Team No. 10

C.A. No. 13 – 1246
Civ. 149 – 2012

IN THE UNITED STATES
COURT OF APPEALS FOR THE TWLEFTH CIRCUIT

NEW UNION WILDLIFE FEDERATION,
Plaintiff – Appellant,

v.

NEW UNION DEPARTMENT OF ENVIRONMENTAL PROTECTION,
Intervenor – Appellant,

v.

JIM BOB BOWMAN,
Defendant – Appellant,

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

Brief for the NEW UNION DEPARTMENT OF ENVIRONMENTAL PROTECTION,
Intervenor – Appellant

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JURISDICTIONAL STATEMENT

This action arose under the Clean Water Act (CWA), 33 U.S.C. §§ 1251 *et seq.,* a federal law, creating a federal cause of action. The United States District Court for the District of New Union has original jurisdiction pursuant to 28 U.S.C. § 1331 (2006).

On June 1, 2012, the district court granted defendant Jim Bob Bowman's (Bowman) motion for summary judgment on all counts and denied plaintiff New Union Wildlife Federation's (NUWF) summary judgment motion. The district court's order is a final decision; the United States Court of Appeals for the Twelfth Circuit has jurisdiction to hear this appeal from the district court's final judgment pursuant to 28 U.S.C. § 1291 (2006).

STATEMENT OF THE ISSUES

I. Whether New Union Wildlife Federation (NUWF) has standing to bring a citizen suit against Bowman pursuant to the Clean Water Act (CWA) § 505, 33 U.S.C. § 1365, for a violation of §§ 301(a) and 404 of the CWA, *id.* §§ 1311(a), 1344.

II. Whether there is a continuing violation as required for subject matter jurisdiction under § 505(a) of the CWA, *id.* § 1365(a).

III. Whether NUWF's citizen suit is barred by the New Union Department of Environmental Protection's (NUDEP) diligent prosecution of Bowman under § 505(b) of the CWA, *id.* § 1365(b).

IV. Whether Bowman's actions satisfy all of the elements for a violation of §§ 301(a) and 404 of the CWA when he moved dredged and fill material from one part of a wetland adjacent to navigable water to another part of the same wetland.

STATEMENT OF THE CASE

This is an appeal from the final order of the District Court for the District of New Union

granting Bowman's motion for summary judgment and denying New Union Wildlife Federation's motion for summary judgment. (R. 1-2.)

On July 1, 2011, NUWF informed Bowman of its intention to sue him under the citizen suit provision of the CWA § 505, §1365, after learning of his land clearing activities. (R. at 4.) Shortly thereafter, NUDEP notified Bowman of state and federal law violations stemming from the same land clearing activities. (Id.) Bowman, despite maintaining his innocence, reached a settlement agreement with NUDEP on August 1, 2012, in which he agreed to cease land-clearing operations. (Id.) Additionally, he agreed to confer to NUDEP a conservation easement consisting of 150 feet of his un-cleared Muddy River shoreline property to be used as a public entry for daytime recreational purposes. (Id.) He also agreed to construct and maintain a year-round wetland in a 75-foot buffer zone between the easement and his cleared field. (Id.)

NUDEP and NUWF originally brought separate suits against Bowman in federal court under CWA § 505. (R. 5.) The court consolidated the suits by granting NUDEP's motion to intervene in the NUWF case. (Id.) The district court granted summary judgment to Bowman, holding that NUWF lacked standing to bring suit; that the court lacked subject matter jurisdiction because all violations were wholly past and prior state action precluded the citizen suit; and finally, that there was no violation of the CWA. (Id.)

STATEMENT OF THE FACTS

Bowman is the owner of one thousand acres of land near the town of Mudflats in the State of New Union. (R. at 3.) The entirety of his property lies within the one-hundred-year flood plain of the Muddy River (Muddy) and includes 650 feet of shoreline on the Muddy. (Id.) Portions of Bowman's property are inundated every year when the river levels rise. (Id.) Additionally, the parties agree that Bowman's property meets the definition of a wetland per the

United States Corps of Engineers' Wetlands Determination Manual. (R. at 4.)

On June 15, 2011, Bowman began leveling and clearing his land. (Id.) He used bulldozers to knock down the trees and other vegetation and pushed the cleared material into windrows. (Id.) Bowman then burned the windrows, and pushed the ashes and remains of the vegetation into trenches dug with the bulldozer. (Id.) Bowman finished leveling the new field by pushing soil from higher portions of his land into lower-lying areas. (Id.) To address drainage issues, he dug a swale that began in the back of his land and drained into the Muddy. (Id.) Bowman's work was completed in one month. A150-foot wide strip of land adjacent to the Muddy was not cleared due to the difficulty of working with the saturated land. (Id.)

SUMMARY OF THE ARGUMENT

NUWF satisfies the requirements of Article III standing through its injured members, Milton, Norton, and Lawless. The district court erred in finding that NUWF members did not establish injury-in-fact. All three members have demonstrated that land-clearing activities fairly traceable to Bowman have lessened their recreational enjoyment of the Muddy River area. They have further demonstrated reasonable concerns about pollution in the Muddy. Milton has alleged aesthetic injury due to visible pollution in the Muddy, and Norton has demonstrated concrete injury to his recreational interest in frogging fairly traceable to Bowman's destruction of the wetlands. Should this Court find that NUWF can establish standing, NUDEP has the right to intervene in this action and has sufficient standing to recommence the proceeding independently.

That being the case, this Court should affirm the district court's finding that it lacks subject matter jurisdiction over NUWF's action. The CWA requires that alleged violations be continuing or intermittent as a matter of subject matter jurisdiction. Here, Bowman's activities are wholly past and thus cannot provide the basis for jurisdiction in this action.

Furthermore, NUWF's citizen suit has been barred by NUDEP's diligent prosecution of Bowman as set out in § 505(b) of the Clean Water Act. NUWF's prosecution was diligent because it is capable of requiring Bowman to comply with the CWA and is in good faith calculated to do so. Furthermore, the negotiations between NUDEP and Bowman were at arm's length, reasonable and fair to the public, and reached under fair procedures. The NUDEP's prosecution should be held diligent because it placed substantial obligations on Bowman while conveying a substantial environmental benefit to the public.

Finally, this Court should reverse the district court's finding that a CWA § 404 violation did not occur. Interpreting the statute to define "addition" as "from the outside world" is an unnecessary and unreasonable narrowing of the § 404 permit program. The EPA intended for the "outside world" definition to be used solely for § 402, and Congress has expressed reasons for interpreting §§ 402 and 404 differently, primarily because to do otherwise would remove the entire dredge and fill provision from the statute itself. Additionally, the unitary navigable waters theory should not be applied because it was included solely in the preamble and is therefore not an interpretation in a formal administrative proceeding.

STANDARD OF REVIEW

The Court of Appeals reviews de novo a district court's grant of summary judgment. *Save the Peaks Coal. v. U.S. Forest Serv.* 669 F.3d 1025 (9th Cir. 2012).

ARGUMENT

I. NUWF SATISFIES THE REQUISITE ELEMENTS OF ARTICLE III STANDING BECAUSE ITS MEMBERS, MILFORD, NORTON AND LAWLESS, HAVE DEMONSTRATED LEGALLY COGNIZABLE INJURIES.

The Clean Water Act grants any citizen standing to bring an enforcement action, defining "citizen" as "a person or persons having an interest which is or may be adversely affected." 33 U.S.C. §1665(g) (2006). The CWA's citizen suit provision extends standing to the outer boundaries set by the Constitution. *Ecological Rights Found. v. Pac. Lumber Co.*, 230 F.3d 1141, 1147 (9th Cir. 2000). Article III of the Constitution mandates that the judicial power of federal courts extend only to the resolution of "Cases" and "Controversies." U.S. CONST. art. III, § 2. To satisfy Article III's standing requirements, a plaintiff must show (1) it has suffered an "injury-in-fact" that is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical; (2) the injury is fairly traceable to the challenged action of the defendant; and (3) it is likely that the injury will be redressed by a favorable decision. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992).

