Team No. 13

C.A. 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 Order of the United States District Court
for the District of New Union,
Civ. No. 149-2012, Dated June 1, 2012.

Brief for Defendant-Appellee

Oral Argument Requested

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STATEMENT OF JURISDICTION

I. Jurisdiction Below

Jurisdiction in the district court below is contested. If the district court had subject matter jurisdiction, it would have been based on section 505(a) of the Clean Water Act. 33 U.S.C. § 1365(a) (2006).

II. Jurisdiction on Appeal

The district court entered summary judgment, a final order in favor of Defendant-Appellee, Jim Bob Bowman, on all issues. New Union Wildlife Federation and New Union Department of Environmental Protection filed timely notices of appeal. Therefore this Court has jurisdiction under 28 U.S.C. § 1291.

STATEMENT OF THE ISSUES

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

II. Whether New Union Wildlife Federation's citizen suit has been barred by New Union Department of Environmental Protection's diligent prosecution of Jim Bob Bowman as set out in section 505(b) of the Clean Water Act.

III. Whether there is a continuing or ongoing violation as required by section 505(a) of the Clean Water Act for subject matter jurisdiction.

IV. Whether Jim Bob Bowman violated the Clean Water Act 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 case involves a nonprofit organization's prosecution against a farmer working to clear his land and allegedly violating sections 301(a) and 404 of the Clean Water Act. (R.4.) On July 1, 2011, New Union Wildlife Federation ("NUWF") sent a notice of intent to sue to Jim Bob Bowman ("Bowman"), the Environmental Protection Agency ("EPA"), and the New Union Department of Environmental Protection ("NUDEP"). (R. 4) NUDEP soon contacted Bowman and they entered into a settlement agreement, which NUDEP incorporated into an administrative order. (R. 4) NUDEP filed an action in the United States District Court for the District of New Union on August 10, 2011. (R. 5) On September 5, 2011, NUDEP moved to have the administrative order adopted as a consent decree. (R. 5)

Despite NUDEP's enforcement actions, NUWF filed its own action on August 30, 2011, against Bowman under section 505(a) of the Clean Water Act ("CWA" or "the Act") in the United States District Court for the District of New Union. (R. 5) NUWF asked the court to issue civil penalties, order removal of the alleged fill material, and restore the wetland. (R. 5) NUWF's action against Bowman is the case before this Court today. On September 15, 2011, a month and half after filing its own suit, NUWF sought to intervene in NUDEP's action against Bowman. (R. 5.)

The district court held a status conference for both cases on November 1, 2011. (R. 5.) The court allowed NUDEP to intervene in NUWF's case, but has refrained from ruling on any motion in NUDEP's case. (R. 5.) Thus, NUDEP's action is still pending. (R. 5.) In the present case, after discovery, NUWF moved for summary judgment on whether Bowman violated the CWA. (R. 5.) Bowman also moved for summary judgment on four grounds: (1) NUWF lacks standing; (2) NUWF's action was barred because NUDEP had already commenced an

enforcement action and resolved the alleged violations; (3) the district court lacked jurisdiction because any violation was wholly past; and (4) NUWF failed to show Bowman added anything to the nation's waters and therefore did not violate the CWA. (R. 5.) NUDEP joined Bowman on the second and third grounds, and joined NUWF on the first and fourth. (R. 5.)

The district court granted summary judgment in Bowman's favor on all four grounds and denied NUWF's motion. (R. 5.) NUWF and NUDEP both filed a timely appeal. (R. 1.)

STATEMENT OF THE FACTS

Bowman owns one thousand acres, some of which abuts the Muddy River. (R. 3.) He recently worked to clear his land with the hopes of raising wheat. (R. 4.) He used a bulldozer to push trees and vegetation, and pushed soil from high spots to low spots of the field. (R. 4.) He formed a wide swale that ran to the bank of the river that drained excess water from the field. (R. 4.) The end result was a field in which he could plant winter wheat by September 2011, which he did. (R. 4–5.)

While Bowman worked his field, he received a notice from NUWF, a nonprofit corporation that seeks to protect wildlife and its habitat, claiming he violated the CWA. (R. 4.) Soon thereafter, NUDEP contacted him. (R. 4.) Bowman felt that he had done nothing wrong, but decided to settle the issue by consenting to NUDEP's remedial administrative order. (R. 4.) NUDEP, in lieu of issuing civil penalties, required Bowman to convey a conservation easement, which includes a buffer zone on the remaining wooded piece of land that abuts the river. (R. 7.) Bowman has already conveyed the easement to NUDEP. (Question & Answer No. 8.) He agreed to construct and maintain a year-round wetland on the seventy-five foot buffer zone. (R. 4.) The conservation easement requires that the land stay in its natural state, forbidding any

development and allowing public entry for appropriate use during the day, including recreational uses. (R. 4.)

Just four weeks after being contacted by NUDEP, Bowman consented to all the terms of NUDEP's administrative order. (R. 4.) Ten days later NUDEP filed suit in federal court against Bowman, and within a month moved to have the administrative order adopted as a decree. (R. 5.) Bowman consented to NUDEP's motion. (R. 5.) However, that motion is still pending in the other court while the present action progresses. (R. 5.) About a week before NUDEP moved to enter the administrative order as a decree, NUWF filed the present action seeking fines and an order demanding Bowman restore the property to its original condition. (R. 5.)

NUWF is a nonprofit corporation who seeks to protect fish and wildlife habitat. (R. 4.) Three of NUWF's members, Dottie Milford, Zeke Norton, and Effie Lawless, testified that they boat, fish, and picnic on the river and its banks on or in the vicinity of Bowman's property. (R. 6.) They testified that they are aware of the valuable functions wetlands serve for rivers. (R.6.) They admitted they cannot see a difference in the land from the river or the banks, yet they claim to be aware of the differences and feel a loss from what Bowman has done. (R. 6.) Ms. Milford claims the river looks more polluted than it did before Bowman's work. (R. 6.) NUWF's members have not changed their behavior or use of the Muddy River since Bowman's activities. (Question & Answer No. 36.)

Mr. Norton testified that he had frogged the area for years and that Bowman's property was especially good for frogging. (R. 6.) He claimed he could always get a dozen good-sized frogs in the right season, but after Bowman's work, he could not find any frogs in the field and would be lucky to find two or three good-sized frogs in the remaining woods and buffer area. (R. 6.) A NUDEP biologist testified that eventually the new wetland in the buffer zone would

provide richer wetland habitat than the former wetland. (R. 6.) Norton also testified that the Bowman property was properly posted against trespassing and that Mr. Norton "supposed he might have been trespassing" on Bowman's property when frogging. (R. 6.)

