. § 1362(7) (2006). The COE defines "waters of the United States" as, essentially, "[a]ll waters which are currently used, were used in the past, or may be susceptible to use in interstate or foreign commerce . . . ." 40 C.F.R. § 122.2 (2011). The DOD must obtain a proper permit under the CWA to discharge its proposed slurry into Lake Temp because its susceptibility to use in interstate commerce makes it a navigable water. First, Lake Temp is the type of water that Congress intended the term to cover, and it differs from the disputed waters in *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers*, 531 U.S. 159 (2001) [hereinafter *SWANCC*]. Second, Lake Temp meets both of the tests proffered by Supreme Court Justices Scalia and Kennedy in *Rapanos v. United States*, 547 U.S. 715 (2006). Therefore, this Court should affirm the lower court's decision and hold that the DOD was required to obtain a permit for this project because Lake Temp is a navigable water under the CWA.

a. Lake Temp is a navigable water given Congress' broad intentions for the term and the lake's dissimilarities from the disputed waters at issue in *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers*.

Prior to the enactment of the CWA, courts interpreted the phrase "navigable waters" to refer to interstate waters that were "navigable in fact" or readily susceptible of being rendered so, meaning that the waters could be used as interstate highways. *See United States v. Appalachian Elec. Power Co.*, 311 U.S. 377, 406 (1940); *The Daniel Ball*, 77 U.S. 557 (1870). But by enacting the CWA and defining "navigable waters" as "the waters of the United States," Congress expressed its intention for the term to have a broader meaning than that used in ordinary language. *See* 118 Cong. Rec. 9124-25 (Oct. 4, 1972) (remarks of Rep. Dingell) ("It means all 'the waters of the United States' in a geographical sense. It does not mean 'navigable waters of the United States' in the technical sense as we sometimes see in some laws."). The report accompanying the proposed bill explicitly stated that the House Committee "fully intend[ed] that the term 'navigable waters' be given the broadest possible constitutional interpretation unencumbered by agency determinations which have been made or may be made for administrative purposes." H.R. Rep. No. 91-911, at 131 (1972).

Furthermore, Congress specifically opted to broaden the definition of navigable water when it defined the term in the CWA. The original version of the CWA adopted by the House of Representatives defined "navigable waters" as "*the navigable waters* of the United States . . . ." H.R. 11896, 92d Cong. § 502(8) (1971) (emphasis added). But when Congress passed the final version of the CWA, it had deleted the word "navigable" from the definition, ultimately defining the term as simply "*the waters* of the United States." *See* 33 U.S.C. § 1362(7) (1972); *see also SWANCC*, 531 U.S. at 181 n.7 (emphasis added). This deletion indicates that "the goals of the 1972 statute have nothing to do with *navigation* at all." *SWANCC*, 531 U.S. at 181.

In fact, the goal of the CWA is "to restore and maintain the chemical, physical and biological integrity of the Nation's waters." 33 U.S.C. § 1251 (2006). Progress relies on Justice Scalia's opin-

ion in *Rapanos* and the majority's opinion in *SWANCC* to urge this Court to place too much significance on the word "navigable." But Congress itself was not concerned with navigability when it passed the CWA; its major concern was the pollution of the nation's waters. *See id.* For that reason, Congress chose not to limit navigable waters in any way other than to define them as the "waters of the United States." 33 U.S.C. § 1362(7) (2006). Courts have since upheld the COE's broad interpretations of the term and generally found the COE's jurisdiction to extend to a great many of the United States' waters, even "waters" that are not navigable in any traditional sense. *See, e.g.*, *United States v. Eidson*, 108 F.3d 1336 (11th Cir. 1997) (classifying a storm sewer that wastewater was emptied into as navigable water); *United States v. Earth Sci., Inc.*, 599 F.2d 368 (10th Cir. 1979) (holding a stream that supported trout and beaver and that was used for agricultural irrigation, but was not navigable in fact or used to transport goods or materials, to be navigable water).