'Injury-in-fact' reflects the statutory requirement that a person be 'adversely affected' or 'aggrieved,' and it serves to distinguish a person with a direct stake in the outcome of a litigation—even though small—from a person with a mere interest in the problem. *United States v. Students Challenging Regulatory Agency Procedures (SCRAP),* 412 U.S. 669, 690 n.14 (1973); *see Lujan*, 504 U.S. at 561 n.1 ("By particularized, we mean that the injury must affect the plaintiff in a personal and individual way."); *Friends of the Earth, Inc. v. Gaston Copper Recycling Corp.*, 204 F.3d 149, 156 (4th Cir. 2000) ("The injury-in-fact requirement precludes those with merely generalized grievances from bringing suit to vindicate an interest common to the entire public.").

An association has standing to bring suit on behalf of its members when any one of its members would otherwise have standing to sue in their own right, the interests at stake are germane to the organization's purpose, and neither the claim asserted nor the relief requested

requires the participation of individual members in the lawsuit. *Hunt v. Wash. State Apple Adver. Comm'n*, 432 U.S. 333, 343 (1977). The district court erred in denying standing to NUWF because it improperly concluded that Milford, Norton, and Lawless failed to demonstrate an injury-in-fact. All three NUWF members have demonstrated legally cognizable injuries sufficient to satisfy Article III requirements, and therefore NUWF has standing to pursue its claim.

A. Milford, Norton, and Lawless have suffered injury-in-fact.

The broad scope of environmental claims recognizes injuries from which Milford, Norton, and Lawless have suffered. The Supreme Court has held that "[a]esthetic and environmental well-being, like economic well-being, are important ingredients of the quality of life in our society . . . deserving of legal protection through the judicial process." *Sierra Club v. Morton*, 405 U.S. 727, 734 (1972). The interest alleged to have been injured may reflect aesthetic, conservational, and recreational as well as economic values, so long as they are personal to the plaintiff. *See id.* at 1368 (quoting *Ass'n of Data Processing Serv. Orgs., Inc. v. Camp*, 397 U.S. 150, 154 (1970)). For the purposes of standing, the injury need not be large; an "identifiable trifle" will suffice. *SCRAP*, 412 U.S. at 690 n.14. A litigant's reasonable concerns about an increased risk of harm can itself be injury-in-fact for standing. *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs.*, 528 U.S. 167, 169 (2000).

1. Milton, Norton, and Lawless have demonstrated injury-in-fact sufficient for Article III standing because their recreational use of the Muddy River area has been "lessened" as a result of Bowman's activities.

In *Laidlaw*, the plaintiffs filed a citizen suit under the CWA against the owner of a South Carolina hazardous waste incinerator facility, alleging violation of mercury discharge limits under the CWA. *Id.* at 167. In finding that the plaintiffs had standing, the Supreme Court

explained, "[t]he relevant showing for Article III standing is not injury to the environment but injury to the plaintiff." *Id.* at 181. Several of the affiants averred that they used the area for recreational activities such as fishing, hiking, picnicking and birdwatching. *Id.* at 181-83. The Court held that "environmental plaintiffs adequately allege injury in fact when they aver that they use the affected area and are persons for whom the aesthetic and recreational values of the area will be lessened" by the challenged activity. *Id.* at 183 (quoting *Morton*, 405 U.S. at 735).

Under *Laidlaw*, a plaintiff can establish injury-in-fact by showing "a connection to the area of concern sufficient to make credible the contention that the person's future life will be less enjoyable—that he or she really has or will suffer in his or her degree of aesthetic or recreational satisfaction—if the area in question remains or becomes environmentally degraded." *Pac. Lumber Co.*, 230 F.3d at 1149 (finding injury-in-fact where plaintiffs "stated longstanding recreational and aesthetic interests in . . . the specific place at issue in this case. Both have used the creek for recreational activities several times in the past, and both have alleged that Pacific Lumber's conduct has impaired their enjoyment of those activities."); *see also White Tanks Concerned Citizens, Inc. v. Strock*, 563 F.3d 1033, 1039 (9th Cir. 2009) (finding injury-in-fact where members regularly used the area for hiking and horseback riding and had "recreational and aesthetic interests in preserving the undeveloped nature of the area in question.").

Under *Laidlaw*, all three NUWF members establish injury-in-fact. They testified that they use the Muddy for recreational boating and fishing, often picknicking on its banks in the vicinity of the Bowman property, thus establishing the requisite "connection to the area of concern." They further testified that they are aware of the important functions that the now-destructed Bowman field wetlands served in maintaining the integrity of the Muddy and "feel a *loss*" from the diminished ecosystem in the area where they often recreate. (R. at 6.) Thus, plaintiffs have

demonstrated a concrete interest in preserving the undeveloped nature of the area in which they recreate from environmental degradation, which has been impaired by Bowman's conduct. Under the standard the Supreme Court set forth in *Laidlaw*, NUWF members have demonstrated that they are citizens whose recreational, environmental and conservational interests in the affected area are "'*lessened'* by the challenged activity." *Laidlaw*, 528 U.S. at 183 (emphasis added).

2. Milton, Norton, and Lawless have expressed reasonable concern of environmental harm to the Muddy River sufficient to demonstrate injury-in-fact.

In *Laidlaw*, the Court found that the FOE members' "reasonable concerns" about the effects of the mercury discharges directly affected their recreational, aesthetic, and economic interests. *Id.* at 183-84. Plaintiffs were not required to show actual environmental harm; they merely had to show that the reasonable fear of some environmental harm would reduce their aesthetic or recreational enjoyment of the area. *Id*. at 169. *See also Gaston Copper Recycling Corp.*, 204 F.3d at 156 (finding injury-in-fact where plaintiff's family fish and swim in the affected lake area and plaintiff testified to his "fears of pollution from Gaston Copper's permit exceedances"); *see also Am. Canoe Ass'n v. Murphy Farms, Inc.*, 326 F.3d 505, 519 (4th Cir. 2003) (injury-in-fact found in part because plaintiff alleged that he was "personally concerned about the harmful impact of the defendants' discharges on fish and plant life in the Black River").

Similar to the affiants in *Laidlaw*, NUWF members testified that they "fear[] that the Muddy is more polluted as a result and will be far more polluted if other adjacent wetlands are cleared and drained for agricultural uses." (R. at 6.) That fear is reasonable. It is undisputed that Bowman drained the incinerated remnants of his field-clearing operation directly into the Muddy River (R. at 5.), and Milford testified that the River "looks more polluted" as a result. (R. at 6.)

The environmental effects of this draining operation are unknown. But for the purposes of constitutional standing, the members have demonstrated "reasonable concern[]" about the effects of the clearing of Bowman's field sufficient to demonstrate injury-in-fact.

B. Milford has sufficiently demonstrated injury to her aesthetic interests resulting from visible pollution in the Muddy River.

The Supreme Court has long recognized harm to aesthetic interests as the type of injury-in-fact "sufficient to lay the basis for standing . . . ." *Morton*, 405 U.S. at 734. Courts have routinely found that the sight of pollution is an aesthetic injury sufficient for standing. *See Laidlaw*, 528 U.S. at 181 (FOE member alleged injury-in-fact because "he occasionally drove over the North Tyger River, and . . . it looked and smelled polluted."); *Pub. Interest Research Grp. of N.J., Inc. v. Powell Duffryn Terminals Inc.*, 913 F.2d 64, 73 (3d Cir. 1990) (finding injury-in-fact where members of organizations stated that waterway into which defendant discharged pollutants had an "oily or greasy sheen they found offensive"); *Friends of the Earth v. Consolidated Rail Corp.*, 768 F.2d 57, 61 (2d Cir. 1985) (conferring standing where affiant stated that he passes the Hudson regularly and "finds the pollution in the river offensive to his aesthetic values"); *Am. Canoe Ass'n*, 326 F.3d at 519 (finding injury-in-fact based, in part, on member's testimony that "the uncleanly appearance of Six Runs Creek and the Black River offends his aesthetic tastes").

