UNITED STATES COURT OF APPEALS
FOR THE TWELFTH CIRCUIT

C.A. No. 13-1246

NEW UNION WIDLIFE FEDERATION,

Plaintiff-Appellant,

v.

NEW UNION DEPARTMENT OF ENVIRONMENTAL PROTECTION,

Intervenor-Appellant,

v.

JIM BOB BOWMAN,

Defendant-Appellee.

On appeal from the United States District Court for the District of New Union,
Civil Action No. 149-2012, Dated June 1, 2012.

OPENING BRIEF OF THE INTERVENOR-APPELLANT

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JURISDICTIONAL STATEMENT

The United States District Court for the District of New Union exercised proper subject matter jurisdiction pursuant to the citizen suit provision of the Clean Water Act ("CWA") under 33 U.S.C. § 1365 and federal question jurisdiction under 28 U.S.C. § 1331.

The Twelfth Circuit Court of Appeals has jurisdiction because it is taken as of right, pursuant to 28 U.S.C. § 1291 (appeals from final district court decisions), from the final Order of the District Court that dismissed with prejudice all claims relevant to this action. The Order was issued on June 1, 2012, and a timely Notice of Appeal was filed in the district court.

STATEMENT OF THE ISSUES

(1) Did the district court err in determining that NUWF lacked standing to bring the present action where two members of the organization are no longer able to recreationally enjoy the property as a direct result of Bowman's land clearing activities?
(2) Did the district court properly conclude that a continuing violation does not exist where any CWA violation ceases prior to the filing of a lawsuit and the violator complies with remediation agreements?
(3) Did the district court properly conclude that NUWF's claims are barred under § 505(b) where NUDEP has diligently prosecuted all claims before this Court by promptly issuing a notice of violation, entering into a comprehensive settlement agreement with the violator to cease and remedy all violations, and filing a consent decree in the District of New Union?
(4) Did the district court err in determining that there was no violation of § 404 under the CWA where numerous courts have discounted the "outside world" and "unitary water" theories and where the "addition" requirement of § 404 is met when sidecasting occurs?

STATEMENT OF THE CASE

The New Union Wildlife Federation ("NUWF") filed suit in the United States District Court for the District of New Union under 33 U.S.C. § 1365 of the CWA. NUWF alleged that Bob Bowman ("Bowman") violated CWA § 301(a) and CWA § 404 when Bowman filled wetlands on his property by engaging in land clearing activities that consisted of bulldozing trees and vegetation, putting it into piles, burning it, and adding the burned vegetation and ashes back into the wetlands. R. at 3. Bowman alleged that NUWF lacked standing to bring its claims and

argued that he had not violated CWA § 301(a) and § 404. R. at 5. The New Union Department of Environmental Protection ("NUDEP") intervened, arguing that while NUWF had sufficient standing to sue Bowman for violating CWA § 301(a) and § 404, NUWF's lawsuit could not continue where Bowman did not perform a continuing violation and NUDEP had diligently prosecuted Bowman for the wholly past violations. R. at 5. After discovery, the parties filed cross-motions for summary judgment. R. at 3.

On June 1, 2012, in Civ. 149-2012, the United States District Court for the District of New Union granted Bowman's motion for summary judgment on all claims and denied NUWF's motion for summary judgment on all claims. R. at 11. In dismissing NUWF's claims, the district court held that NUWF lacked Article III standing to sue Bowman for alleged violations of CWA § 301(a) and § 404, 33 U.S.C. § 1311(a), 1344; the court lacked subject matter jurisdiction under CWA § 505(a), 33 U.S.C. § 1365(a) because Bowman's violations were wholly past in nature; the court lacked subject matter jurisdiction due to prior state enforcement action under CWA § 505(b), 33 U.S.C. § 1365(b); and there was no violation of CWA § 404, 33 U.S.C. § 1344. R. at 11.

NUWF and NUDEP filed timely appeals with the United States Court of Appeals for the Twelfth Circuit, which granted certiorari to review the claims.

STATEMENT OF THE FACTS

a. Bowman's Land Clearing Activities

Bowman owns 1,000 acres of wooded or previously wooded land bordering the Muddy River in the State of New Union. R. at 3. The Muddy River is more than 500 feet wide and forms the border between the State of New Union to the west and the State of Progress to the east. R. at 3. Bowman's property includes 650 feet of shoreline located directly on the Muddy River. R. at 3. Bowman's entire 1,000-acre property is hydrologically connected to the Muddy

River, portions of which become inundated with water every year, and is covered with trees and vegetation characteristic of wetlands. R. at 3. Bowman's property is considered a wetland pursuant to the U.S. Army Corps of Engineers ("COE") Wetlands Delineation Manual, a fact to which all parties agree. R. at 3-4.

On June 15, 2011, Bowman began land clearing operations on his 1,000 acres of wetlands. R. at 4. At the time Bowman commenced land clearing operations, he had not obtained any requisite permits from the COE. R. at 4. Bowman's clearing method included bulldozing the trees and vegetation, placing the vegetation into large piles, and burning the piles. R. at 4. After burning the vegetation, Bowman again used his bulldozer to dig large trenches, pushing the ash and vegetation remains into them. R. at 4. Bowman continued this practice until the wetlands wer completely leveled. R. at 4. Lastly, Bowman created a wide ditch leading to the Muddy River, allowing the cleared wetlands to drain directly into the river. R. at 4.

Bowman's land clearing activities on the wetlands ceased completely after approximately one month on July 15, 2011. R. at 4. As a result of saturation on a portion of his property, Bowman did not clear 150 acres of the wetlands adjacent to the Muddy River. R. at 4. In late July 2011, NUDEP issued a notice of violation to Bowman for violations of federal and state law. R. at 4. NUDEP issued the notice before Bowman could clear the remaining 150 acres of wetlands on his property. R. at 4. Shortly thereafter, NUDEP entered into a settlement agreement with Bowman. R. at 4. In September 2011, Bowman noticed that the cleared fields had sufficiently drained and subsequently planted the field with winter wheat. R. at 5.