The Supreme Court has agreed that this broad interpretation is commensurate with Congress' intentions. The Court first discussed the definition of navigable waters in *United States v. Riverside Bayview Homes, Inc.*, when it addressed an action brought by the COE to enjoin an owner of wetlands from filling them without the permission of the COE. 474 U.S. 121 (1985). The Court was hesitant to extend the term to cover wetlands, stating "it is one thing to recognize that Congress intended to allow regulation of waters that might not satisfy traditional tests of navigability; it is another to assert that Congress intended to abandon traditional notions of 'waters' and include in that term 'wetlands' as well." *Id.* at 133. Nonetheless, the Court held that it was reasonable for the COE to interpret the term to encompass "wetlands adjacent to waters as more conventionally defined" given the "evident breadth of congressional concern for protection of water quality and aquatic ecosystems." *Id.* The Court even went so far as to state that "the term 'navigable' as used in the Act is of *limited import*." *Id.* (emphasis added).

Progress relies on the Court's interpretation of navigable water in its two cases since *Riverside*, *SWANCC* and *Rapanos*, to argue that Lake Temp is not a navigable water. But neither of these cases requires such a holding. In *SWANCC*, the Court de-

clined to extend the COE's jurisdiction to abandoned sand and gravel pits in northern Illinois that provided habitats for migratory birds. 531 U.S. at 162. In particular, the Court concluded that the CWA did not support the COE's "Migratory Bird Rule," which had extended the COE's jurisdiction to waters "[w]hich are or would be used as [a] habitat by . . . migratory birds which cross state lines." *Id.* at 164. The Court further explained that *Riverside* was not applicable to the case before it because in *Riverside*, the Court was informed by "the significant nexus between the wetlands and 'navigable waters.'" *Id.* at 167. There was no such nexus between the pits in *SWANCC* and any navigable waters, so the Court held the pits were not navigable waters. *See id.*

There is also no nexus between the pits in *SWANCC* and Lake Temp. The disputed waters in *SWANCC* were "a scattering of permanent and seasonal ponds of varying size (from under one-tenth of an acre to several acres) and depth (from several inches to several feet)." *Id.* at 163. Lake Temp is not a scattering of small ponds: it is a lake. R. at 3. At its high-water mark, it is three miles wide and nine miles long. R. at 3-4. The Court held the ponds in *SWANCC* to not be navigable waters because they had no significant nexus to navigable waters; Lake Temp is itself a navigable water, so its nexus could not be any more significant. Moreover, in *SWANCC*, the COE had to rely on its self-propagated Migratory Bird Rule to establish jurisdiction. 531 U.S. at 164. In this case, the COE need not rely on that overruled regulation: Lake Temp is used not only by migratory birds, but also by interstate travelers for hunting and bird watching. R. at 4. Therefore, the disputed waters in *SWANCC* are not so similar to Lake Temp as to require the same result, and this Court should uphold the lower court's determination that Lake Temp is a navigable water.

b. Lake Temp also qualifies as a navigable water under either test promulgated in *Rapanos v. United States* because it is a relatively permanent body of water and is navigable in the traditional sense.

The second case Progress relies on to dispute Lake Temp's qualification as a navigable water is *Rapanos v. United States*, 547 U.S. 715 (2006). *Rapanos* resulted in a fractured opinion,

