Team No. 18

C.A. No. 13-1246
Civ. No. 149-2012

IN THE UNITED STATES
COURT OF APPEALS FOR THE TWELFTH CIRCUIT

NEW UNION WILDLIFE FEDERATION

Petitioner - Appellant

v.

JIM BOB BOWMAN

Respondent - Appellee

v.

NEW UNION DEPARTMENT OF ENVIRONMENTAL PROTECTION

Intervenor - Appellant

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

Brief for JIM BOB BOWMAN
Respondent –Appellee

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JURISDICTIONAL STATEMENT

This case arises from the Clean Water Act (CWA), 33 U.S.C. §§ 1311, 1344, 1365 (2006). The District Court had subject matter jurisdiction over this case pursuant to 28 U.S.C. §1331 (1980) because the CWA arises out of federal law, and the federal court will have jurisdiction over any action arising from federal law. The United States Court of Appeals for the Twelfth Circuit has jurisdiction to hear cases that have been brought before it to appeal a decision from The United States District Court of New Union. 28 U.S.C. §1291 (2006).

STATEMENT OF THE ISSUES

I. Whether New Union Wildlife Federation (hereinafter NUWF) has Article III Standing to bring suit on behalf of its members in federal court against Jim Bob Bowman for his relocation of biological material from one portion of the wetland to another part the wetland.

II. Whether the presence of dredged soil constitutes a continuing violation required for subject matter jurisdiction under 33 U.S.C. § 1311 even though Mr. Bowman ceased the activity alleged to be a violation.

III. Whether the citizen suit provision of the CWA bars NUWF from bringing action against Mr. Bowman after New Union Department of Environmental Protection (hereinafter NUDEP) commenced and diligently prosecuted the action against Mr. Bowman.

IV. Whether Mr. Bowman's act of relocating a portion of his wetland constitutes an "addition" under the Environmental Protection Agency's Water Transfers Rule, in violation of the CWA.

STATEMENT OF THE CASE

From June 15 to July 15, 2011, Mr. Bowman leveled a portion of his land to prepare it for agricultural use by knocking down trees and leveling the soil. R. at 4. NUWF sent Mr. Bowman a notice of violation, alleging he was violating federal law by clearing his property, and sent a copy of this notice to the government enforcement agency, NUDEP. R. at 4. NUDEP brought action against Mr. Bowman in federal court within the statutorily required sixty days of the notice of alleged violation received from NUWF. R. at 4. Mr. Bowman and NUDEP entered into a consent decree, and the action was then brought in federal court and is currently awaiting adjudication. R. at 4-5. NUWF sent notice of intent to sue to Mr. Bowman on July 1, 2011. R. at 4. NUDEP then contacted Mr. Bowman and an administrative order was issued by NUDEP to Mr. Bowman on August 1, 2011. *Id*. This order granted a conservation easement from Mr. Bowman's waterfront land to NUDEP for use as a public nature preserve. *Id*. The action was then brought in federal court as a decree with the same terms as the parties had previously agreed to so that the consent decree could be entered for final adjudication. R. at 4-5. NUWF then filed a citizen suit against Mr. Bowman in federal court on August 30, 2011. R. at 5. NUDEP filed a motion to intervene on the NUWF suit, which was granted by the District Court. R. at 5. The parties, NUWF and NUDEP along with Mr. Bowman, jointly filed cross motions for summary judgment. R. at 5. The Court granted summary judgment for Mr. Bowman on all four issues, (1) the Petitioner (NUWF) lacks standing (2) the Court lacks subject matter jurisdiction because all violations are wholly past (3) the Court lacks subject matter jurisdiction due to prior state action and (4) there was no violation of the CWA. R. at 11. NUWF and NUDEP each filed a Notice of Appeal after the issuance of the Order of the District Court dated June 1, 2012. R. at 1.

STATEMENT OF THE FACTS

Mr. Bowman owns one thousand acres adjacent to the navigable waters of the Muddy River in the State of New Union. R. at 3. His property includes 650 feet of shoreline and there is a consensus between the parties that it meets the criteria of a wetland set out by the U.S. Army Corps of Engineers' Wetlands Determination Manual. R. at 4. On June 15, 2011, Mr. Bowman began clearing a portion of his property by leveling the vegetation, gathering the flora of the wetland into windrows, and subsequently burning it. *Id*. Thereafter, he dug trenches to hold the remaining biological material, which included saturated soil from the wetland, and created a swale to drain into the Muddy River, leaving a 150 feet wide strip of land intact adjacent to the Muddy River that runs along the 650 feet length of the river shoreline. *Id*. Mr. Bowman's act of removing a portion of the wetland on his property and relocating it to another area of his property, connected to the navigable waters of the Muddy River, was completed within a mere month of when he first commenced his land clearing operation. *Id*.

STANDARD OF REVIEW

The United States District Court of New Union granted summary judgment under FED. R. CIV. P. 56(c). for Mr. Bowman on all counts presented. R. at 11. Therefore, this Court will review its decision *de novo*. *United States v. DBB, Inc.*, 180 F.3d 1277, 1281 (11th Cir. 1999) (holding that review of statutory interpretation is de novo); *Oti Kaga, Inc. v. South Dakota Housing Dev. Auth.*, 342 F.3d 871 (8th Cir. 2003) (holding that review of summary judgment based on standing is de novo). This Court must apply deferential review of the EPA's Water Transfers Rule under the Administrative Procedure Act, setting aside the agency ruling only if it is found to be "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law." 5 U.S.C. § 706(2)(A) (1966). *Ill. Power Co. v. Ill. Commerce Com'n*, 490 N.E. 2d 1255,

1257 (Ill. 1986) ("Courts have given great weight and deference to the interpretation of an ambiguous statute by a public agency charged with the administration and enforcement of the statute.")

SUMMARY OF THE ARGUMENT

The district court was correct when it granted summary judgment for Mr. Bowman, and asserted that NUWF did not have standing to bring their claim against Mr. Bowman in federal court. NUWF had the burden to prove that it had standing and the court granted summary judgment because NUWF could not, as a matter of law, establish that its members, (1) had suffered injury in fact which is sufficiently concrete and particularized, (2) the harm was causally connected to Mr. Bowman's actions, and (3) that there is redressability so any alleged injury could be remedied by the court's favorable decision. This Court should affirm the lower court's holding because NUWF has not asserted any facts to show that its members have suffered concrete and particularized injuries to any legally protected rights, causally connected to Mr. Bowman's actions that would be redressable by a favorable decision of this Court.

This Court should affirm the lower court's holding, that the district court lacked subject matter jurisdiction under the CWA. The statutory language of the CWA does not contain, nor create, an ongoing obligation, which makes the presence of dredged soil in the Muddy River a continuing violation required by the Supreme Court of the United States. Because Mr. Bowman ceased his activity and conveyed the property to NUDEP in a conservation easement prior to the commencement of this suit, the alleged violations are wholly past. Therefore, this Court lacks subject matter jurisdiction over the claim and should affirm the lower court's holding.

The lower court correctly found in favor of Mr. Bowman, against NUWF's motion for summary judgment. When NUDEP filed a consent decree in federal court, it was diligent in its

prosecution of Mr. Bowman. Diligent prosecution by a government agency precludes citizen suit. Therefore, the court had no subject matter jurisdiction to hear the claim per the CWA citizen suit statutory provisions. 33 U.S.C. §1365. The action against Mr. Bowman by NUWF is barred because NUDEP commenced and diligently prosecuted the action against him within the statutory time period.

