Team Number 22

Docket Number C.A. No. 13-1246

IN THE UNITED STATES DISTRICT COURT OF APPEALS
FOR THE TWELFTH CIRCUIT

NEW UNION WILDLIFE FEDERATION,

Plaintiff-Appellant

v.

NEW UNION DEPARTMENT OF ENVIRONMENTAL PROTECTION,

Intervenor-Appellant,

v.

JIM BOB BOWMAN,

Defendant-Appellee.

ON APPEAL
FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW UNION
HON. ROMULUS N. REMUS, UNITED STATES DISTRICT JUDGE

BRIEF FOR APPELLEE JIM BOB BOWMAN

STATEMENT REGARDING ORAL ARGUMENT

Pursuant to Federal Rules of Appellate Procedure 34(a), Appellee Jim Bob Bowman ("Bowman") respectfully requests oral argument to persuade this court that the District Court properly granted summary judgment in favor of the defendants on the issues of whether Appellant New Union Wildlife Federation ("NUWF") has standing to sue Appellee, whether Appellee's actions constitute a continuing violation, whether Appellant's suit has been barred by New Union Department of Environmental Protection's ("NUDEP") diligent prosecution of Appellee, and whether the Appellee's actions constituted a § 404 violation under the Clean Water Act ("CWA").

Oral argument will significantly aid the court in reviewing these claims, because it will allow both parties to thoroughly expound upon the issues. Moreover, in the event that the Court has any questions or concerns beyond the scope of the briefs, the opportunity to respond to specific questions will reduce the mischaracterization of evidence and thus aid the Court's analysis. Furthermore, oral argument will enhance the Court's comprehension of the facts and assure that all of the legal issues are properly determined.

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STATEMENT OF JURISDICTION

Pursuant to 33 U.S.C. § 1365(a) (2006), the district courts should have jurisdiction over all citizen suits brought under the Clean Water Act ("CWA"). The United States District Court for the District of New Union ("District Court") did not have jurisdiction over this case, however, because Appellant New Union Wildlife Federation ("NUWF") lacked standing to bring suit, there was no continuing or ongoing violation as required by § 505(a) of the CWA to establish subject matter jurisdiction, and Intervenor-Appellant New Union Department of Environmental Protection ("NUDEP") diligently prosecuted Appellee's Jim Bob Bowman's actions, therefore barring Appellant's suit under § 505(b) of the CWA. On June 1, 2012, the District Court properly granted Appellee's Motion for Summary Judgment on all counts.

Consequently, Appellant and NUDEP each filed a timely Notice of Appeal pursuant to Fed. R. App. P. 4. The United States Court of Appeals for the Twelfth Circuit has appellate jurisdiction to hear all civil cases from final decisions of the United States District Court for the District of New Union, pursuant to 28 U.S.C. § 1291 (2006) and Fed. R. App. P. 3 and 4.

STATEMENT OF THE ISSUES

I. WHETHER THE DISTRICT COURT'S SUMMARY JUDGMENT WAS PROPER ON THE ISSUE OF WHETHER NEW UNION WILDLIFE FEDERATION ("NUWF") HAS STANDING TO SUE JIM BOB BOWMAN FOR VIOLATING THE CWA WHEN THE UNDISPUTED EVIDENCE SHOWS THAT THE INDIVIDUAL MEMBERS OF NUWF HAVE NOT SHOWN AN INJURY-IN-FACT AND THEREFORE CANNOT ESTABLISH STANDING IN THEIR OWN RIGHT.

II. WHETHER THE DISTRICT COURT'S SUMMARY JUDGMENT WAS PROPER ON THE ISSUE OF WHETHER THERE IS A CONTINUING OR ONGOING VIOLATION AS REQUIRED BY § 505(a) OF THE CWA FOR SUBJECT MATTER JURISDICTION WHEN JIM BOB BOWMAN CEASED LAND CLEARING OPERATIONS ON JULY 15, 2011 AND HIS ONLY SUBSEQUENT ACTIVITIES HAVE INCLUDED SOWING THE FIELD WITH WINTER WHEAT AND DRAINING THE PROPERTY.

