Team #11

CA. No. 13-1246

In the United States
Court of Appeals for the Twelfth Circuit

NEW UNION WILDLIFE FEDERATION,

Plaintiff-Appellant

v.

NEW UNION DEPARTMENT OF ENVIRONMENTAL PROTECTION,

Intervenor-Appellant,

v.

JIM BOB BOWMAN,

Defendant-Appellee.

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 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 subject matter jurisdiction pursuant to 28 U.S.C. § 1331 (2006). On June 1, 2012, the district court granted defendant**'**s motion for summary judgment. Pursuant to 28 U.S.C. § 1291 (2006), the United States Court of Appeals for the Twelfth Circuit has jurisdiction to hear appeals from the final decision of the district court.

STATEMENT OF THE ISSUES

I. Whether NUWF has standing to sue Jim Bob Bowman for violating the Clean Water Act, where three members who use the Muddy River for recreational activities allege that it appears more polluted than prior to Bowman's activity and one of the members can no longer use the cleared area for frogging.

II. Whether defendant's wetland-clearance activities, which were completed prior to commencement of NUWF's citizen suit, constitute a continuing or ongoing violation as required by § 505(a) of the Clean Water Act for subject matter jurisdiction.

III. Whether NUWF's citizen suit is barred by NUDEP's timely civil action and consent decree with Bowman that required him to immediately cease further violations, to deed a conservation easement over a large portion of his property, and to maintain a year-round, partially inundated wetland at an indeterminate expense.

IV. Whether defendant's excavating, burning, and redepositing of dredged and fill material on his wetland property constitutes an "addition to navigable waters" (and therefore a violation) under § 404 of the Clean Water Act.

STATEMENT OF THE CASE

This is an appeal from a decision by the United States District Court for the District of New Union granting Jim Bob Bowman's ("Bowman" or "Defendant") motion for summary judgment and denying New Union Wildlife Federation's ("NUWF" or "Plaintiff") and New Union Department of Environmental Protection's ("NUDEP" or "Intervenor") motions for summary judgment. NUWF filed a citizen suit pursuant to § 505 of the Clean Water Act (CWA), claiming that Bowman violated section §§ 301(a) and 404 of the CWA by failing to secure a

permit prior to conducting land-clearing activity on his wetland property. (R-3). The district court granted NUDEP's motion to intervene in NUWF's suit as an interested party. (R-3).

Following discovery, all parties filed motions and cross-motions for summary judgment. (R-5). The district court granted all four of Bowman's requests, holding that (1) NUWF lacked standing to bring its claim under § 505 of the CWA; (2) there was no continuing violation as required for subject matter jurisdiction under § 505(a) of the CWA; (3) NUWF'S citizen suit is barred by NUDEP's diligent prosecution of Bowman under § 505(b) of the CWA; and (4) Bowman did not violate § 404 of the CWA because he did not discharge dredged or fill material into the waters of the United States. (R-5).

Both NUWF and NUDEP filed a Notice of Appeal. NUWF challenges all four of the Court's holdings. NUDEP only challenges the holdings that NUWF did not have standing to bring its citizen suit and that Bowman did not violate § 404 of the CWA.

STATEMENT OF THE FACTS

On June 15, 2011, defendant began land-clearing activity on his one-thousand-acre wetland property in the State of New Union. (R-4). Using a bulldozer, Bowman knocked down trees and other vegetation and pushed the leveled material into long piles called windrows. (R-4). Defendant proceeded to burn the windrows and then push the ashes and remains into trenches he had dug with the bulldozer. (R-4). He then leveled the resulting field, using soil from high portions of the field to fill the trenches and low lying areas. (R-4). Finally, he formed a wide ditch so the new field would drain into the Muddy River. (R-4). Defendant left a strip of land approximately 150 feet wide adjacent to the Muddy, which he intended to clear after his new field had drained. (R-4). The entire process took roughly a month, and Bowman finished his work on or around July 15, 2011. (R-4).

Defendant's wetland property is both adjacent to and hydrologically connected to the Muddy River. (R-3). The property and the Muddy share 650 feet of shoreline, and each year Bowman's wetland is inundated with water when the Muddy rises and floods. (R-3). New Union residents use the Muddy at the location where it meets defendant's property for recreational boating and fishing (R-4). New Union residents also picnic on the Muddy's banks near defendant's property. (R-6).

NUWF is a nonprofit corporation organized under the laws of New Union. (R-4). Its purpose is to protect the fish and wildlife of New Union by preserving the species' habitats. (R-4). Following defendant's land-clearance activity, three NUWF members -- Dottie Milford, Zeke Norton, and Effie Lawless -- testified in sworn affidavits that they feared that the Muddy River was more polluted and that the frog population in the area had decreased as a result of Bowman's actions. (R-6). On August 30, 2011, in response to these residents' complaints, NUWF filed the complaint that initiated this case. (R-4).

Prior to commencement of NUWF's suit, however, NUDEP notified Bowman that his actions violated state and federal law. (R-4). NUDEP and defendant eventually entered into a settlement agreement in which defendant promised not to clear more wetlands in the area. (R-4). The agreement also stipulated that Bowman would convey to NUDEP an easement on the still-wooded part of his property that is adjacent to the Muddy River. (R-4). NUDEP, authorized by a state statute, incorporated the agreement into an administrative order, to which Defendant consented on August 1, 2011. (R-4).

On August 10, 2011, seeking to enforce its order, NUDEP filed a complaint in federal court. (R-5). NUDEP quickly moved to enter a decree identical to the state administrative order. (R-5). Bowman consented to the motion and decree. (R-4). However, that motion is still pending,

because the district court refused to rule on any motions other than NUDEP's motion to intervene in NUWF's case. (R-5). The district court granted NUDEP's motion to intervene in NUWF's suit, and that case is the basis of this appeal. (R-5).

STANDARD OF REVIEW

This is an appeal of the district court's decision to grant defendant's motion for summary judgment. Summary judgment is only appropriate where "there is no genuine issue of material fact and...the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). Because the issues before this Court are questions of law, this Court should review the issues de novo. *Pierce v. Underwood*, 487 U.S. 552, 557 (1988). Thus, this Court should grant no deference to the district court's opinion. *Id*.

SUMMARY OF THE ARGUMENT

The district court erred in holding that New Union did not have standing. NUWF has standing to sue because its members have each suffered an injury in fact in connection with Bowman's land-clearing operations; the interests at stake are germane to NUWF's purpose; and neither the claim asserted or the relief request requires individual members' participation in the lawsuit. *Friends of the Earth, Inc. v. Laidlaw Envtl. Services (TOC), Inc.*, 528 U.S. 167, 169 (2000). NUWF submitted affidavits on behalf of its members showing that Bowman's land-clearing operations directly affected their "aesthetic and recreational interests" recognized in *Sierra Club v. Morton*, 405 U.S. 727, 734 (1972).

The plaintiffs also satisfied the statutory requirements for standing by demonstrating a reasonable fear of polluted waters and concerns of continued wetland destruction. Although one of the plaintiffs admitted that he may have been trespassing when he was frogging on Bowman's land, the other plaintiffs still allege an injury in fact because Bowman's activities negatively

impacted their aesthetic and recreational values of the area. In addition, the decrease in the frog population that resulted from Bowman's activities negatively impacted Plaintiff Norton's frogging activities in areas on the Muddy River other than Bowman's lands. NUWF is seeking civil penalties and an order requiring Bowman to remove the fill material and restore the wetlands. (R. at 5). These civil penalties provide sufficient deterrence to support redressability.

NUDEP, however, does not disagree with all of the district court's holdings. The district court properly held that it lacked subject matter jurisdiction. While a citizen may commence a civil action against an individual who is alleged "to be in violation" of the Clean Water Act, 33 U.S.C. § 1365(a)(1) (2006), the district court does not have subject matter jurisdiction over citizen suits where the alleged violations are wholly past. *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Foundation, Inc.*, 484 U.S. 49, 67 (1987). Here, the plaintiffs fail to prove a violation that continued on or after the date the complaint was filed. Because the defendant's wetland-clearance activities ceased on or about July 15, 2011, any alleged violations which may have resulted from those activities occurred a month and a half before the plaintiffs filed their complaint. *Chesapeake Bay Foundation, Inc. v. Gwaltney of Smithfield, Ltd.*, 844 F.2d 170, 171-2 (4th Cir. 1988).