This Court should affirm the lower court's holding because Mr. Bowman's actions did not constitute an addition of a pollutant into navigable waters that would justify the finding of a violation of the CWA under the EPA's Water Transfers Rule. This mandates that the simple act of moving one portion of wetland to another area of the same wetland without an intervening use from the outside world adding pollutants into the water, falls under the definition of a water transfer, and therefore is exempt from requiring a permit to satisfy the CWA. 73 Fed. Reg. 33697 (June 13, 2008) (codified at 40 C.F.R. pt. 122). The lower court correctly granted *Chevron* deference to the EPA's rule and interpretation of the term "addition" as an introduction of a pollutant from an outside world that has infiltrated the unitary navigable water system through an intervening use. R. at 9, 10. The congressional authority delegated to the EPA encompasses the authorization to promulgate regulations and interpret ambiguity in statutory language, so long as it is a permissible construction and reasonable interpretation of the statute. *Chevron, U.S.A., Inc. v. Natural Resource Defense Council, Inc.*, 467 U.S. 837, 843-44 (1984).

ARGUMENT

I. THE LOWER COURT CORRECTLY HELD THAT NUWF DOES NOT HAVE ARTICLE III STANDING TO BRING SUIT ON BEHALF OF ITS MEMBERS IN FEDERAL COURT AGAINST JIM BOB BOWMAN BECAUSE THE MEMBERS HAVE NOT SUFFERED A CONCRETE AND PARTICULARIZED INJURY AS A RESULT OF CLEARING HIS OWN LAND, NOR WOULD THE SUIT BRING PROPER RELIEF FOR THEIR ALLEGED INJURIES.

Article III § 2 of the United States Constitution requires that to bring suit in Federal Court, Petitioner will have the burden to show they have a continuing "case" or "controversy." U.S. CONST. art. III, § 2 cl. 1. This standard serves "to identify those disputes which are appropriately resolved through judicial process." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992). NUWF will have to prove that because of Mr. Bowman's actions, the group, through its members, (1) has suffered injury in fact which is sufficiently concrete and particularized, (2) the harm was causally connected to Mr. Bowman's actions, and (3) that there is redressability so any alleged injury could be remedied by the court's favorable decision. This Court should find NUWF does not have standing to bring this claim because it has not asserted any facts to show that its members have suffered concrete and particularized injuries causally connected to Mr. Bowman's actions that would be redressable by a favorable decision of this Court.

A. NUWF does not have standing because its members have not suffered an injury in fact to a legal right that is sufficiently concrete or particularized to assert Article III standing.

The first element of standing that the Petitioners will have the burden to prove is that the individual members suffered from an injury in fact. *Lujan*, 504 U.S. at 560. The injury claimed must be concrete and particularized. *Id*. This means the harm the Petitioner asserts must be actual or imminent, not conjectural or hypothetical. *Id*. When injury in fact is of a noneconomic nature, the test must be more narrow to include "more than an injury to a cognizable interest." It

requires that "the party seeking review be himself among the injured." *Sierra Club v. Morton*, 405 U.S. 727, 734-35 (1972).

In order for NUWF to have standing to bring this action, the individual members must be able to assert standing in their own right. Because no such standing exists for the members, this Court should find no standing exists for NUWF and affirm summary judgment for Mr. Bowman. The legally protected interest that the Petitioner cites to would be their use of the Muddy River for boating and fishing. R. at 6. This right has not been infringed upon because Mr. Bowman's actions did not in any way alter their ability to fish or boat on the river. Neither Mr. Bowman's act of clearing his own land, nor the relocation of fill material within his wetland, would infringe on Petitioner's continued ability to use the river for boating and fishing.

NUWF member Zeke Norton's claim that he used the land for frogging, which does not give rise to an injury to a lawful due to the uncontested fact that he was illegally trespassing on Mr. Bowman's property. R. at 6. (Mr. Norton asserts that he "might have been trespassing.") Mr. Norton is therefore restricted from asserting an injury to a legal right, because Mr. Bowman's land was properly posted as private property and Norton's presence was an illegal trespass. R. at 6. The lower court correctly asserted that "the inability to continue illegal activities cannot give rise to an injury to support standing." *Id*.

Dottie Milford's claim that the river "*looks*" more polluted than it had previously is not a legally sufficient concrete or particularized injury for NUWF to assert in order to establish standing. Milford even admitted that she "cannot see a difference in the land from the river or its banks." *Id*. The injury alleged for environmental standing can be aesthetic, however, as the Court held in *Lujan*, there must still be an "actual or imminent" injury. *Lujan*, 504 U.S. at 560. Mr. Bowman's actions have not changed the aesthetics or integrity of the river sufficiently to

constitute an injury in fact to the NUWF members, as the parties admit there has not been perceptible aesthetic change. (Milford admitted that she is unable to see the relocated wetland, which is now in the riverbed as sediment.) R. at 4. In fact, the trees along the riverbed were indefinitely preserved and will be maintained so the ecosystem can flourish because Mr. Bowman designated them as protected area to NUDEP, so aesthetically, the river and its bank are now more protected and will be preserved so that NUWF members can continue to boat and fish in the future.

B. NUWF, through its members, has not suffered an injury in fact that can be linked to Mr. Bowman's actions, therefore there is insufficient injury to assert Article III standing.

The second element for the Petitioner to prove is that there is a causal connection between the injury they claim to suffer and the conduct of Mr. Bowman. *Lujan*, 504 U.S. at 560. The injury must be "fairly traceable to the challenged action of the Defendant and not the result of the action of a third party not before the court." *Id*. The injury alleged should be found insufficient, however the Petitioner will try to show that the cited cause was the action of Mr. Bowman. Mr. Bowman's actions have ceased and will not resume because he conveyed a conservation easement and agreed to protect the integrity of the wetland on that property. R. at 4. The Court should also find that the injury the Petitioner claimed is not linked to the actions of Mr. Bowman because clearing his land did not cause the individual members of NUWF to be injured in any legal right, nor did the fill material in the Muddy River cause an aesthetic injury sufficient to constitute a case or controversy, as required by the U.S. Constitution. U.S. CONST. art. III, § 2 cl. 1. Mr. Bowman's acts did not change the aesthetics of the Muddy River, since the land along the

bank was not cleared, and will be improved in the future. Mr. Bowman's actions did not negatively impact any legal right of the Petitioner.

C. NUWF, through its members, has not suffered an injury in fact to a legal right that could be redressed by a favorable decision by this Court to assert Article III standing.

The final element the Petitioner bears is the burden to prove that their injury would be redressed by a favorable decision by the Court. An injury must be "likely," rather than "speculative," to be redressed by a favorable decision. *Lujan*, 504 U.S. at 559. This Court is precluded from finding for the Petitioner, because a favorable decision would not alter their position, because the injury they assert is speculative and no future injury is likely. Environmental standing cases have established that the injury can be aesthetic rather than economic harm. *Sierra Club*, 405 U.S. at 735. This Court should find that this issue is not redressable because the action by Mr. Bowman that the NUWF link to their alleged injury has already ceased. The act will not be repeated because he has already donated land to create a conservation easement, which will preserve the trees, and the integrity of the wetland, as well as allow public use of his property by the river. R. at 6. Additionally, a judgment of the Court will not put NUWF members in a better position because the members who are bringing suit are in a better position now than they were prior to bringing suit because their use of Mr. Bowman's land for picnicking and frogging is now legal, rather than an illegal trespass, and the integrity of the land will be maintained improving the fishing and frogging in the future. There is no continuing violation by Mr. Bowman that could be redressed by a favorable judgment of the Court.