The district court, facing conflicting motions for summary judgment held that NUWF lacked standing to sue, that NUWF's suit is barred because NUDEP is diligently prosecuting Bowman's alleged violation, that any alleged violation would not be continuing, and finally, that Bowman did not violate the CWA. (R. 11.)

SUMMARY OF THE ARGUMENT

Bowman maintains that NUWF, and its members, have no right to challenge his working of his land in court. First, NUWF and its members lack standing to sue. They have failed to show how Bowman's activities have affected their particular use of the Muddy River. They never gave a specific location where they were injured and they never claimed that their particular use or enjoyment of the Muddy River was diminished. Also, NUWF cannot base their standing on an injury that occurs only while trespassing on Bowman's property. Next NUWF cannot bring this suit while the state agency is diligently prosecuting any claimed violations. NUDEP filed a civil action before NUWF filed its own action and NUDEP acted quickly when it issued an administrative order within four weeks of discovering Bowman's activities. In addition, the court lacked jurisdiction over NUWF's suit because any alleged violation of the CWA is wholly past. Not only is Bowman no longer clearing the land, he has consented to NUDEP's order. Finally, Bowman maintains that he did not violate the Clean Water Act. A plain reading of the Act shows that a person must add pollutants, or dredged or fill material to violate the law. Bowman never added pollutants, or dredged or fill material, to his land. He merely worked to clear the land and move soil from one place to another within his

property. He never added anything to the waters of the United States. For the foregoing reasons, this Court should affirm the district court's granting summary judgment on all issues.

STANDARD OF REVIEW

The standard of review of the district court's grant of summary judgment is *de novo*. Elkins v. District of Columbia, 690 F.3d 554, 561 (D.C. Cir. 2012). Summary judgment is proper where there are no genuine issues of material fact and the movant is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(a).

This Court may affirm the district court's summary judgment on a legal theory that differs from the one upon which the district court relied. Blackman v. N.Y.C. Transit Auth., 491 F.3d 95, 100 (2d Cir. 2007) (per curiam); Wilburn v. Robinson, 480 F.3d 1140, 1148 (D.C. Cir. 2007).

ARGUMENT

I. NUWF lacks standing because its members have failed to establish, through specific facts, an injury in fact, and because member Norton's injury, for purposes of standing, cannot be based on an unlawful act.

"Article III of the Constitution limits federal-court jurisdiction to 'Cases' and 'Controversies.'" Massachusetts v. EPA, 549 U.S. 497, 516 (2007). This requires a plaintiff to prove it has suffered an "injury in fact" that is a cognizable legal interest, concrete and particularized, actual or imminent, and not conjectural or hypothetical. Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc., 528 U.S. 167, 180–81 (2000) (citing Lujan v. Defenders of Wildlife, 504 U.S. 555, 560–61 (1992)). In addition, an organizational plaintiff, such as NUWF, only has standing "when its members would otherwise have standing to sue in their own right." Friends of the Earth, 528 U.S. at 181. Finally, "[t]he party invoking federal jurisdiction

has the burden of establishing these elements." Defenders of Wildlife, 504 U.S. at 561.

NUWF has not satisfied its jurisdictional burden because, first, it has not established through specific facts that it has suffered an injury in fact; and second, any injury NUWF member Norton has suffered is not a legally recognized injury because it is based on his unlawful use of Bowman's property. These issues are discussed below.

A. NUWF's members, aside from Zeke Norton, have failed to claim with specific facts that Bowman's activities affected their area of use or lessened their particular use and enjoyment of that area.

NUWF's members have not established a concrete and particularized injury —aside from Zeke Norton— with the requisite specific facts, nor have they claimed their particular use or enjoyment of the Muddy River has been impaired in anyway. (See R. 6.)

A plaintiff's claimed injury must be "concrete and particularized and [] actual or imminent, not conjectural or hypothetical." Friends of the Earth, 528 U.S. at 180. For purposes of summary judgment, a "plaintiff [cannot] rest on . . . mere allegations, but must set forth by affidavit or other evidence 'specific facts' . . . , that for purposes of the summary judgment motion will be taken as true." Defenders of Wildlife, 504 U.S. at 561 (quoting Fed. R. Civ. P. 56(e)). This means 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." Defenders of Wildlife, 504 U.S. at 565-66 (citing Lujan v. Nat'l Wildlife Fed'n, 497 U.S. 871, 889 (1990)); see also Pollack v. U.S. Dep't of Justice, 577 F.3d 736, 742 (7th Cir. 2009). If a plaintiff's claim lacks specific facts, the court cannot "'presume' the missing facts because without them the affidavits would not establish the injury that they generally allege." Nat'l Wildlife Fed'n, 497 U.S. at 889.

In Pollack, the plaintiff lacked standing to bring a CWA challenge against various

government agencies for the discharge of lead bullets into Lake Michigan. 577 F.3d at 738. In his affidavit, Pollack claimed that he was injured because he feared that the discharged bullets had contaminated his drinking water and that he would be less likely to visit "the public areas along the Illinois portion of Lake Michigan" because of the discharged bullets. Id. at 741. The Court of Appeals for the Seventh Circuit found neither of these injuries was sufficient to establish standing. Id. First, the court explained that Pollack was "not downstream from the alleged pollutants and it is unclear whether their presence affects him" or his drinking water. Id. Second, relying on National Wildlife Federation, the court found the Lake Michigan shoreline Pollack visited stretched "for approximately 70 miles, and Pollack never specifie[d] where along that shoreline he visits. Accordingly, his generalized statements that he visits the Illinois shoreline of Lake Michigan . . . [does] not give rise to standing . . . ."

Conversely, in Friends of the Earth, the Supreme Court found that the plaintiff's reasonable concerns about water pollution lessened their enjoyment of the affected area and this was sufficient to establish an injury for purposes of standing. 528 U.S. at 183. The plaintiffs in Friends of the Earth brought a CWA citizen suit against Laidlaw Environmental Services ("Laidlaw") for unlawfully exceeding its pollution discharge permit limits. Id. at 177. One Friends of the Earth member claimed that he lived a half-mile away from Laidlaw's facility and when he drove over the river, "it looked and smelled polluted . . . ." Id. at 181. He further claimed that he wanted to fish and swim in the river between three to fifteen miles downstream from the polluting facility as he had when he was a teenager, but that he would not "because he was concerned that the water was polluted by Laidlaw's discharges." Id. at 181–82. Other members similarly claimed they wished to picnic, hike the shores, birdwatch, camp, boat, canoe,

or drive near the river but would forgo such activities because of their concern about Laidlaw's unlawful discharges. Id. at 182.