Further, the plaintiffs fail to adduce evidence from which a reasonable trier of fact could find that an intermittent or sporadic violation was likely to recur. Because the defendant is subject to an administrative order which requires him not to resume any wetland-clearance activities on his property, there is no genuine material factual dispute as to whether the repetition of any alleged pre-complaint violations is likely, and the district court correctly granted summary judgment in favor of the defendant on this count. *Id.*

The court was also correct in holding that NUDEP's actions met the statutory requirements of Section 505(b)(1)(B) of the CWA to bar NUWF's suit. NUDEP commenced a timely civil action just a month after receiving NUWF's notice letter and entered into a settlement agreement with Bowman within a month thereafter. NUWF's suit is barred by NUDEP's diligent prosecution of Bowman.

In the settlement agreement, Bowman agreed not to clear any more wetlands in the area and to convey a conservation easement on the 150-foot-wide strip of still-wooded property adjacent to the Muddy River that he had not yet cleared, plus an additional 75-foot buffer zone between that wooded area and the new field. NUDEP and Bowman incorporated their agreement into an administrative order, authorized by a state statute, to Bowman, to which he consented on August 1, 2011.

The consent decree entered with Bowman in lieu of a monetary penalty is not evidence of lack of diligence. The conservation easement allows public entry for appropriate, day-use-only, recreational purposes, requires Bowman to keep the easement area in its natural state, and forbids him from developing it in any way other than constructing and maintaining the artificial wetland. (R. at 4). This is a cost to Bowman with which the NUDEP could justify not exacting a civil penalty.

Finally, the district court erred in holding that defendant's actions did not constitute an "addition" under the CWA. This Court should reverse the district court's ruling because that court improperly relied on the EPA's Water Transfers Rule and the Eleventh Circuit's holding in *Friends of the Everglades v. South Florida Water Management District*. Both of those precedents applied to water transfers, a process entirely different from the facts of defendant's case. Thus, those two sources are inapplicable here. On the contrary, every circuit court

presented with facts similar to defendant's case has held that defendant's actions constitute an addition under the CWA. This Court should disregard the EPA's Water Transfer Rule and *Friends of the Everglades v. South Florida Water Management District* and instead rely the precedent of its sister circuits. Last, assuming defendant's conduct is an "addition," his actions do not fall under any of the statutory exemptions to § 404 of the CWA. Thus, defendant violated § 404 of the CWA by failing to gain a permit prior to commencing his land-clearing activities.

ARGUMENT

I. New Union Wildlife Federation has standing to sue Jim Bob Bowman for violating the Clean Water Act.

Article III, § 2 of the United States Constitution limits the jurisdiction of federal courts to "cases or controversies." U.S. CONT. art. III, § 2. "[T]he core component of standing is an essential and unchanging part of the case-or-controversy requirement of Article III." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992). To have standing, 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 has to be fairly traceable to the challenged action of the defendant"; and (3) "it must be likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision." *Id.* at 560–561. "In addition to the constitutional standing requirements, an individual also must satisfy any applicable statutory requirements for standing." *Friends of the Earth, Inc. v. Gaston Copper Recycling Corp.*, 629 F.3d 387, 396 (4th Cir. 2011). "An association has standing to bring suit on behalf of its members when its members would 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 individual members' participation in the lawsuit." *Friends of the Earth, Inc. v. Laidlaw Envtl. Services (TOC), Inc.*, 528 U.S. 167, 169 (2000).

New Union Wildlife Federation (NUWF) has established that it has standing to sue on behalf of its members. First, injury in fact was documented by the affidavits and testimony of NUWF members asserting that Bowman's land clearing operations directly affected their "aesthetic and recreational interests" recognized in *Sierra Club v. Morton*, 405 U.S. 727, 734 (1972). Second, the plaintiffs also satisfied the statutory requirements for standing by demonstrating a reasonable fear polluted waters and concerns of continued wetland destruction. Thus, this Court should reverse the district courts holding and find that New Union Wildlife Federation has established standing sufficient to satisfy the requirements of Article III and the Clean Water Act.

a. New Union Wildlife Federation has standing to bring a citizen suit on behalf of its members because Jim Bob Bowman's land clearing operations directly affected their aesthetic and recreational interests.

NUWF has shown that Bowman caused an injury in fact to its members. In *Lujan v. Defenders of Wildlife*, the Supreme Court set forth the requirements to establish standing. The plaintiff must have suffered an "injury in fact" that is "concrete and particularized" and "actual or imminent." 504 U.S. at 560. Also, the injury must be "fairly traceable to the challenged action of the defendant" and it must be "likely that the injury will be redressed by a favorable decision." *Id.* at 561. These are "not mere pleading requirements but rather an indispensable part of the plaintiff's case [and] each element must be supported in the same way as any other matter on which the plaintiff bears the burden of proof." *Id.* Therefore, in response to a summary judgment motion the plaintiff "must set forth by affidavit or other evidence specific facts, Fed. R. Civ. P. 56(e), which for the purposes of the summary judgment motion will be taken to be true." *Id.* The Supreme Court also said that "the desire to use or observe an animal species, even for purely esthetic purposes, is undeniably a cognizable interest for purpose of standing." *Id*. at 562. The members of NUWF use Muddy River for boating, fishing, frogging, and picnicking on its banks.

(R. at 6). They adequately alleged injury in fact when they submitted affidavits expressing concerns that Muddy is more polluted and that there are fewer frogs as a result of Bowman's activities. *Id.*

Although, the lower court found that the new wetland will be richer than the former, the plaintiffs still have standing to sue Bowman. The Supreme Court has stated that "[t]he relevant showing for purposes of Article III standing . . . is not injury to the environment but injury to the plaintiff." *Laidlaw Envtl. Services.*, 528 U.S. at 181. "[E]nvironmental 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 (citing *Sierra Club v. Morton*, 405 U.S. 727, 735 (1972)). However, a plaintiff "claiming injury from environmental damage must use the area affected by the challenged activity and not an area roughly 'in the vicinity' of it." *Lujan*, 504 U.S. at 565–566. The plaintiffs' enjoyment of boating and fishing is adversely affected by Muddy's polluted appearance and lower frog population.

Plaintiffs in this case have standing because they use the area that was affected by the challenged activity. In *Friends of the Earth, Inc. v. Laidlaw Envtl. Services (TOC), Inc*. 528 U.S. at 183–189., the Supreme Court held that standing to bring a citizen suit could be established by affidavits demonstrating that plaintiffs' use of an area was affected by the challenged activity. In that case, the plaintiffs testified that their recreational activities near a river were affected by defendant's discharges, which made the river look polluted. *Id.* at 182. Similarly, NUWF has standing in this case because its members use Muddy River for recreational activities and averred that Bowman's land clearing activities caused Muddy to look more polluted. (R. at 6).

NUWF submitted affidavits from three of its members, Dottie Milford, Zeke Norton, and Effie Lawless, alleging specific facts that support their injury claim. *Id.* They testified that Bowman's land clearing activities affected the integrity of Muddy River, which in turn affected their recreational experiences. *Id.* The affiants testified that they felt a loss from the destruction of the wetlands and expressed concerns that Muddy River is more polluted. *Id.* "Milton testified that the Muddy looks more polluted to her than it did prior to Bowman's activities." *Id.* Norton uses the Muddy River area for recreational and subsistence frogging. Although the lower court found that Norton was trespassing on Bowman's property when he had gone frogging, the plaintiff's observations that there are fewer frogs indicates that, as a result of Bowman's activities, the Muddy River's frog population has been negatively impacted. Because frogs are mobile, Norton's frogging activities in areas on the Muddy River other than Bowman's lands were impacted by the lower frog population. NUWF is seeking civil penalties and an order requiring Bowman to remove the fill material and restore the wetlands. (R. at 5). These civil penalties provide sufficient deterrence to support redressability. Therefore, this Court should find that NUWF has standing to sue Bowman.

b. New Union Wildlife Federation satisfied the statutory requirements for standing by showing that Jim Bob Bowman's land clearing operations created a reasonable fear of polluted waters and a concern for continued wetland destruction.