The lower court correctly held that the injury cited by NUWF is too speculative to be sufficient for there to be a case or controversy. R. at 6. The group brought this case, and thus has the burden to establish standing, and has failed to show a legal injury, caused by Mr.

Bowman, repressible by this Court. Their argument that they perceive an imperceptible change to the riverbed is not sufficiently concrete to represent an injury in fact. The claim that the number of frogs has been depleted, injuring Mr. Norton's ability to go frogging asserts no legally protected interest being infringed on because it is an admission that a member of NUWF was trespassing on Mr. Bowman's land. Petitioner does not have a legally redressable continuing case or controversy to bring their claim in this Court.

D. NUWF, through its members, has no Article III standing to bring a case in federal court because there is no reasonable expectation that the wrong will be repeated by Mr. Bowman, and is therefore moot.

"An issue is moot when it no longer presents a live controversy with respect to which the court can give meaningful relief." *Friends of the Everglades v. S. Fla. Water Mgmt. Dist.*, 570 F.3d 1210, 1216 (11th Cir. 2009). NUWF does not have jurisdiction to continue suit because, in addition to a lack of standing, the issue of Mr. Bowman's alleged violations is moot. The doctrine of mootness "prevents maintenance of a suit when there is no reasonable expectation that the wrong will be repeated." *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Found., Inc.*, 484 U.S. 49, 66 (1987) (citing to *United States v. W.T. Grants Co.*, 345 U.S. 629, 633 (1953)). This suit has now been brought by NUWF to two separate courts, first to accuse Mr. Bowman of violations that were deemed insufficient for adjudication, and now to assert the same facts in an appeal of the ruling in favor of Mr. Bowman. This is contrary to the basic principal of the legal system and contrary to public policy, which calls for finality in the judgment of the court. Here, the lower court found that Petitioner had no standing to bring suit because it had not suffered an injury caused by Mr. Bowman, and there is no decision of the court that will redress the alleged harm. R. at 7.

The burden of proof lies with the Petitioner. *Gwaltney of Smithfield, Ltd.,* 484 U.S.49, 66. Mr. Bowman has demonstrated through his actions that "it is absolutely clear that the alleged wrongful behavior could not reasonably be expected to recur." *Id*. (citing to *United States v. Phosphate Exp. Ass'n., Inc.*, 393 U.S. 199, 203 (1968)). Mr. Bowman completed the clearing of his land on July 15, 2011 and NUWF did not bring suit until August 30, 2011. R. at 4-5. Before NUWF brought suit, Mr. Bowman granted a conservation easement that totals 146,250 square feet along the bank of the river, along all 650 feet of the riverfront, and 150 feet wide with a 75-foot buffer area. *Id*. at 4. This easement ensured that the injury alleged, the Petitioner's ability to go boating and fishing in the river and go frogging on the land, are now legally protected rights that they will be able to enjoy in the future. The allegation that the river now looks more polluted is not sufficiently concrete or particularized, however the area along the bank will be taken care of as a nature preserve which will allow the ecosystem and aesthetic value of the river bank to flourish. Because Mr. Bowman is unable to use the land that NUDEP now holds the conservation easement to, there is no feasible way for him to infringe on Mr. Norton's ability to frog or Ms. Milford's perception of sediment in the riverbed. Additionally, the private property he retained is already cleared for agricultural purposes, so there will be no future dredging on the land or clearing of the soil to relocate it to parts of the wetland retained for public use. Because there is no reasonable expectation that Mr. Bowman will repeat the alleged wrongs, this Court should find that the allegations brought by NUWF against Mr. Bowman are moot.

II. THE LOWER COURT CORRECTLY HELD THAT BECAUSE MR. BOWMAN'S ALLEGED VIOLATIONS WERE WHOLLY PAST, THIS COURT LACKS SUBJECT MATTER JURISDICTION OVER THE CLAIM.

This Court should affirm the lower court's grant of summary judgment for Mr. Bowman because his alleged violations were wholly past, therefore, not fulfilling the continuing violation

requirement for subject matter jurisdiction as established by the Supreme Court of the United States. *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Found., Inc.*, 484 U.S. 49, 60 (1987) (The Supreme Court of the United States held that the alleged violations must be continuing or ongoing for subject matter jurisdiction). The lower court correctly interpreted the CWA when it held that there must be a continuous discharge of pollutants to meet the continuing violation requirement. R. at 7. The lower court correctly found that the remaining dredged soil present in the Muddy River after Mr. Bowman ceased all activities did not constitute a continuing violation. *Id.* The court held that held that NUWF's claim is outside this Court's subject matter jurisdiction. *Id*. Mr. Bowman discontinued his land clearing activities before receiving notice of this suit and donated land for a conservation easement to NUDEP as part of a consent decree, constituting both a voluntary and contractual end to the alleged violation. *Id*. at 4. Accordingly, the lower court correctly held that it lacked subject matter jurisdiction as Mr. Bowman's alleged violations were wholly past. *Id*. at 7.

A. <u>The continued presence of dredged soil in the Muddy River does not constitute a continuing violation because the CWA requires an act of discharging a pollutant for a violation.</u>

The remaining dredged soil present in the Muddy River does not fulfill the continuing violation requirement for subject matter jurisdiction because the CWA does not deem wholly past incidents an ongoing obligation that was violated. *United States v. Telluride Co.*, 884 F.Supp. 404, 407 (D. Colo. 1995) (rev'd on other grounds). Citizen suit jurisdiction of the CWA only authorizes subject matter jurisdiction to the court to hear citizen suits alleging an effluent limitations violation for the discharge of pollutants without a permit. 33 U.S.C. § 1365(a) (2006). The Supreme Court of the United States has held that citizen suits against alleged violators for wholly past violations are impermissible. *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay*

Found., Inc., 484 U.S. 49, 60 (1987) The alleged violations must be continuing at the time the action was commenced in order to constitute a continuing violation of the CWA for the jurisdictional requirement under § 33 U.S.C. 1365(a). *Id*. In order for the dredged material to be deemed a continuous violation under the CWA, the statutory language of the Act must contain a continuing obligation that is violated by the presence of the material. *Telluride*, 884 F.Supp. at 407. The CWA neither creates nor contains an ongoing obligation to remove the dredged soil; therefore, the presence of the remaining material cannot constitute a continuing violation and the Court lacks subject matter jurisdiction over the claim.

1. The CWA does not contain statutory language to establish an ongoing obligation that would require Mr. Bowman to remedy the effects of his alleged violations.