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b. NUDEP's Enforcement Actions Taken Against Bowman

i. NUDEP's Settlement Agreement and Administrative Order Against Bowman

After Bowman began land clearing operations on his wetland property, NUWF members sent a 60-day notice of intent to sue letter to Bowman, the Environmental Protection Agency ("EPA"), and NUDEP. R. at 4. Shortly after the issuance of NUWF's notice of intent to sue, NUDEP contacted Bowman to notify him of both federal and state violations for clearing and filling wetlands. R. at 4.

Although Bowman did not admit to violating state or federal law, Bowman responded to NUDEP's notice of violation and pending prosecution by entering into a settlement agreement with NUDEP. R. at 4. The terms of the settlement agreement required Bowman to cease any additional land clearing operations on his property and to convey the remaining 150-foot strip of wetlands property to NUDEP as a conservation easement. R. at 4. The conservation easement must be open to the public and must be maintained in its natural state at Bowman's expense, and must not include any additional development of the wetlands. R. at 4. In addition to the conservation easement, Bowman was required to create an artificial wetland buffer on 75 feet of land between the remaining 150 feet of wetlands and the cleared field, which must be maintained on a year-round basis. R. at 4.

On August 1, 2011, the settlement agreement between NUDEP and Bowman was incorporated into an administrative order and signed by Bowman. R. at 4. Bowman's creation and maintenance of both the conservation easement and the artificial wetlands will cause Bowman to incur significant initial and long-term expenses. R. at 7-8. In light of these expenses, NUDEP exercised its discretion in foregoing the statutorily authorized penalties of up to $125,000 under administrative orders. R. at 4.

ii. NUDEP's CWA Lawsuit Against Bowman

On August 10, 2011, immediately following the issuance of NUDEP's administrative order against Bowman, NUDEP filed a complaint against Bowman under CWA § 505 in the United States District Court for the District of New Union. R. at 5. On September 5, 2011, NUDEP filed a motion to enter a consent decree that embodied the same terms and conditions as the State's administrative order. R. at 5. That motion is still pending before the District Court of New Union. R. at 5.

On September 15, 2011, NUWF filed a motion to intervene in NUDEP's action, requested that the Court consolidate the NUDEP and NUWF actions, and filed opposition to NUDEP's pending consent decree with Bowman. R. at 5. On November 1, 2011, the court held a status conference with NUDEP and NUWF in which the court determined that while it would not act on any other pending motion at that time, it would grant NUDEP's motion to intervene in the present action. R. at 5. All other motions in the NUDEP action are still pending. R. at 5.

SUMMARY OF THE ARGUMENT

The district court improperly dismissed NUWF's claims for lack of standing. NUWF properly asserted organizational standing, and the individual members meet all elements of standing including injury in fact, traceability, and redressability. Two NUWF members suffered actual injuries that were traceable to the defendant's conduct and would be redressed by the requested relief. NUWF members are no longer able to recreationally enjoy the area due to the defendant's dredging. Ordering civil penalties and the restoration of wetlands would redress this injury. In dismissing the organization's suit, the court failed to acknowledge the aesthetic and economic injuries to the individual members. Additionally, the district court wrongly considered the possibility of future environmental restoration and failed to consider present, actual, and concrete harm to the plaintiffs.

While NUWF has sufficient standing to sue for Bowman's CWA violations, the suit is barred because Bowman is not engaged in any continuing violation. A citizen suit requires that a party be in violation of the CWA or be likely to violate the CWA in the future, neither of which is the case here. Bowman's violations ceased prior to NUWF's initiation of this lawsuit. Any continuing effects from the violations are not independent violations that implicate the continuing violation provision of the CWA. The administrative order requires Bowman to abstain from any future violations. Because there are not any current or likely future violations, NUWF cannot show a continuing violation and the district court properly dismissed NUWF's claims for lack of subject matter jurisdiction.

NUWF's suit is also barred because NUDEP's settlement negotiations and consequent civil suit against Bowman constitute a diligent prosecution for the purposes of the CWA. The CWA bars citizen suits when a state, local, or federal government agency engages in a diligent prosecution. This serves to promote the government's interest in protecting citizens and enforcing the CWA. NUDEP issued an administrative order, established a conservation easement, and brought a civil suit to enter a consent decree, all of which are part of NUDEP's diligent prosecution. Because citizen suits are barred so long as NUDEP is engaged in diligent prosecution, NUWF's suit is barred. Even if the citizen suit provision of the CWA is found to be a non-jurisdictional provision, the department's settlement negotiations, administrative order, and pending consent decree all show a diligent prosecution by the state agency, thereby precluding NUWF's suit.

Bowman's land clearing activities are an addition of a pollutant from a point source into navigable water of the United States. The district court improperly relied on the inapplicable "outside world" theory when it held that Bowman had not put an addition into the wetlands.

Bowman participated in sidecasting for which multiple circuits require a § 404 permit under the CWA. Regardless of whether sidecasting requires a § 404 permit, filling a wetland for agricultural use where no agricultural use previously existed brings an area into a new use and subjects it to the permitting requirements of § 404. Bowman did this when he filled wetlands for the purpose of sowing winter wheat. In addition, the scale of the dredge and fill activities shows that this is not mere incidental fallback—instead, this was a large-scale operation that was a new and destructive use in violation of the CWA.

STANDARD OF REVIEW

A district court's granting of summary judgment is reviewed *de novo*. *United States v. Green Acres Enters., Inc.*, 86 F.3d 130, 133 (8th Cir. 1996); *Pres. Endangered Areas of Cobb's History, Inc. v. U.S. Army Corps of Eng's*, 87 F.3d 1242, 1246 (11th Cir. 1996); *Sierra Club v. Lujan*, 972 F.2d 312, 314 (10th Cir. 1992). Summary judgment is not appropriate unless there is no genuine issue of material fact. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-48 (1986). The moving party must also be entitled to judgment as a matter of law. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). The evidence must be viewed in the light most favorable to the nonmoving party. *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986).

ARGUMENT

I. THE DISTRICT COURT ERRED IN FINDING THAT NUWF LACKED STANDING WHEN IT ONLY LOOKED TO PROSPECTIVE REMEDIES AND IGNORED PRESENT INJURIES.