In NUWF's case, assuming Bowman's activity has actually polluted the Muddy River as Dottie Milford claims, NUWF's members have not testified that their specific use of the Muddy River occurs in the discrete area downstream from Bowman's property. (See R. 6.) Rather, they have only generally testified that they use the river "in the vicinity" of his property. (R. 6.) This is unlike Friends of the Earth where the plaintiffs indicated that their specific desired use of the affected river was downstream from Laidlaw's facilities, 528 U.S. at 181–82, because NUWF has made no such claim. NUWF's members have never specifically claimed to use the Muddy River in the area downstream from Bowman's property, the only area of the Muddy that may have been affected by Bowman's challenged activity. (See R. 6.) In addition, like the plaintiff in Pollack, who never specified which portion of the seventy miles of Illinois's Lake Michigan shoreline he actually used, NUWF's members never specifically established which portion of the Muddy's eighty-mile expanse they use. (See R. 6.) Further, this Court cannot presume NUWF's members' use of the Muddy is in the affected area because NUWF had an opportunity to establish this fact during discovery and they did not. Given these facts, under Pollack, and National Wildlife Federation, NUWF lacks standing because they claimed only general injury from environmental damage but have not claimed they use the specific and discrete area of the Muddy River actually affected by Bowman's activity.

Finally, unlike in Friends of the Earth, none of NUWF's members, aside from Norton, have claimed their particular use, or enjoyment, of the Muddy River has decreased, or that they use the river any less frequently because of their concerns. (Question & Answer No. 36.) Without making such a claim, NUWF's members have failed to claim a concrete and

particularized injury. In Friends of the Earth, plaintiff's members established an injury in fact, not because the river was more polluted—because standing does not require a plaintiff to show harm to the environment—but because their use and enjoyment of the river decreased because of Laidlaw's activity. 528 U.S. at 183. While NUWF members have a general fear that the Muddy River is more polluted, they never claim these changes have lessened their use or enjoyment of the Muddy River and therefore they have failed to established a concrete and particularized injury in fact.

B. Zeke Norton's injury is not judicially or legally cognizable because his injury is based on his unlawful use of Bowman's property.

Alleging an injury in fact is not enough to establish standing. Aurora Loan Servs., Inc. v. Craddieth, 442 F.3d 1018, 1024 (7th Cir. 2006). "The alleged injury must be legally and judicially cognizable. This requires, among other things, that the plaintiff[s] have suffered 'an invasion of a legally protected interest.'" Id. (quoting Raines v. Byrd, 521 U.S. 811, 819 (1997); Defenders of Wildlife, 504 U.S. at 560). One does not have a judicially recognized right to trespass on another's property. See Restatement (Second) of Torts § 158 (1965). Given this, an injury in fact cannot be predicated on the impairment to an area that the plaintiff has no right to use. Conservation Council v. Costanzo, 505 F.2d 498, 502 (4th Cir. 1974).

In Costanzo, the environmental plaintiffs sought to enjoin construction activities on a privately owned island off the coast of North Carolina. Id. at 500. In this case, plaintiffs had previously fished, camped, and birdwatched on the private island. Id. at 501 n.3. Some had been given permission, and therefore were licensees; others had trespassed. Id. at 502. The court held the plaintiffs' claim for standing "was predicated upon plaintiffs' recreational use as either a licensee or a trespasser" and the court found "little difficulty in holding they have suffered no

injury due to any impairment of their use" of the private island. Id. at 502. Because they failed to indicate, or allege, that the private island's owner would continue to allow such uses in the future, the court found no standing. Id.

Norton should not be allowed to base his injury on the right to trespass. Norton claims that Bowman's activities have decreased the amount and size of frogs he finds on Bowman's property—the same property on which Norton trespassed. (R. 6.) Furthermore, Norton never claimed that Bowman's activities have affected his frogging on any property on which Norton had a legal right to frog. (See R. 6.) Like in Costanzo, Norton's standing cannot be based on the use of an area to which he has no present, or future, legal right of use. Furthermore, NUDEP's biologist testified that the easement Bowman conveyed to NUDEP will provide a more productive frog habitat than the former wetland. (R. 6.) Norton will have legal access to this improved wetland. (R. 6.) Therefore, Norton, and thus NUWF, has not suffered a legally recognized injury in fact.

This Court should affirm the district court's finding of no standing. NUWF's members did not set forth specific facts establishing where their claimed injury occurred or an injury to their particular uses or enjoyment. Furthermore, Norton's injury cannot be based on an unlawful use of Bowman's property.

II. NUWF's citizen suit against Bowman is precluded under section 505(b)(1)(B) of the CWA because NUDEP has commenced, and is diligently prosecuting, a civil action against Bowman in federal court.

Under the plain language of section 505(b)(1)(B), a citizen suit is precluded "only if . . . a state has initiated and is diligently prosecuting an action in a state or federal court." Friends of the Earth v. Consol. Rail Corp., 768 F.2d 57, 63 (2d Cir. 1985); see 33 U.S.C. § 1365(b)(1)(B)

(2006). The CWA bars citizen suits when a state diligently prosecutes an alleged violation because, while citizen suits are critical to ensure proper enforcement of the CWA, the responsibility of the Act's enforcement rests, first and foremost, with state and federal governments. Piney Run Pres. Ass'n v. Cnty. Comm'rs, 523 F.3d 453, 456 (4th Cir. 2008). As the Supreme Court has explained, "[a] citizen suit is meant to supplement rather than supplant governmental action." Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Foundation, Inc., 484 U.S. 49, 60 (1987). In fact, "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, at 64 (1971)).

As will be discussed, there are two relevant inquiries as to whether section 505(b)(1)(B) precludes a citizen suit: first, whether the state has initiated an action in court before the citizen-plaintiffs filed their own suit, Conn. Fund for the Env't v. Contract Plating Co., 631 F. Supp. 1291, 1293 (D. Conn. 1986); see Chesapeake Bay Found. v. Am. Recovery Co., 769 F.2d 207, 208 (4th Cir. 1985); and, second, whether that previously commenced action is being diligently prosecuted. Conn. Fund for the Env't, 631 F. Supp. at 1293. Both inquiries show that the district court properly barred NUWF's suit against Bowman.

A. NUDEP filed a civil action against Bowman in federal court twenty days before NUWF filed the present action.

The CWA requires a citizen plaintiff to give notice of her intent to sue, and then wait at least sixty days, before she can commence her own citizen suit. 33 U.S.C. § 1365(b)(1)(A). The purpose of this notice and waiting requirement is to give the alleged violator an opportunity to come into compliance. Gwaltney, 484 U.S. at 60. This requirement also "gives the government the opportunity to act and to control the course of the litigation . . . ." Chesapeake Bay Found.,

769 F.2d at 208. In essence, the notice and waiting requirements "operate as Congress intended—to both spur and supplement . . . government enforcement" of the Act. S. Rep. No. 99-50, at 28 (1985).