III. WHETHER THE DISTRICT COURT'S SUMMARY JUDGMENT WAS PROPER ON THE ISSUE OF WHETHER NUWF'S CITIZEN SUIT HAS BEEN BARRED BY NEW UNION DEPARTMENT OF ENVIRONMENTAL PROTECTION'S ("NUDEP") DILIGENT PROSECUTION OF JIM BOB BOWMAN'S CASE WHEN NUDEP TOOK ACTION WITHIN SIXTY DAYS AS REQUIRED BY 505(b) AND BOWMAN'S ALLEGED VIOLATIONS ARE NOT ONGOING OR CONTINUOUS.

IV. WHETHER THE DISTRICT COURT'S SUMMARY JUDGMENT WAS PROPER ON THE ISSUE OF WHETHER JIM BOB BOWMAN VIOLATED § 404 OF THE CLEAN WATER ACT WHEN HE MOVED DREDGED AND FILL MATERIAL FROM ONE PART OF HIS FORMER WETLAND TO ANOTHER PART OF THE SAME WETLAND WITHOUT INTRODUCING ANY NEW POLLUTANTS TO THE PROPERTY.

STATEMENT OF THE CASE

a. Procedural History

Defendant-Appellee Jim Bob Bowman ("Bowman") is the owner of the land at issue in this case. (R. 3). Plaintiff-Appellant New Union Wildlife Federation ("NUWF") is a not for profit corporation whose purpose is to protect the fish and wildlife of the state by protecting their habitats. (R. 4). NUWF is funded by members' dues and contributions and organized under the State of New Union. (R. 4). Intervenor-Appellant New Union Department of Environmental Protection ("NUDEP") has been properly delegated authority by the Environmental Protection Agency ("EPA") to implement the Clean Water Act ("CWA").

After Bowman commenced land clearing operations on June 15, 2011, NUWF sent a notice of its intent to sue Bowman under § 505 of the CWA to Bowman, the EPA, and the State of New Union/NUDEP on July 1, 2011. (R. 4). Shortly thereafter, NUDEP sent Bowman a notice of violation informing him that he had violated both state and federal law by clearing his field. (R. 4). Although Bowman maintained that he had not violated state or federal law, he subsequently entered into a settlement agreement with NUDEP. (R. 4). The terms of this agreement require Bowman to refrain from clearing any more wetlands in the area and to convey the 150-foot-wide strip of still wooded property to NUDEP as a conservation easement. (R. 4). The agreement also requires Bowman to convey a 75-foot "buffer zone" to NUDEP on which he is required to construct and maintain a year-round wetland. (R. 4). The agreement requires Bowman to allow public entry on the easement for appropriate, day-use-only, recreational purposes, to keep the easement area in its natural state, and to refrain from developing it in any way other than constructing and maintaining the artificial wetland. (R. 4). This agreement was

incorporated into an administrative order issued by NUDEP to Bowman, which Bowman consented to on August 1, 2011. (R. 4).

On August 10, 2011, NUDEP filed a complaint against Bowman in the United States District Court for the District of New Union ("District Court") under § 505 of the CWA. (R. 5). On September 5, 2011, NUDEP filed a motion to enter a decree, the terms of which are identical to the state administrative order, to which Bowman consented. (R. 5). This motion is still pending. (R. 5).

On August 30, 2011, NUWF filed its own complaint against Bowman in the District Court under § 505 of the CWA. (R. 5). NUWF's suit seeks civil penalties and an order requiring Bowman to remove the fill material and restore the wetlands. (R. 5). On September 15, 2011, NUWF filed a motion to intervene in the NUDEP § 505 action, to consolidate the NUDEP and NUWF actions, and an opposition to entry of the decree proposed by NUDEP in the NUDEP § 505 action. (R. 5). These motions and opposition are still pending. (R. 5). At about the same time, however, NUDEP filed a motion to intervene in the NUWF case, which the District Court subsequently granted. (R. 5).

On November 1, 2011, a status conference was held on both cases. (R. 5). The District Court notified the parties that it was not acting on any of the pending motions in either the NUDEP or the NUWF cases besides NUDEP's motion to intervene in the NUWF case. (R. 5). This was done without prejudice to NUDEP's rights to enforce violations of its proposed decree or of NUWF's rights to continue with its cause of action.