Milford testified that the Muddy River "looks more polluted to her than it did prior to Bowman's activities." Thus, Milford has demonstrated harm to her aesthetic interests in the Muddy River, reasonably traceable to Bowman's conduct. The district court erred in finding that the aesthetics of navigational use of the river are unaffected because the easement blocks the view of the cleared field from the river. Visible signs of pollution in the Muddy River unquestionably affect the aesthetics of navigational use of the river.

C. Norton has suffered a direct injury to his recreational interest in frogging the areas surrounding the Muddy River.

Norton testified that he has frogged the Muddy River area for years for recreational and subsistence purposes. (R. at 6.) Where he could always count on getting a dozen good sized frogs on the Bowman property prior to its clearing, now he cannot find any frogs in the drained field, and he can only count on finding two to three good sized frogs in the remaining woods and buffer area. (Id.) This diminution represents a direct injury to his interest in frogging.

The district court erred in finding that Norton lacked standing to challenge the harm to his interests in frogging. Based on Norton's testimony that he "supposed he might have been trespassing" when he had gone frogging on the Bowman property, the district court held that "the inability to continue illegal activities cannot give rise to an injury to support standing." (R. at 6.) For the purposes of standing, a plaintiff need not show that he has a right of access to the site on which the challenged activity is occurring. *Cantrell v. City of Long Beach*, 241 F.3d 674, 681 (9th Cir. 2001). The injury-in-fact requirement is designed to ensure that the litigant has a concrete and particularized interest distinct from the interest held by the public at large. *Id.* at 681 (citing *Defenders of Wildlife*, 504 U.S. at 562-63; *Morton*, 405 U.S. at 735). That the litigant's interest must be greater than that of the public at large does not imply that the interest must be a substantive right sounding in property or contract. *Id.* at 681.

In *Cantrell*, the Ninth Circuit conferred standing on birdwatchers who challenged a Navy action that would disrupt bird habitat on the Navy's land because of their desire to view the birds at the Naval station and publicly accessible locations outside the Navy land. *Id.* at 680-81. The Navy argued that the birdwatchers could not establish standing because they had no legal right to enter the closed station or stand adjacent to the station and gaze over the property line at the birds and their habitat. *Id.* at 680. In finding injury-in-fact, the Ninth Circuit reasoned that standing

does not require "a plaintiff to show that he has a right of access to the site on which the challenged activity is occurring, or that he has an absolute right to enjoy the aesthetic or recreational activities that form the basis of his concrete interest." *Id.* at 681.

The Ninth Circuit's reasoning applies here. The purpose of the standing inquiry is to determine whether a litigant has a personal stake in the outcome. At this juncture, Norton is not required to show an absolute right of access to the Bowman property. What Norton must show is injury to a personal, concrete, and particularized interest in the affected area distinct from the interest held by the public at large. Furthermore, Norton testified that he frogs the Muddy River "area" generally. Evidence that Norton can now only procure a fraction of the frogs he used to on the Bowman property, which was rife with frogs in the past, demonstrates a genuine risk of injury to his interest in frogging the surrounding river area beyond Bowman's property line. Therefore, Norton has demonstrated direct injury to his recreational interest in frogging the affected area fairly traceable to Bowman's land-clearing operation.

D. The District Court erred in finding that the NUWF members' injuries are only speculative because of potential future environmental benefit from plans to restore the buffer zone.

The Supreme Court has consistently held that "jurisdiction is tested by the facts as they existed when the action [was] brought" and " 'that after vesting, it cannot be ousted by subsequent events.'" *Smith v. Sperling*, 354 U.S. 91, 93 n.1 (1957) (quoting *Mollan v. Torrance*, 22 U.S. (9 Wheat.) 537, 539 (1824)). In *Laidlaw*, the Supreme Court applied its "longstanding rule that jurisdiction is to be assessed under the facts existing when the complaint is filed." *Lujan*, 504 U.S. at 569 n.4. In support of its holding, the *Laidlaw* Court repeatedly noted that the plaintiffs' injuries were occurring as of the time their complaint was filed. *See, e.g.*, *Laidlaw*, 528 U.S. at 120; *see also Becker v. Fed. Election Comm'n*, 230 F.3d 381, 386 n.3 (1st Cir. 2000)

(noting that *Lujan* "clearly indicat[es] that standing is to be 'assessed under the facts existing when the complaint is filed'").

The district court erred in finding that plaintiffs' injuries are only speculative based on testimony that plans to restore the buffer zone will provide a "richer habitat" for frogging and that "the environment may be benefitted rather than injured" by restoration of the buffer area. (R. at 6.) This projection, while optimistic, has no bearing on the standing inquiry. The relevant showing for Article III standing is injury to the plaintiff at the commencement of litigation. Any speculative future "benefit to the environment" resulting from changes to the buffer zone has no curative effect on the injury demonstrated at the time the suit was filed and does not serve to oust the plaintiffs of jurisdiction. Thus, plaintiffs have alleged sufficient injury in fact to meet Article III's standing requirements.

II. THE DISTRICT COURT WAS CORRECT IN GRANTING SUMMARY JUDGMENT ON THE GROUNDS THAT IT LACKED SUBJECT MATTER JURISDICTION BECAUSE NUWF FAILED TO MAKE A GOOD FAITH ALLEGATION OF A CONTINUING OR ONGOING VIOLATION AS REQUIRED BY THE CWA.

A. The plain meaning of Section 505(a) does not confer jurisdiction for wholly past violations, and NUWF has failed to allege a continuing or intermittent violation.

Section 505(a) of the CWA provides that any citizen may bring a civil action against any person "alleged to be in violation" of the Act. 33 U.S.C. §1365(a) (2006). The Supreme Court has held that the present tense phrase "to be in violation" requires that there be a continuous or intermittent violation for private citizens to bring suit. *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Found., Inc*., 484 U.S. 49, 57 (1987) ("*Gwaltney"*). Accordingly, a court does not have subject matter jurisdiction over a citizen suit under section 505(a) challenging wholly past violations. *Id.* at 64.

To establish jurisdiction, a plaintiff must make a good faith allegation of a continuing or intermittent violation and demonstrate its existence by presenting sufficient allegations of fact. *Id.* at 64, 66. Once a violation ceases to be intermittent, there is no real likelihood of repetition. *Chesapeake Bay Found., Inc. v. Gwaltney of Smithfield*, 844 F.2d 170, 172 (4th Cir. 1988) ("*Gwaltney II"*). If the defendant presents evidence showing there is no genuine factual dispute that the defendant will continue a violation, then the plaintiff must demonstrate more than just good faith. *Conn. Coastal Fishermen's Assoc. v. Remington Arms Co.,* 989 F.2d 1305, 1312 (2d Cir. 1993).

A plaintiff can show a continuing or intermittent violation by demonstrating one of the following: 1) that violations continued on or after the date the complaint was filed; or 2) that there is evidence from which a reasonable trier of fact could find a continuing likelihood of a recurrence of violation. *Gwaltney II*, 844 F.2d at 171.

1. NUWF has not demonstrated that any discharge has occurred on or after the day the complaint was filed, and there exists no evidence from which a reasonable trier of fact could find a continuing likelihood of a recurrence of violation.

NUWF alleges that Bowman violated section 301(a) of the CWA by adding dredged or fill material into the wetlands without a permit. Section 301(a) makes unlawful "the discharge of any pollutant" into navigable waters except as authorized by specified sections of the CWA. 33 U.S.C. § 1311(a) (2006). One of these specified sections is § 404, which allows the discharge of dredged and fill material with a permit. 33 U.S.C. §1344(a) (2006). CWA § 502(12) defines the discharge of a pollutant as "any addition of any pollutant to navigable waters from any point source." 33 U.S.C. §1362(12) (2006). The addition of a pollutant requires 'active conduct.' *Froebel v. Meyer*, 217 F.3d 928, 938 (7th Cir. 2000) ("[A] permit is required only when the party allegedly needing a permit takes some action, rather than doing nothing whatsoever."). The

addition of dredged material cannot be a passive activity; thus, any defendant not actively engaged in adding a pollutant does not need a permit under § 404 and cannot said to be "in violation." *Id.* at 936.