with a plurality opinion written by Justice Scalia, a dissent authored by Justice Stevens, and a concurrence in the judgment from Justice Kennedy. *See id.* Determining which holding is the controlling opinion of the Supreme Court in *Rapanos* is a difficult task. "When a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, 'the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds . . . .'" *Marks v. United States*, 430 U.S. 188, 193 (1977) (quoting *Gregg v. Georgia*, 428 U.S. 153, 169 n.15 (1976)). The circuit courts that have applied *Rapanos* have differed as to which opinion, Justice Scalia's or Justice Kennedy's, is the narrowest ground and thus the controlling opinion. *Compare United States v. Robison*, 505 F.3d 1208 (11th Cir. 2007) (applying Kennedy's), *and N. Cal. River Watch v. City of Healdsburg*, 496 F.3d 993 (9th Cir. 2007) (applying Kennedy's), *and United States v. Gerke Excavating, Inc.*, 464 F.3d 723 (7th Cir. 2006) (applying Kennedy's), *with United States v. Johnson*, 467 F.3d 56 (1st Cir. 2006) (applying Scalia's). In fact, there is no need to determine which test is the appropriate test for this Court to correctly label Lake Temp: the lake is a navigable water under either Justice Scalia's or Justice Kennedy's analysis.

Under the plurality's test in *Rapanos*, "the phrase 'the waters of the United States' includes only those *relatively* permanent, standing or continuously flowing bodies of water 'forming geographic features' that are described in ordinary parlance as 'streams[,] . . . oceans, rivers, [and] lakes . . .'" and "*only* those wetlands with a continuous surface connection to bodies that are 'waters of the United States' in their own right." *Rapanos*, 547 U.S. at 739 (emphases added). Lake Temp does not need to meet the latter criterion because it meets the former.

Lake Temp is a relatively permanent body of water. The word "relatively" means "in relation, comparison, or proportion to something else." Webster's New International Dictionary 2882 (2d ed. 1934). Just as Progress and the majority of the *Rapanos* Court insisted that the word "navigable" carries significant weight, so too does the word "relatively" in Justice Scalia's definition of a navigable water. In *Rapanos*, Justice Scalia listed, with

some incredulity, the types of waters that courts had upheld the COE's jurisdiction over:

> intermittent flow of surface water through approximately 2.4 miles of natural streams and manmade ditches; a "roadside ditch" . . .; irrigation ditches and drains . . .; and . . . the "washes and arroyos" of an "arid development site," located in the middle of the desert, through which "water courses . . . during periods of heavy rain."

Id. at 727 (citations omitted). All of these examples have one thing in common: they rarely contain water. *See id.* Lake Temp is not similar to these waters, which the *Rapanos* plurality would have held to be outside the COE's jurisdiction. The record does state that Lake Temp is "wholly dry approximately one out of five years," but that necessarily indicates that it contains water four out of five years. R. at 4. With that description, Lake Temp, relative to the ditches, washes, and arroyos that Justice Scalia would not qualify as navigable waters, is a relatively permanent body of water.

Lake Temp is also a larger and more permanent body of water than the waters that at least one federal circuit court held to be navigable water since the *Rapanos* decision. In *Northern California River Watch v. City of Healdsburg*, the Ninth Circuit characterized a pond that was created when a rock quarry pit was filled with water to be a navigable water under the CWA. 496 F.3d at 1000. That pond was only one half mile in length and a quarter mile in breadth, whereas Lake Temp is many times larger. *See id.*; R. at 3. There was also no evidence that any people ever used the pond, whereas Lake Temp receives many visitors during the wet season for hunting and bird watching. *See id.*; R. at 4.

In addition, Lake Temp differs from waters that Justice Scalia sought to exclude from navigable waters because it is also navigable in fact. Its shores contain clearly visible trails that indicate the public uses the lake to hunt, bird watch, and boat. R. at 4. The lower court also found that "interstate hunters . . . have hunted from boats and canoes on the lake and have rowed or paddled across the lake to hunt from the shore opposite the high-

way." R. at 7. Therefore, Lake Temp qualifies as a navigable water under the plurality's test in *Rapanos*.