After discovery, the parties filed cross-motions for summary judgment. (R. 5). Bowman filed a motion for summary judgment on four grounds: 1) NUWF lacked standing because neither it nor its members suffered an injury in fact fairly traceable to Bowman's alleged

violations; 2) the District Court lacked subject matter jurisdiction because any alleged § 404 violations were wholly past and there was no continuing or ongoing violations; 3) the District Court lacked subject matter jurisdiction because the State of New Union had diligently prosecuted Bowman by already taking an enforcement action and fully resolving the violations; and 4) the District Court lacked subject matter jurisdiction because the element of "addition" was not satisfied in order to constitute a § 404 violation under the CWA. (R. 5).

Furthermore, NUWF filed a motion for summary judgment on one ground: Bowman violated the CWA because he added fill material to navigable waters from a point source without a § 404 permit. (R. 5). NUDEP joined Bowman in his motion for summary judgment the second and third issues of continuing violation and diligent prosecution and joined NUWF in its motion for summary judgment on the first and fourth issues of standing and the alleged § 404 violation. (R. 5).

On June 1, 2012, the District Court granted Bowman's Motion for Summary Judgment on all counts. (R. 11). Specifically, the District Court held that the appellant lacked standing, that the District Court lacked subject matter jurisdiction because all violations were wholly past, that the District Court lacked subject matter jurisdiction due to prior state action, and that there was no violation of the CWA. (R. 11). Consequently, NUWF and NUDEP each filed a Notice of Appeal. (R. 1). NUWF takes issue with respect to the District Court's holding on all four issues. (R. 1). NUDEP takes issue with respect to the District Court's holding that NUWF lacked standing and that Bowman did not violate § 404 of the CWA. (R. 1). On September 14, 2012, the United States Court of Appeals for the Twelfth Circuit issued an order that all parties brief the four issues. (R. 1-2).

b. Statement of Facts

Appellee Jim Bob Bowman owns one thousand acres of land adjacent to the Muddy River near the town of Mudflats in the State of New Union. (R. 3). The Muddy River, which is more than five-hundred feet wide and more than six feet deep where it borders Bowman's property, forms the border between New Union and Progress for at least forty miles both upstream and downstream from Bowman's property. (R. 3). The river is commonly used for recreational activity, including boating, fishing, frogging, and picnicking on its banks. (R. 3, 6).

Bowman's property includes 650 feet of shoreline on the Muddy River and is a wetland according to the U.S. Army Corps of Engineers' Wetlands Determination Manual. (R. 3-4). The one thousand acre property is hydrologically connected to the Muddy, wholly within the one-hundred year floodplain of the Muddy, and covered with trees and other vegetation characteristic of wetlands. (R. 3). Portions of the property are inundated every year when the river is high. (R. 3). Bowman's property is properly posted under state law against trespassing. (R. 6).

From June 15, 2011 to July 15, 2011, Bowman cleared a portion of his land. (R. 4). He used bulldozers to knock down trees and level other vegetation. (R. 4). He next formed windrows out of these trees and vegetation and subsequently burned them. (R. 4). Bowman then used a bulldozer to dig trenches and pushed the remains of the trees and vegetation into these trenches. (R. 4). After that, Bowman leveled the field, pushing soil from high portions of the field into the trenches and low lying portions. (R. 4). Lastly, he formed a wide ditch that ran from the back of his property and into the Muddy in order to drain the field. (R. 4).

Bowman, however, left a strip of land untouched. (R. 4). This strip of land runs along the 650-foot-length of the property's river frontage and is approximately 150 feet wide. (R. 4).

The strip features a densely wooded area that shields the field from the river and its users. (R. 6). The aesthetics of the river are therefore unaffected. (R. 6).

Since entering into the settlement agreement with NUDEP, Bowman has not altered the state of his property in any way other than sowing the cleared field with winter wheat in September 2011 and draining the property into the Muddy. (R. 5, 7).

c. Standard of Review

This Court's review of the District Court's grant of summary judgment is *de novo*, applying the same standards that controlled the District Court's decision. *Green v. Holland*, 480 F.3d 1216, 1258 (11th Cir. 2004). Under Fed. R. Civ. P. 56(a), summary judgment should be affirmed because the evidence on the record proves there is no genuine dispute as to any material fact, and the Appellees are entitled to judgment as a matter of law. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249 (1986).