To show jurisdiction, NUWF would have to make a good faith allegation that Bowman continued to discharge dredged or fill material by adding that material to the wetlands without a permit on or after the date the complaint was filed. Or, alternatively, that there exists evidence from which a reasonable trier of fact could find a continuing likelihood that he would engage in the addition of dredged and fill material again. Plaintiff fails to make a good faith allegation that alleged discharge violations continued on or after the date the complaint was filed. *See Bettis v. Town of Ontario, N.Y.*, 800 F. Supp. 1113 (W.D.N.Y. 1992) (Developer's alleged excavation and filling-in of wetlands did not constitute continuing violation for purposes of CWA even though fill material remained in wetlands when activity ceased years before complaint was filed, and there was no evidence that such activity was likely to recur in the future.).

Bowman's land clearing activities ceased entirely on July 15, 2011, and NUWF filed its § 505 complaint August 30, 2011. (R. at 4.) Bowman's only activities after July 15, 2011 included planting wheat seeds and draining the property through the drainage ditch or swale he constructed earlier. (R. at 7.) Neither activity constitutes *adding* dredged spoil or fill to the property, nor do plaintiffs allege that they constitute such addition. (R. at 7)(emphasis added). Thus, it cannot be said that Bowman is continuing to discharge dredged and fill material into the river in violation of the CWA.

Furthermore, there is no evidence from which a trier of fact could conclude that there is a continuing likelihood of a recurrence in intermittent or sporadic discharges. On remand to the district court in *Gwaltney III*, the court found that plaintiffs alleged likelihood of an intermittent

violation of *Gwaltney*'s NPDES permit because the evidence at trial demonstrated that *Gwaltney* had a history of repeated violations before the date the suit was filed, despite remedial measures taken to halt effluent discharges. *Chesapeake Bay Found., Inc. v. Gwaltney of Smithfield*, 688 F. Supp. 1078, 1079 (E.D. Va. 1988) ("*Gwaltney III*"). Witnesses testified at trial that even with an upgraded wastewater treatment system in place, effluent limitations would still likely be exceeded after the date the complaint was filed, and others had "clear doubts" based on articulated factors about continued compliance. *Id.*

By contrast, NUWF has not demonstrated that there is any reason to believe Bowman will continue his land-clearing activities or in any way add additional fill material to the wetlands. Indeed, the evidence is to the contrary. Bowman has placed the only remaining land he owns in the area in a conservation easement with NUDEP pursuant to a settlement agreement. (R. at 7.) Any alleged violation on the part of Bowman is wholly past without any risk of recurrence. Thus, NUWF has not demonstrated a continuing or intermittent violation, and the court does not have jurisdiction.

2. The district court was correct in finding that the continued presence of dredged and fill material in the former wetland does not constitute a continuing violation.

NUWF contends that the continued presence of dredged and fill material in the former wetland constitutes a continuing violation for the purpose of jurisdiction. A number of courts have found jurisdiction on this basis. *See Sasser v. EPA*, 990 F.2d 127 (4th Cir. 1993) ("[e]ach day the pollutant remains in the wetlands without a permit constitutes an additional day of violation") (citing *United States v. Ciampitti*, 669 F. Supp. 684, 700 (D.N.J. 1987); *N.C. Wildlife Fed. v. Woodbury*, No. 87-584-CIV-5, 1989 WL 106517, at *3 (E.D.N.C. Apr. 25, 1989) (citing *Ciampitti*); *Informed Citizens United v. USX Corp.*, 36 F. Supp. 2d 375, 377 (S.D. Tex. 1999) (conferring jurisdiction where fill material remained in wetland at the time the suit was filed);

see also United States v. Reaves, 923 F. Supp. 1530 (M.D. Fla. 1996); *United States v. Tull*, 615 F. Supp. 610 (E.D. Va. 1983), *aff'd* 769 F.2d 182 (4th Cir. 1985), *rev'd on other grounds*, 481 U.S. 412 (1987).

a. NUWF's continuing violation theory would render without meaning the jurisdictional requirement in § 301(a) and eviscerate the Supreme Court's holding in *Gwaltney* barring wholly past violations.

Plaintiff's argument that the continued presence of pollutant materials is a continuing violation must fail because it renders without meaning the jurisdictional requirement for a continuing violation required by the plain language of the CWA. *See Duncan v. Walker*, 533 U.S. 167, 174 (2001) (It is "a cardinal principle of statutory construction" that "a statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant.") (internal quotation marks and citations omitted). NUWF's argument would also serve to eviscerate the Supreme Court's holding in *Gwaltney I*—permitting citizens to sue for wholly past violations. *See Conn. Coastal Fishermen's Ass'n*, 989 F.2d at 1313 ("The present violation requirement of the [CWA] would be completely undermined if a violation included the mere decomposition of pollutants."); *Wilson v. Amoco Corp.*, 33 F. Supp. 2d 969, 975 (D. Wyo. 1998) (migration of residual contamination from previous releases does not constitute an ongoing discharge, and that to so hold would undermine the CWA's limitations as set forth in the statute's definition of point source and the Supreme Court's holding in *Gwaltney*).

In *Gwaltney*, the Supreme Court determined that, by § 505's plain language, Congress expressly conferred jurisdiction only for continuing or intermittent violations. *Gwaltney I*, 484 U.S. at 57 ("The most natural reading of [the present tense phrase] 'to be in violation'" requires that the courts only have jurisdiction over continuous or intermittent violations.). Noting that its

language is identical to citizen suit provisions in other environmental statutes authorizing only prospective relief, the Court concluded that Congress' choice of words was not a "careless accident." *Id.* at 57. Instead, Congress' pervasive use of the present tense "make[s] plain that the interest of the citizen-plaintiff is primarily forward-looking." *Id.* at 59. If Congress had wished to allow suits for wholly past violations, the Court explained, it could have written the CWA to express such an objective, but did not choose "this readily available option." *Id.* at 57. The Court noted that the central purpose of the citizen provision is to abate pollution, not to rectify past violations. *Id.* at 62. Accordingly, the statute's notice requirement gives citizens a chance to come into compliance with the CWA. Without the jurisdictional requirement, the notice requirement would be rendered gratuitous because citizens could sue for wholly past violations even when violators bring themselves into complete compliance with the CWA. *Id.* at 62. Plaintiff's continuing violation theory would obviate the jurisdictional bar against past violations and contravene Congress' intent that the citizen provision has only prospective application.

b. To adopt plaintiff's interpretation would undermine the supplementary role envisioned for § 505 citizen suits.

In *Gwaltney,* the Court explained that prospective application of the citizen suit ensures that citizen enforcement remains supplementary to government enforcement. *Id.* at 60. The *Gwaltney* Court illustrated by way of hypothetical the danger posed to government enforcement if the jurisdictional requirement were eviscerated:

> Suppose that the Administrator identified a violator of the Act and issued a compliance order under § 309(a). Suppose further that the Administrator agreed not to assess or otherwise seek civil penalties on the condition that the violator take some extreme corrective action . . . . If citizens could file suit, months or years later, in order to seek the civil penalties that the Administrator chose to forgo, then the Administrator's discretion to enforce the Act in the public interest would be curtailed considerably. The same might be said of state enforcement authorities.

Id. at 61. In *Orange Env't, Inc. v. Cnty. of Orange*, 923 F. Supp. 529 (S.D.N.Y. 1996), the district court declined to find a continuing violation despite the continued presence of material in a wetland without a § 404 permit because defendants had entered into a Compliance Order with the EPA. The court reasoned that if plaintiff's continuing violation theory were adopted "it would be impossible for the EPA to ever negotiate a Compliance Order." *Id.* at 539-40.

The facts here present the precise danger the *Gwaltney* Court envisioned. Bowman has taken extreme corrective action in compliance with a state administrative order identical to a § 309(a) order: he has conveyed a conservation easement and has agreed to construct and maintain a year-round wetland. Similarly, the state chose to forego civil penalties where it had the discretion to assess them. Without the jurisdictional bar against wholly past violations, plaintiffs may assess civil penalties against Bowman even though he has come into compliance with the CWA. Thus, plaintiff's continuing violation theory would allow citizen suits to supplant government enforcement and "change the nature of the citizens' role from interstitial to potentially intrusive." *Gwaltney*, 484 U.S. at 61.

c. NUWF's continuing violation argument obviates application of the statute of limitations in the citizen suit context.