The instant situation is a perfect example of how the dual roles of citizen and government enforcement of the CWA are supposed to interact. On July 1, 2011, after NUWF became aware of Bowman's alleged violation, NUWF gave notice to Bowman, the EPA, and NUDEP, under section 505(b)(1)(A). (R. 4.) NUDEP took action and issued an administrative order, which Bowman consented to by August 1, 2011. (R. 4.) Then, on August 10, 2011, NUDEP filed, in federal court, a civil action against Bowman for his alleged violation of the CWA where it later sought to have the administrative order adopted as a decree. (R. 5.) Twenty days later, on August 30, 2011, NUWF filed this action against Bowman after NUDEP had already commenced its own civil action against Bowman. (R. 5.) NUWF does not seem to appreciate that notifying Bowman and NUDEP, spurred NUDEP into action. This is exactly what Congress intended the notice to do. Therefore, the need for NUWF to bring its own suit to compel enforcement is not necessary. Indeed, NUWF's suit is precluded because of NUDEP's commencement of its suit. Furthermore, this Court should presume NUDEP's prosecution is diligent, as is discussed below.

B. NUDEP's court action against Bowman for the alleged CWA violation creates a presumption of diligent prosecution that NUWF has failed to overcome.

When the state has filed an action in court against an alleged violator of the CWA, the State's diligent prosecution is presumed. Piney Run, 523 F.3d at 459. This is because a court should not second-guess the State's "assessment of an appropriate remedy." Karr v. Hefner, 475 F.3d 1192, 1197 (10th Cir. 2007) (quoting Ellis v. Gallatin Steel Co., 390 F.3d 461, 477 (6th Cir.

2004)). Nor should a court "interpret [section 505] in a manner that would undermine the [agency's] ability to reach voluntary settlements with defendants." Karr, 475 F.3d at 1198. This is especially true when the court is "presented with a consent decree [because the court] must be particularly deferential to the agency's expertise." Piney Run, 523 F.3d at 459. Indeed, a court's failure to give due deference to the state's consent decree undermines the enforcement structure of the Act because "[i]f citizens could file suit . . . in order to seek the civil penalties that the [agency] chose to forgo, then the [agency's] discretion to enforce the Act in the public interest would be curtailed considerably." Gwaltney, 484 U.S. at 61.

Therefore, "citizen-plaintiffs must meet a high standard to demonstrate that [the agency] has failed to prosecute a violation diligently." Karr, 475 F.3d at 1198. This standard cannot be met "by merely showing the agency's prosecution strategy is less aggressive than [the citizen-plaintiff] would like or that it did not produce a completely satisfactory result." Piney Run, 523 F.3d at 459.

NUWF has not met this high standard because it has failed to provide specific facts showing NUDEP's prosecution of Bowman is less than diligent. (See R. 7–8.) Indeed, NUDEP has acted diligently by quickly responding to NUWF's notice, forming an administrative order, filing a civil action, and seeking a consent decree. (R. 4–5.) NUDEP took all of these actions within almost two months of receiving notice. (R. 4–5.) Furthermore, it is within NUDEP's expert discretion to settle this issue in the way it believes will best serve the public interest. To allow NUWF's suit to continue in spite of NUDEP's efforts to resolve the matter, would disregard NUDEP's expertise, undermine NUDEP's authority, and ignore the CWA's enforcement structure.

Even though NUWF's suit is barred because of NUDEP's action, NUWF can still seek

relief by intervening in NUDEP's action against Bowman. Because the Act recognizes the importance of citizen enforcement, the Act allows citizens to intervene in the very suit that bars the citizens' own suit. 33 U.S.C. § 1365(b)(1)(B). The state's court action provides a forum where a citizen's interest in the matter may be represented. Therefore, NUWF may intervene in NUDEP's pending action against Bowman. Importantly, NUWF's motion to intervene in NUDEP's suit is currently pending, and but for the instant action, it is possible NUWF's motion to intervene might have already been granted. (R. 5.)

In sum, this Court should affirm the district court's finding that NUWF's citizen suit against Bowman is barred under section 505(b)(1)(B) of the CWA. First, because NUDEP commenced a civil action in court before NUWF filed the instant action; second, NUWF did not meet the high burden necessary to show NUDEP's prosecution has been anything less than diligent; and finally, NUWF's interests may be represented as an intervenor in NUDEP's pending action.

III. This Court lacks jurisdiction because Bowman cooperated with and consented to NUDEP's administrative order and is therefore no longer violating the CWA.

Citizen plaintiffs must make a good faith allegation of continuing or intermittent violation of the CWA to invoke the jurisdiction of the courts under section 505(a). Gwaltney, 484 U.S. at 64. The critical time for determining whether a violation will likely continue is when the complaint is filed. Conn. Coastal Fisherman's Ass'n v. Remington Arms Co., Inc., 989 F.2d 1305, 1311 (2d Cir.1993). To survive a motion for summary judgment, a plaintiff must show more than good faith; she must present specific evidence that the violation will likely continue. Id. at 1312.

Under section 404 of the CWA, there is a question of whether a violation is continuing when unlawfully discharged fill has not been removed. See City of Mountain Park v. Lakeside at Ansley, LLC, 560 F. Supp. 2d 1288, 1293 (N.D. Ga. 2008). Some lower courts disagree about whether the presence of fill is a continuing violation. See generally City of Mountain Park, 560 F. Supp. 2d at 1293–97. Yet, no court has disagreed that once a defendant demonstrates a "state" of compliance—for example, by agreeing to and complying with administrative orders or making remediation efforts—the violation is no longer continuing. See id.; Atlantic States Legal Found. v. Eastman Kodak, Co., 933 F.2d 124, 127–28 (2d Cir. 1991); see also Gwaltney, 484 U.S. at 69 (Scalia, J., concurring) (a continuing violation is a state of being, "rather than an act—the opposite state of compliance."). Therefore, if a discharger agrees to and complies with an administrative order, a section 404 violation ceases without requiring the removal of the fill material, as was the case in Gwaltney, where discharges violating section 402 of the CWA were not required to be removed. See id. This allows citizens and agencies to enforce the Act against dischargers who hide activities to evade the Act's requirements, or those violators whose fill material is not discovered until after the activity has ceased. This, also, does not override the expert agency's decision on the most appropriate remedial action for the public interest.

As will be shown, even if Bowman had violated the CWA, he is no longer in violation because he has consented to NUDEP's administrative order, which requires remedial measures. (R. 4.) Therefore, this Court should not override NUDEP's expert decision on which remedy brings the violator into compliance and serves public interest.