Because Bowman met the initial burden by showing the absence of any genuine dispute of fact material to NUWF's claims, the burden shifted to NUWF to establish why summary judgment was improper. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). In doing so, NUWF must set out specific facts showing a genuine issue for trial and may not rely merely on allegations or denials in its own pleadings. Fed. R. Civ. P. 56(e). However, "[f]or factual issues to be considered genuine, they must have a real business within the record." *Hairston v. Gainesville Sin Publ'g Co.*, 9 F.3d 913, 918 (11th Cir. 1993).

While this Court should draw all reasonable inferences in favor of NUWF since it opposed summary judgment, this standard does not require the Court to resolve all factual inferences in such a manner. *Barnes v. Sw. Forest Indus., Inc.*, 814 F.2d 607, 609 (11th Cir. 1987); *See also Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587-88 (1986).

On this point, the Court has held, "[t]he mere existence of some factual dispute is material to an issue affecting the outcome of the case." *Chapman v. Al Transp.*, 229 F.3d 1012, 1023 (11th Cir. 2000).

In the present case, the District Court applied summary judgment principles and properly concluded that NUWF failed to produce evidence "such that a reasonable [fact finder] could return a verdict for [her]." *Anderson*, 477 U.S. at 248. Nevertheless, "[w]hen reviewing a grant of summary judgment, the court of appeals may affirm if there exists an adequate ground for doing so, regardless of whether it is the one on which the district court relied." *Fitzpatrick v. City of Atlanta*, 2 F.3d 1112, 1117 (11th Cir. 1993). Because the undisputed evidence on record clearly demonstrates summary judgment was appropriate, this Court should affirm the District Court's decision.

SUMMARY OF THE ARGUMENT

Summary judgment on Appellant NUWF's violation of Clean Water Act claim was proper because NUWF lacked standing to bring suit against Appellee and therefore cannot establish a cause of action for a violation of the CWA. Under CWA §§ 301(a) and 404, the members of NUWF would not otherwise have standing to sue Jim Bob Bowman in their own right; therefore, NUWF lacks standing and summary judgment should be affirmed. The NUWF's members do not have standing in their own right because they have not shown that Bowman's activities caused them recreational, aesthetic or economic injuries, they only assert general averments and conclusory allegations that do not show any specific facts supporting their allegations of injury-in-fact, and they cannot claim injury to their ability to recreationally "frog" because their frogging constituted illegal trespassing. As such, there are no genuine issues of material fact and summary judgment was proper.

Additionally, summary judgment on Appellant's continuing violation claim was proper because Bowman ceased filling the land on July 15, 2011, and his only subsequent actions have included planting seeds and draining the property. As such, Bowman's alleged violations are not ongoing or continuous and there is no reasonable likelihood that he will resume them. Therefore, there is no continuing violation and subject matter jurisdiction cannot be established. As such, there are no genuine issues of material fact and summary judgment was proper.

Furthermore, under § 505(b) of the CWA, NUDEP diligently prosecuted Bowman and therefore NUWF's citizen suit under § 505(a) is barred; thus, subject matter jurisdiction cannot be established and summary judgment was proper. NUDEP timely filed suit and diligently worked to achieve settlement with Bowman within the sixty-day time period required under § 505(b)(1)(B). Also, there is no realistic prospect that Bowman's activities are ongoing or

continuous. Therefore, NUDEP's diligent prosecution of Bowman has barred NUWF's citizen suit under § 505(a) and subject matter jurisdiction cannot be established. As such, there are no genuine issues of material fact and summary judgment was proper.

Lastly, Bowman did not add pollutants to his wetlands; therefore, he did not violate § 404 of the CWA because the requisite element of "addition" was not satisfied. Firstly, under the EPA's "from the outside world" definition, Bowman's moving dredged soil from one area of his property to another area of his property does not constitute "addition" for the purposes of the CWA. Secondly, under the EPA's Water Transfers Rule, which is based on the "unitary navigable waters" theory, all navigable waters are one for the purposes of the CWA; therefore, under this theory, Bowman's moving soil from one part of the former wetland to the other did not constitute an "addition."