The statutory interpretation of the CWA precluded from creating an ongoing obligation to force Mr. Bowman into liability for the presence of dredged soil in the wetlands because he ceased the activities alleged to be in violation prior to the commencement of this action. A continuing violation arises from an ongoing obligation created under the statute, which must be included in the language of the statute. *United States v. Rutherford Oil Corp.*, 756 F.Supp.2d 782, 790 (S.D. Tex. 2010) (citing *Interamericas Invs., Ltd. v. Bd. of Governors of the Fed. Reserve Sys.*, 111 F.3d 376, 382 (5th Cir. 1997). The Supreme Court of the United States has held that when interpreting a statute the focus must first turn to whether the statutory language at issue has a plain and unambiguous meaning. *Gwaltney*, 484 U.S. at 56. After examining the statutory language, if it is unambiguous the plain language of the statute must prevail. *Zapata Hayie Corp. v. Arthur*, 926 F.2d 484, 487 (5th Cir. 1991).

The statutory language of the CWA, states, in pertinent part, "the discharge of any pollutant by any person shall be unlawful." 33 U.S.C. § 1311(a) (2006). The definitions section

of the CWA defines "discharge of a pollutant" as an action that is required for a violation. 33 U.S.C. § 1362(12)(A) (2008) ("(A) any addition of any pollutant to navigable waters from any point source"). In *United States v. Rutherford Oil Corp*, the court had to determine liability for alleged violations of the CWA for depositing soil and other materials in areas from illegal "prop washing" of oil vessels by interpreting the same effluent limitations section of the CWA that is at issue in the present case. 756 F.Supp.2d 782, 790 (S.D. Tex. 2010). The *Rutherford* court held that in addition to the usage of unambiguous terms in the CWA, by examining the placement of the phrase "by any person" behind the word "discharge," and the CWA clearly refers to the act of discharging a pollutant as the violation, not the ongoing effects of that act. *Id*. at 791.

Additionally, the court in *Telluride* held that the CWA establishes that once the discharge has stopped the violation has ended. 884 F.Supp. at 407. The court in *Rutherford* relied upon *Telluride*, and held that once the violator stops the action in violation, the violation itself is over. 756 F.Supp.2d at 791. The plain language of 33 U.S.C. § 1311(a) does not create an ongoing obligation that makes remaining dredged soil a violation since the section refers to the discrete act of discharging as a violation, and such violation ends upon the completion of that act. *Telluride*, 884 F.Supp. at 407. Applying this interpretation to the present facts, once Mr. Bowman became aware of his alleged violations he ceased his activities alleged to be in violation and entered a consent decree conveying his land to NUDEP in a conservation easement, consequently ending the alleged violation prior to this action.

Construing the statute to allow the remaining dredged material to constitute a continuing violation would render without meaning the *Gwaltney* requirement that alleged violations be continuing or going, which was established by the Supreme Court of the United States. This Court is obligated to follow Supreme Court precedent, as a move from it would render all

violations as continuing until the pollutant is removed, in direct conflict with the Supreme Court's holding in *Gwaltney* which requires a continuing violation. What remains after the act of discharging are the mere effects of the violation and without an ongoing obligation making those effects a violation, the remaining material cannot be violations. *Rutherford*, 756 F.Supp.2d at 791. Therefore, because § 1311(a) does not create an ongoing obligation, the remaining dredged soil cannot be a continuing violation, and this Court does not have subject matter jurisdiction over this case.

2. This Court should affirm that Mr. Bowman's alleged violations do not create an ongoing obligation because the trend in recent decisions hold that remaining dredged material does not constitute a continuing violation of the CWA.

This Court should follow the general trend of court decisions not forcing liability upon individuals by holding there is no ongoing obligation for prior alleged violations of statute. The Petitioner relies on *Sasser v. Adm'r*, which creates a continuing violation for not removing dredged material, holding that each day the remaining dredged material remains without a permit constitutes an additional day of violation. 990 F.2d 127, 129 (4th Cir. 1993). In *Sasser*, the defendant constructed a new embankment, filled an older deteriorated one, and installed a water gate, discharging dredged and fill material into the wetlands. 990 F.2d at 128. Distinguishable from the facts of the present case, the EPA in *Sasser* issued an administrative order requiring the defendant to cease and desist his activities and to restore the property. The defendant refused to comply, which lead to the suit. This is distinguishable because Mr. Bowman, ceased his activity prior to the suit and agreed to a consent decree, then conveyed his property in a conservation easement to NUDEP. Mr. Bowman also maintained the wetland furthering the preservation of the property. *Id*.

Immediately following the *Sasser* ruling, the *Telluride* decision declined to follow *Sasser*. *Telluride*, 884 F.Supp at 408. Additionally, there has been a general trend of court decisions, most recently in 2010, declining the *Sasser* decision, and opting to follow *Telluride* by holding that remaining dredged material is not a continuing violation. *See United States v. Rutherford Oil Corp.*, 756 F.Supp.2d 782, 790 (S.D. Tex. 2010) (held that dredged material from prop washing of oil vessels was not a continuing violation); *Nat'l Parks Conservation Ass'n, Inc. v. U.S. Army Corps of Eng'rs*, 574 F.Supp.2d 1314, 1324 (S.D. Fla. 2008) (stating that existing fills are wholly past violations).

Following *Sasser* would not only misinterpret the CWA, but it would obviate the application of the statute of limitations. *Telluride*, 884 F.Supp. at 408. The statute of limitations requires that an action be brought within five years from the date when the claim first accrued. 28 U.S.C. § 2462 (1987). Accordingly, if the remaining dredged soil constitutes a continuing violation, every day the soil remains would be a violation that continuously accrues, preventing the statute of limitations from ever running. *Telluride*, 884 F.Supp. at 408. By holding the effects of a violation *as violations themselves*, this Court would erroneously extend the period for which a claim may be brought by not permitting the statute of limitations to run, which is inconsistent with statutory intent and with prior court decisions holding that the mere effects of past violations does not extend the period for which a plaintiff can bring an action. *Telluride*, 884 F.Supp. at 408 (citing *McDougal v. Cnty. of Imperial*, 942 F.2d 668, 674-675 (9th Cir. 1991)). Therefore, this Court should follow the recent trend of court decisions holding that remaining dredged material is not a continuing violation and should not create an ongoing obligation to force Mr. Bowman into liability for the remaining dredged soil.

B. Mr. Bowman was not in violation, as required by the Supreme Court of the United States for subject matter jurisdiction, because he ceased his activities prior to the date of suit.

This Court lacks subject matter jurisdiction under 33 U.S.C. § 1365, because Mr. Bowman did not have a continuing violation at the time of suit. The Supreme Court of the United States held that the CWA prohibits subject matter jurisdiction over wholly past violations, and that at the time of suit, the alleged violation must be continuous or there must be a reasonable likelihood that a past violator will continue to pollute. *Gwaltney*, 484 U.S. at 58. Furthering the *Gwaltney* framework, the recent trend of courts following *Telluride* held that a remaining dredged material is not a continuing violation for lack of an ongoing and continuing obligation in the CWA. Absent a continuing obligation that is itself violated, the remaining materials and effects were not themselves violations. *Rutherford*, 756 F.Supp.2d at 791.