A. Bowman's ongoing cooperation and agreement with NUDEP's order demonstrates his state of compliance.

Under section 404, a violation ceases when the violator cooperates in an enforcement proceeding by consenting to and complying with a remedial administrative order or has participated any other type of enforcement action. See Orange Env't, Inc. v. Cnty. of Orange, 923 F. Supp. 529, 538 (S.D.N.Y. 1996) (relying on Atlantic States Legal Found., 933 F.2d at 127). The Orange Environment court rejected the idea that the presence of fill was a continuing violation because the "defendants' compliance with the EPA's . . . remediation Order put[] them into compliance with the Act." Id. at 538. Initially, the court found jurisdiction at the time of the plaintiff's complaint, because "it was the continued intent of the defendants to proceed with the landfill" expansion, which would have allegedly violated section 404. Id. at 535. However, during the course of the suit the defendants abandoned the landfill expansion plans, and the U.S. Army Corps of Engineers ("Corps") and the EPA made an "expert administrative determination . . . that off-site remediation was an appropriate resolution of the CWA violations in order to insure compliance with the Act." Id. at 537; see also Conn. Coastal Fisherman's Ass'n, 989 F.2d at 1309–13 (finding no continuing violation where defendant permanently stopped filling activity and cooperated with agency requests).

The courts that find the presence of fill a continuing violation almost always face a defendant who refuses to comply with an administrative enforcement order. E.g., Sasser v. Adm'r, U.S. EPA, 990 F.2d 127, 128 (4th Cir. 1993); see also City of Mountain Park, 560 F. Supp. 2d at 1293–97 (discussing courts that have and have not held that presence of fill is a violation). For example, in Sasser, the defendant unlawfully filled wetlands after being denied a section 404 permit. 990 F.2d at 128. Sasser continuously ignored and violated orders by the Corps and EPA. Id. After the Corps discovered his activities, he refused to restore the property

to its previous condition. Id. He failed to comply with EPA's cease and desist order, and its restoration orders. Id. Sasser claimed—for the first time in his reply brief—that he had filled the wetland before Congress had given the EPA authority to assess civil penalties; therefore, the EPA lacked jurisdiction to do so now. Id. at 129. The court found that they did not need to address his argument because "Dr. Sasser's violations continued long after" Congress gave the EPA authority to assess fines. Id. The court said that "[e]very day the pollutant remains in the wetlands without a permit,"—in violation of the Corps' request to restore and the EPA's order to cease and desist and submit a restoration plan—"constitutes an additional day of violation." Id. The court never addressed whether it would have found a continuing violation if Sasser had agreed and complied with either of the agencies' requests; however, the tone of the court implies that it would not have. See id.

In the present case, Bowman halted all land clearing activities on July 15, 2011, soon after NUDEP contacted him, and he has followed NUDEP's orders ever since. (R. 4.) Unlike Sasser, who refused to cooperate with every Corps and EPA request, Bowman cooperated with NUDEP promptly. (R. 4.) For example, Bowman consented to the administrative order within less than a month after being contacted by NUDEP. (R. 4.) He complied with NUDEP's order to cease his activities and has begun performing NUDEP's other requests. (R. 4,7.) Bowman has already conveyed a conservation easement on part of his property to NUDEP, which NUDEP requested as part of its mitigation plan. (Question & Answer No. 8.) He has agreed to create and maintain a year-round wetland on the buffer zone adjacent to the Muddy River. (R. 4.) Like the plaintiffs in Orange, who abandoned their plans to expand the landfill, Bowman's actions show that he has decided to abandon further landclearing on his property. (See R. 4.) Moreover, if NUWF believes that Bowman has failed to comply with NUDEP's order, NUWF may challenge

Bowman for failing to comply with the order in another proceeding. Such an action would differ from what NUWF challenges in the present action, which is whether Bowman violated the CWA regardless of NUDEP's order.

B. This Court should defer to NUDEP's decision on how to enforce the CWA.

The agency charged with enforcing the CWA program—in this case, NUDEP—has multiple enforcement options to bring against a violator. See 33 U.S.C. § 1319; 33 C.F.R. § 326.3 (2012). This Court should afford NUDEP "broad deference" in its determination of the appropriate settlement. United States v. District of Columbia, 933 F. Supp. 42, 47 (D.D.C. 1996) (citing In re Cuyahoga Equip. Corp., 980 F.2d 110, 118 (2d Cir. 1992)); see also Orange Env't, 923 F. Supp. at 539 (discussing how a court should give deference to the agency charged with enforcement). Likewise, citizen plaintiffs are not permitted to pursue "personalized" remedies under the CWA. Orange Env't, 923 F. Supp. at 539. This Court should defer to NUDEP's determination of the appropriate settlement and not provide NUWF a forum to overrule NUDEP's judgment by demanding "an additional and different type of remediation . . . ." Id. at 540.

To be clear, NUWF's action does not challenge the sufficiency of NUDEP's order, but rather seeks its preferred remedy, which is for Bowman to remove the fill material. (R. 7.) In Orange, the EPA decided that off-site mitigation was preferable to on-site removal, over the plaintiffs' claim that removal was necessary to cure the violation. Id. at 537. The court refused to consider whether on-site mitigation was desirable or possible, noting that the plaintiffs could have challenged the EPA's approach to remediation but failed to do so. Id. In this case, NUDEP chose a certain approach to remediation that NUWF failed to challenge before filing this suit.

(R. 4-5.) Instead, NUWF filed its complaint after NUDEP issued its administrative order and after Bowman consented to such order. (R. 5.) And, like the plaintiffs in Orange, NUWF claims that the presence of fill is a continuing violation. (R. 7.) In doing so, NUWF asks this Court to step beyond the proper role of the judiciary and override NUDEP's decision that removal is unnecessary for Bowman to comply with the Act. (R. 4, 7.)

Lastly, if this Court were to grant NUWF's wishes and demand removal of all fill material, the court would effectively write "removal" into the enforcement section of the statute. No violator of section 404 who has fully complied with an administrative order would be immune from citizen suits unless the agency required complete removal of fill material. So the agency would be forced to demand removal to resolve, or end the violation. Neither the CWA nor its regulations require removal as an enforcement action. See 33 U.S.C. § 1319; 33 C.F.R. § 326.3. Therefore, NUDEP, or any enforcement agency, should not be required to order removal before a defendant becomes compliant and this Court should not impose such a requirement by allowing NUWF to maintain its suit.

Bowman is in a state of compliance, despite the presence of fill, because he has fully cooperated with NUDEP's orders and agreed to perform the remedial measures NUDEP has chosen. For this Court to hold otherwise would fail to give proper deference to the expertise of NUDEP and write a requirement into the enforcement provisions where none exists. Thus, this Court lacks jurisdiction because the presence of fill is not a continuing violation under the Act.