To adopt plaintiff's continuing violation argument would obviate application of the statute of limitations, for it would never start to run as long as dredged and fill material was still present. Thus, citizen plaintiffs would have jurisdiction *ad infinitum* until the material was removed. *See United States v. Telluride Co.*, 884 F. Supp. 404, 408 (1995) (rev'd on other grounds) ("[Defendant] is not presently discharging pollutants, and thus no present or continuing violation exists for the purpose of the statute of limitations. The fact that a continuing impact exists from [Defendant's] past violations does not render the violation continuing."). *Cf. Reaves*, 923 F. Supp. at 1534 (finding that the five-year statute of limitations in 28 U.S.C. § 2462 had not

begun to run on the government's claims for civil penalties, although the actual activity resulting in the discharge of dredged or fill material occurred *thirteen years* prior to the filing of the government's complaint).

Statutes of limitations serve to ensure fairness to defendants; to enhance the effectiveness and efficiency of the judicial system; and to promote societal stability. Joseph G. Theis, *The Application of The Federal Five-Year Statute of Limitations for Penalty Actions to Wetlands Violations Under the Clean Water Act, 24 N. KY. L. REV. 1, 7 (1996).* Statutes of limitations give defendants a sense of repose "by preventing surprises through the revival of claims that have been allowed to slumber until evidence has been lost, memories have faded, and witnesses have disappeared." *Order of R.R. Tel. v. Railway Express Agency, Inc.*, 321 U.S. 342, 348-49 (1944). Statutes of limitations also serve to promote the efficiency and effectiveness of the courts by ridding court systems of stale, tenuous claims, and by ensuring that the fact finding process is not impaired by the loss of evidence, faded memories, and the disappearance of witnesses. Theis, *supra*, at 8. Finally, statutes of limitations contribute to the stability of society by avoiding the disruptive effects that unsettled claims may have on commercial transactions and help to provide security over property rights. *Id.*

Plaintiff's view would effectively rob the defendant, the judicial system, and society of the protections of the statute of limitations in the CWA context.

3. NUWF's argument that *Gwaltney* is limited to § 402 violations and not § 404 violations must fail because it misunderstands the CWA's permit program and improperly emphasizes the remediability of violations.

a. Plaintiff's argument improperly distinguishes between § 402 and § 404 violations.

NUWF attempts an end-run around *Gwaltney* by arguing that its holding is limited to § 402 violations—at issue in *Gwaltney*—and not § 404 dredged-and-fill violations—at issue here. Plaintiff's distinction cannot stand because it overlooks the nature of § 402 violations.

Permit programs provide an exception to the CWA's broad prohibition against the discharge of pollutants in § 301(a). Section 402 provides for the National Pollutant Discharge Elimination System (NPDES), which gives the Administrator the ability to issue a permit "for the discharge of any pollutant, or combination of pollutants." 33 U.S.C. § 1342 (2006). Section 404 of the CWA separately governs the discharge of dredged or fill material, giving the U.S. Army Corps of Engineers the authority to issue permits under that section. 33 U.S.C. § 1344 (2006).

In the classic case of water pollution violating § 402, an industrial plant discharges liquid wastes into a body of water without, or in excess of, an NPDES permit. The discharged wastewater, by its effervescent nature, flows away or intermixes with the water or sediment and cannot be removed. Such was the case in *Gwaltney*. Plaintiffs argue § 402 violations are wholly past under *Gwaltney* because a § 402 discharge is "irreversible" by virtue of the fact that the pollutant cannot be removed once discharged. Plaintiffs contend that § 404 dredged-and-fill discharge violations, however, are continuing under *Gwaltney* unless and until they are removed. (R. at 7.) This is so because dredged and fill discharges are "reversible"—fill materials settle on the water bottom below or shortly downstream from the outfall and can be removed. *Id.*; *see N.C. Wildlife Fed.*, 1989 WL 106517, at *3 ("[Defendant's argument] fails to adequately distinguish between various types of effluent violations. . . . [C]itizen-suits for past discharges which are not susceptible to remedial efforts, due to effective natural dissipation or dispersion, would clearly continue to be barred under *Gwaltney*."); *see Informed Citizens United*, 36 F. Supp. 2d at 377

("USX's reliance on *Gwaltney* for its construction of 33 U.S.C. § 1365(a) is misplaced because *Gwaltney* involved a wastewater violation and thus a much different situation than in the instant action.").

NUWF's argument must fail because it wrongly assumes that all § 402 violations are irreversible. Not all § 402 violations are "classic" in the sense that the pollutant dissolves or the discharge is otherwise irreversible upon entering the water. In fact, § 402 violations cover "any pollutant," and "pollutant" is defined broadly in the CWA to include "dredged spoil, solid waste, incinerator residue, sewage, garbage, sewage sludge, munitions, chemical wastes, biological materials, radioactive materials, heat, wrecked or discarded equipment, rock, cellar dirt and industrial, municipal, and agricultural waste discharged into water." 33 U.S.C. § 1362(6) (2006). As such, many § 402 violations involve the discharge of solids or sediment which settle on the water bottom or downstream and can be removed. (R. at 7.) Thus, it cannot be said that § 402 discharges are "irreversible" and wholly past under *Gwaltney*, while § 404 discharges are continuing until the fill material is removed.

b. Plaintiff's emphasis on the curability of violations is unsupported by the plain language of the CWA and the Supreme Court's opinion in *Gwaltney*.

Plaintiff's emphasis on the "curability" or "reversibility" of the effects of a discharge for the purpose of determining a continuing violation is misplaced, although not unpopular. Courts have readily distinguished between "remediable" and "unremediable" discharges for the purpose of finding continuing violation. *See N.C. Wildlife Fed.,* 1989 WL 106517, at *3; *Informed Citizens United*, 36 F. Supp. 2d at 377. This distinction is appealing, especially in light of the remedial purpose of the statute, because it would give citizens the opportunity to enforce violators to remediate curable violations. However, this position is wholly unsupported by the text of the CWA and the Supreme Court's decision in *Gwaltney*.

The CWA addresses discharges, not the impacts of those discharges on wetlands. The plain language of § 301(a) prohibits the "discharge of any pollutant, or combination of pollutant . . . " and does not in any way address the *effects* of the discharge on wetlands. 33 U.S.C. § 1311(a) (2006). Accordingly, the violation lies with the discharge, not the remediability of its effects. Whether the discharged material has dispersed or remained is not contemplated by the statute and was not contemplated by the Supreme Court in *Gwaltney*. Courts have construed the concurrence in *Gwaltney*'s emphasis on "remediable measures" to support this theory. *See N.C. Wildlife*, 1989 WL 106517 at *2; *Gwaltney*, 484 U.S. at 69 (Scalia, J., concurring). The relevant language in the *Gwaltney* concurrence reads:

> '[T]o be in violation' . . . suggests a state rather than an act-the opposite of state of compliance . . . . When a company has violated an effluent standard or limitation, it remains for purpose of 505(a), 'in violation' of that standard or limitation so long as it has not put in place remedial measures that clearly eliminate the cause of the violation. . . . I think the question on remand should be whether petitioner had taken remedial steps that had clearly achieved the effect of curing all past violations by the time suit was brought.

Gwaltney, 484 U.S. at 69-70. The concurrence's reference to "remedial measures" most logically refers to remedying the source of the discharge in order to prevent future or intermittent violations, not its effects. The concurrence never suggests remedying the effects of Gwaltney's discharge by removing effluent discharge from the water body. Indeed, whether or not Gwaltney had taken remedial measures to eliminate the source of the discharge was the issue in *Gwaltney* on remand, and the court found that there was a continuing violation because the system in place would not necessarily prevent future discharges. *Gwaltney III*, 688 F. Supp. at 1079.