Upon receiving notice of alleged violations, Mr. Bowman ceased his land clearing activities prior to the commencement of this suit. R. at 4. Once he stopped his actions, Mr. Bowman was no longer in violation of the CWA, because the CWA does not create a ongoing obligation to remove dredged soil, what soil remains is not itself a violation, therefore, there was no continuing violation as required by the Supreme Court of the United States. *See Telluride*, 884 F.Supp. at 408 (holding that the dredged and fill material covering sixty acres of wetlands from the development of ski resort did not constitute a continuing violation); *Rutherford*, 756 F.Supp.2d at 793 (holding that dredged material from prop washing of oil vessels was not a continuing violation); *Nat'l Parks Conservation Ass'n, Inc. v. U.S. Army Corps of Eng'rs*, 574 F.Supp.2d 1314, 1324 (S.D. Fla. 2008) (stating that existing fills are wholly past violations).

Furthermore, it is unlikely that Mr. Bowman will continue to violate the CWA in the future. Shortly after Mr. Bowman became aware of his alleged violations, he and NUDEP

entered into a consent decree whereby Mr. Bowman agreed to convey to NUDEP a conservation easement on the 150 foot wide strip of still wooded property adjacent to the Muddy River that he left uncleared. R. at 4. Mr. Bowman also agreed to create a 75-foot buffer zone between the protected easement and the new field to prevent any damage to that area and to maintain a year-round wetland within the easement. *Id*. Mr. Bowman keeps the easement area in its natural state and does not develop, clear, or disrupts that area in any way, other than maintaining and preserving the wetland. *Id*. Mr. Bowman and NUDEP incorporated this agreement into an administrative order, which Mr. Bowman consented to. *Id*. Additionally, when Mr. Bowman ceasing his activities and conveying an easement of his own property to NUDEP, he made a good faith effort to restore the area and help preserve the integrity of the Muddy River. His actions satisfy the congressional purpose of the CWA "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a) (2006).

Without an ongoing obligation in the statute, the remaining dredged soil cannot constitute a continuing violation; therefore, once Mr. Bowman ceased all clearing activities and entered into an agreement with NUDEP to donate the wetland for preservation, there was no continuing violation. Therefore, this Court should affirm the lower court's holding as the Supreme Court's requirement for a continuing violation is not met, as Mr. Bowman's violations are wholly past, precluding subject matter jurisdiction by this Court.

III. THE LOWER COURT CORRECTLY HELD THAT THE CITIZEN SUIT PROVISION OF THE CWA BARS NUWF FROM BRINGING ACTION AGAINST MR. BOWMAN BECAUSE NUDEP COMMENCED AND DILIGENTLY PROSECUTED THE ACTION AGAINST MR. BOWMAN WHEN THE PARTIES ENTERED INTO A CONSENT DECREE.

The Court here should hold, as the lower court previously held, that NUDEP's action of filing a consent decree in federal court precludes NUWF from bringing suit under the CWA

citizen suit statutory provisions. R. at 8. NUDEP filed action in court within the requisite sixty day time period after receiving notice from NUWF. R. at 4. When NUDEP brought action in lower court and signed a consent decree with Mr. Bowman the action was diligently prosecuted. *Id*. Mr. Bowman's voluntary cessation of clearing the land coupled with the donation of the conservation easement on his land demonstrates his compliance with the CWA. The action against Mr. Bowman is barred because NUDEP commenced and diligently prosecuted the action against him within the statutory time period. § 33 U.S.C. §1365(b)(1)(B) states, in relevant parts:

> No action may be commenced under this section prior to sixty days after the Petitioner has given notice of the alleged violation to the Administrator… if the Administrator…has commenced and is *diligently prosecuting* … to require compliance with the standard, limitation, or order, but in any such action in a court of the United States any citizen may intervene as a matter of right (emphasis added).

The Court in *Conn. Fund for the Env't* found that "[T]he court must apply an inflexible rule which determines jurisdiction from the time of filing the complaint." *Conn. Fund for the Env't Inc. v. Upjohn Co.*, 660 F.Supp. 1397, 1404 (D.Conn. 1987). The heavy deference given to government agencies is a burden for the citizen groups to overcome, and "it would be unreasonable and inappropriate to find failure to diligently prosecute simply because a … compromise was reached." *Ark. Wildlife Fed'n v. ICI Americas, Inc.*, 9 F.3d 376, 380 (8th, Cir. 1994).

A. <u>NUDEP commenced action when they filed suit against Mr. Bowman in federal court under the citizen suit section of the CWA.</u>

NUDEP's filing suit precludes NUWF from filing against Mr. Bowman under that statutory language of § 1365(b)(1)(B) of the CWA. This section provides that "a citizen cannot bring a private action to enjoin violations of the CWA if the EPA or State has commenced and is

diligently prosecuting a civil or criminal action in a court the United States." *Karr v. Hefner*, 475 F.3d 1192, 1196, (10th Cir. 2007) (citing to § 1365(b)(1)(B)). Mr. Bowman had already entered into a consent decree with NUDEP, and an action had already been filed to mirror that decree in federal court at the time NUWF filed suit. This Court should find, as the lower court did, that the statutory language of the CWA precludes NUWF's suit and eliminates this Court's subject matter jurisdiction over the suit brought by NUWF.

B. NUDEP diligently prosecuted Mr. Bowman when the parties entered into a consent decree resulting in Mr. Bowman's grant of a conservation easement to NUDEP and then filed in federal court.

When NUDEP and Mr. Bowman entered into a consent decree, the issue had already been diligently prosecuted which prevents a citizen suit per the statutory language of the CWA. Diligent prosecution is presumed, and deference is given to agency's diligence, so the Petitioner will bear the burden of overcoming the presumption that NUDEP was not diligent in their prosecution of Mr. Bowman. *Karr,* 475 F.3d at 1198. In *Karr*, the court held that a consent decree and a civil penalty between the defendant and the EPA was sufficient to constitute diligent prosecution on the part of the EPA and preclude the citizen suit. Here, the Court should also find that the consent decree and the grant of a conservation easement between Mr. Bowman and NUDEP is sufficient to constitute diligent prosecution on the part of NUDEP and preclude NUWF from citizen suit against Mr. Bowman.

Diligence on the behalf of the government agency is presumed, and NUWF will have the heavy burden of proving that the government agency's action amount to a failure to act in order for NUWF to pursue their suit. NUWF has not asserted any facts that would overcome the presumption that NUDEP has been diligent in their prosecution of Mr. Bowman. Petitioner may argue diligent prosecution requires that the court enter a judgment in the case arising between

NUDEP and Mr. Bowman. However, Mr. Bowman settled by entering into a consent decree that required him to donate a strip of land along the river. R at 4. This is a is a greater loss to Mr. Bowman than a one-time fine or a settlement in court because it represents a long term loss of agricultural profits and loss of his property rights along the bank of the river, which is presumably the most valuable portion of his property. Citizen groups are permitted 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." *Karr*, 475 F.3d at 1197 (citing to *Ellis v. Gallatin Steel Co.,* 390 F.3d 461, 477 (6th Cir. 2004); *see N. & S. Rivers Watershed Ass'n v. Scituate,* 949 F.2d 552, 558 (1st Cir. 1991) ("Merely because the State may not be taking the precise action Appellant wants it to or moving with the alacrity Appellant desires does not entitle Appellant to injunctive relief."); *Conn. Fund for Env't v. Contract Plating Co.,* 631 F.Supp. 1291, 1293 (D.Conn.1986) ("[A] federal court ought not to allow a citizens' suit to proceed merely because a prior pending state suit has not alleged as many separate violations of the Act as has the citizens' suit and therefore seeks to impose a less substantial civil penalty on the defendant.").