Two members of NUWF have United States Constitution Article III standing to sue Bowman for CWA violations, which gives NUWF organizational standing. U.S. Const. art. III, §2, cl. 1. As a nonprofit organization, if the interests at stake are germane to the organization's

purpose and individual participation is not required, standing for one member provides standing for the organization. *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs., Inc.*, 528 U.S. 167, 181 (2000). NUWF's purpose is to protect the fish and wildlife of New Union by protecting their habitats. This interest is directly affected by Bowman's land clearing operations, which disturbed habitat for fish and frogs in the area. Neither Dottie Milford nor Zeke Norton, both NUWF members, would be required to participate in litigation beyond the previously submitted affidavits. Article III standing is met when an individual:

> (1) [] has suffered an 'injury in fact' that is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical; (2) the injury is fairly traceable to the challenged action of the defendant; and (3) it is likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision.

Id. at 180-81. Both Milford and Norton meet all three elements. Therefore, NUWF has standing.

a. Injury

i. Dottie Milford

An individual's use of water in an affected area, coupled with reasonable concern of environmental degradation due to a defendant's activities, is sufficient to establish injury in fact. *Friends of the Earth, Inc. v. Gaston Copper Recycling Corp.*, 629 F.3d 387, 397 (4th Cir. 2011). Milford testified that she uses the Muddy River for recreational fishing and boating, and goes picnicking along the banks of the river. Furthermore, Milford testified that the Muddy River looks more polluted than prior to Bowman's destructive activity. The Supreme Court has held that standing is sufficient when the litigants "aver that they use the affected area and are persons 'for whom the aesthetic and recreational values of the area will be lessened' by the challenged activity." *Laidlaw*, 528 U.S. at 183 (quoting *Sierra Club v. Morton*, 405 U.S. 727, 735 (1972)); *see also Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871 (1990). This observation directly supports

the reasonableness of her fear that the Muddy River is more polluted as a result of the blighted wetland. The district court erred in failing to find that Milford's injury supported NUWF's standing.

ii. Zeke Norton

Norton has also been injured by Bowman's activity. In addition to using the Muddy River for recreational boating and fishing, he has frogged in the area for many years. During the frogging season, Norton always caught twelve good-sized frogs on Bowman's property. However, Bowman's land clearing activities in the area where Norton historically frogged have directly impaired Norton's ability to catch frogs. Now, Norton rarely finds as many as two or three frogs in the area. This is a concrete and actual harm.

Regardless of the posted "trespassing" signs on the property, Norton has suffered an injury. Norton participates in frogging for recreational and subsistence use. His value in the area has been dramatically decreased by Bowman's activity. No case law presumes to diminish Norton's injury due to the illegal nature of his activity; instead, standing cases focus strictly on the plaintiff's ability to meet the three constitutional standing requirements. *See Laidlaw*, 528 U.S. at 180-81.

Furthermore, Norton has frogged on Bowman's property for years without Bowman taking any action to stop the alleged trespass. States throughout the United States recognize that various trespassing can become legal when done continuously over a period of time, openly, and adversely to the owner—for example, the doctrines of custom, prescriptive easement, and adverse possession.[1] Although these doctrines are applied under state law, they are widely

[1] *See generally Stevens v. City of Cannon Beach*, 114 S. Ct. 1332, 1336 n.1 (1994) ("the English doctrine of custom, as applying to land used in a certain manner (1) so long that the mind runneth not to the contrary; (2) without interruption; (3) peaceably; (4) where the public

recognized and are designed to encourage productive use of the land. *See N. Natural Gas Co. v. Munns*, 254 F. Supp. 2d. 1103, 1115 (S.D. Iowa 2003). Norton's frogging activity is a productive use of the land, and his standing to sue is not contingent on whether there were trespassing signs posted on Bowman's property.

The district court further failed to properly recognize that Norton's inability to frog now is an injury, regardless of a possible, future, re-established wetland that could provide a richer habitat for frogs. A future restored wetland does not replace Norton's current injury. Although he may be able to have successful frogging ventures in the future, he has been actually harmed by Bowman's land clearing activity. The reduction in frogs Norton has caught not only diminishes his enjoyment of the activity due to less success, but it also decreases his subsistence from the source. Furthermore, the district court's contention that the possibility for an improved environment as a result of Bowman's changes ignores that "the relevant showing for purposes of Article III standing, however, is not injury to the environment but injury to the plaintiff." *Laidlaw*, 528 U.S. at 181. Regardless of the long-term effects on the wetland, Bowman's violation of the CWA harmed Norton.

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use has been appropriate to the land and the usages of the community; (5) where the boundary is certain; (6) where the custom is obligatory (not left up to individual landowners as to whether they will recognize the public's right to access); and (7) where the custom is not repugnant to or inconsistent with other customs or laws."); *Starks v. White*, 49 Fed. Appx. 798, 801 (10th Cir. 2002) (applying New Mexico law, the elements of a prescriptive easement are: ". . . acquired by an open, uninterrupted, peaceable, notorious, adverse use, under a claim of right, and continued for a period of ten years with the knowledge, or imputed knowledge of the owner."); *Marathon Oil Co. v. Heath*, 358 F.2d 34, 38 (7th Cir. 1966) (applying Illinois law, adverse possession "must be open, notorious, hostile, and adverse, and must be uninterrupted for a period of twenty years.").

b. Traceability and Redressability

NUWF also meets the additional standing requirements of traceability and redressability. A plaintiff's injury is "fairly traceable" to the defendant's conduct when the injury is causally related to the defendant's actions. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992). There is no dispute that Bowman conducted land-clearing operations on his property in July 2011. Bowman's land clearing activities destroyed wetlands that served as a habitat for fish and frogs. This action directly harmed Milford and Norton's recreational activities in the area.

Redressability exists when a favorable decision is likely to alleviate the petitioner's injuries. *Id.* In this case, NUDEP has already taken action to fashion an appropriate remedy against Bowman, but the civil penalties requested by NUWF could also supply redress for Bowman's violations. Although civil penalties would not be paid directly to NUWF, this suit was brought under 33 U.S.C. § 1365—once a plaintiff has shown a "distinct and palpable injury to himself . . . persons to whom Congress has granted a right of action . . . may invoke the general public interest in support of their claim." *Warth v. Seldin*, 422 U.S. 490, 501 (1975). Furthermore, Congress has found that civil penalties have a valuable deterrent effect in CWA cases. *Laidlaw*, 528 U.S. at 185.