IV. Bowman did not violate sections 301(a) or 404 of the CWA while clearing his land to farm because he did not add or increase pollutants to the nation's waters from a point source.

The stated purpose of the CWA is "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a). To achieve that goal the CWA established systems to set water quality standards, id. § 1313, and regulate the discharge of pollutants. Id. §§ 1311(a), 1342, 1344. Section 301(a) of the Act—the section upon which NUWF bases its claims—declares an unpermitted discharge of a pollutant unlawful. Id. § 1311(a). The "discharge of a pollutant" is defined as "any addition of any pollutant to navigable waters from any point source." Id. § 1362(12). Therefore, to establish a violation of sections 301(a) or 404 of the CWA requires the showing of (1) an addition of (2) any pollutant, including dredged and fill material, to (3) navigable waters from (4) a point source. Id.; see also id. § 1344 (establishing the permit program for "the discharge of dredged or fill material"); S. Rep. 92-1236, at 142 (1972) (Conf. Rep.) ("Failure to obtain a permit under . . . section [404, or 33 U.S.C. § 1344,] would be a violation of section 301(a) . . . .").

As will be shown, the plain reading of the Act is clear and unambiguous. It declares that only an activity that adds or increases pollutants to the nation's waters from a point source is unlawful, rather than merely moving a pollutant from one place to another. 33 U.S.C. §§ 1311(a), 1344. Because Bowman did not add or increase any pollutant, or dredged or fill material, his activities were not an "addition" and therefore he did not violate the CWA.

When determining whether Congress's language is ambiguous or not, the Court has employed some traditional rules of construction. If a term is not defined as a term of art within a statute, a court should construe the term "in accordance with its ordinary or natural meaning." S.D. Warren Co. v. Me. Bd. of Envtl. Prot., 547 U.S. 370, 376 (2006). A court "must give effect

to every word that Congress used in the statute," Lowe v. SEC, 472 U.S. 181, 207 n.53 (1985), and must not add, subtract, distort, or delete Congress's words. 62 Cases of Jam v. United States, 340 U.S. 593, 596 (1951). If Congress's language is clear and unambiguous, "the courts must give effect to the unambiguously expressed intent of Congress" without looking to other reasonable interpretations or giving Chevron deference to an agency's interpretations. FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 132 (2000) (quoting Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 842–43 (1984)).

As shown below, first, the ordinary meaning of addition is to add or increase. Second, because "discharge of a pollutant" has a clear, unambiguous meaning, this Court must not look to agency interpretations or other reasonable interpretations of the Act. Third, to define "addition" as moving pollutants from one place to another, would strip meaning from the term "point source" and render either it or "addition" surplusage. Finally, this interpretation does not strip all meaning from the phrase "discharge of dredged or fill material" found in section 404(a), as NUWF had claimed in the district court.

A. The ordinary, natural meaning of "addition" is to add or increase.

The CWA expressly defines each element of "discharge of a pollutant," except for "addition." See 33 U.S.C. § 1362. Because the CWA foregoes defining "addition" as a term of art, courts should apply its ordinary, natural meaning. See S.D. Warren, 547 U.S. at 376. The ordinary and natural meaning of "addition" is "the result of adding; increase; the act or process of adding." Merriam-Webster's Collegiate Dictionary 14 (11th ed. 2003). To "add" means to "join or unite so as to bring about an increase . . . ." Id. Therefore, an addition of any pollutant

into the navigable waters from a point source requires adding or increasing pollutants into the navigable waters from a point source.

The Court of Appeals for the Fourth Circuit once applied this exact meaning to "discharge of a pollutant," United States v. Wilson, 133 F.3d 251, 259–60 (4th Cir. 1997) (opinion of Niemeyer, J.), modified, United States v. Deaton, 209 F.3d 311 (4th Cir. 2000). In Wilson, the court split without giving a majority opinion on whether the sidecasting of soil from a ditch-digging device was an "addition." Id. at 266 (opinion of Luttig, J.). Yet, the controlling opinion found that sidecasting was not an addition. Id. at 259–60 (opinion of Niemeyer, J.). Judge Niemeyer applied the ordinary, natural definition of "addition" and found that "that the movement of native soil a few feet within a wetland does not constitute . . . discharge," and the statute requires a violator to

> have ***added*** dredged spoil to the wetland . . . . While sidecasting moves excavated dirt from one particular locus in the wetland to another, it does not involve the addition of any material to the wetland. "Addition" requires the introduction of a new material into the area, or an increase in the amount of a type of material which is already present.

Id. at 259 (emphasis in original). Judge Niemeyer found that the plain reading of the Act was unambiguous and did not look to the interpretations of the Corps or EPA, which is in accord with the first of the Chevron principles. Id.; Chevron, 467 U.S. at 843.

Similarly, in National Mining Association v. U.S. Army Corps of Engineers, the Court of Appeals for the D.C. Circuit held that the Corps had acted outside its statutory authority by presuming any amount of dredged material incidentally falling back into the navigable waters was an addition. 145 F.3d 1399, 1404 (D.C. Cir. 1998). The court found the Corps' argument—which was that any fallback is an addition of a pollutant because material becomes a pollutant once it is dredged—to be "ingenious but unconvincing." Id. "Regardless of any legal

metamorphosis that may occur at the moment of dredging, we fail to see how there can be an addition of ***dredged material*** when there is no addition of ***material***." Id. (emphasis in original). The Court of Appeals issued a narrow holding on whether the Corps could make a presumption for all mechanical dredging and did not address whether all mechanical excavation or dredging that moved material from one place to another would constitute an addition. Id. at 1405–06. Yet the court declared that if the agencies were unhappy with the language of the CWA for "inadequately protect[ing] wetlands and other natural resources by insisting upon the presence of an 'addition' to trigger permit requirements, the appropriate body to turn to is Congress." Id. at 1410.

NUWF has not claimed that Bowman added or increased pollutants to the water or the wetland. (See R. 3–4, 9.) The district court found that Bowman had pushed material and pollutants—such as soil, vegetation, and the remaining ash from the burnt vegetation that grew on the wetland—from one part of his land to another, but he "did not add . . . pollutants" originating from outside his land. (R. 9.) Bowman did not add or increase the pollutants within his property; he merely moved pollutants and other materials from one location to another. (R. 9.) To find Bowman in violation of either section 301(a) or 404, would be against the clear language of the CWA.