Additionally, because Lake Temp is navigable in fact, it necessarily meets Justice Kennedy's "significant nexus" test for navigable waters. This test requires a significant nexus between the water at issue and a navigable water if the former is not a traditionally navigable water in its own right. *See Rapanos*, 547 U.S. at 759. The lower court held Lake Temp to be "within the description of water bodies that have been traditionally held navigable because of use by interstate travelers." R. at 7. Traditionally, courts held waters to be navigable waters because they were navigable in fact. *United States v. Appalachian Elec. Power Co.*, 311 U.S. 377, 406 (1940) (defining navigable waters as those that could be used as interstate highways); *The Daniel Ball*, 77 U.S. 557 (1870) (defining navigable waters as those waters that allow vessels to engage in interstate trade). Lake Temp is a traditionally navigable water because the facts indicate that individuals have used Lake Temp to hunt and bird watch in the past. R. at 7. The Supreme Court has specifically "held that 'nonnavigable, isolated, intrastate waters' . . . [that do] not 'actually abu[t] on a navigable highway' [are] not included as 'waters of the United States.'" *Rapanos*, 547 U.S. at 726 (quoting *SWANCC*, 531 U.S. at 167-68, 171) (alteration in original). Lake Temp is an isolated and intrastate water, but it is navigable because interstate hunters have rowed or canoed across it to hunt on its shore opposite the highway. R. at 3, 7. Furthermore, the closest navigable highway is less than 100 feet from its shore. R. at 4. Such a body of water is a navigable water. And as a navigable water, Lake Temp meets Justice Kennedy's test; it needs no significant nexus to a navigable water because it is such a water itself.

For these reasons, this Court should affirm the lower court's decision and hold that the DOD was required to obtain a permit for this project because Lake Temp is a navigable water under the CWA.

III. THE CORPS OF ENGINEERS DOES NOT HAVE THE JURISDICTION TO ISSUE A PERMIT UNDER § 404 OF THE CLEAN WATER ACT BECAUSE PROPER JURISDICTION BELONGS

TO THE ENVIRONMENTAL PROTECTION AGENCY UNDER § 402 OF THE CLEAN WATER ACT.

Under the CWA, an individual seeking to discharge material into a navigable water of the United States must apply for a permit to do so from either the COE or the EPA. 33 U.S.C. §§ 1344(a), 1342(a) (2006). If the material the individual seeks to discharge is a fill material, the appropriate agency is the COE. 33 U.S.C. § 1344(a) (2006). If the material is a pollutant, however, the appropriate agency is the EPA. 33 U.S.C. § 1342(a) (2006). In this case, the DOD is seeking to discharge a wide variety of munitions and hazardous chemicals into Lake Temp, so the appropriate agency from which DOD must seek its permit is the EPA. *See id.* Therefore, this Court should reverse the ruling of the lower court and hold that the DOD's § 404 permit for discharging its slurry into Lake Temp is invalid because the COE was not the appropriate agency to issue the permit.

a. The slurry that the Department of Defense seeks to discharge in this case is a pollutant, not a fill material.

Under § 1342(a) of the CWA, an individual seeking a "permit for the discharge of any pollutant, or combination of pollutants," must apply for the permit with the EPA. *Id.* The CWA defines "pollutant," in relevant part, as "munitions, chemical wastes, . . . [and] rock . . . ." 33 U.S.C. § 1362(6) (2006). An individual seeking a "permit[] . . . for the discharge of dredged or fill material . . .," however, may apply for the permit with the COE. 33 U.S.C. § 1344(a) (2006). Here, the DOD is seeking to discharge slurry containing munitions, hazardous chemicals, and rock, all listed examples of pollutants, into Lake Temp, and therefore the slurry is a pollutant requiring a permit from the EPA before the DOD can discharge it into Lake Temp.

The CWA does not define the term "fill material," but the COE and the EPA have agreed on a definition for the term in their regulations. The two agencies define "fill material" as "ma-

terial placed in waters of the United States where the material has the effect of: (i) Replacing any portion of a water of the United States with dry land; or (ii) Changing the bottom elevation of any portion of a water of the United States." 40 C.F.R. § 122.2 (2011) (EPA's definition); 33 C.F.R. § 323.2(e) (2011) (COE's definition). The agencies list "rock, sand, soil, clay, plastics, construction debris, wood chips, overburden from mining or other excavation activities, and materials used to create any structure or infrastructure in the waters of the United States" as examples of fill materials. *Id.* Neither list of examples includes munitions or hazardous chemicals. *See id.* The examples listed under the definition of pollutants in the CWA, however, include both munitions and hazardous chemicals. 33 U.S.C. § 1344(a) (2006).