The court can additionally redress NUWF's injury. The court may grant injunctive relief in the form of a supplemental environmental project ("SEP") to help to reduce the impacts of Bowman's activity on the Muddy River. *See United States v. LTV Steel Co.*, 187 F.R.D. 522, 526 (E.D. Pa. 1998) (holding SEPs can satisfy Article III standing requirements).

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II. NUWF CANNOT CLAIM A CONTINUING VIOLATION WHERE ALL DREDGING HAS CEASED, THE VIOLATIONS WILL NOT RESUME IN THE FUTURE, AND A CONSERVATION EASEMENT REMEDIES ANY OF BOWMAN'S WHOLLY PAST VIOLATIONS.

Filling a wetland without a CWA § 404 permit constitutes a violation of the CWA. 33 U.S.C. § 1344(f)(2) (2012). The CWA limits citizen suits to claims against parties who are "alleged to be in violation" of the CWA. 33 U.S.C. § 1365(a)(1) (2012). Therefore, a plaintiff must allege a continuing violation in order for a federal court to have jurisdiction over a claim under the CWA citizen suit provision. *Laidlaw*, 528 U.S. at 175. To show a continuing violation at the summary judgment stage, a plaintiff must make a "good faith allegation of continuous or intermittent violations." *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Found., Inc.*, 484 U.S. 49, 64 (1987) [hereinafter *Gwaltney I*].

If the plaintiff makes a good faith allegation, the defendant can refute that allegation by showing that any alleged violation occurred wholly in the past. *Conn. Coastal Fisherman's Ass'n v. Remington Arms Co.*, 989 F.2d 1305, 1312 (2d Cir. 1993). Allegations based on wholly past actions do not constitute continuing violations. *Gwaltney I*, 484 U.S. at 64. A violation is wholly past when the violation ceases prior to the plaintiff's filing of a lawsuit and there is no likelihood of continued or intermittent violation in the future. *Chesapeake Bay Found. v. Gwaltney of Smithfield, Ltd.*, 844 F.2d 170, 171-72 (4th Cir. 1988) [hereinafter *Gwaltney II*]. When the basis of a plaintiff's allegations is the defendant's wholly past actions, the lawsuit is barred by the mootness doctrine because there is no "present or future wrongdoing." *Gwaltney I*, 484 U.S. at 67-68.

Here, the plaintiff has alleged a continuing violation and bears the burden of showing a good faith basis for this allegation. The plaintiff cannot carry this burden at the summary judgment stage. Bowman's violations occurred and were completed prior to NUWF filing its

lawsuit. Bowman's agreement to enter into a conservation easement and administrative order prevent any future violations. NUWF's suit is moot.

a. Permitting Citizen Suits Under the CWA Where There is No Danger of Future Environmental Harm by a Defendant, as is the Case Here, Would Negate the CWA's Goal of Preventing Only Continuing Violations.

Allowing prosecution where all that remains of a violation is the "mere decomposition of pollutants" undermines the "in violation" terms of the CWA. *Conn. Coastal Fisherman's Ass'n*, 989 F.2d at 1313. Similarly, multiple circuits have held that a single past violation with continuing effects cannot be construed as a continuing violation. *Nat'l Parks & Conservation Ass'n v. Tenn. Valley Auth.*, 502 F.3d 1316, 1322 (11th Cir. 2007); *Hamker v. Diamond Shamrock Chem. Co.*, 756 F.2d 392, 397 (5th Cir. 1985).

Although filling wetlands imparts some continuing effects, such as the continued fill of the land, labeling dredge fill as a continuing violation would impair the effectiveness of the CWA. *United States v. Telluride Co.*, 884 F. Supp. 404, 408 (D. Colo. 1995) *rev'd on other grounds*, 146 F.3d 1241 (10th Cir. 1998). In *Telluride*, the court attempted to determine when a fill action ceased to be a continuing violation for the purposes of the statute of limitations under the CWA. *Id.* The court reasoned that the statute of limitations could not be based on the removal of fill. *Id.* This is because the statute of limitations would never start to run if the fill were never removed. *Id.* Such a reading would have rendered the five-year statute of limitations present in the CWA superfluous for dredge and fill violations—so long as a site remained filled, a claim could be brought, even fifty or one-hundred years in the future. *See id.*

Additionally, compliance with the terms of CWA § 404 does not require complete restoration or removal of fill. *Orange Env't, Inc. v. Cnty. of Orange*, 923 F. Supp. 529, 538 (S.D.N.Y. 1996). A defendant who complies with a government settlement agreement complies

with the CWA. *Id*. In *County of Orange*, the plaintiffs requested the removal of fill material, restoration of wetlands, and issuance of an after-the-fact § 404 permit. *Id.* at 539-40.

Looking to the enforcement structure of the CWA, the court stated that requiring these stringent remedies would undermine the government's ability to negotiate settlements with defendants. *Id.* at 540. The government could enter into what it believed to be a proper remedial agreement that did not include the restoration of wetlands, but the defendant would be placed in danger of civil double jeopardy because a citizen suit could subsequently require wetland restoration based on the same violation. *Id.* Where the government has already entered an agreement with a defendant, a citizen suit cannot interfere with the terms of the settlement unless there is some "realistic prospect" that the alleged violations "will continue notwithstanding the settlement." *Atl. States Legal Found. v. Eastman Kodak, Co.*, 933 F.2d 124, 127 (2d Cir.1991).

Some courts have determined that fill material that remains at the same location violates the CWA regardless of the length of time that has elapsed since the actual dredging occurred. *See e.g., Sasser v. Adm'r, U. S. Envtl. Prot. Agency*, 990 F.2d 127, 129 (4th Cir. 1993) (holding that each day fill remained was a violation for purposes of fines); *United States v. Cumberland Farms of Conn., Inc.*, 647 F. Supp. 1166, 1183 (D. Mass. 1986) (same). However, these decisions undercut both the statute of limitations as stated in the CWA and the government's authority to enforce the statute.