Petitioner here brought suit after NUDEP and Mr. Bowman entered into a consent decree, and filed a claim. R. at 4-5. NUWF has asserted no facts to allege that NUDEP was not diligent in its prosecution of Mr. Bowman, so given the standard of the Court to give deference to administrative agencies, this Court should hold that NUDEP was diligent in its prosecution, and NUWF's suit is precluded under the Citizen Suit provisions of the CWA.

C. <u>NUDEP diligently prosecuted by requiring compliance with CWA from Mr. Bowman when the parties entered into a consent decree and Mr. Bowman granted a conservation easement forever restraining him this portion of land and requiring him to maintain a conservation easement.</u>

NUDEP and Mr. Bowman's consent decree granted a conservation easement to NUDEP. R. at 4. This easement runs the entire 650 feet of riverfront, 150 feet wide with a barrier of seventy five feet on Mr. Bowman's property. *Id*. In total, Mr. Bowman has signed away his right to 146,250 square feet of his land. Additionally, Mr. Bowman completed all land clearing and seed planting prior to this suit. *Id*. These factors are the functional equivalent of required compliance in the written decree because there is no more land to clear, thus no more dredged material that could be relocated to the riverbed, and Mr. Bowman has a written agreement with NUDEP requiring him to maintain the wetland so he will be required to comply with the decree, which required that the land remain intact, and thus he cannot dredge that area. *Id*. This Court should affirm the summary judgment of the lower court that NUWF is barred from bringing citizen suit against Mr. Bowman by NUDEP's diligent prosecution in the matter.

IV. THE LOWER COURT CORRECTLY HELD THAT MR. BOWMAN DID NOT VIOLATE THE CLEAN WATER ACT BECAUSE HIS ACTIONS DID NOT CONSTITUTE AN ADDITION OF A POLLUTANT INTO NAVIGABLE WATERS UNDER THE ENVIRONMENTAL PROTECTION AGENCY'S WATER TRANSFERS RULE, WHICH WAS CORRECTLY GRANTED *CHEVRON* DEFERENCE.

This Court should affirm the lower court's holding, granting Mr. Bowman summary judgment, because his actions did not constitute an addition of a pollutant into navigable waters that would justify a violation of the CWA under the EPA's Water Transfers Rule. 73 Fed. Reg. 33697 (June 13, 2008) (codified at 40 C.F.R. pt. 122). Under the EPA's rule, the simple act of moving one portion of wetland to another area of the same wetland falls under the definition of a water transfer without an intervening use from the outside world adding pollutants into the water, and therefore is exempt from requiring a permit to satisfy the CWA. *Id*. at 33699. Due to the conjunctive characteristics of the required elements of the CWA – (1) an addition of (2) pollution (3) from a point source into (4) navigable waters – a sustainable violation is established only

when all the elements have been met. 33 U.S.C. § 1311(a), 1362(12). Therefore, the lower court was correct when it held that Mr. Bowman did not violate the CWA when he relocated a portion of his wetland, absent an intervening use, and drained it into the Muddy River, because there was no addition of pollutants into navigable waters. R. at 10.

In its analysis of the ambiguous element of addition, the lower court correctly granted *Chevron* deference to the EPA's rule and interpretation of the term "addition" as an introduction of a pollutant from an outside world that has infiltrated the unitary navigable water system through an intervening use. R. at 9, 10. The congressional authority delegated to the Environmental Protection Agency encompasses the authorization to promulgate regulations and interpret ambiguity in statutory language, so long as it is a permissible construction and reasonable interpretation of the statute. *Chevron, U.S.A., Inc. v. Nat'l Res. Def. Council, Inc.*, 467 U.S. 837, 843-44 (1984). The Supreme Court of the United States has held that federal courts, composed of impartial arbitrators rather than elected legislatures, have "a duty to respect legitimate policy choices" of an administrative agency when it has made a permissible construction and reasonable interpretation of a federal statute. *Id*. at 866. Therefore, this Court has an obligation to grant the EPA's Water Transfers Rule *Chevron* deference, because "a reviewing court has no business rejecting an agency's [permissible and reasonable] exercise of its generally conferred authority to resolve a particular statutory ambiguity." *United States v. Mead Corp.*, 533 U.S. 218, 229 (2001).

A. The lower court was correct in granting *Chevron* deference to the Environmental Protection Agency's Water Transfers Rule, as a permissible construction and reasonable interpretation of the CWA.

The lower court demonstrated the proper course of action when presented with an administrative agency's rule, which is to grant deference to the rule when it has passed the two-

step test set out by the landmark case, *Chevron, U.S.A., Inc. v. Nat'l Res. Def. Council, Inc.*, 467 U.S. 837 (1984). Analogous to the facts of the present case, the Court in *Chevron* was bestowed with the burden of determining whether an EPA regulation was a sufficient interpretation of a federal statute, the Clean Air Act (CAA). *Chevron*, 467 U.S at 839. However, the ambiguity of the phrase, "stationary source," a key element of the statute, led the EPA to take affirmative action to interpret the gap left by Congress. *Id*. at 840-41. The Supreme Court of the United States developed a two-prong test to proctor the agency's regulatory authority. *Id*. at 843-44.

The two-prong *Chevron* test is applicable when a statute is silent or contains ambiguous language coupled with a lack of congressional intent to formulate an interpretation. *Id*. at 843. The first prong asks whether the agency's interpretation is based on a permissible construction of the statute, validated by an explicit or implicit authority to fill in any gaps left by Congress. *Id*. The second prong is directed at the authority granted to the agency and mandates that explicit delegation require an interpretation be "given controlling weight unless [it is] arbitrary, capricious, or manifestly contrary to the statute," and an implicit delegation restrains the court from invalidating an interpretation that is "reasonable." *Id*. at 844.

The Supreme Court held in *Chevron* that Congress had not directly addressed the definition of a stationary source in the 1977 Amendments of the CAA, therefore the EPA was granted broad discretion in implementing the act. *Chevron*, 467 U.S at 862. This discretion to interpret an ambiguous statutory term was deemed permissible, and the Court held that the EPA's interpretation was reasonable as it furthered the purpose of the CAA and incorporated an informed rulemaking process. *Id*. at 866, 863. This unwavering precedent obligates this Court to grant deference to the EPA's definition of the ambiguous term "addition" as interpreted in the Water Transfers Rule, because it satisfies the *Chevron* two-step process: it is a permissible

construction of an ambiguous term within the CWA and a reasonable interpretation under an implicit authority to fill in a congressional gap.

1. The EPA's regulation in the Water Transfers Rule is controlling as a permissible construction of the statute, because the statutory term "addition" was ambiguous and the EPA has implicit authority to define an ambiguous term.