B. Because "addition" is clear and unambiguous, this Court must not look further to agency interpretations of the term.

"If a court, employing traditional tools of statutory construction, ascertains that Congress had an intention on the precise question at issue, that intention is the law and must be given effect." Chevron, 467 U.S. at 865 n.9. The use of the term "addition," which is clear and unambiguous, shows Congress's intent. To violate section 301(a) or 404, a person must add or

increase any pollutant, or dredged or fill material, into navigable waters from any point source. 33 U.S.C. §§ 1311, 1344.

The Corps and EPA have interpreted the CWA to mean that when material is moved from one part of the navigable water to another part, that material becomes a pollutant. See 33 C.F.R § 323.2(d)(1) (including "redeposit" within the meaning of "addition"); 40 C.F.R. § 232.2 (2011) (same). The courts have adopted this interpretation, or some variation of it, by declaring that the movement of material transforms the material and makes it an additional pollutant. Borden Ranch P'ship v. U.S. Army Corps of Eng'rs, 261 F.3d 810, 819 (2001) aff'd, 537 U.S. 99 (2002) (4-4 decision); United States v. M.C.C. of Fla., Inc., 772 F.2d 1501, 1506 (11th Cir. 1985) vacated and remanded on other ground, 481 U.S. 1034 (1987) readopted in relevant part 848 F.2d 1133 (11th Cir. 1988); Rybachek v. U.S. EPA, 904 F.2d 1276, 1286 (9th Cir. 1990); Avoyelles Sportsmen's League v. Marsh, 715 F.2d 897, 923–25 (5th Cir. 1983) (pre-Chevron decision); United States v. Bay-Houston Towing Co., 33 F. Supp. 2d 596, 606 (E.D. Mich. 1999).

The majority of these courts have failed to adhere to step one of the Chevron Doctrine. See e.g., Rybachek, 904 F.2d at 1286 (discussing ways in which "addition" may reasonably be defined without first addressing whether the text is ambiguous and then declaring, "We will follow the lead of the Fifth and Eleventh Circuits and defer to the EPA's interpretation of the word 'addition' in the Clean Water Act").

In Borden Ranch, the court declares that any redeposit of soil in the same place transforms the soil into a pollutant; and later cites to Avoyelles claiming that "addition" may reasonably be understood to include "redeposit." 261 F.3d at 814. The court does not address whether the Act's language is unambiguous before reaching for the supposedly reasonable theory

that moving material from one place to another metaphysically transforms the material into a pollutant. See id. at 814–15. Under Chevron, a court may look to an agency's reasonable interpretation, but only after the court has first determined that the language is ambiguous. 467 U.S. at 865.

The court in Deaton, seems to apply the Chevron Doctrine because the court, for the first time, boldly declares that Congress unambiguously intended for the moving of material from one place to another to be considered an "addition." 209 F.3d at 335–36. The court claims the other courts have reached this same conclusion; however, the Deaton court fails to mention that the courts in Avoyelles, M.C.C. of Florida, and Rybachek merely stated that the idea that addition means moving material from one place to another was a reasonable interpretation of the CWA. Id. at 336–37. The Deaton court, relied on these other cases to find that "addition" unambiguously means moving material from one location to another; but those courts never said this. Those courts only said that such an interpretation was reasonable without first addressing whether the plain reading of the statute was unambiguous, as Chevron requires.

This Court should adhere to the Chevron Doctrine and apply the plain, unambiguous meaning of the text before looking to the reasonable interpretations of the agencies. As the next section further discusses, traditional canons of statutory construction show that the relevant text of the CWA is unambiguous, and this Court should find the agencies' interpretations inconsistent with the text.

C. To define "addition" as moving a pollutant from one place to another would strip meaning from "point source."

Courts must give effect to every word and must not add, subtract, distort or delete any one of them, otherwise a word would be surplusage. Lowe, 472 U.S. at 207 n.53; 62 Cases of

Jam, 340 U.S. at 596; see Marbury v. Madison, 5 U.S. (1 Cranch) 137, 174 (1803). The CWA defines discharge of a pollutant as "any addition of any pollutant into a navigable water from any point source." 33 U.S.C. § 1362(12). In accordance with this rule of construction, courts must give effect to "addition" in a way that differs from the meanings of pollutant, navigable water, and point source.

To define "addition" as moving material from one place to another strips meaning from the term "point source," because the CWA defines "point source" to mean the act of conveying material from one place to another. See 33 U.S.C. §§ 1311, 1362(12). "A point source is, by definition, a 'discernible, confined, and discrete ***conveyance***." S. Fla. Water Mgmt. Dist. v. Miccosukee Tribe of Indians, 541 U.S. 95, 105 (2004) (emphasis in original) (quoting 33 U.S.C. § 1362(14)). Conveyance is not defined within the CWA; its ordinary, natural meaning is "the action of conveying." Merriam-Webster's Collegiate Dictionary, supra, at 273. "Convey" means to "cause to pass from one place . . . to another." Id.; see also Oral Argument at 22:27, Borden Ranch P'ship v. U.S. Army Corps of Eng'rs, 537 U.S. 99 (2002) (No. 01-1243) (Breyer, J., arguing that a plow moving soil can reasonably be considered a point source), available at http://www.oyez.org/cases/2000-2009/2002/2002_01_1243/argument. Because "point source" means a conveyance—that is, the act of moving material from one place to another—courts consider an object such as a "pipe, ditch, channel, tunnel," 33 U.S.C. § 1362(14), or a bulldozer, Avoyelles, 715 F.2d at 922 ("[B]ulldozers and backhoes were 'point sources,' since they collected into windrows and pile[d] material . . . ."), to be point sources when they convey pollutants. A point source is not only an object, but also the conveyance of material through or with that object. 33 U.S.C. § 1362(14).

Because "point source" means a conveyance, the term "addition" cannot also mean conveyance. "Addition" cannot mean moving something from one place to another because that meaning is already captured with the term "point source." Otherwise, "addition" or the term "conveyance" within the definition of "point source" would lack effect and be mere surplusage.

The Corps and EPA have literally written "point source" out of certain parts of the regulations enforcing section 404. See 33 C.F.R § 323.2; 40 C.F.R. § 232.2. As discussed above, the CWA defines the discharge of a pollutant as "any addition of any pollutant in navigable waters from any point source . . . ." 33 U.S.C. § 1362(14). Therefore, Corps' and EPA's promulgated rules should define discharge of dredged material—a specific type of pollutant prohibited by section 301(a)—as having similar, if not identical, structure and meaning as "discharge of a pollutant." See Sorenson v. Sec'y of Treasury, 475 U.S. 851, 860 (1986). Instead, the Corps and EPA define discharge of dredge material as "any addition of dredged material into . . . the waters of the United States," and define discharge of fill material as "the addition of fill material into waters of the United States." 33 C.F.R § 323.2; 40 C.F.R. § 232.2. Note that "point source" is missing from both definitions. The agencies have imparted the meaning of "point source" onto "addition" and abandoned the plain meaning of the word "addition." With the agencies' new meaning of addition, one that means conveying or moving things around, the agencies can claim authority over actions that fall outside the plain, unambiguous language of the Act. As will be shown below, this can lead to some absurd results, but more importantly it literally denies effect to words "point source" or "addition." The agencies have effectively, and literally, deleted one of Congress's words.