The citizen suit provision of the Clean Water Act confers standing on any "person or persons having an interest which is or may be adversely affected." 33 U.S.C. § 1365(a), (g) (2006). "The language chosen by Congress confers standing on a broad category of potential plaintiffs who can claim some sort of injury, be it actual or threatened, economic or noneconomic." *Friends of the Earth, Inc. v. Gaston Copper Recycling Corp.*, 204 F.3d 149, 155 (2000) (citing *Middlesex County Sewerage Auth. v. National Sea Chambers Ass'n*, 453 U.S. at

16-17)). The Supreme Court has recognized that this grant of standing reaches the outer limits of Article III. *Id.* "Thus, if a Clean Water Act plaintiff meets the constitutional requirements for standing, then he *ipso facto* satisfies the statutory threshold as well." *Id.*

Plaintiffs may establish an injury in fact by asserting a reasonable fear and concern about the effects of the defendant's activities. *Friends of the Earth, Inc. v. Gaston Copper Recycling Corp*., 629 F.3d 387, 394 (4th Cir. 2011). In *Gaston*, the Fourth Circuit stated that evidence concerning the chemical content or any other negative change in the ecosystem was not required by the Constitution nor embraced by Congress. *Id.* at 394–395 . Moreover, "the harm sought to be addressed by the citizen suit lies in the present or the future, not the past." *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Foundation, Inc.*, 484 U.S. 49, 59 (1987). The NUWF members fear that Muddy River is more polluted as a result of Bowman's activities and will be far more polluted if other adjacent wetlands are cleared and drained for agricultural uses. (R. at 6). This fear was based on their understanding and direct observations of the interactions between the wetlands and Muddy River. The plaintiffs established standing by demonstrating a reasonable fear of polluted waters and concerns of continued wetland destruction. Therefore, this Court should reverse the lower court and hold that NUWF has standing to bring its claim.

II. This Court lacks subject matter jurisdiction under § 505(a) of the Clean Water Act, because any alleged violation resulting from defendant's wetland-clearance activities, which were completed prior to commencement of NUWF's citizen suit, is wholly past.

Section 505(a) of the Clean Water Act ("CWA" or "the Act") provides that a citizen may commence a civil action against any person who is alleged "to be in violation" of an effluent standard or limitation under the Act, or an order issued by the EPA Administrator or a State for such violation. 33 U.S.C. § 1365(a)(1) (2006). A citizen-plaintiff may maintain an action for an ongoing violation, not for violations that are "wholly past." *Gwaltney of Smithfield, Ltd. v.*

Chesapeake Bay Foundation, Inc., 484 U.S. 49, 67 (1987). A plaintiff alleging an ongoing violation may prevail at trial either by proving a violation that continues on or after the date the complaint was filed, or by adducing evidence from which a reasonable trier of fact could find a continuing likelihood that an intermittent or sporadic violation will recur. *Chesapeake Bay Foundation, Inc. v. Gwaltney of Smithfield, Ltd.*, 844 F.2d 170, 171-2 (4th Cir. 1988). Because NUWF fails to satisfy either prong of the *Gwaltney* test, this Court should affirm the district court's decision to grant summary judgment in favor of defendant and hold that there is no ongoing violation required to confer subject matter jurisdiction under § 505(a) of the Act.

a. NUWF fails to allege that defendant has committed a violation which continued on or after the date the complaint was filed.

In assessing a citizen-plaintiff's allegations of an ongoing violation of the CWA, the primary question for the court is whether the defendant was in compliance at the time the complaint was filed. *Atlantic States Legal Foundation, Inc. v. Tyson Foods, Inc.*, 897 F.2d 1128, 1134 (11th Cir. 1990). The court may consider whether the defendant has taken remedial actions to cure the violation; the *ex ante* probability that any remedial measures would be effective; and "any other evidence presented during the proceedings that bears on whether the risk of the defendant's continued violation had been completely eradicated when citizen-plaintiffs filed suit." 844 F.2d 170 at 172.

The courts are divided on what constitutes an ongoing violation. *Aiello v. Town of Brookhaven*, 136 F. Supp. 2d 81, 120 (E.D.N.Y. 2001). Whereas some courts have taken the expansive view that "an ongoing violation exists until the risk of continued violation has been completely eradicated," 136 F. Supp. 2d 81 at 120 (quoting *Wilson v. Amoco Corp.*, 33 F. Supp. 2d 969, 975 (D. Wyo. 1998)), other courts have interpreted the ongoing violation requirement more narrowly, holding that "'continuing residual effects resulting from a discharge are not

equivalent to a continuing discharge.'" *Id.* (quoting *Hamker v. Diamond Shamrock Chem. Co.*, 756 F.2d 392, 397 (5th Cir. 1985)). Because the facts more closely resemble the latter line of cases, this Court should apply the less expansive interpretation of ongoing violation.

The Second Circuit, taking the narrower approach, has noted that "[t]he present violation requirement of the Act would be completely undermined if a violation included the mere decomposition of pollutants." *Connecticut Coastal Fishermen's Assoc. v. Remington Arms, Co., Inc.*, 989 F.2d 1305, 1313 (2nd Cir. 1993) (complaint failed to allege ongoing violation where defendant had permanently ceased operations of trap and skeet shooting club by commencement of the lawsuit, even though lead and clay fragments had not been removed from Long Island Sound). Following the *Remington* approach, the Eastern District of New York held that defendant Town of Brookhaven should not be held liable as a past polluter under the CWA for the ongoing migration of contaminants from the town landfill to a pond. *Aiello*, 136 F. Supp. 2d at 121. Similarly, any alleged violations of the CWA resulting from Bowman's wetland-clearance activities occurred well before NUWF filed its complaint. Consequently, as in *Remington* and *Aiello*, NUWF cannot allege an ongoing violation of the Act, even if there were continuing migration of contaminants from the dredge and fill material at the time the plaintiffs filed suit.

Similarly, in *Orange Env't., Inc. v. County of Orange*, 923 F. Supp. 529, 538 (S.D.N.Y 1996), the Court rejected the plaintiffs' argument that the defendants had not come into compliance with the CWA because wetlands had not been restored to a landfill site. The present condition of the county landfill did not constitute an ongoing violation for the purposes of § 505, because the defendants' compliance with an EPA off-site remediation order brought them into compliance with the Act, thereby rendering moot citizen-plaintiff's claim for injunctive relief. *Id.*

Here, Bowman's consent order with NUDEP, in which the defendant has agreed to convey to the State a conservation easement and restore wetlands on an additional 75-foot-wide portion of his property, has brought Bowman into compliance with the CWA and rendered NUWF's citizen suit moot. As the Supreme Court has noted, § 505's "bar on citizen suits when governmental enforcement action is under way suggests that the citizen suit is meant to supplement rather than to supplant governmental action." *Gwaltney*, 484 U.S. 49 at 60.

Applying a more expansive interpretation of "ongoing violation," the Fourth Circuit held that the defendant plantation owner's violation of the CWA was ongoing, because "each day the pollutant remains in the wetlands without a permit constitutes an additional day of violation." *Sasser v. Adm'r, U.S. Envtl. Prot. Agency*, 990 F.2d 127, 129 (4th Cir. 1993). *See Also Carr v. Alta Verde Indus.*, 931 F.2d 1055, 1061 (5th Cir. 1991) (defendant's failure to obtain an NPDES permit to discharge wastewater from a cattle feedlot amounted to a continuing violation of the CWA). However, unlike the present case, *Sasser* did not involve a citizen suit. Rather, the EPA acted pursuant to an amendment to the Act which authorized the Administrator to assess civil penalties. *See* U.S.C. § 1319(g)(1).