The COE's definition of a fill material was not always contingent on the effect of the material on the targeted water. Prior to 2002, "the COE's definition of fill material expressly provided that fill material did 'not include any pollutant discharged into the water primarily to dispose of waste' . . . ." Kory R. Watson, Comment, *Fill Material Pollution Under the Clean Water Act: A Need for Legislative Change*, 35 S. Ill. U. L.J. 335, 345 (2011) (quoting 35 C.F.R. § 323.2 (2001)). The COE was concerned with protecting the waters of the United States from pure waste material. *See id.* But in 2002, amid concerns that the regulations were overbroad, the COE and the EPA issued new regulations that changed the analysis of whether a material was a fill material from a purpose-based test to an effects-based test. *See* Final Revisions to the Clean Water Act Regulatory Definitions of "Fill Material" and "Discharge of Fill Material," 67 Fed. Reg. 31,129, 31,133 (May 9, 2002) (to be codified at 33 C.F.R. pt. 323 and 40 C.F.R. pt. 232). The agencies explained that one of the reasons for the change in the regulations was to promote consistency in categorizing discharges as fill materials:

> An objective, effects-based standard also helps ensure that discharges with similar environmental effects will be treated in a similar manner under the regulatory program. The subjective, purpose-based standard led in some cases to inconsistent treatment of similar discharges, a result which hampers effective implementation of the statute.

Id. Although the agencies' reasoning for the change was reasonable in theory, in practice the new definition set up the possibility of "a grave danger that chemically hazardous [material would] be permitted as fill material . . ." because of the COE's strict adherence to the new regulations. Watson, *supra*, at 345.

The Supreme Court faced an example of that grave danger in *Coeur Alaska, Inc. v. Southeast Alaska Council*, 557 U.S. 261 (2009). In that case, the COE granted a § 404 permit to a gold mining company seeking to discharge a slurry of crushed rock and water from a froth-flotation mill into a lake protected by the CWA. *Id.* at 2464. The majority of the Court focused on the effect of the slurry in determining that it was a fill material, and not a pollutant, and it upheld the COE's grant of the permit. *Id.* at 2463 (holding the slurry to be fill material "because it would have the effect of raising the lake's bottom elevation"). The majority acknowledged there could be extreme cases where the COE's interpretation would "lead to § 404 permits authorizing the discharges of other solids that are now restricted by EPA standards," but it declined to decide that issue because no such extreme instance was before it. *Id.* at 2468.

The dissent, on the other hand, was very concerned with the majority's approach to interpreting the term "fill material." *See id.* at 2483 (Ginsburg, J., dissenting). In particular, the dissent felt that the majority's narrow reading would allow "[w]hole categories of regulated industries . . . [to] gain immunity from a variety of pollution-control standards." *Id.* ("A discharge of a pollutant, otherwise prohibited by firm statutory command, becomes lawful if it contains sufficient solid matter to raise the bottom of a water body, transformed into a waste disposal facility."). The dissent was concerned that the majority's reading of the regulations and statute would create a loophole for polluters. *See id.*