The U.S. Supreme Court came close to resolving the issue of what "addition" means in Borden Ranch Partnership v. U.S. Army Corps of Engineers. 537 U.S. 99 (2002) (4-4 decision)

("The judgment is affirmed by an equally divided Court."). In Borden Ranch, a farmer wanted to convert a grazed pasture into a fruit orchard. 261 F.3d at 819. To successfully raise fruit on certain parts of his property, the farmer had to plow a long metal shank deep into the soil to break-up a sealed clay pan; this helped the fruit plants' long roots. Id. at 812. The farmer claimed the plowing basically churned up a small amount of soil and placed it back to the vicinity from where it came. Id. at 814. The plowing would be similar to running a knife through a pie to break-up the underlining crust; the knife would not be adding any material, but instead moving a small portion of the underlying crust. Two judges of the Court of Appeals for the Ninth Circuit saw the farmer's plowing, the moving of the clay plan material, as a redeposit and an addition of a pollutant—and accordingly held that the farmer had violated sections 301(a) and 404 of the CWA. Id. at 814–15. However, Judge Gould's opinion agrees with the farmer's perspective. Id. at 820 (Gould, J., dissenting). Judge Gould failed to see a significant addition of any material to the site because

> [t]he ground is plowed and transformed. It is true that the hydrological regime is modified, but Congress spoke in terms of discharge or addition of pollutants, not in terms of change of the hydrological nature of the soil. If Congress intends to prohibit so natural a farm activity as plowing, . . . Congress can and should be explicit.

Id.

Similar to Judge Gould's critiques, when Borden Ranch was argued before the Supreme Court, Justice Scalia pressed the government on its interpretation that plowing soil is an addition by pointing out that "we have to generalize from that [interpretation] and say that any movement of anything within the wetlands is also an addition to the wetlands. . . . And I think it is fanciful to think that anything has . . . be[en] added to the wetlands here [in this case.]" Oral Argument at 38:53, Borden Ranch, 537 U.S. 99 (2002) (No. 01-1243), available at

http://www.oyez.org/cases/2000-2009/2002/2002_01_1243/argument. Justice Scalia posed another scenario that shows how defining addition as the moving of material from one place to another would fall outside the plain reading of the CWA language, "I'm walking through a wetland . . . and I kick a dirt ball and it moves to another part of the wetland. I suppose that's an addition . . . ?" Id. at 32:49. Government's counsel did not disagree, instead he said the Corps was not concerned with regulating "movements of this type." Id. The Court never resolved the issue because four justices sought to affirm and four did not, while Justice Kennedy did not participate. Borden Ranch, 537 U.S. 99 (4-4 decision).

D. To require that a violator add pollutants to the navigable waters does not strip meaning from "discharge of dredged or fill material."

Again, courts must give effect to every word of a statute. Lowe, 472 U.S. at 207 n.53. NUWF tries to claim that recognizing the plain meaning of "addition" would read section 404 out of the Act. (R. 9.) This is not true. Section 404 still has meaning because it prohibits depositing dredged or fill material into navigable waters from a point source where the material originated from outside that navigable water. 33 U.S.C. § 1344(a). Under the plain, unambiguous meaning of addition, a discharger would still need a permit if she were to discharge dredged and fill into a navigable water if the dredged or fill material originated from outside that navigable water, such as from another basin or dry land.

NUWF's claim is not really a statutory construction argument; instead NUWF is concerned about whether the CWA protects the rivers as much as NUWF would like. The broad policy goal of protecting the integrity of the nation's waters cannot override the clear language of the Act. See Nat'l Wildlife Fed'n v. Gorsuch, 693 F.2d 156, 178 (D.C. Cir. 1982) ("[I]t is one thing for Congress to announce a grand goal, and quite another for it to mandate full

implementation of that goal."). Furthermore, the integrity of the nation's waters are still protected. Sections 303 and 304 of the CWA provide protections so that the nation's waters do not fall below certain quality standards. 33 U.S.C. §§ 1313–1314. In addition, section 10 of the Rivers and Harbors Act of 1899, commonly known as the Refuse Act, still provides the Corps regulatory authority over the navigability of the nation's waters. Id. § 403 ("[I]t shall not be lawful to excavate or fill, or in any manner to alter or modify the course, location, condition, or capacity of, any port, roadstead, haven, harbor, canal, lake, harbor or refuge, or enclosure within the limits of any breakwater, or of the channel of any navigable water of the United States . . . .").

This Court must adhere to the integrity of Congress's language and not supplant Congress's clear intent with NUWF's, or an agency's, policy goals. As the Court of Appeals said in National Mining Association, if the concern is that the statute is "inadequately protect[ing] wetlands and other natural resources by insisting upon the presence of an 'addition' to trigger permit requirements, the appropriate body to turn to is Congress." 145 F.3d at 1410.

This Court should apply the Chevron Doctrine, and first determine whether the plain reading of the statute is unambiguous, as it is in this case, then this Court must not look to any agency interpretations of the Act. Therefore, this Court should uphold the lower court's grant of summary judgment for Bowman because his activities did not result in an addition of pollutants to his property and therefore he did not violate the Clean Water Act.

CONCLUSION

This Court should hold that NUWF's members failed to show how their injuries were concrete and particular. They could not give a specific location on the Muddy River where they were injured, nor could they show what particular uses or enjoyments were diminished by

Bowman's activities. And they cannot base their injury on a person whose injury requires unlawfully trespassing. Furthermore, NUWF cannot interfere with NUDEP's enforcement measures and the agency's role of looking out for the public interest in this Court while NUDEP seeks remedies in another court. Also, NUWF has no right to sue, under the CWA citizen suit provision, a party who has stopped violating the Act. Bowman's actions show great cooperation with NUDEP's efforts to protect the habitat of the Muddy River. NUWF should not be allowed to supersede New Union's Department of Environmental Protection. Finally, Bowman has not violated the plain, unambiguous reading of the CWA. Where he has not added or increased the material on his property, he has not violated sections 301(a) or 404 of the CWA.

For the foregoing reasons this Court should affirm district court's grant of summary judgment for Jim Bob Bowman.

Respectfully submitted,

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Counsel for Jim Bob Bowman