Moreover, whereas in *Sasser*, the defendant refused to comply with two separate EPA administrative orders to cease and desist his discharge activities and restore the wetlands that he had filled, Bowman had entered into an administrative order with NUDEP one month before the citizen-plaintiffs filed their complaint. *Carr* is similarly inapposite, because the basis of the court's holding was that the defendant's "concentrated animal feeding operation" would continue to violate the Act "so long as it has not put in place remedial measures that clearly eliminate the cause of the violation." 931 F.2d 1055 at 1062-3 (quoting *Gwaltney*, 484 U.S. 49 at 69 (Scalia, J., concurring)). Unlike Bowman, the defendant in *Carr* had not entered into a consent order to cure

his alleged past violations. In addition, unlike the present case, the court in *Carr* specifically held that any discharge resulting from a chronic rainfall event would be an intermittent violation of the CWA. 931 F.2d 1055 at 1061.

Further, the Fifth Circuit has clarified that the *Carr* mootness test is only appropriate when considering *voluntary* cessations of CWA violations, because it protects plaintiffs from defendants who "seek to evade sanction by predictable protestations of repentance and reform." *Envtl. Conservation Org. v. City of Dallas,* 529 F.3d 519, 527 (5th Cir. 2008) (quoting *Gwaltney*, 484 U.S. 49 at 66). In light of the administrative order issued by NUDEP, any interest in protecting citizen-plaintiffs from such "predictable protestations" is absent here.

b. NUWF fails to adduce evidence from which a reasonable trier of fact could find a continuing likelihood of recurrence in an intermittent or sporadic violation.

Section 505(a) confers jurisdiction over citizen suits when the citizen-plaintiff makes a "good-faith allegation" of a continuous or intermittent violation. *Gwaltney*, 484 U.S. 49 at 64. In order to prevail on a summary judgment motion dismissing a citizen-plaintiff's suit for failing to satisfy § 505's "in violation" requirement, the defendant must show that there is no genuine material factual dispute as to as to whether repetition of the alleged pre-complaint violations is likely. *Remington,* 989 F.2d 1305 at 1312. If the defendant presents evidence that shows that there is no genuine material factual dispute with respect to whether illegal discharges will continue, the plaintiff must proffer evidence from which the court could find that continuing violations were likely, rather than "some metaphysical doubt as to the material facts." 989 F.2d 1305 at 1312 (quoting *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986)). Here, NUWF has proffered no evidence to show that continuing violations are likely. On the contrary, the fact that Bowman is bound by the administrative order not to resume any

wetland-clearance activities on his property leaves no genuine material factual dispute as to whether the repetition of any alleged pre-complaint violations is likely.

In *Atlantic States Legal Foundation, Inc. v. Eastman Kodak, Inc.* 933 F.2d 124, 127 (2nd Cir. 1991), the court held that a citizen suit for a violation of § 402(b) of the CWA had to be dismissed where state enforcement proceedings had caused the alleged violations to cease "without any likelihood of recurrence." The court rejected the citizen-plaintiff's argument that defendant's CWA violations were part of a "continuing pattern," because the amended complaint failed to include any specific allegations of violations following the date on which the defendant entered into a civil consent order. *Id*. Similarly, NUWF's complaint includes no specific allegations of violations following NUDEP's issuance of the administrative order to which Bowman consented on August 1, 2011. Rather, all of the allegations contained in NUWF's complaint pertain to activities that Bowman ceased on or about July 15, 2011, two weeks prior to the administrative order and a month and a half before NUWF filed suit. Therefore, unless the plaintiff proves that there is a realistic prospect that the alleged violations will continue despite the consent order, its claims for relief are moot. *Envtl. Conservation Org. v. City of Dallas*, 529 F.3d 519, 528 (5th Cir. 2008) (citing 933 F.2d 124 at 127; *Comfort Lake Assoc., Inc. v. Dresel Contracting, Inc.*, 138 F.3d 351, 355 (8th Cir. 2003)).

The Fifth Circuit joined the Second and Eighth Circuits in adopting the "realistic prospect" test (no realistic prospect that the alleged illicit storm sewer discharges would continue where defendant city entered into a consent decree which required the city to pay civil penalties, complete supplemental environmental projects, agree to minimum staffing levels for the sewer monitoring department, and provide ongoing compliance reports). *City of Dallas*, 529 F.3d 519 at 529. The court found that the citizen-plaintiff had failed to point to specific facts that would

allow the court to infer that the City would continue any alleged violations that were not addressed by the consent order. *Id*. Similarly, because the administrative order in the present case addresses in full all of the alleged pre-complaint violations, the plaintiff cannot demonstrate that there is a reasonable likelihood that the defendant would pollute in the future.

In *Sierra Club v. Union Oil Co. of California*, 853 F.2d 667, 670 (9th Cir. 1988), the court found that the citizen-plaintiff made good-faith allegations of "continuous or intermittent ongoing NPDES permit violations" where the complaint alleged 76 separate violations of defendant oil company's NPDES permit. Here, by contrast, the plaintiff has alleged a single, discrete violation of the CWA, not "an ongoing pattern of frequent and substantial non-compliance with the Act." 853 F.2d 667 at 670. *See Also Allen County Citizens for the Env't, Inc. v. BP Oil Co.*, 762 F. Supp. 733, 742 (N.D. Ohio 1991) *aff'd sub nom. Allen County Citizens for Env't, Inc. v. BP Oil Co.*, 966 F.2d 1451 (6th Cir. 1992) ("As a matter of law, the Court finds that one exceedance does not constitute an ongoing violation.") Further, the holding in *Union Oil* was based in part on the good-faith allegation in the complaint that "without the imposition of appropriate civil penalties and issuance of an injunction, defendants will continue to violate their NPDES permit to the further irreparable injury of plaintiff and the public." 853 F.2d 667 at 670. Here, the administrative order to which Bowman is subject renders duplicative any potential remedies from a citizen suit.

III. New Union Wildlife Federation's citizen suit is barred by New Union Department of Environmental Protection's diligent prosecution as set out in § 505(b) of the Clean Water Act.

The EPA has properly delegated authority to NUDEP to implement the CWA. Despite NUWF having standing, section 505(b)(1)(B) of the CWA bars a citizen suit if the "State has commenced and is diligently prosecuting a civil . . . action in a court of the United States . . . to require compliance with the standard, limitation, or order . . ." 33 U.S.C. § 1365(b)(1)(B). In

Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Foundation, Inc., 484 U.S. 49, 60 (1987), the Supreme Court concluded that "the citizen suit is meant to supplement rather than to supplant governmental action." "Although the primary responsibility for enforcement rests with the state and federal governments, private citizens provide a second level of enforcement and can serve as a check to ensure the state and federal governments are diligent in prosecuting Clean Water Act violations." *Sierra Club v. Hamilton Cty. Bd. of Cty. Comm'rs.*, 504 F.3d 634, 637 (6th Cir. 2007). "Enforcement actions are considered diligent if they are capable of requiring compliance with the Act and are in good faith calculated to do so . . . diligence is presumed. Citizen-plaintiffs bear a heavy burden when challenging the diligence of a prosecution." *Sierra Club v. ICG E., LLC*, 833 F. Supp. 2d 571, 578 (N.D.W. Va. 2011). Courts must be especially deferential to the government agency's expertise when a consent decree to cure violations of the CWA is entered into. *See, e.g., Sierra Club v. ICG E., LLC*, 833 F. Supp. 2d 571, 578 (N.D.W. Va. 2011), *The Piney Run Pres. Ass'n. v. The County Comm'rs. Of Carroll County, MD*, 523 F.3d 453, 459 (4th Cir. 2008), *Karr v. Hefner*, 475 F.3d 1192, 1197 (10th Cir. 2007).