The EPA's Water Transfers Rule, which is based on the unitary waters theory, is a reasonable interpretation of an ambiguous statute; therefore, the regulation is permissible and this Honorable Court should give effect to it. Firstly, § 404 of the CWA is ambiguous because it does not define "addition." Secondly, the EPA's interpretation is a permissible construction. Therefore, the regulation is permissible. Regardless of how well-founded this Honorable Court's interpretation might be, the EPA's interpretation is controlling and this Honorable Court should give effect to it. Under Water Transfers Rule, the fill materials on Bowman's property were already part of the wetland, and re-introducing them back into the wetland did not constitute "addition." Therefore, the fourth element of "addition" is not satisfied. As such, there is no genuine issue of material fact and summary judgment was proper.

ARGUMENT

I. Summary judgment on Appellant NUWF's violation of CWA claim was proper because NUWF lacked standing to bring suit against Appellee and therefore cannot establish a cause of action for a violation of the CWA.

The United States District Court for the District of New Union's ("District Court") decision to grant summary judgment on New Union Wildlife Federation's ("NUWF") §§ 301(a) and 404 claims was proper because NUWF, as an association, lacks standing to bring suit in this action. In order to establish standing, the appellant has the burden of proving (1) an injury-in-fact (2) that is fairly traceable to the alleged violations, and (3) that is redressable by the court. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992). An association, however, has a heightened burden of proof. *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 181 (2000); *Hunt v. Washington State Apple Adver. Comm'n,* 432 U.S. 333, 343 (1977). To prove standing, an association must show: (1) its members would otherwise have standing to sue in their own right, (2) the interests at stake are germane to the organization's purpose, and (3) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit. *Laidlaw*, 528 U.S. at 181 (citing *Hunt*, 432 U.S. at 343). Thus, in order for NUWF to have standing, it must prove that its members have endured injuries that are germane to NUWF's purpose and those individual members are not required to participate in the lawsuit.

A. Under CWA §§ 301(a) and 404, the members of NUWF would not otherwise have standing to sue Jim Bob Bowman in their own right; therefore, NUWF lacks standing and summary judgment should be affirmed.

The Supreme Court has held that "environmental plaintiffs adequately allege injury in fact when they aver that they use the affected area and are persons 'for whom the aesthetic and recreational values of the area will be lessened' by the challenged activity." *Id.* at 182 (quoting

Sierra Club v. Morton, 405 U.S. 727, 735 (1972)). This requirement reinforces the notion that in order for a plaintiff to have standing, there must be an injury to that plaintiff rather than an injury to the environment. *Laidlaw*, 528 U.S. at 199. Thus, in order for NUWF to have standing in this suit, it must demonstrate that its members could sue Appellee Jim Bob Bowman ("Bowman") for their individual injuries, economic or aesthetic, resulting from his violation of the Clean Water Act ("CWA").

NUWF and its individual members are not able to prove injury-in-fact. The produced affidavits and testimony do not adequately show that NUWF or its members have endured recreational, aesthetic, or economic injury. Additionally, neither NUWF nor its members assert specific facts in support of their allegations. Lastly, Zeke Norton cannot claim injury in the form of deprivation of recreational activity when that activity is illegal. As such, NUWF and its members are unable to prove injury-in-fact and cannot establish standing.

1. The NUWF's members' affidavits and testimony do not prove that Bowman's activities caused them recreational, aesthetic or economic injuries; therefore, they have suffered no injury-in-fact.

NUWF presents affidavits from three of its members claiming injuries-in-fact. These affidavits, however, do not give rise to any recreational, aesthetic, or economic injuries. In *Laidlaw*, where a group of environmental associations brought a citizen suit against a defendant under the CWA for excessive mercury discharge, the United States Supreme Court affirmed the District Court's holding that the plaintiff associations had standing. *Id.* at 184-85. In that case, individual members of the environmental associations presented affidavits and testimony "asserting that [appellee] Laidlaw's pollutant discharges, and the affiants' reasonable concerns about the effects of those discharges, directly affected those affiants' recreational, aesthetic, and economic interests." *Id.* at 169. The affidavits and testimony presented in *Laidlaw* revealed that

the river "looked and smelled polluted" and that individuals no longer enjoyed hiking, fishing, picnicking, swimming, boating or even living in or around the river. *Laidlaw,* 528 U.S. at 182-83.