Here, the DOD is attempting to take advantage of that loophole. The DOD claims, and the lower court erroneously agreed, that its slurry is covered by the majority's decision in *Coeur*. R. at 8. But the slurry in *Coeur* and the slurry in this case are markedly different. The slurry in *Coeur* consisted solely of crushed rock and water; the slurry in this case consists of munitions and chemicals, in addition to rock and water. R. at 4. The relevant definitions in the statutes and regulations provide examples of fill ma-

terial and pollutants, but whereas munitions and chemicals are not included in the examples of fill material, they are explicitly included in the examples of pollutants. *See* 33 U.S.C. § 1362(7) (2006). Moreover, the chemicals the DOD plans to mix with the munitions include many chemicals that are on the CWA's list of hazardous substances. R. at 4. The slurry in this case is far more dangerous for the environment than the slurry in *Coeur*, so the procedure for obtaining a permit under the CWA for the discharge of such a pollutant requires a permit from the EPA, not the COE.

b. Labeling the slurry in this case as a fill material rather than a pollutant is antithetical to the explicit goal of the Clean Water Act.

More importantly, classifying the slurry in this case as a fill material flies in the face of the goals of the CWA. The explicit purpose of the CWA is "to restore and maintain the chemical, physical and biological integrity" of the waters of the United States. 33 U.S.C. § 1251(a) (2006). The CWA's drafters stated, "The use of any river, lake, stream or ocean as a waste treatment system is unacceptable." S. Rep. No. 92-414, at 7 (1971). The dissenters in *Coeur* were particularly outraged with the majority's decision, explaining that "[t]he use of waters of the United States as 'settling ponds' for harmful mining waste . . . is antithetical to the text, structure, and purpose of the Clean Water Act." *Coeur*, 557 U.S. at 304 (Ginsburg, J., dissenting). Similarly, classifying the discharge of the DOD's slurry in this case as the discharge of a fill material would be irreconcilable with the CWA's stated purpose.

Congress enacted the CWA in 1972 with the goal of eliminating the discharge of pollutants into the nation's waters by 1985. 33 U.S.C. § 1251(a) (2006). In line with that goal, the COE and EPA initially excluded as fill material any pollutant that was discharged primarily to dispose of waste. *See* 33 C.F.R. § 323.2 (2001). Although the agencies have since changed their technical definitions of the term, the purpose behind the CWA has not changed at all. 33 U.S.C. § 1251(a) (2006). The agencies also continue to recognize this purpose, as evidenced by their continued exclusion of "trash or garbage" from their definitions of fill mate-

rial. *See* 33 C.F.R. § 323.2 (2011); 40 C.F.R. § 232.2 (2011). Thus, even as definitions in the CWA may change, its stated purpose should continue to guide agencies and courts in their decisions.

The *Coeur* majority, however, appeared to lose sight of this purpose. In coming to its decision, the majority ignored the fact that "the discharge would kill all of the lake's fish and nearly all of its other aquatic life." *Coeur*, 557 U.S. at 297. The majority also paid little heed as to whether aquatic life could ever inhabit the lake again. *See id.* at n.1. Killing all of the aquatic life in a lake cannot be commensurate with the goal of maintaining a water's "physical, chemical and biological integrity." *See* 33 U.S.C. § 1251(a) (2006). Such an act is inapposite to the CWA's goals.

Here, the DOD and the COE have also ignored the CWA's stated purpose. Dumping munitions and chemicals, many of which are among the hazardous substances listed in CWA § 311, will very likely disrupt Lake Temp's chemical integrity, if not also its physical and biological integrity. New Union presented evidence, and neither the parties nor the lower court contested, that the discharge of the slurry into Lake Temp will contaminate its waters. R. at 5. The lower court referred unflinchingly to "the pollution" of the lake when discussing the issue of New Union's standing in this case. R. at 5. And the EPA also "argued . . . that the nature of the discharge here [is] significantly different from the discharge in *Coeur*, so as to warrant a different outcome . . . ." R. at 9. This argument indicates the EPA also believes the slurry in this case will have a significant impact on the future of Lake Temp. *Cf. Massachusetts*, 549 U.S. at 526 ("EPA would presumably not bother with such efforts if it thought emissions reductions would have no discernable impact on future global warming.") (citation omitted). Therefore, this Court should reverse the ruling of the lower court and hold that the DOD's § 404 permit for discharging into Lake Temp is invalid because the slurry is not a fill material and classifying it as such would violate the stated purpose of the CWA.