Here, NUDEP filed a complaint with the District Court shortly after receiving NUWF's notice letter and negotiated a consent decree with Bowman. The consent decree ordered Bowman to cease clearance of wetlands and convey a public conservation easement on the 150 foot wide strip of still wooded property adjacent to the Muddy River that he had not yet cleared plus an additional 75 foot buffer zone between that wooded area and the new field. (R. at 4). Because of the various policy considerations including, deference to state enforcement action, protection of all of the parties' interests, and the limited scope of citizen suits, this court should find that NUWF's citizen suit is barred by NUDEP's diligent prosecution of Bowman under Section

505(b)(1)(B) of the CWA. *See Citizens Legal Envtl. Action Network, Inc. v. Premium Standard Farms, Inc*., No. 97-6073-CV-SJ-6, 2000 WL 220464, at *12 (W.D. Mo. Feb. 23, 2000).

a. NUWF's citizen suit was barred by NUDEP's timely and commencement and diligent administrative enforcement action against Bowman.

In enacting Section 505(b)(1)(B) of the CWA, Congress sought to prevent duplicative and unnecessary suits. *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Foundation, Inc.*, 484 U.S. 49, 60 (1987). The Supreme Court relied on a Senate Report that said "[t]he Committee intends the great volume of enforcement actions [to] be brought by the State," and that citizen suits are proper only "if the Federal, State, and local agencies fail to exercise their enforcement responsibility." *Id.* (quoting S.Rep. No. 92-414, p. 64 (1971)). The Supreme Court also posited an example that is similar to the situation in the present case.

> Suppose that the Administrator identified a violator of the Act and issued a compliance order . . . [and] 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 . . . 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. at 61. Therefore, much deference should be afforded to state enforcement agencies. *See, e.g., Sierra Club v. ICG E., LLC*, 833 F. Supp. 2d 571, 578 (N.D.W. Va. 2011), *The Piney Run Pres. Ass'n. v. The County Comm'rs. Of Carroll County, MD*, 523 F.3d 453, 459 (4th Cir. 2008), *Karr v. Hefner*, 475 F.3d 1192, 1197 (10th Cir. 2007).

The NUDEP has met all the requirements under 1319(g)(6)(A)(ii). In *Friends of Milwaukee's Rivers v. Milwaukee Metro. Sewerage Dist*., 382 F.3d 743, 755 (7th Cir. 2004), the court indicated that the "diligent prosecution bar" under § 1319(g)(6)(A)(ii) has three requirements – (1) "the state must have commenced an enforcement procedure against the polluter," (2) "the state must be 'diligently prosecuting' the enforcement proceedings," and (3)

"the state's statutory enforcement scheme must be 'comparable' to the federal scheme promulgated in 33 U.S.C. § 1319(g)." (quoting *McAbee v. City of Fort Payne,* 318 F.3d 1248, 1251 (11th Cir. 2003)). The Seventh Circuit held that for the purposes of § 1319(g), an administrative action commences when an agency files a complaint with state or federal court. *Id.* at 757. The court also acknowledged that other circuits have found "that the filing of an administrative consent order prior to the filing of a citizens' suit would in most cases qualify as the sort of administrative action that would bar a citizens' suit for civil penalties." *Id.* at 756.

NUDEP and Bowman agreed to a consent decree on August 1, 2011. The administrative consent order was filed prior to the filing of NUWF's citizen suit on August 30, 2011 and therefore it was timely. The diligence on the part of NUDEP is presumed where it is capable of requiring compliance with the Act and is in good faith calculated to do so. *Id.* at 760 (explaining that the state is the primary enforcer of the CWA and that "courts are not in the business of designing, constructing or maintaining sewage treatment systems."). Finally, the authorizing statute used by NUDEP to issue the administrative order is virtually identical in relevant parts to §§ 309 (a) and (g) of the CWA.

b. NUDEP's prosecution should be presumed diligent absent a pattern of dilatory, collusive or otherwise bad faith conduct in its prosecution of Bowman.

There is a presumption that state prosecutions are diligent in a variety of jurisdictions. *See, e.g., Sierra Club v. ICG E., LLC*, 833 F. Supp. 2d 571, 578 (N.D.W. Va. 2011), *Friends of Milwaukee's Rivers v. Milwaukee Metro. Sewerage Dist*., 382 F.3d 743, 760 (7th Cir. 2004). "This presumption [of diligent prosecution] arises from a variety of policy considerations: deference to state (and federal) decision-making and enforcement authority, protection of litigants' interest in the finality of their cases, preservation of the incentives that polluters might have to settle charges with state or federal authorities, and recognition of the limited and

interstitial role that citizen suits occupy in the overall enforcement regime." *Citizens Legal Envtl. Action Network, Inc. v. Premium Standard Farms, Inc*., No. 97-6073-CV-SJ-6, 2000 WL 220464, at *12 (W.D. Mo. Feb. 23, 2000). On the same token, prosecutions are not *ipso facto* "diligent" and legislative history suggests that a court should exercise its discretion in determining whether there was diligent prosecution. *Id.* at 12-13. The plaintiff bears the burden of proving that the state enforcement agency has not diligently prosecuted the polluter. *See, e.g., Sierra Club v. ICG E., LLC*, 833 F. Supp. 2d 571, 578 (N.D.W. Va. 2011), *The Piney Run Pres. Ass'n. v. The County Comm'rs. Of Carroll County, MD*, 523 F.3d 453, 459 (4th Cir. 2008).

This court should presume the diligence of NUDEP's prosecution of Bowman. The First Circuit, in *North & South Rivers Watershed Ass'n. v. Town of Scituate*, 949 F.2d 552, 557 (1st Cir.1991), stated that courts must give deference to the expertise of the agency. Also, "[t]he court must presume the diligence of the state's prosecution of a defendant 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." *Connecticut Fund For Env't. v. Contract Plating Co., Inc*., 631 F. Supp. 1291, 1293 (D. Conn. 1986). Diligent prosecution of an environmental defendant does not depend on whether "the settlement reached in the state action was less burdensome to the defendant than the remedy sought [by the plaintiffs]." *Id.* at 1294. The question of diligent prosecution must be addressed this way or the state would not be able to "preclude subsequent citizens' suit . . . no matter how diligently the state suit had been prosecuted." *Id.* at 1294. Plaintiffs have not asserted that NUDEP's enforcement action was not in good faith calculated to require compliance.

Unlike *Citizens Legal Envtl. Action Network, Inc. v. Premium Standard Farms, Inc*., No. 97-6073-CV-SJ-6, 2000 WL 220464, at *17 (W.D. Mo. Feb. 23, 2000), where the court found

that some of the alleged violations in the citizen suit and state action might not have shared the same "nucleus of operative fact," the NUDEP suit and NUWF suit arise from the same violations of the CWA. Indeed, on September 15, 2011, NUDEP and NUWF intervened on and consolidated each other's § 505 actions. There is no showing that NUDEP "engaged in a pattern of conduct in its prosecution of the defendant that could be considered dilatory, collusive or otherwise in bad faith." *Connecticut Fund For Env't. v. Contract Plating Co., Inc.*, 631 F. Supp. 1291, 1293 (D. Conn. 1986). The plaintiffs have not shown any evidence that NUDEP had "no intention of acting responsibly" necessary "to impute an improper motive" to NUDEP. *The Piney Run Pres. Ass'n. v. The County Comm'rs Of Carroll County, MD*, 523 F.3d 453, 460 (4th Cir. 2008).

c. NUDEP diligently prosecuted Bowman despite its decision not to include an administrative penalty in the consent decree.

The fact that an agency has entered into a consent decree with a violator does not establish lack of diligence. *Id.* at 459. In fact, "when presented with a consent decree [courts] must be particularly deferential to the agency's expertise." *Id.* In *The Piney Run Pres. Ass'n.*, the court rejected plaintiffs' argument that the consent decree "failed to ensure that violations would not continue." *Id.* The court held that the plaintiffs "failed to meet its high burden of establishing that the [agency enforcement action was not] capable of requiring compliance with the Act and [was not] in good faith calculated to do so." *Id.* at 460.