The CWA states that only those people who are "in violation" at the time a suit is filed are subject to citizen suits. 33 U.S.C. § 1365(a)(1) (2012). NUWF attempts to distinguish continuing violations of the CWA that involve discharges from continuing violations of the CWA that involve dredged material. As *Telluride* and *County of Orange* explain, this distinction is arbitrary and does not serve the goal of the CWA. In many instances, NUWF's interpretation

would eliminate any tolling of the statute of limitations for either type of pollutant. Additionally, parties would have less incentive to cooperate with government enforcement if agreeing to remediation with the government would not eliminate future demands from citizen suits for complete restoration of a location. Because NUWF's interpretation would interfere with the structure of the CWA as a whole, leaving dredge or fill materials in the same location cannot constitute a continuing violation under the CWA.

b. Bowman Did Not Engage in a Continuing Violation Where Land Clearing Operations Were Complete, and He Entered into an Agreement That Prohibited Future Land Clearing.

Intermittent or sporadic violations of the CWA can be considered continuing violations. *Gwaltney II*, 890 F.2d at 693. These violations cease "when there is no real likelihood of repetition." *Id.* A defendant who has completely ceased operations does not engage in continuing violations because he is not likely to repeat the violation. *Pawtuxet Cove Marina v. Ciba-Geigy Corp.*, 807 F.2d 1089, 1094 (1st Cir. 1986); *see Brewer v. Ravan*, 680 F. Supp. 1176, 1183 (M.D. Tenn. 1988) (holding a permanently closed plant could not be engaged in continuing violations).

Here, NUWF filed its citizen suit more than a month after Bowman had completed actions that violated the CWA. Bowman finished his land clearing operations by July 15, 2011. NUWF did not file a citizen's suit until August 30, 2011. By the time the suit was filed, not only had Bowman ceased any dredging or filling, he had also entered into an administrative order and conservation easement with NUDEP that stated he would not clear any additional land or develop the remaining artificial wetland area.

The administrative order and easement prevented Bowman from violating the CWA in the future. NUDEP also has a civil suit pending in federal court to enter a consent decree that would prevent any future violations. Because the order and easement prevent any likely sporadic

or intermittent violations in the future, and Bowman was not engaged in a CWA violation when NUWF filed its lawsuit, Bowman did not and is not presently performing a continuing violation. The district court properly dismissed NUWF's lawsuit for lack of subject matter jurisdiction.

III. THE DISTRICT COURT DID NOT ERR IN HOLDING THAT NUDEP DILIGENTLY PROSECUTED BOWMAN FOR CWA VIOLATIONS.

The purpose of a citizen suit is "to supplement rather than to supplant governmental action." *Gwaltney I*, 484 U.S. at 60. Indeed, CWA § 505 states that "no action may be commenced . . . if the Administrator or State has commenced and is diligently prosecuting a civil or criminal action in a court of the United States . . . ." 33 U.S.C. § 1365(b) (2012). The plain language of § 505, the precedent established by numerous judicial authorities, and ample policy rationales support the conclusion that the diligent prosecution bar is a jurisdictional requirement that precludes citizen suits where the state is diligently prosecuting an action in a court of the United States. Regardless of whether the diligent prosecution bar is jurisdictional or non-jurisdictional, NUDEP's actions constitute diligent prosecution as intended by Congress and interpreted by judicial authorities.

a. The CWA's Diligent Prosecution Requirement is a Jurisdictional Bar That Precludes This Court's Jurisdiction Over NUWF's Claims.

The plain language of § 505 unambiguously supports the district court's interpretation that the diligent prosecution requirement is jurisdictional. Congress created a statutory scheme that provides the EPA Administrator ("Administrator") and state with the primary method of enforcement under 33 U.S.C. § 1365 and § 1319, allowing citizen suits only "if the Federal, State, and local agencies fail to exercise their enforcement responsibility." S. Rep. No. 92-414, at 64 (1971). It is a "fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme." *Davis v.*

Mich. Dep't. of Treasury, 489 U.S. 803, 809 (1989). Moreover, the legislative history demonstrates that "[t]he Committee intends the great volume of enforcement actions [to] be brought by the State." S. Rep. No. 92-414, at 64 (1971).

Viewing the diligent prosecution bar as non-jurisdictional has serious consequences. If the diligent prosecution bar were non-jurisdictional, the court would be required to make a determination regarding diligent prosecution by accepting all well-pleaded facts in the plaintiff's complaint as true and viewing the facts in the light most favorable to the plaintiff. Fed. R. Civ. P. 12(b)(6). But since the diligent prosecution bar is jurisdictional, the court considers its own evidence and is empowered "to make factual findings which are decisive of jurisdiction," because "[j]urisdictional issues are for the court . . . to decide." *Williamson v. Tucker*, 645 F.2d 404, 413 (5th Cir. 1981).

There is no statutory language indicating that the diligent prosecution bar is non-jurisdictional. Therefore, the court is not limited to the information provided by the plaintiff in determining the diligence of prosecution. If Congress intended for the diligent prosecution bar to be non-jurisdictional, it could have accounted for this in the statute. Congress did not do this. Instead, the language and legislative history demonstrates Congress' favor of state enforcement over citizen suits. The language and history also indicate that Congress intended for this Court to possess discretion in making a determination of diligence based on any evidence the Court deems relevant rather than requiring it to view the facts as set forth by the plaintiff.

In addition to the plain language of the statute, several courts have concluded that the CWA "strips the courts of subject matter jurisdiction over citizens' suits where the State has timely commenced judicial or administrative enforcement actions." *Friends of Milwaukee's Rivers v. Milwaukee Metro. Sewerage Dist.*, 556 F.3d 603, 606 (7th Cir. 2009) ("[t]he Act strips

the courts of subject matter jurisdiction over citizens' suits where the State has timely commenced judicial or administrative enforcement actions."); *see also Chesapeake Bay Found. v. Am. Recovery Co.*, 769 F.2d 207, 208 (4th Cir. 1985). In addition to the express determination that the diligent prosecution bar is jurisdictional, the vast majority of courts apply the diligent prosecution bar in a jurisdictional fashion. *See Eastman*, 933 F.2d at 127-28 (holding that diligent prosecution barred plaintiff's case); *Comfort Lake Ass'n, Inc. v. Dresel Contracting Inc.*, 138 F.3d 351, 356-57 (8th Cir. 1998) (same).