IV. THE DECISION BY THE OFFICE OF MANAGEMENT AND BUDGET THAT THE CORPS OF ENGINEERS, AND NOT THE ENVIRONMENTAL PROTECTION AGENCY,

HAD JURISDICTION TO ISSUE THE PERMIT IN THIS CASE WAS A VIOLATION OF THE CLEAN WATER ACT.

The OMB improperly instructed the EPA not to veto the decision of the COE to issue the § 404 permit to the DOD. R. at 9. The OMB's interference was a violation of the CWA. R. at 9. The CWA tasks the Secretary of the Army and the Administrator of the EPA with interpreting and acting upon the relevant statutes of the CWA. *See* 33 U.S.C. §§ 1342(a), 1344(a) (2006). The CWA allocates no such power to the OMB, and the only power it reserves to any party other than the COE or the EPA is the power it grants the President to grant effluents an exemption from the statute for up to one year. *See* 33 U.S.C. § 1323 (2006). Not only was the OMB's action improper, but also the EPA's decision not to veto the COE's grant of the permit was contrary to the intent of the CWA. Therefore, this Court should reverse the decision of the lower court and hold that the OMB's participation in these proceedings was improper.

a. Congress did not provide the Office of Management and Budget with the power to make such a decision.

The United States Constitution requires the President to "take Care that the Laws be faithfully executed . . . ." U.S. Const. art. II, § 3. Under that authority, President Jimmy Carter, in 1978, enacted Executive Order No. 12,088, the purpose of which was to ensure that all federal, state, and local agencies comply with federally mandated pollution control standards. 43 Fed. Reg. 47,707 (Oct. 17, 1978). Section 1-602 of that Executive Order states that "[t]he Administrator [of the EPA] shall make every effort to resolve conflicts regarding [a] violation between Executive agencies . . . . If the Administrator cannot resolve a conflict, the Administrator shall request the Director of the Office of Management and Budget to resolve the conflict." *Id.* at 47,708. But the OMB did not simply seek to resolve a conflict in this case; it directed the EPA not to exercise its veto power over the COE. R. at 9. This action exceeded the OMB's authority under Executive Order No. 12,088.

The lower court correctly noted that "Congress conferred no authority directly or indirectly on OMB to issue permits or veto permits under 33 U.S.C. §§ [402] or [404] or to decide which permit should be issued in any particular instance." R. at 9. OMB thus violated the CWA by "directing [the] EPA not to veto the permit." R. at 9. The "EPA argued to OMB that the nature of the discharge here was significantly different from the discharge in *Coeur*, so as to warrant a different outcome, requiring a section 402 permit at least for treatment of the non-fill liquid and semi-solid portion of the material before discharge to navigable waters." R. at 9. These facts indicate that the EPA was preparing to veto the COE's decision until it was directed not to do so by the OMB, an improper abrogation of the EPA's veto power.

b. The decision of the Environmental Protection Agency to follow the direction of the Office of Management and Budget and not exercise its veto power was contrary to Congress' clear intent with the Clean Water Act.

Under the direction of the OMB, the EPA then chose not to veto the COE's decision, and this decision was also improper. The EPA's decision is wholly discretionary, and, as the lower court correctly noted, "agency action . . . committed to agency discretion by law" is not subject to judicial review." 5 U.S.C. § 701(a)(2) (2006). The Supreme Court in *Chevron, U.S.A., Inc. v. NRDC*, however, stated that the "judiciary is the final authority on issues of statutory construction and must reject administrative constructions which are contrary to clear congressional intent." 467 U.S. 837, 843 n.9 (1984). Therefore, if the EPA's decision in this case was contrary to Congress' intent with its enactment of the CWA, this Court should reverse the lower court's decision.