Section 1365(b)(1)(B) does not require government prosecution to be far-reaching or zealous. It requires only diligence. Nor must an agency's prosecutorial strategy coincide with that of the citizen-plaintiff. *Karr v. Hefner*, 475 F.3d 1192, 1197 (10th Cir. 2007).

> [S]econd-guessing of the EPA's assessment of an appropriate remedy ... fails to respect the statute's careful distribution of enforcement authority among the federal EPA, the States and private citizens, all of which permit citizens to act

> where the EPA has 'failed' to do so, not where the EPA has acted but has not acted aggressively enough in the citizens' view.

Id. at 1197 (quoting *Ellis v. Gallatin Steel Co*., 390 F.3d 461, 477 (6th Cir.2004)). A citizen-plaintiff that seeks stiffer penalties against a polluter does not change the court's deference to a state enforcement agency's judgment. *Comfort Lake Ass'n., Inc. v. Dresel Contracting, Inc*., 138 F.3d 351, 357 (8th Cir. 1998). In *Comfort Lake Ass'n.,*, the court afforded deference to a state agency's decision to reduce civil penalties. *Id.* The court refused to reconsider the issue of civil penalties, indicating that penalties vary according to context and compromises in consent decrees are acceptable. *See Id.* While [citizen plaintiff] might have preferred more severe civil penalties, [the state enforcement agency] has the primary responsibility for enforcing the Clean Water Act. *Id.*

Indeed, the focus of the court should not be *how* violations are prosecuted but *whether* they are prosecuted diligently so that the parties achieve a solution with a degree of permanence. *Friends of Milwaukee's Rivers v. Milwaukee Metro. Sewerage Dist*., 382 F.3d 743, 763 (7th Cir. 2004). In *Friends of Milwaukee's Rivers*, the court focused its inquiry on whether the state's actions would bring compliance and stated that "the presence or absence (or, for that matter, the size) of penalties does little, on its own, to shed light on the diligent prosecution inquiry." *Id* at 761. While they may bring about compliance and deter future violations, "penalties are by no means a *requirement* for compliance to be assured." *Id.* at 762. The Seventh Circuit agreed with the First Circuit in stating that, "duplicative actions aimed at exacting financial penalties in the name of environmental protection at a time when remedial measures are well underway do not further the goals of the CWA. They are, in fact, impediments to environmental remedy efforts." *Id.* at 763 (quoting *North & South Rivers Watershed Ass'n. v. Town of Scituate*, 949 F.2d 552, 556 (1st Cir. 1991)). NUDEP included no penalty in its administrative order to Bowman even

though the statute authorizes penalties up to $125,000 because Bowman consented to NUDEP's decree that was in "good faith calculated to require compliance with the Act." *The Piney Run Pres. Ass'n. v. The County Comm'rs. Of Carroll County, MD*, 523 F.3d 453, 460 (4th Cir. 2008). The consent decree required immediate compliance with the CWA. Also, in September 2011, Bowman observed that the field had sufficiently drained and sowed it with winter wheat. There is no showing that the violations in § 505 complaint will continue.

The consent decree entered by Bowman will ensure compliance with the CWA. In *Sierra Club v. ICG E., LLC*, 833 F. Supp. 2d 571, 579 (N.D.W. Va. 2011), the plaintiffs complained that the "unconscionably small civil penalty imposed . . . was evidence that the Draft Consent Decree [could not] require compliance." The court rejected this argument and focused on the costs of installing new treatment technologies to ensure compliance with the CWA. *Id.* The court also rejected the argument that a small penalty was evidence of bad faith. *Id.* In the present case, the costs of a conservation easement is a similar to the costs of installing new technologies.

Bowman also agreed to convey a conservation easement and a 75 foot buffer zone, which would become a year-round wetland. The easement is over a large portion of his property, relinquishing its agricultural and development value. Also, it allows public entry for recreational purposes and forbids Bowman from future development projects other than maintaining the wetland "at considerable initial expense and an indeterminable future expense." (R. at 8). These expenses constitute an "extreme corrective action" that justifies the waiver of civil penalties. *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Foundation, Inc*., 484 U.S. 49, 61 (1987). "If a defendant is exposed to a citizen suit whenever the [agency] grants it a concession, defendants will have little incentive to negotiate consent decrees." *Karr v. Hefner*, 475 F.3d 1192, 1197 (10th Cir. 2007).

Also, imposing additional monetary penalties on Bowman, who is undertaking a massive remedial project "will not bring about compliance any faster or cause the result to be any more effective – it will just cause the result to be more expensively arrived at." *Friends of Milwaukee's Rivers v. Milwaukee Metro. Sewerage Dist*., 382 F.3d 743, 763. Not only will Bowman be in compliance with the CWA, he will be doing a service to the public as these measures will preserve the aesthetics of the Muddy River and enhance the wetlands environment on the site. Thus, this court should affirm the lower court's decision and find that NUWF's citizen suit is barred by NUDEP's diligent prosecution of Bowman.

IV. Defendant violated the CWA because his actions constitute an addition under the language of the CWA and because he did not seek a permit as required under § 404.

Section 301(a) of the CWA prohibits the "discharge of any pollutant" except in compliance with a permit issued under § 404 of the CWA. 33 U.S.C. § 1311(a). However, under § 404, the Corps may issue permits "for the discharge of dredged or fill material." 33 U.S.C. § 1344(a). Thus, if a person "discharges dredged or fill material" without a permit, he has violated the CWA. The CWA defines "discharge of any pollutant" as "any addition of any pollutant to navigable waters from any point source." 33 U.S.C. § 1362(12). The parties agree that three of the four elements have been satisfied in defendant's case ("pollutant", "navigable waters" and "point source"). The parties only dispute whether defendant's actions constitute an "addition."

Defendant's actions constitute an addition because (1) every circuit court presented with cases similar to defendant's has held defendant's actions an addition and (2) the interpretation of "addition articulated in the EPA's 2008 Water Transfers Rule and *Friends of the Everglades v. South Florida Water Management District* does not apply to defendant's case. Because defendant's activity is an addition of dredged and fill material into navigable waters that does not

qualify as statutory exemption to § 404, and because defendant did not seek a permit as required under § 404, he has violated the CWA.

a. Every circuit court presented with cases similar to defendant's has held that defendant's actions constitute an addition under the CWA.

In cases where people have dredged or excavated material and then replaced that material in the same wetland, courts have held that such activity is an "addition" under the CWA. *See United States v. Deaton*, 209 F.3d 331 (4th Cir. 2000); *Avoyelles Sportsmen's League, Inc. v. Marsh*, 715 F.2d 897 (5th Cir. 1983); *United States v. Huebner*, 752 F.2d 1235 (7th Cir. 1985); *United States v. Cundiff*, 555 F.3d 200 (6th Cir. 2009). In *Deaton* and *Cundiff*, defendants dug drainage ditches using a process called "sidecasting"—redepositing dredged or excavated material back into the same wetland from which it was dug. *United States v. Deaton*, 209 F.3d at 333 and *United States v. Cundiff*, 555 F.3d at 204-05. The Fourth and Sixth Circuit both held that sidecasting was an "addition", and that it therefore constituted a "discharge of pollutant" under the Clean Water Act. *United States v. Deaton*, 209 F.3d at 337 and *United States v. Cundiff*, 555 F.3d at 214. Similarly, in *Avoyelles Sportsmen's League*, after leveling vegetation in wetland and burning the material, defendant redeposited the material into the same wetland. *Avoyelles Sportsmen's League, Inc. v. Marsh*, 715 F.2d at 907. The Fifth Circuit held that defendant's actions constituted an "addition" under the CWA: "We have concluded that the term 'discharge' covers the redepositing of materials taken from wetlands." *Id.* at 923. Lastly, in *Huebner*, the Seventh Circuit held that a § 404 permit is required to use earthmoving equipment to spread soil around wetlands. *United States v. Huebner*, 752 F.2d at 1241-43.