Akin to the EPA's definition of an ambiguous term within the statutory language of the CAA in *Chevron, U.S.A., Inc. v. Nat'l Res. Def. Council, Inc.*, the EPA's Water Transfers Rule provides a concise definition to ambiguous language within the CWA. Due to the lack of congressional intent on the meaning of the term "addition," it is within the discretionary power of the EPA to provide an interpretation. *Chevron*, 467 U.S at 843. Prior to the EPA's final rule, various Courts of Appeals had published conflicting opinions on what constitutes an "addition" of pollutants into navigable waters. (*Compare Nat'l Wildlife Fed'n v. Gorsuch*, 693 F.2d 156 (D.C. Cir. 1982) *and Nat'l Wildlife Fed'n v. Consumers Power Co.*, 862 F.2d 580 (6th Cir. 1988) (holding that the EPA's definition of addition is permissible and excludes water transfers) *with Dubois v. U.S. Dept. of Agric., et el.*, 102 F.3d 1273 (1st Cir. 1996) *and Catskill Mountains Chapter of Trout Unlimited, Inc. v. City of N.Y.*, 273 F. 3d 481, (2nd Cir. 2002) (holding that a water transfer from two distinct bodies of waters constitutes an addition of pollutants.)) The EPA expressed concern regarding the inconsistency of the courts and promulgated the Water Transfers Rule to "resolve the confusion created by these conflicting approaches." 73 Fed. Reg. 33701. The Supreme Court of the United States has held that it is not within the court's power to "impose its own construction, as would be necessary in the absence of an administrative interpretation," when an administrative agency has set forth a permissible and reasonable interpretation of an ambiguous statute. *Chevron*, 467 U.S at 843.

The statutory term at issue, "addition," is an inherently ambiguous term, lacking a clear definition within the statutory language of the CWA, therefore *Chevron* deference is an appropriate application and should be granted by this Court. The Definitions section of the CWA incorporates the term while defining what constitutes a discharge of a pollutant: "(A) any *addition* of any pollutant to navigable waters from any point source." 33 U.S.C. 1362(12) (emphasis added). The vague statutory term demonstrates that Congress has not clearly spoken on the definition of addition, and the lack of congressional intent is further established by the ability to reasonably interpret the act in two different ways: (1) "any addition … to [any] navigable water," and (2) "any addition … to navigable waters [as a whole]." *Friends of the Everglades v. S. Fla. Water Mgmt. Dist.*, 570 F.3d 1210, 1227 (11th Cir. 2009). The 11th Circuit Court of Appeals determined in *Friends of the Everglades*, that not only was the term ambiguous within the statutory language of the act, but the competing interpretations are the very definition of ambiguity, requiring an administrative regulation to fill in the congressional gap. *Id*. at 1227.

Congress has expressly granted the EPA authority fill congressional gaps, allowing the agency discretion in designating certain qualities of the CWA, such as "criteria which will define natural chemical, physical, and biological integrity of water," 117 CONG. REC. 38, 817 (1971), and "defin[ing] point and nonpoint sources." *Nat'l Res. Def. Council, Inc. v. Costle*, 568 F.2d 1369, 1382 (1977). Congress may delegate express authority to regulate gaps intentionally left for an agency to fill, however there are times when the authority can be implicit and inferred from an agency's "generally conferred authority." *Chevron*, 467 U.S. at 843-44. The EPA is interpreting an inherently ambiguous term of the CWA through a reasonable inference of implicit congressional authority that logically extends from the explicit authority to define the terms "point source" and "pollutant." *Nat'l Wildlife Fed'n v. Gorsuch*, 693 F.2d 156, 175 (D.C.

Cir. 1982). Under the *Chevron* test, this Court must grant the EPA's implicit authority to interpret "addition," as it is a permissible construction of an ambiguous statutory term. *Chevron*, 467 U.S at 844.

2. The EPA's definition of addition under the unitary waters theory is controlling, as it was a reasonable interpretation consistent with the purpose of the CWA, and promulgated by an informed rulemaking process.

The EPA's definition of addition as *an introduction of pollutants from an outside world infiltrating unitary waters via an intervening use* is controlling, as it is a reasonable interpretation formulated upon informed rulemaking processes. 73 Fed. Reg. 33699. This Court is bound to grant the EPA deference by precedent set out by the Supreme Court of the United States, which has long recognized the deference contingent upon an administrative agency's reasonable interpretation of ambiguous statutory language. *Chevron*, 467 U.S. at 844. An administrative agency that has been delegated congressional authority to make rules carrying the force of law should be granted *Chevron* deference when it has promulgated a reasonable interpretation of the statute it has been entrusted to enforce. *United States v. Mead Corp.*, 533 U.S. 218, 226-27 (2001). The crux of a reasonable interpretation falls upon the formal administrative rulemaking procedure of the availability of a notice-and-comment period prior to a final ruling. *Id*. at 230.

The Supreme Court of the United States denied *Chevron* deference to a customs classification that changed the definition of a "day planner," relying on common definitions found in the Oxford English Dictionary, which resulted in an imposed tariff upon the respondent corporation. *Id*. at 225. The Court held that deference has been consistently granted when there is a notice-and-comment process, demonstrating congressional authority to promulgate rulings with the force of law, and there was no evidence that Congress had delegated authority to customs to issue classifications. *Id*. at 230-31.

Unlike the customs classification, the EPA has been delegated authority to interpret congressional gaps in the CWA, 117 CONG. REC. 38, 817 (1971), and incorporates notice-and-comment rulemaking processes as required under the Administrative Procedure Act, which mandates that proposed rules be published in the Federal Register and allows interested parties to participate in the rulemaking procedure by submitting comments, concerns, and suggestions related to the proposed rule. 5 U.S.C. § 553 (1996). Two years prior to the EPA's final Water Transfers rule, it provided the public with an opportunity to examine the proposed rule and encouraged commenters to explain why they agree or disagree with the rule, and to provide specific examples to illustrate concerns and suggest alternatives. 71 Fed. Reg. 32887 National Pollutant Discharge Elimination System Water Transfers Proposed Rule (June 7, 2006). The EPA's reasonable interpretation contributes to an inclusive rule consistent with the purpose of the CWA and providing the public with an opportunity to contribute to the formal administrative rulemaking procedure.

The purpose of the CWA is to preserve the integrity of the nation's waters while balancing the interest of the states in their necessary use of the nation's waters. 33 U.S.C. § 1251(a),(b). The EPA efficiently researched the congressional intent prior to releasing their final rule, and established that the lack of a provision addressing water transfers as an addition of pollution is consist with Congress intending that the waters not be federally regulated to prevent an unnecessary burden on the rights of the States in utilizing the nation's navigable waters. 73 Fed. Reg. 33700. The unitary waters theory developed by the EPA grants the States flexibility in harnessing the benefits of water resource allocations absent an intervening municipal, commercial, or industrial use, because the intrinsic pollutants have already merged with the navigable waters and there is no further introduction of pollutants from an outside world. *Id*. at

33701. The carefully crafted Water Transfers Rule maintains harmony between the administrator's clarification of an ambiguous statutory term and congressional intent, constituting a reasonable interpretation and entitling the Rule to *Chevron* deference.