By this interpretation, a court can find a continuing violation where sufficient efforts have not been made to stop the source of the discharge. The interpretation plaintiff advances leads to inconsistent, if not iniquitous, results. In certain cases, a continuing violation is found based on

the event of the discharge alone, while in others it is found based on the mere effects of a discharge.

Bowman has taken the necessary "remedial steps" to prevent future dredged-and-fill discharges. The source of Bowman's discharge was his land clearing operation. He fully ceased the operation more than a month prior to suit and placed the only remaining land he owns in the area in a conservation easement. Furthermore, Bowman has taken measures which have effectively brought him into a "state of compliance" with the CWA by entering into the NUDEP order enforcing a statute identical to § 309(a). *See Orange Environment, Inc.*, 923 F. Supp. at 538 (defendant not held liable despite continuing presence of material in a wetland without a § 404 permit because "defendants' compliance with the EPA off-site remediation Order puts them in compliance with the CWA"). Therefore, Bowman's alleged violation is not continuing for the purpose of conferring jurisdiction.

III. NUWF'S CITIZEN SUIT HAS BEEN BARRED BY NUDEP'S DILIGENT PROSECUTION OF BOWMAN AS SET OUT IN § 505(b) OF THE CWA.

Section 505(b)(1)(B) of the CWA bars a citizen suit if the "State has commenced and is diligently prosecuting a civil or criminal action in a court of the United States . . . to require compliance . . ." with the CWA. 33 U.S.C. § 1365(b)(1)(B) (2006). As stated in *Gwaltney*, "the citizen suit is meant to supplement rather than to supplant governmental action." *Gwaltney of Smithfield v. Chesapeake Bay Found.*, 484 U.S. 49, 60, (1987). Under this section the government's prosecution is not required to be far-reaching or zealous. *Piney Run Pres. Ass'n v. Cnty. Comm'rs*, 523 F.3d 453, 459 (4th Cir. 2008); *Karr v. Hefner*, 475 F.3d 1192, 1197 (10th Cir. 2007). Nor does it require that the case is prosecuted in the same manner that the citizen-plaintiff would have prosecuted it. *Karr*, 475 F.3d at 1197. It only requires that the prosecution

be diligent. *Id.* An agency's prosecution does not lack diligence simply because the citizen-plaintiff is not satisfied with the results or would have used a more aggressive strategy. *Id.*

The burden of proving the prosecution is not diligent rests on the plaintiff-citizen. *Id.* at 1198; *SPS Ltd P'ship v. Severstal Sparrows Point, LLC*, 808 F. Supp. 2d 794, 809 (D. Md. 2000). The burden on the plaintiff is a heavy one, requiring "'persuasive evidence that the state has engaged in a pattern of conduct in its prosecution of the defendant that could be considered dilatory, collusive, or otherwise in bad faith.'" *Dodge v. Mirant Mid-Atl., LLC*, 732 F. Supp. 2d 578, 585 (D. Md. 2010) (quoting *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs.*, 890 F. Supp. 470, 487 (D.S.C. 1995); *see also Karr*, 475 F.3d at 1198 (stating diligence is presumed in an agency enforcement action). "Most courts considering the diligence of a state or federal prosecution have exhibited substantial deference for the agency's process." *Karr*, 475 F.3d at 1198 (citing *Williams Pipe Line Co. v. Bayer Corp.*, 964 F. Supp. 1300, 1324 (S.D. Iowa 1997)). "This presumption is due not only to the intended role of the government as the primary enforcer of the CWA, but also the fact that the courts are not in the business of designing" ground-level environmental remedies. *Piney Run Pres. Ass'n*, 523 F.3d at 459 (citing *Friends of Milwaukee's Rivers v. Milwaukee Metro. Sewerage Dist.*, 382 F.3d 743, 760 (7th Cir. 2004), *cert. denied*, 544 U.S. 913 (2005)(internal quotations and brackets omitted)).

Deference to the agency's process is especially pertinent where, as here, the CWA is enforced through a consent decree. *Piney Run Pres. Ass'n*, 523 F.3d at 459; *Karr*, 475 F. 3d at 1197. An agency's strategy can be undermined when substantial deference is not given to its decisions. *Karr*, 475 F. 3d at 1197. The Supreme Court recognized this in *Gwaltney*, stating:

> Suppose . . . that the Administrator agreed not to assess or otherwise seek civil penalties on the condition that the violator take some extreme corrective action, such as to install particularly effective but expensive machinery, that it otherwise would not be obliged to take. If citizens could file suit, months or years later, in

> order to seek the civil penalties that the Administrator chose to forgo, then the Administrator's discretion to enforce the Act in the public interest would be curtailed considerably.

Id. (citing *Gwaltney of Smithfield*, 484 U.S. at 60-61). Here, for the forgoing reasons, it is in the best interest of the public and environment that this Court give deference to NUDEP's expertise in enforcing the CWA against Bowman.

A. NUDEP's enforcement action should be held diligent because it is capable of requiring compliance with the CWA and is in good faith calculated to do so.

A court's determination of diligence is largely a factual decision and many factors are considered. *See* Jeffrey G. Miller, *Theme and Variations in Statutory Preclusions Against Successive Environmental Enforcement Actions by EPA and Citizens*, 28 HARV. ENVTL. L. REV. 401, 463 (2004). An agency's enforcement prosecution will normally be held diligent where it "'is capable of requiring compliance with the Act and is in good faith calculated to do so.'" *Piney Run Pres. Ass'n*, 523 F.3d at 459 (quoting *Friends of Milwaukee's Rivers*, 382 F.3d at 760). Based on the record, NUWF is not able to meet the high burden of establishing that NUDEP's enforcement action does not satisfy this standard.

Under the settlement, Bowman has agreed not to clear any more wetlands. (R. 4.) Moreover, he has conveyed a conversation easement and agreed to construct and maintain a year-round wetland on the still forested portion of his property. *Id.* He would have to drain this wetland in order to clear this. Additionally, because it is open to the public, someone is likely to blow the whistle on Bowman in the event that he did take adverse action. In light of these facts, the NUDEP enforcement action is surely capable and in good faith calculated to require Bowman to comply with the Act.

B. NUDEP's enforcement action should be held diligent because there were no procedural irregularities.

In finding diligent prosecution courts have looked to whether the negotiation was at arm's length, being reasonable and fair to the public, and reached under normal procedures. *See Laidlaw*, 890 F. Supp. at 489 (finding a lack of diligence for, inter alia, procedural deficiencies); *Atl. States Legal Found., Inc.* v. *Universal Tool & Stamping Co.*, 735 F. Supp. 1404, 1416 (N.D. Ind. 1990) (finding a lack of diligence where the agency bent its procedure to allow the consent decree negotiations, a process that normally takes weeks, to be completed in one day); *United States v. BP Exploration & Oil Co.*, 167 F. Supp. 2d 1045, 1049 (N.D. Ind. 2001) (reviewing a consent decree to ensure it was legal and in the best interest of the public). There is no evidence here that the settlement agreement between NUDEP and Bowman was entered into in a collusive manner or with bad faith. *See Conn. Fund for the Env't v. Contract Plating Co.*, 631 F. Supp. 1291, 1293 (D. Conn. 1986) (noting that diligence is presumed "absent persuasive evidence that the state has engaged in a pattern of conduct in its prosecution of the defendant that could be considered dilatory, collusive or otherwise in bad faith").

The facts here are distinguishable from both *Laidlaw* and *Universal Tool & Stamping* (*Universal Tool*) where the agency's prosecution was held to lack diligence. In *Laidlaw*, the defendant (Laidlaw) violated its NPDES permit hundreds of times over five years when the plaintiff sent a notice to sue letter. *See Laidlaw Envtl. Servs.*, 890 F. Supp. 470, 477 (D.S.C. 1995). The agency (DHEC) was not planning to file a judicial action against Laidlaw until Laidlaw requested it in order to bar the plaintiff's citizen suit. *Id.* at 478. Laidlaw drafted, filed, and paid the filing fees for DHEC's suit against itself. *Id.* at 479. In just one day after the suit was filed, the parties concluded negotiation and entered into a consent order — a process that usually takes thirty to forty-five days. *Id.* Similarly, in *Universal Tool* the defendant "walked" the consent decree through the agency's office in one day in a "highly unusual" procedure.