Defendant's actions are similar to the actions in *Deaton*, *Cundiff*, and *Huebner* and virtually identical to the actions in *Avoyelles Sportsmen's League*. Here, exactly like defendant in *Avoyelles Sportsmen's League*, defendant knocked down trees and vegetation, which he then

pushed into piles, burned, and redeposited into the same wetland. However, defendant did not stop there—activity that alone constitutes a § 404 violation. Defendant also scooped out material and dumped it into another area of the wetland in order to create a "wide ditch" so his new field would drain into the Muddy River—an action the Fourth and Sixth Circuits labeled an addition in both *Deaton* and *Cundiff*.

In addition, the District Court mischaracterized the facts of defendant's case in its attempt to distinguish it from *Deaton*. According to the District Court, "nothing is added when a defendant moves soil, no matter what you call it, a mere few feet within a wetland." Contrary to this assertion, defendant did not simply move soil a "mere few feet within a wetland." In reality, defendant excavated natural materials, pushed the excavated materials into piles, burned the piles, and then mixed the remains into previously pure soil by leveling the entire field multiple times. Furthermore, exactly like defendant in *Deaton*, defendant dug a "wide ditch" for drainage purposes. As *Deaton*, *Cundiff*, *Huebner*, and *Avoyelles Sportsmen's League* all demonstrate, relevant case law holds that defendant's activity is an "addition."

Finally, the District Court incorrectly invoked *National Wildlife Federation v. Gorsuch* and *National Wildlife Federation v. Consumers Products Company* to support its opinion. In both of those cases, water flowed through a manmade structure[1] and then entered a body of water on the opposite side. *National Wildlife Federation v. Gorsuch*, 693 F.2d 156 (D.C. Cir. 1982) and *National Wildlife Federation v. Consumer Products Company*, 862 F.2d 580 (6th Cir. 1988). In those cases, therefore, water ended up in a place where it naturally and expectedly was meant to go. Here, defendant's leveling, burning, redepositing, and ditch digging were neither a natural nor expected activities. In addition, both *Gorsuch* and *Consumers Products* dealt with the

[1] In *Gorsuch*, the water flowed through a dam. In *Consumers Products*, the water flowed through a hydroelectric power generator.

movement of water, unlike defendant's case, which deals with the movement of dredged and fill material. Both cases, therefore, are factually distinguishable. Lastly, *Gorsuch* and *Consumer Powers* are undermined by recent cases that are factually similar to defendant's case. In fact, the Sixth Circuit's 2009 opinion in *Cundiff*—a case significantly more similar to defendant's than *Consumer Products*—renders irrelevant its 1988 *Consumer Products* decision on which the district court relied.

b. The interpretation of addition adopted in the EPA's 2008 Water Transfer Rule and *Friends of the Everglades v. Water Management District* does not apply to defendant's case.

The sole reason that the above precedents are in question is because of the EPA's 2008 Water Transfer Rule ("WTR" or "the rule") and *Friends of the Everglades v. South Florida Water Management District*, a case in which the Eleventh Circuit applied the WTR. However, neither the WTR nor *Friends of the Everglades* apply to defendant's case.

In *Friends of the Everglades*, defendant used a pumping station to pump polluted water from a South Florida canal into Lake Okeechobee. *See Friends of the Everglades v. South Florida Water Management Dist*., 570 F.3d 1210 (11th Cir. 2009). Defendant cited the EPA's WTR to argue that its actions were not an "addition" under the CWA. *Id*. at 1219. In the rule, the EPA adopted the "uniform water theory", which holds that "all United States navigable waters are one." *Id*. Defendant argued that because all waters are one under this theory, moving water from one of the United State's navigable waters into another does not constitute an "addition" under the CWA. *Id*. The Eleventh Circuit held that the CWA's meaning of "addition" was ambiguous, and that the WTR was therefore entitled to *Chevron* deference. *Id*. at 1228. Under *Chevron* analysis, the court decided that the EPA's adoption of the uniform water theory in the WTR was a reasonable interpretation of the CWA. *Id*. Then, applying the WTR, the Eleventh Circuit held that moving an existing pollutant from one navigable water to another is

not an "addition." *Id*. However, the District Court erred when it applied *Friends of the Everglades* to defendant's case.

First, the EPA's WTR—the basis for the *Friends of the Everglades* decision—does not apply to defendant's case because it only applies to "water transfers" and NPDES permits as required under § 402. National Pollutant Elimination System (NPDES) Water Transfers Rule, Final Rule, 73 Fed. Reg. 33697 (June 13, 2008 (codified at 40 C.F.R. §122.3 (2008). The WTR does not propose a definition of "addition" nor does it propose an always applicable theory under which to interpret the CWA. Instead, the EPA intended that the rule set a narrow policy for specific activity—water transfers that require NPDES permits under § 402. In its preamble, the rule expressly states:

> This rule focuses *exclusively* on water transfers and does not affect any other activity that may be subject to NPDES permitting requirements. (emphasis added). *Id*.

The WTR defines a water transfer as: "an activity that conveys or connects waters of the United States without subjecting the *transferred water* to intervening industrial, municipal, or commercial use." *Id*. (emphasis added). Later on, the rule explains that it pertains to a specific context:

> taken as a whole, the statutory language of the CWA indicates that Congress generally did not intend to subject *water transfers* to the NPDES program. Interpreting the term "addition" in *that context*, EPA concludes that *water transfers*, as defined by today's rule, *do not constitute an "addition.*" (emphasis added). *Id*. at 33701.

By using this language, the EPA clearly intended that the rule apply only to "water transfers" that previously required a NPDES permit under § 402.

Defendant's case, however, does not deal with a "water transfer" and does not involve § 402 of the CWA. Instead, defendant's case deals with dredged and fill material—vegetation, ashes, and other biological material that was removed from and then redeposited into defendant's wetland. No language in the WTR supports extending the rule to cover the pollutants here.

Additionally, no language in the WTR supports extending the rule to cover any section of the CWA other than § 402. In fact, the rule specifically states: "today's rule has no effect on the 404 permit program, under which discharges of dredged or fill material may be authorized by permit."[2] *Id*. at 33703. Furthermore, when the WTR was codified, it was codified to apply to NPDES permits only. 40 C.F.R. §122.3 (2008). Under the CWA, because NPDES permits pertain solely to § 402, this rule has no bearing on the application of § 404. Thus, the WTR and *Friends of the Everglades*, a decision anchored by the WTR and relied on by the District Court, do not apply to defendant's case.

Second, the EPA itself has argued that the redepositing of dredged and fill material should be considered a "discharge of a pollutant" (and therefore an addition) under § 404 of the CWA. In *Greenfield Mills, Inc. v. Macklin*, defendant drained a hatchery supply pond into a river, an act that resulted in a large influx of dredged and fill material into the river. *Greenfield Mills, Inc. v. Macklin*, 361 F.3d 934 (7th Cir. 2004). In its Amicus Brief, the EPA cited case law in order to support its argument that defendant's actions were a "discharge of a pollutant":

> The courts of appeals have consistently recognized that materials that have been scooped up and then redeposited in the same waterbody can result in a discharge of pollutant" *Id*. at 948.

Thus, the EPA's brief demonstrates that the EPA considers it a "discharge of a pollutant" (and therefore an "addition") when materials are "scooped up and redeposited in the same

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[2] In the Code of Federal Regulations, the EPA has defined "dredged material" as "material that is excavated or dredged from the waters of the United States." 33 C.F.R. §323.2(c) (2008). "Fill material" is defined as "any material [that] has the effect of: (i) replacing any portion of the water of the United States with dry land; or (ii) changing the bottom elevation of any portion of a water of the United States." 33 C.F.R. §323.2(e)(1)(i)-(ii) (2008).