Courts have also held that the diligent prosecution bar in other environmental statutes, such as the Resource Conservation Recovery Act ("RCRA"), is jurisdictional. *See e.g., Chesapeake Bay Found. Inc. v. Severstal Sparrows Point, LLC,* 794 F. Supp. 2d 602, 616 (D. Md. 2011) (holding citizen suit was jurisdictionally barred by state diligent prosecution under RCRA); *City of Heath, Ohio v. Ashland Oil, Inc.*, 834 F. Supp. 971, 981 (S.D. Ohio 1993) (same). In *Gwaltney I*, the Supreme Court compared provisions of RCRA and the CWA and found the statutes were substantially similar. 484 U.S. at 57.

Moreover, other portions within the same section as the CWA's diligent prosecution bar have also been held to be jurisdictional. The Supreme Court, in considering whether the 60-day notice requirement of the RCRA was mandatory, held that it was jurisdictional, thus indicating that the diligent prosecution requirement is likely also jurisdictional. *Hallstrom v. Tillamook Cnty.*, 493 U.S. 20, 26 (1989). In *Hallstrom*, the Supreme Court held that the plain language of the statute establishes that "compliance with the 60-day notice provision is a mandatory, not optional, condition precedent for suit" and "a district court may not disregard these requirements at its discretion." *Id*. at 26, 31.

Lastly, there are important policy rationales for precluding citizen suits where the Administrator or state is already diligently prosecuting an action against an alleged violator. One of the primary purposes of citizen suits provisions is to allow citizens to notify the government of alleged statutory violations, thus initiating state enforcement. Citizen suits are designed to "ensure that the agencies fulfill their duties under the CWA responsibly." *Nat'l Wildlife Fed'n v. Hanson*, 859 F.2d 313, 317 (4th Cir. 1988). Only when the state fails to act after the issuance of a 60-day notice letter may a citizen suit be filed, giving the EPA and the state primary authority to enforce violations. 33 U.S.C. § 1365(a) (2012).

In *Gwaltney I*, the Supreme Court cited important reasons for the diligent prosecution bar. 484 U.S. at 61. Those reasons included preventing interference with state enforcement and providing certainty and incentive to defendants to comply with state enforcement actions. *Id*. The Supreme Court stated that if citizens could bring suit for violations already subject to enforcement, "the Administrator's discretion to enforce the CWA in the public interest would be curtailed considerably." *Id*. These statements highlight the importance of state discretion in initiating enforcement actions without subjecting the defendant to simultaneous or subsequent lawsuits for the same violations.

Moreover, allowing citizen suits to proceed without regard for ongoing state enforcement would create unnecessarily duplicative litigation and provide for inefficient allocation of valuable judicial resources. The First Circuit has held that:

> [d]uplicative actions aimed at exacting financial penalties in the name of environmental protection at a time when remedial measures are well underway do not further [the goal of the CWA]. They are, in fact, impediments to environmental remedy efforts.

N. & S. Rivers Watershed Ass'n v. Town of Scituate, 949 F.2d 552, 556 (1st Cir. 1991); *see also Karr v. Hefner*, 475 F.3d 1192, 1198 (10th Cir. 2007) (holding courts "should not interpret §

1365 in a manner that would undermine the [government's] ability to reach voluntary settlements with defendants.").

For the foregoing reasons, this Court should conclude that the diligent prosecution provision is a jurisdictional requirement and that a court may consider any information it deems necessary in determining whether a state is diligently prosecuting an alleged violation of the CWA. However, in the event that this Court finds that the diligent prosecution bar is a non-jurisdictional requirement, NUDEP's actions still constitute a diligent prosecution in this matter.

b. NUDEP is Diligently Prosecuting Bowman, Thereby Barring NUWF from Filing Suit Under the Citizen Suit Provision of the CWA.

While NUWF has demonstrated that it possesses Article III standing to commence a citizen suit against Bowman for CWA violations, NUWF is precluded from bringing a suit to enforce these violations because NUDEP is diligently prosecuting an action against Bowman for the same violations in the District Court of New Union.

Diligent prosecution is established where the Administrator or state investigates an alleged violation, reaches a settlement with a violator, and submits the settlement agreement as a consent decree, thus causing the violator's conduct to cease. *See e.g.*, *Envtl. Conservation Org. v. Dallas*, 529 F.3d 519, 528-29 (5th Cir. 2008). In *Karr v. Hefner*, the court examined the issue of whether the EPA had diligently prosecuted CWA violations where the EPA entered into a settlement and consent decree with defendants. 475 F.3d at 1197-98. The court found that EPA's investigation and settlement was diligent and held that § 505 does "not require government prosecution to be far-reaching or zealous" but rather "requires only diligence." *Id.* In addition, "the fact that an agency has entered into a consent decree with a violator that establishes a prospective schedule of compliance does not necessarily establish lack of diligence." *Piney Run Pres. Ass'n v. Cnty. Comm'rs*, 523 F.3d 453, 459 (4th Cir. 2008).

NUDEP is diligently prosecuting Bowman for filling wetlands on his property in violation of § 404 in the District Court of New Union, and NUDEP has already entered into a settlement agreement with Bowman, which has caused the unlawful conduct to cease entirely. R. at 4. Upon receipt of NUWF's notice of intent, NUDEP quickly issued a notice of violation to Bowman and entered into a settlement agreement. R. at 4. The settlement agreement was subsequently entered as an administrative order pursuant to state law. R. at 4. Under the settlement agreement, Bowman agreed and is required to permanently cease his illegal activities, convert the remaining wetlands on his property into a conservation easement open to public use, create an additional buffer zone between the conservation easement and filled wetlands, and maintain the conservation easement in its natural form. R. at 4. Additionally, NUDEP has initiated suit in the District of New Union where a consent decree is pending court approval. R. at 5.

Finally, the only difference between NUDEP's enforcement action and NUWF's citizen suit is that NUWF seeks the imposition of civil penalties against Bowman. The Supreme Court has held that citizens may not "seek the civil penalties that the Administrator chose to forgo." *Gwaltney I*, 484 U.S. at 61; *Dresel*, 138 F.3d at 356-57. State agencies are entitled to substantial discretion in determining appropriate penalties, and "[w]here an agency has specifically addressed the concerns of an analogous citizen's suit, deference to the agency's plan of attack should be particularly favored." *Scituate*, 949 F.2d at 557.