Universal Tool & Stamping Co., 735 F. Supp. at 1416. The defendant's president also stated that the agency's action had little effect on its operations and that it was the plaintiff's suit that spurred him to action. *Id.*

In contrast, NUDEP here made the effort to contact Bowman first. (R. at 4.) The filing of the enforcement action was not prompted by Bowman, but rather initiated by NUDEP soon after the agency had notice of Bowman's violations. Moreover, it took the parties here close to a month to agree on an administrative order. (Id.) This is far different from the one day negotiation period in *Laidlaw* and *Universal Tool*.

C. NUDEP's enforcement action should be held diligent because it placed substantial obligations on bowman while conveying substantial environmental benefits to the public.

NUWF is likely to argue that diligent prosecution is lacking due to failure by NUDEP to include an administrative penalty in the settlement agreement. Although a lenient penalty has been held to show lack of diligence, the settlement here cannot be considered lenient on the whole. Courts have held that enforcement was not diligent when the penalty assessed was lower than the economic benefit received by the violator. *See Jones v. City of Lakeland, Tenn.*, 224 F.3d 518, 222 (6th Cir. 2000) (finding a lack of diligence for, inter alia, imposing a "nominal token penalty"); *Altamaha Riverkeepers v. City of Cochran*, 162 F. Supp. 2d 1368, 1373 n.5 (M.D. Ga. 2001) (holding a lenient $5,000 penalty for continuing violation insufficient to constitute diligent prosecution).

Courts also consider the penalty amount assessed in the consent order compared to the maximum amount the agency could have assessed in a factor in determining diligence. *Atl. States Legal Found., Inc. v. Hamelin*, 182 F. Supp. 2d 235, 247 (N.D.N.Y. 2001) (citations omitted). Instead of enforcing a penalty here, NUDEP required Bowman to give a significant

portion of his land to pubic use. Bowman conveyed a conservation easement to NUDEP over a 150 feet wide by 650 feet long strip of land adjacent to the Muddy River. In addition, the agreement requires Bowman to construct and maintain a year-round wetland on a seventy-five foot wide buffer zone between his field and the conservation easement. Although there is no mention of the value of this property or the cost of constructing the buffer, the combination of both are likely to approach the $125,000 cap on administrative penalties; a penalty that NUDEP chose not to enforce in lieu of the conservation easement. This is exactly the situation the Court recognized in *Gwaltney*, warning that the "public interest [could] be curtailed considerably" if agencies were not able to extract concessions from violators in lieu of civil penalties. *Gwaltney of Smithfield,* 484 U.S. at 61.

IV. THE DISTRICT COURT ERRED IN FINDING THAT BOWMAN DID NOT SATISFY THE ELEMENT OF ADDITION FOR A VIOLATION OF § 404 OF THE CWA WHEN HE MOVED DREDGED AND FILL MATERIAL FROM ONE PART OF A WETLAND ADJACENT TO NAVIGABLE WATER TO ANOTHER PART OF THE SAME WETLAND.

Section 301(a) of the CWA prohibits "the discharge of any pollutant by any person," unless receiving an exception or issued a permit under §§ 402 or 404. 33 U.S.C. § 1311(a) (2006). The "discharge of a pollutant" is defined in § 502(12) as "any addition of any pollutant to navigable waters from any point source." *Id.* at § 1362(12). All parties have agreed that the fill material Bowman excavated when building trenches and burning the cleared vegetation constitutes a pollutant under § 502(6). *Id.* at § 1362(6) ("The term pollutant means dredged spoil . . . biological materials . . . rock, sand . . . and agricultural waste discharged into water."). The parties also agree that the bulldozers used were point sources and that Bowman's property was wetland as determined by the U.S. Corps of Engineers' Wetland Delineation Manual. The parties

do not agree, however, that the fill material constituted an "addition" to a navigable water of the United States.

Courts have historically treated "addition," for purposes of the § 404 permitting program, to mean any pollutants, including those that originated within the same navigable body of water. For example, the court held that in terms of "discharge" in the CWA, the word "addition" may "reasonably be understood to include 'redeposit.'" *Avoyelles Sportsmen's League, Inc. v. Marsh*, 715 F.2d 897, 923 (5th Cir. 1983) (holding that filling in sloughs and leveling the land resulted in re-depositing fill material into the waters of the United States and was therefore a "discharge of a pollutant").

In 1982, the EPA promulgated a view that "the point source must *introduce* the pollutant into navigable water from the outside world" as a litigation strategy in a § 402 violation case. *See Nat'l Wildlife Fed'n v. Gorsuch*, 693 F.2d 156, 165 (D.C. Cir. 1982). In 2009, in a § 404 permit case, the Eleventh Circuit found that the unitary navigable waters theory in the preamble of the CWA precluded the court from allowing a pollutant already available in a navigable water to count as an addition when re-introduced to the water. The district court found that these two mostly isolated cases determined that Bowman did not commit a violation of the CWA by failing to seek a § 404 permit. This is an incorrect interpretation of the § 404 permitting program, however, and a majority of circuit courts have interpreted the statute otherwise. *See, e.g., Dubois v. U.S. Dep't of Agric.*, 102 F.3d 1273 (1st Cir. 1996) (unitary navigable waters theory should not apply); *Del. Dep't of Natural Res. & Envtl. Control v. U.S. Army Corps of Eng'rs*, 685 F.3d 259 (3d Cir. 2012) (violation of § 404 could be found because of the addition of dredged spoil into the same river from which it was dredged); *United States v. Deaton*, 209 F.3d 331 (4th Cir. 2000) (re-introduction of dredge material requires § 404 permit); *Greenfield Mills, Inc. v.*

Macklin, 361 F.3d 934 (7th Cir. 2004) (although a pond and river were considered the same body of water, there was still an addition of a pollutant and a § 404 permit was necessary); *Borden Ranch P'ship v. U.S. Army Corps of Eng'rs*, 261 F.3d 810 (9th Cir. 2001) (§ 301(a) does not require that "additions" of pollutants to a navigable water "involve the introduction of material brought in from somewhere else").

It is logical to define "addition" as the discharge of any pollutant into navigable water, including one that it was originally dredged or excavated from. This is consistent with the CWA's purpose, because it is logical to believe that soil and vegetation removed from one part of a wetland could disturb the overall ecological balance of the wetland. Finally, reading "addition" to only include from two separate navigable waters or "from the outside world" would "effectively remove the dredge-and-fill provision from the statute." *Avoyelles*, 715 F.2d at 924 n.43. Bowman, for the purposes of §§ 301(a) and 404, excavated his land by digging trenches and clearing the vegetation and trees, and then re-deposited the fill material into those trenches, thereby discharging a pollutant into a navigable water of the United States and violating § 404 of the CWA by not first requesting a permit.

A. The "from the outside world" definition of addition is a litigation position in § 402 cases and should not be applied to § 404 cases.

In *Gorsuch*, the EPA said that for the addition of a pollutant from a point source to occur, "the point source must *introduce* the pollutant into navigable water *from the outside world."* *Gorsuch*, 693 F.2d at 165 (second emphasis added). This, however, was a case that focused solely on a potential violation of § 402 of the CWA. *Id.* The EPA has not promulgated the application of the "from the outside world" definition of addition for any cases that include violations of the § 404 permitting program. This is the first line of proof that neither the EPA nor

Congress intended for the definition of addition to be narrowed to "from the outside world" for § 404 cases.