In contrast to the reasonable interpretation promulgated in the EPA's Water Transfers Rule, an administrative agency interpretation found to be inconsistent with the language of a statute must fail, as there is no amount of deference that can save it when the congressional purpose has been desecrated. *Gorsuch*, 693 F.2d at 171. Distinguishable from the facts at hand, the 9th Circuit Court of Appeals denied *Chevron* deference to the EPA's final rule regarding storm water discharge, 71 Fed. Reg. 33628 (June 12, 2006), because the rule was inconsistent with the purpose of the CWA as it changed the definition of what constituted contamination, thus permitted pollutants from an outside world to be freely discharged into navigable waters that had once been regulated by the CWA. *Nat'l Res. Def. Council v. U.S. E.P.A.*, 526 F.3d 591, 606-07 (9th Cir. 2008). The rule was held to be an unreasonable interpretation of the act, attributable to the uncontested fact that the rule allowed an exemption of oil and gas exploration from requiring permits prior to the discharge of pollutants from storm water runoff, even when the addition of pollution violated water quality standards. *Id*. at 600. The court in *National Resource Defense Council* correctly denied deference due to the unreasonable nature of the interpretation that allowed for an unregulated infiltration of pollutants that would have altered the integrity of the Nation's navigable waters. This Court is obligated to follow the lower court's holding and grant deference to the EPA's reasonable interpretation of the CWA promulgated in the Water Transfers Rule, as it is plainly distinguishable from prior EPA regulations that desecrated the objective of the Act.

B. Mr. Bowman's actions do not constitute an addition of pollution under the EPA's definition of addition as pollution from an "outside world," because he

relocated biological material from one area of his wetland to another within the same source of water.

Under the EPA's Water Transfers Rule, navigable waters that are transferred to another body of navigable waters absent an intervening use do not require a permit under the CWA, because there is no addition of pollutants from an outside world into the unitary water system. 73 Fed. Reg. 33699. There can be no addition of pollutants into the nation's navigable water, unless there is a physical introduction of a pollutant from the outside world. *Nat'l Wildlife Fed'n v. Consumers Power Co.*, 862 F.2d 580, 584 (6th Cir. 1988). The 6th Circuit Court of Appeals gives examples of an introduction of pollutant from the outside world as "oil, sanitary waste, and municipal waste," *Id*. at 586, which is quite distinguishable from the act of relocating biological material from one area of wetland to another area of the same wetland. Similar to the biological nature of Mr. Bowman's water transfer, the Court in *Consumers Power Co.* found that the transfer of biological material, fish particles, already present in the water did not constitute an addition of pollutants into the waters, because the conveyance of water was absent an introduction from the outside world. *Id*. at 585. Therefore, Mr. Bowman did not add a pollutant by introducing biological material into the Muddy River from the outside world, because his actions relocated the material within the same "world."

Mr. Bowman's action of relocating biological material via a water transfer is easily distinguishable from cases where an addition of pollution was introduced from the outside world. *Exxon Shipping Co. v. Baker* is an unprecedented example of a tragic introduction of pollutants from the outside world that dramatically altered the integrity of the nation's navigable waters. 554 U.S. 471 (2008). In that case, a massive oil tanker ran aground on Bligh Reef off the Alaskan coast, spewing eleven million gallons of crude oil into Prince William Sound. *Id*. at 476, 478. Exxon pled guilty to an obvious violation of the CWA. *Id*. at 479. *United States v. Lucas*

presents a more common example of the introduction of pollutants from the outside world constituting a violation of the CWA. 516 F.3d 316 (5th Cir. 2008). In that case, the defendants had sold house lots on wetlands, but failed to provide adequate septic systems, causing leakage of sewage and domestic wastewater onto the saturated property, which was interconnected by creeks leading out to the Gulf of Mexico. *Id*. at 322, 328. This Court has been presented with examples of an introduction of pollutants from the outside world that are incomparable to Mr. Bowman's act of relocating biological material on his property. Alternatively, had Mr. Bowman decided to treat his property with pesticides prior to leveling his land, there would be a valid argument of an addition from the outside world. However, this is not the case, and this Court should affirm the lower court's holding granting Mr. Bowman summary judgment, because his actions did not violate the CWA.

C. Mr. Bowman's actions do not constitute an addition of pollution according to the EPA's definition of navigable waters under the unitary waters theory, because the mere act of relocating wetland, absent an intervening use, constitutes a transfer of navigable waters exempt from the CWA.

Mr. Bowman's property line consists of wetlands adjacent to the Muddy River and constitutes one body of navigable water under the unitary waters theory. R. at 9. The theory is founded on the premise that a water transfer does not introduce the addition of pollutants, unless it is the initial introduction of the pollutant into the navigable water. *Friends of the Everglades v. S. Fla. Water Mgmt. Dist.*, 570 F.3d 1210, 1217 (11th Cir. 2009). The EPA incorporated the unitary waters theory into its Water Transfers Rule, under the thesis that water transfers between navigable waters do not lose their status as waters of the United States until there is an intervening use of the water. 73 Fed. Reg. 33701. Therefore, the lower court was correct when it found that Mr. Bowman's actions do not constitute an addition of pollution to the Muddy River by transferring biological material from one area of wetland to another adjacent to the Muddy

River, because the water was transferred without interference from industrial, municipal, or commercial use.

D. The Court of Appeals should affirm the lower court's holding that Mr. Bowman did not violate the Clean Water Act, because his actions fall outside the jurisdiction of the CWA, due to the conjunctive characteristics of the Act's required elements.

The simple act of moving a portion of wetland to another area of the same wetland, absent an intervening use, does not fall within the jurisdiction of the CWA. The Clean Water Act is a federal guideline, implemented by the Environmental Protection Agency, and established to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C § 1251(a). The integrity of the water "refers to a condition in which the natural structure and function of ecosystems is maintained." H.R. REP. NO. 92-911, p. 76 (1972). As the administrator of the CWA, the EPA has mandated that the transfer of water from one navigable body of water to another without an intervening commercial, municipal, or industrial use does not constitute a violation of the CWA because the integrity of the water has not been altered. NPDES Water Transfers Rule, 40 C.F.R. pt. 122. The integrity of the water is manipulated when there is an illegal addition of any pollutant to navigable waters from any point source. 33 U.S.C. § 1311(a), 1362(12).

Mr. Bowman's actions do not violate the Clean Water Act because he does not meet the four elements that equate to a violation of the CWA: (1) an addition of (2) pollution from a (3) point source into (4) navigable waters. *Id*. A consensus between the parties that some of the elements of the CWA have been met does not constitute a violation due to the conjunctive characteristic of the Act. A sustainable violation is established only when all the elements have been met, therefore this Court should affirm the lower court's grant of summary judgment to Mr.

Bowman because his relocation of biological material on his property did not add a pollutant to the Muddy River that would justify a violation of the CWA.

CONCLUSION

For the foregoing reasons, Mr. Bowman respectfully requests that this Court affirm the lower court's grant of summary judgment. NUWF has no standing to appear before a federal court because it has asserted no continuing case or controversy required for Article III standing. NUWF members have not alleged an injury of a legally protected right precluding this Court from providing a favorable ruling to redress their non-existent injuries. The allegations against Mr. Bowman by NUWF are wholly past, because the presence of dredged soil in the river bed does not constitute a continuing violation of the CWA therefore this Court has no federal subject matter jurisdiction over the claim. NUDEP's diligent prosecution barred the citizen suit brought by NUWF, when NUDEP and Mr. Bowman entered into a consent decree that was subsequently filed in federal court, and removed subject matter jurisdiction over the adjudicated claim. Furthermore, this Court has an obligation to defer to the EPA's Water Transfers Rule as a permissible and reasonable construction of the CWA, and affirm the lower court's holding that Mr. Bowman's act of removing wetland and transferring it to another portion of his property absent an intervening use in not an addition of a pollutant from the outside world infiltrating the unitary waters of this Nation.

Respectfully submitted,

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Counsel for Jim Bob Bowman