While NUDEP chose to forgo the issuance of civil penalties, its remedy fully addressed Bowman's CWA violations. Bowman will face considerable immediate and future cost due to the requirement that Bowman deed the remaining wetlands for the creation of a conservation easement, maintain the conservation easement open to public use, and create a buffer zone

between the cleared field and the remaining wetlands. Not only do these measures remedy the CWA violations, but they are also more favorable for NUWF than its request for civil penalties because NUDEP's enforcement action ensures the preservation of the remaining wetlands and opens them for recreational use to the public and NUWF's members.

IV. THE DISTRICT COURT ERRED IN DETERMINING BOWMAN DID NOT VIOLATE § 404 OF THE CWA WHEN HE CONDUCTED LAND CLEARING ACTIVITIES ON HIS PROPERTY.

Congress passed the CWA for the purpose of "restor[ing] and maintain[ing] the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a) (2012). To enforce this value, the CWA prohibits the "discharge of any pollutant by any person" into waters of the United States. 33 U.S.C. § 1311 (2012). Discharge is acceptable, however, if a person first obtains a permit through § 402 or § 404. *See id.* Bowman failed to obtain a permit prior to conducting land clearing activities on his property, and therefore he violated the CWA. Four elements must have been met to hold Bowman liable under the CWA: 1) the material must have been a pollutant, 2) which was emitted from a point source, 3) into a navigable water, and 4) the activity must have been an "addition." 33 U.S.C. § 1362(12) (2012). This is exactly what Bowman did—his activities directly compromised the chemical, physical, and biological integrity of the Muddy River.

a. Pollutant

All parties agree that the term "pollutant" has been interpreted broadly to include "dredged spoil, solid waste . . . biological materials, rock, [or] sand . . . discharged into water." 33 U.S.C. § 1362(6) (2012). As the district court found, Bowman's trees and leveled vegetation remains were "biological materials." However, contrary to the district court's reasoning, "dredged spoil" was also present in Bowman's activities. Although "dredge" is not defined in the CWA, the district court used a narrow definition of "dredge" that only includes "activity that

occurs on open water to excavate a channel or port docking area to make them available for commercial navigation." R. at 8. However, the lower court cites no source for this strict interpretation. The definition of dredge is much broader and is defined as to "catch, gather, or pull out . . . to deepen." *Webster's Third New International Dictionary* 688 (1993), available at http://www.merriam-webster.com/dictionary/dredge. Bowman's clearing activity involved digging and pulling up the soil to reconfigure the landscape. Therefore, the result of his digging and gathering activity, the vegetation, is both biological material and dredged spoil.

b. Point Source

Point source has also been defined broadly under the CWA. *See* 33 U.S.C. § 1362(14) (2012). Although "bulldozer" is not specifically mentioned in the definition of a "point source," as a mechanism designed to convey dirt and other material from one place to another, it is a point source. *Avoyelles Sportsmen's League, Inc. v. Marsh*, 715 F.2d 897, 922 (5th Cir. 1983). As an uncontested issue, the district court and Bowman agree with this interpretation.

c. Navigable Waters

It is further undisputed that Bowman's property fits in the "navigable waters" requirement for CWA liability. Although his property is a wetland, the COE has found, and been supported by the Supreme Court, that wetlands adjacent to navigable waters are also navigable waters themselves. *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 135 (1985). The reasoning for this interpretation is consistent with the fundamental purpose of the CWA: wetlands adjacent to navigable waters ". . . may function as integral parts of the aquatic environment . . . ." *Id.* The Muddy River represents a navigable water by the plain meaning of the term because the river supports recreational navigation and is a "water of the United States." 33 U.S.C. § 1362(7) (2012). Because Bowman's wetland is adjacent to the Muddy River, the wetland also fits firmly in the "navigable waters" definition.

d. Addition

The district court incorrectly relied heavily on cases and an EPA interpretation that do not apply to the facts here. Placing emphasis on a now debunked "outside world" theory and an inapplicable "unitary waters" doctrine, Bowman and the district court insist that any destruction Bowman committed on his own property is not subject to regulation under the CWA. However, this view overlooks the majority of circuits that have held to the contrary in the last decade, and it also overlooks many cases with facts that directly align with Bowman's activities.

i. Outside World

The CWA does not define "addition," and the EPA and COE have not given the term a definition in either agency's regulations. However, numerous circuit court decisions provide this Court with the authority to find that Bowman's action of pushing pollutants from one part of his property to another was an addition. In the past, the EPA has determined that an "addition" occurs when a "point source itself physically introduces a pollutant into water from the outside world." *Nat'l Wildlife Fed'n v. Gorsuch*, 693 F.2d 156, 174-75 (D.C. Cir. 1982). However, the *Gorsuch* court found that this interpretation of the statute was not evidenced by the statutory language nor the legislative history. *Id.* at 175. Further, the facts in *Gorsuch* were far different from the present case. *See generally id.* The parties in *Gorsuch* argued over whether "addition" applies when a dam, the point source, causes pollutants to enter a connected body of water, such as a reservoir. *Id.* at 174. It is also important to note that *Gorsuch* addressed the CWA § 402, and the EPA did not take the "outside world" position in a § 404 case. *Id.* at 175-76.

The district court acknowledged numerous cases that find a § 404 permit is required to conduct land clearing activities. However, the district court wrongly found that none of the land clearing cases discuss the "outside world" and "unitary navigable waters" theories applied by the EPA. *See* R. at 10. In fact, courts have made clear that regardless of the EPA and COE

interpretations, a § 404 permit is required for land clearing activities that occur even when nothing is coming from the outside world. Thus, Bowman's activities are subject to the CWA permitting requirement.

ii. Sidecasting and Redeposit

The preamble to the Final Rule for Regulatory Programs of the Corps of Engineers, as cited in *United States v. Bay-Houston Towing Co.*, also specifically mentions that disposal by "sidecasting" will be subject to regulation under § 404. 33 F. Supp. 2d 596, 602 (E.D. Mich. 1999); 33 C.F.R. § 323.4 (1987). Sidecasting is "the deposit of dredged or excavated material from a wetland back into that same wetland." *United States v. Deaton*, 209 F.3d 331, 335 (2000). Specifically, the preamble states that "if [] material is disposed of in a water of the United States, by sidecasting or by other means, this disposal will be considered a 'discharge of dredged material' and will be subject to regulation under section 404." 33 C.F.R. § 323.4 (1987).