The EPA's decision not to exercise its veto power is contrary to the intent of the CWA. The goal of the statute is the "maintenance of [the] chemical, physical and biological integrity of [the] Nation's waters." 33 U.S.C. § 1251(a) (2006). By not vetoing the COE's decision, the EPA is allowing the DOD to discharge pollutants into Lake Temp, thereby compromising the lake's integrity and violating the purpose of the CWA. Furthermore, Congress did not intend for the OMB to interpret and administer the per-

mit system under the CWA; it grants those powers only to the COE and the EPA. *See* 33 U.S.C. §§ 1344, 1342 (2006). By continuing under the OMB's direction, the EPA is allowing the OMB to make a decision that Congress explicitly reserved for the EPA. *See* 33 U.S.C. § 1344(c) (2006). The EPA expressed to the OMB that it had reservations about the contents of the slurry, and it argued that a § 402 permit should be required for at least some of those contents. R. at 9. If the EPA were to act as Congress intended, it would move forward with its veto power and protect the waters of the United States from pollution, as the CWA requires. Instead, the EPA is following the direction of an executive agency that does not have near the experience that the EPA does in administering the CWA, thereby acting contrary to Congress' wishes.

The OMB's inexperience with the CWA and its applications is more reason why the EPA needs to make its own decision in this case. When addressing similar situations, the Supreme Court has refused to grant the OMB authority to overrule an agency's decision when Congress has not expressly provided the OMB with any such reviewing power in the relevant statute. *See Dole v. United Steelworkers of Am.*, 494 U.S. 26, 39 (1990) (holding that the OMB did not have the power to determine whether an agency should adopt certain measures when Congress had not authorized the OMB to do so). One of the reasons that the Court is reluctant to grant the OMB such authority is the same reason many scholars argue that the OMB's involvement in agency decisions should be very limited: the people that make up the OMB lack the substantive backgrounds to make sufficiently informed judgments in the fields which they attempt to regulate. *See* Alan B. Morrison, *OMB Interference with Agency Rulemaking: The Wrong Way to Write a Regulation*, 99 Harv. L. Rev. 1059, 1066 (1986). These scholars are concerned that "OMB's small staff, comprised of economists, lawyers, or public policy analysts, as opposed to scientists, pharmacologists, or doctors, is making decisions about regulations that would require scientific determinations or expert judgments." Pamela M. Foster, *A Limit to OMB's Authority Under the Paperwork Reduction Act in* Dole v. United Steelworkers of America*: A Step in the Right Direction*, 6 Admin. L.J. Am. U. 153, 168 (1992).

Here, the OMB is essentially making the determination that the DOD's slurry is a fill material and not a pollutant, but it is the EPA that has the necessary expertise to make such a determination. Allowing the OMB this interference would not only be contrary to Congress' intent, it would also allow the OMB to "abuse its authority at the expense of the public's well-being." *Id.* at 166 n.116. The OMB has abused its authority before, also in a way that served to frustrate the purposes of agency regulations and to ultimately endanger public health and safety. *See id.* at 153 n.2 (listing examples of when the OMB's interference with policymaking has resulted in the endangerment of the public). This Court should not allow the same to happen here. Therefore, this Court should reverse the lower court and hold that the OMB's participation in these proceedings was improper, and the EPA should be allowed to veto the COE's decision.

CONCLUSION

This Court should hold that New Union has standing to bring its claims, either under its power to protect its sovereign interests or its representative capacity under the *parens patriae* doctrine. Although the lower court was correct in classifying Lake Temp as a navigable water, it incorrectly upheld the COE's jurisdiction to issue the permit in this case when it determined that the slurry is a fill material rather than a pollutant. And the OMB's involvement in the permit process was improper given that Congress gave only the EPA the power to decide whether the COE's issuance of a permit under § 404 is proper. For the foregoing reasons, New Union respectfully requests that this Court reverse the decision of the district court to grant the Secretary of the Army's motion for summary judgment. This Court should then grant New Union's motion for summary judgment.