The material in defendant's case falls within these definitions. Because the materials were taken from his wetland, the materials clearly were "excavated…from the waters of the United States." In addition, defendant excavated and redeposited the material in order to turn the wetland into a field on which he could farm. It is clear, therefore, that he intended to "replace [a]…portion of the water…with dry land."

waterbody." *Id*. Although *Greenfield Mills* was decided prior to the WTR, the case shows that, historically, the EPA has always intended for "scooped up and redeposited" materials to require a § 404 permit. *Id*. *Greenfield Mills* is equally important because it shows the EPA departed from its stance taken in *Gorsuch* and *Consumers Products*—earlier cases involving water transfers through manmade structures. This departure further proves that the EPA always has viewed cases involving strict water transfers (like *Friends of the Everglades*) differently than it views cases involving dredged or fill material (like defendant's).

In conclusion, the EPA itself classified the redeposit of dredged or fill material as a discharge of a pollutant (and therefore an "addition") in *Greenfield Mills*. Furthermore, in its WTR, the EPA stressed that the rule apply "exclusively" to "water transfers" and not to activity covered by the § 404 permit program. For these two reasons, this court should not apply the WTR or *Friends of the Everglades* to defendant's case. Such an application would misread the rule and disregard the EPA's long-time intent to differentiate between water transfers and the discharge of non-water pollutants. Because neither the WTR nor *Friends of the Everglades* apply to defendant's case, this Court should adopt the overwhelming view of its Sister Circuits and hold that defendant's actions are an "addition" under the CWA.

c. Defendant's actions do not qualify under the farming exemption or drainage ditch exemption to the §404 permit requirement.

Finally, defendant's case is a not valid exemption to the § 404 permit requirement. In order to be exempt from § 404, defendant bears the burden of establishing that (1) his activity is one of the listed exemptions in § 404(f)(1) and (2) his activity does not violate the recapture provision in § 404(f)(2). *Greenfield Mills, Inc. v. Macklin*, 361 F.3d at 949. These §404 exemptions are to be construed narrowly by courts. *United States v. Huebner*, 752 F.2d at 1240-41. Defendant fails to prove either of these requirements.

First, defendant's activity does not fall under § 404(f)(1)(a)—the farming exemption. In order for activity to fall under the farming exemption, it "must be a part of an established (i.e., ongoing) farming, silviculture, or ranching operation." *United States v. Cundiff*, 555 F.3d at 215, (quoting 33 C.F.R. §323.4(a)(3)). Here, there is no evidence to support the idea that defendant's activity was intended as part of an ongoing agricultural operation. In fact, there is no evidence, and the District Court never mentions, that defendant ever took part in agricultural operations *prior* to his clearing of the wetland property. Thus, it is clear that defendant's activity is not excused under the farming exemption in § 404(f)(1).

Second, defendant's activity does not fall under § 404(f)(1)(c)—the drainage ditch exemption. The language of § 404(f)(1)(c) specifies that a defendant does not need a permit "for the purpose of *construction or maintenance* of...irrigation ditches, or the *maintenance* of drainage ditches." (emphasis added). 33 U.S.C. § 1344(f)(1)(c). The difference in language is critical:

> while the exemption applies to the *maintenance or construction* of...irrigation ditches, it only applies to the *maintenance* of drainage ditches and not their construction. The regulations make this explicit. (emphasis added). *United States v. Cundiff*, 555 F.3d at 215, (quoting 33 C.F.R. §323.4(a)(3)).

Here, defendant created "drainage ditches" not "irrigation ditches." Therefore, the exemption would only apply if defendant's activity constituted "maintenance of drainage ditches" (not the construction of them). However, as the District Court opinion makes clear, defendant created the drainage ditches. Thus, because defendant dug "drainage ditches", and because defendant constructed them rather than maintained them, the § 404(f)(1)(c) exemption does not apply.

Finally, even if one of these exemptions did apply to defendant's case, he failed to satisfy the recapture provision required by § 404(f)(2). The recapture provision is a catchall provision that mandates a permit for

> 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 reduced *Id*. (quoting § 404(f)(2)).

These two requirements are "conjunctive," which means "the recapture provision is applicable only when both of these conditions are present." *Greenfield Mills, Inc. v. Macklin*, 361 F.3d at 954. Thus, defendant is not exempt under § 404(f)(2) if his conduct: (1) brought his wetland into a use to which it was not previously subject *and* (2) caused the flow or circulation of his wetland to be impaired or the reach of his wetland to be reduced. *Id*. at 956.

Courts have held that actions similar to defendant's bring wetlands into a use to which they were not previously subject and cause the flow or circulation of a wetland to be impaired. In *Cundiff*, defendant admitted that his land-clearing activity was intended to dry out the wetlands and transform them into farmland suitable for crop production. *United States v. Cundiff*, 555 F.3d at 215. In *Avoyelles Sportsmen's League*, defendant cut down vegetation, leveled the land, and dug at least one ditch to increase drainage in order to change the property from a forest to a soybean field. *Avoyelles Sportsmen's League, Inc. v. Marsh*, 715 F.2d at 926. The Sixth and Fifth Circuits, respectively, both held that defendants' uses of their wetlands satisfied both prongs of the recapture provision and therefore required a permit under § 404. *United States v. Cundiff*, 555 F.3d at 215; *Avoyelles Sportsmen's League, Inc. v. Marsh*, 715 F.2d at 926.

Here, defendant's intentions and actions are the same as defendants' intentions and actions in *Cundiff* and *Avoyelles Sportsmen's League*. Defendant had to clear and burn the vegetation, redeposit the remains into the wetland, and then level the new field. If not for these actions, his wetland would have remained unfarmable land. Thus, defendant's decision to clear, dry out, and flatten the wetland were essential to transforming the nature and use of his wetland. Consequently, his plan finally came to fruition in September 2012 when "Bowman observed that the field had sufficiently drained to plant and sowed it with winter wheat." (R. 5). Thus, at that

point, the land had been transformed from a wetland into a field capable of being farmed and had been dried out by defendant redepositing the excavated material in order to reduce the wetland's water level. Therefore, like in *Cundiff* and *Avoyelles Sportsmen's League*, defendant's conduct (1) brought the wetland into a use which it was not previously subject and (2) caused the flow or circulation of navigable waters be impaired or reach of such waters reduced. Because defendant's activity satisfies both elements of the recapture provision, he was required to gain a permit under § 404 prior to commencing his land-clearing activities.

CONCLUSION

This Court should hold that Bowman violated §§ 301(a) and 404 of the CWA, because every circuit court presented with facts similar to the present case has held that defendant's actions constitute an addition under the CWA, and the EPA's Water Transfer Rule and *Friends of the Everglades v. South Florida Water Management District* are inapplicable. Further, this Court should hold that NUWF has standing to sue Bowman for violating the CWA, because its members each allege an injury in fact in connection with Bowman's land-clearing operations; the interests at stake are germane to NUWF's purpose; and neither the claim asserted or the relief request requires individual members' participation in the lawsuit.

However, there is no ongoing violation required to confer subject matter jurisdiction, as required by § 505(a) of the Act, because the violation ended more than a month before the plaintiffs' filed their complaint, and plaintiffs fail to show that recurrence of an intermittent or sporadic violation is likely. Moreover, NUWF's citizen suit is barred by NUDEP's diligent prosecution of Bowman under § 505(b) of the Act, because NUDEP commenced a timely civil action just a month after receiving NUWF's notice letter and entered into a settlement agreement with Bowman within a month thereafter.

Finally, defendant's actions constitute an addition because every circuit court has held such actions an addition, the sole precedent relied on by the district court does not apply to defendant's case, and defendant's actions do not fall under any of the CWA's statutory exemptions. Thus, because defendant's actions are an addition of a pollutant, and because he did not seek a permit in order to conduct his activity, defendant has violated § 404 of the CWA.

For the foregoing reasons, NUDEP respectfully requests that this Court reverse the district court's decision to grant Bowman's motion for summary judgment regarding NUWF's standing and whether Bowman has violated the CWA. NUDEP also requests that this Court affirm the district court's decision to grant Bowman's motion for summary judgment as to whether there is an ongoing violation of the Act and whether NUWF's citizen suit is barred by NUDEP's diligent prosecution.

Respectfully Submitted,

Counsel for New Union
Department of Environmental
Protection