The plaintiff would argue that Congress did not intend for § 402 to be read differently from § 404, and therefore, the "from the outside world" definition should be given deference and applied throughout the statute. However, this would lead to an unreasonable reading of § 404. With the inclusion of the dredge and fill permit program found in § 404, it is necessary for the two statutes to need differing interpretations. The fill material should be considered an offending pollutant since it contains the pollutants of dredged spoil and biological materials. 33 U.S.C. § 1362(6) (2006). Additionally, Congress has been explicitly clear that § 404 should define "addition" as any addition of material, including re-deposited material. 33 C.F.R. § 323.2(d)(1) (2012) ("[T]he term discharge of dredged material means *any addition* of dredged material into, *including redeposit* of dredged material . . . within the waters of the United States.") (emphasis added). Discharge of dredged material also includes and is not limited to: any redeposited material that is incidental to activities, "including mechanized landclearing, ditching, channelization, or other excavation." *Id.* at § 323.2(d)(1).

Additionally, applying the "from the outside world" definition to "addition" would lead to an unreasonable interpretation of § 404 of the CWA. Section 404 applies to discharges of materials that are dredged from waters of the United States, and expressly states that the re-depositing of such materials requires a permit even though they are not introduced from the outside world. 33 U.S.C. § 1362 (2006). Dredged spoil or dredged material includes "any material excavated or dredged from the navigable waters of the United States." 33 U.S.C. § 1402(i) (2006). Bowman removed materials from the wetlands, burned it, and then re-deposited

the materials onto his property by placing the leftover excavated spoils into trenches. In digging the trenches, Bowman dredged from the navigable waters.

Additionally, Bowman disturbed the bottom layer of soil when he dug out his swale, constituting an addition of a pollutant to the wetland. In *Borden Ranch Partnership*, the Ninth Circuit specifically addressed swales and their impact on the environment in the context of § 404. *Borden Ranch P'ship*, 261 F.3d 810, 812 (9th Cir. 2001) *aff'd*, 537 U.S. 99 (2002) ("Swales are sloped wetlands that allow for the movement of aquatic plant and animal life, and that filter water flows and minimize erosion."). The court held that "by ripping up the bottom layer of soil" of a swale, trapped water could now drain out; and although "in so doing, no new material [was] 'added,' a 'pollutant' [was] certainly . . . 'added.'" *Id.* at 815.

In *Deaton*, the Court held that sidecasting, which it defined as "deposit[ing] . . . dredged or excavated material from a wetland back into that same wetland[,] constitutes the discharge of a pollutant" for the purposes of § 404. *Deaton*, 209 F.3d 331, 335 (4th Cir. 2000). The defendant in this case dug a drainage ditch across his property intersecting areas that had been identified as wetlands. *Id.* at 333. The excavated dirt was then piled on either side of the ditch. *Id.* The court held that § 404 did not simply prohibit the addition of material; instead, it prohibited "the addition of any pollutant." *Id.* at 335. The court reasoned that Congress determined by classifying "dredged spoil" as a pollutant, that "plain dirt, once excavated from waters of the United States, could not be redeposited into those waters without causing harm to the environment." *Id.* at 336; *see* 33 U.S.C. § 1362(6) (2006).

The Fourth Circuit makes a convincing point that Congress realized that materials that may seem benign could have effects on the environment when removed and then replaced. Congress did not intend for the phrase "addition of any pollutant," including dredged spoil, to be

narrowly construed as an "addition of any pollutant *from the outside world*." Doing so would be an unreasonable reading of the statute and contrary to Congress' intent in enacting the CWA.

Finally, reading the statute to only intend the "addition of any pollutant from the outside world" would "effectively remove the dredge-and-fill provision from the statute." *See Avoyelles*, 715 F.2d at 924 n.43. Dredged material is by its very definition material "from the water itself." *Id.* It would be an unnecessary and unreasonable narrowing of the statute, as well as one that has not been promulgated by EPA, to interpret § 404 to require that an "addition" of any pollutant must be only those introduced "from the outside world." *Gorsuch*, 693 F.2d at 165.

B. The unitary navigable waters theory should have no effect on the § 404 permit program.

First, § 404 should not be read to be ambiguous. The relevant portion of the statute reads as follows:

> Any discharge of dredged or fill material into the navigable waters incidental to any activity having as its purpose bringing an area of the navigable waters into a use to which it was not previously subject, where the flow or circulation of navigable waters may be impaired or the reach of such waters be reduced shall be required to have a permit under this section.

33 U.S.C. § 1344(f)(2) (2006). The statute plainly reads that *any* discharge of dredged or fill material that changes the flow or circulation of navigable waters is required to have a permit. Bowman discharged fill material into trenches he dug on his land and leveled the land. He then dug a swale to bring the run-off from the back of his land to the Muddy River. This is a significant change to the flow or circulation of the Muddy River by adding a new channel of water. Additionally, changing the level of the field as a whole will have an impact on the Muddy River when the river gets high, since it normally saturates portions of his field, and those previously low and high lying areas are now at the same level.

The district court below held that the statute did not define "addition" and was therefore ambiguous. (R. at 9.) Because Congress had not "directly spoken" to the "precise question" at

hand, the Court held that the EPA defined addition in a regulation, therefore entitling its interpretation to *Chevron* deference. (R. at 9.); see *Chevron U. S. A. Inc.* v. *Natural Res. Defense Council, Inc.*, 467 U. S. 837, 842 (1984).

The district court here said that "addition" could not include material that had already been a part of the same navigable water because the EPA interpreted the word "addition" to apply the "unitary navigable waters" theory that all navigable waters are one for purposes of §301(a). *(*Id.*)* The court below applied *Chevron* deference to this theory when incorporating it into its decision. However, this interpretation appears only in the preamble of the CWA and is not stated in the actual rule. In *Leslie Salt Co.*, the court held that the preamble to the CWA regulations was an interpretive rule and therefore not subject to notice and comment requirements of the Administrative Procedure Act (APA). *Leslie Salt Co. v. United States*, 55 F.3d 1388 (9th Cir. 1995). The court went on to say that a court ruling relying on examples in the preamble could not be reconsidered because the preamble was an invalid rule. *Id*. Because of this interpretation, the unitary navigable waters theory may not receive *Chevron* deference.

Additionally, the unitary waters theory has not been looked upon kindly by many circuits. *See, e.g.*, *Dubois v. U.S. Dep't of Agric.*, 102 F.3d 1273, 1296 (1st Cir. 1996) (rejecting unitary waters theory because there was "no basis in law or fact" to support it); *see also*, *Catskill Mtns. Chapter Of Trout Unlimited, Inc. v. City of N.Y.C.*, 273 F.3d 481 (2d Cir. 2001); *N. Plains Res. Council v. Fid. Exploration and Dev. Co.*, 325 F.3d 1155 (9th Cir. 2003). Even the Supreme Court has been reluctant to apply the unitary waters theory. *See S. Fla. Water Mgmt. Dist. v. Miccosukee Tribe of Indians*, 541 U.S. 95 (2004) (in non-binding dicta, "several NPDES provisions might be read to suggest a view contrary to the unitary waters approach). Also, perhaps most convincing is the fact that the EPA has expressly said that it did not intend for the

unitary navigable waters theory to affect § 404 because doing so would be inconsistent with the dredge and fill material program. *See* 77 Fed. Reg. 115 at 33703 (2008) (codified at 40 C.F.R. § 122) ("Because Congress explicitly forbade discharges of dredged material except as in compliance with the provisions cited in CWA section 301, today's rule has no effect on the 404 permit program, under which discharges of dredged or fill material may be authorized by a permit.").

The unitary navigable waters theory should not apply to § 404 permits. Because it was included only in the preamble, it does not qualify for *Chevron* deference. Additionally, it is contrary to Congress' and the EPA's intent in enacting the CWA as a whole and specifically in creating the § 404 dredge and fill permitting program.

CONCLUSION

This Court should hold that NUWF has standing to bring its claims because its members adequately alleged injuries-in-fact sufficient for Article III standing. Although the lower court was incorrect in denying NUWF standing, it was correct in finding that NUWF does not have subject-matter jurisdiction to challenge Bowman's activities because any alleged violations on his part are wholly past. Also, this Court should hold that NUWF's citizen suit is barred by NUDEP's diligent prosecution under § 505(b) of the CWA. Finally, the court should hold that Bowman's landclearing actions resulted in the addition of a pollutant into a navigable water of the United States, thereby violating §§ 301(a) and 404 of the CWA.