Courts have also supported COE's decision to require a permit for discharge by sidecasting. The Fourth Circuit held that "sidecasting adds a pollutant that was not present before." *Deaton*, 209 F.3d at 336. *Deaton* also discounted the "outside world" theory promoted by Bowman and found "Congress would not have used the word 'addition' (in 'addition of any pollutant') to prohibit the discharge of dredged spoil in a wetland, while intending to prohibit such pollution only when the dredged material comes from outside the wetland." *Id.* In addition to the Fourth Circuit, the Fifth Circuit and the Eleventh Circuit have interpreted "addition" to include redeposit of materials from the same wetland. *See e.g. United States v. M.C.C. of Fla., Inc.*, 772 F.2d 1501, 1506 (11th Cir. 1985); *Avoyelles*, 715 F.2d at 923-25.

In *Avoyelles*, the Fifth Circuit acknowledged EPA's substantial discretion in administering the CWA, but the court still found that land clearing activities constitute discharge within the meaning of the CWA. 715 F.2d at 922. Removal of vegetation can "destroy the vital function of the wetlands." *Id.* For this reason, among others, the court held that not requiring a permit would "frustrate the ecological purposes of the CWA." *Id.* The *Avoyelles* court was also convinced that the activities of burying material and filling in sloughs go beyond mere removal of material and are more likely to require a permit. *Id.* at 923. Just as in *Avoyelles*, Bowman created big trenches and pushed the vegetation into the trenches.

Avoyelles also clarified that this type of land clearing does not fit in the "normal farming activities" exception. *Id.* at 925; 33 U.S.C. § 1344(f) (2012). This exception only applies to ongoing and continuing agricultural activity, not activity in which no farming operation was or could have been contemplated prior to the dredge and fill. *Avoyelles*, 715 F.2d at 925. Indeed, a changed use of land is exactly the activity Congress intended the statute to address, and not exempt, from the § 404 permitting requirements. *Id.*

The Ninth Circuit also held that activities occurring completely within the same wetland can constitute an "addition," by expressing that "activities that destroy the ecology of a wetland are not immune from the Clean Water Act merely because they do not involve the introduction of material brought in from somewhere else." *Borden Ranch P'ship v. U. S. Army Corps of Eng'rs*, 261 F.3d 810, 814-15 (9th Cir. 2011). *Borden Ranch* held that even where soil is already present but just "churned up," it still constitutes an addition. *Id.* at 814. Additionally, the court applied the same reasoning from *Avoyelles* to § 404(f). *Id.* at 815-16. This "recapture" provision requires a permit for activities that "bring the land 'into a use which it was not previously subject.'" *Id.* at 815.

Although Bowman argues that the EPA has interpreted "addition" to incorporate the "unitary navigable waters" theory, both are mistaken by the context of the EPA rule. The NPDES Water Transfer Rule applies strictly to water transfers and "does not affect any other activity that may be subject to NPDES permitting requirements." NPDES Water Transfer Rule, 73 Fed. Reg. 33,697 (June 13, 2008) (codified at 40 C.F.R. pt. 122). The rule explicitly states that "water transfers route water through tunnels, channels, and/or natural stream water features, and either pump or passively direct it for uses such as providing public water supply, irrigation, power generation, flood control, and environmental restoration." *Id.* The lower court's use of this rule and its mention of *Chevron* deference have no relation to Bowman's activities in dispute here.

On the other hand, the EPA has expressed an opinion regarding "addition" for § 404 permits more broadly than for water transfers. In the Seventh Circuit case *Greenfield Mills, Inc. v. Macklin*, the EPA participated as an amicus curiae and expressed the opinion that "addition" should be applied broadly. 361 F.3d 934, 948 (7th Cir. 2004). The EPA further stated that multiple circuit opinions, such as *Avoyelles* and *Borden Ranch*, have consistently recognized that materials which are "scooped up and then redeposited in the same waterbody can result in discharge of a pollutant," and the EPA therefore expressed the opinion that this was the appropriate way to apply the term "addition." *Id.* Further contradicting the district court's holding, *Greenfield* held that "excluding such dredged materials from the concept of 'addition' would effectively remove the dredge-and-fill provision from the statute." *Id.* at 949 (citing *Avoyelles*, 715 F.2d 897).

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iii. Statutory Interpretation

While Bowman argues that the same term used in different parts of the same statute has the same meaning, the case on which he bases this assertion can easily be distinguished from the present case. *See Sorenson v. Sec'y of Treasury of U.S.*, 475 U.S. 851, 860 (1986). In *Sorenson*, the definition of the term "overpayment" was applied to two different sub-sections of the same section of the Internal Revenue Code. *Id.* at 859. Not only was the term in the same section, it was explicitly defined in the same chapter of the Internal Revenue Code. *Id.* at 860. Here, neither § 402 or § 404 define "addition," and these are completely different sections that two different government agencies implement and interpret. *See* 33 U.S.C. §§ 1342, 1344 (2012).

iv. Intent of § 404

Bowman additionally argues that *United States v. Bay-Houston Towing Co.* shows that the intent behind § 404 was to provide a permitting scheme for dredged and fill material that is disposed of a considerable distance from its point of origin–that proposition is not sufficiently supported by the cited case. 33 F. Supp. 2d 596 (E.D. Mich. 1999). Indeed, *Bay-Houston* focuses on "incidental fallback" that occurs when materials are removed from water and a small portion of it happens to fall back into the water. *Id.* at 603. Additionally, the court in *Bay-Houston* emphasized that the preamble to the regulation promulgated by the COE allows "normal dredging operation[s]" to operate without a permit. *Id.* at 602 (quoting Final Rule for Regulatory Programs of the Corps of Engineers, 33 C.F.R. § 323.4 (1987)). Bowman's activity was not a normal dredging operation; therefore, his conduct constitutes an "addition" and required a CWA § 404 permit.

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CONCLUSION

NUDEP respectfully requests that this Court affirm the district court's grant of summary judgment regarding NUWF's diligent prosecution and continuing violation claims. NUDEP also respectfully requests that this Court reverse the district court's grant of summary judgment regarding NUWF's standing to bring the claim and the defendant's violation of the CWA.