Similarly, in the instant case, NUWF presented the affidavits of three of its individual members, who testified that they use the Muddy for boating, fishing, and picnicking, and that although they cannot see a difference in the land from the river or its banks, they are aware of the differences and fear that the Muddy is more polluted. (R. 6). In particular, the affidavit of Dottie Milford states that the Muddy looks more polluted to her than it did prior to Bowman's activities. (R. 6). However, the facts of this case differ from *Laidlaw* in that the fill material here consists of trees and other vegetation, which are safe, organic materials. In *Laidlaw,* the discharged pollutants, which were in excess of Laidlaw's National Pollutant Discharge Elimination System (NPDES) permit, consisted primarily of mercury, an extremely toxic pollutant. 528 U.S. at 176. In the instant case, the natural, organic tree and vegetation fill material has little to no bearing on the polluted status of the river or the recreational activities of boating, fishing and picnicking in or around the river. Moreover, when the flood plain is inundated every year when the river gets high, the same trees and vegetation become a part of the river. (R. 3). Therefore, the Appellant cannot prove injury-in-fact.

Additionally, in *Laidlaw,* the dangerous mercury pollutant certainly posed a significant aesthetic risk as well as a hazardous health risk to those who hiked, fished, picnicked, boated, lived, and swam in or around the polluted river. One of the member's affidavits even stated that the mercury discharge was responsible for the loss in the value of her home, which gives rise to an economic injury. *Laidlaw,* 528 U.S. at 182-83. In the instant case, there is no such evidence of any semblance of an economic injury.

Lastly, Laidlaw violated the mercury discharge limitation in its permit 489 times between 1987 and 1995. *Laidlaw*, 528 U.S. at 176. Bowman, on the other hand, has only cleared his land one time, which drained into the Muddy beginning on July 15, 2011, and he is prohibited under the NUDEP order from clearing any more wetlands in the area. (R. 4). Indeed, it is clear that the individual members of the plaintiff environmental associations in *Laidlaw* endured far more substantial recreational, aesthetic, economic, and possibly health injuries than those in the instant case.

2. The NUWF's members' affidavits and only testimony assert general averments and conclusory allegations that do not show any specific facts supporting their allegations of injury-in-fact.

The individual NUWF members assert in their affidavits and testimony that they "feel a loss from the destruction of the wetlands" and that they fear that the Muddy will be far more polluted if other adjacent wetlands are cleared and drained. (R. 6). In *Lujan v. National Wildlife Federation*, the United States Supreme Court affirmed the district court's holding that a group of wildlife conservation organizations could not survive a motion for summary judgment motion by merely offering "general averments" or "conclusory allegations." 497 U.S. 871, 888-89 (1990). In order to prove that the Appellant's interests are actually affected, "[i]t will not do to 'presume' the missing facts because without them the affidavits would not establish the injury that they generally allege." *Id.* at 889. In *Lujan*, the language in the organization members' affidavits broadly stated that the plaintiffs used the contested lands "in the vicinity" and the defendant's behavior would threaten "the aesthetic beauty and wildlife habitat potential of these lands." *Id.* at 886. The Court agreed with the district court's decision that the affidavits were bare allegations of injury that did not show specific facts supporting their allegations; therefore, the environmental organizations did not have standing. *Id.* at 888-89.

Similarly, in the instant case, the assertions in the affidavits and testimony of Dottie Milford, Zeke Norton and Effie Lawless are equally as vague and unconvincing. Stating that they feel a loss from the destruction of the wetlands and that they fear that the Muddy will be far more polluted if other adjacent wetlands are cleared and drained is not sufficient to establish standing under the *Lujan* decision. The Appellant's argument that their members "feel a loss from the destruction of the wetlands" is refuted by the fact that Bowman is required under the New Union Department of Environmental Protection ("NUDEP") order to develop and maintain a year-round artificial wetland. (R. 4). According to a NUDEP biologist, this artificial, partially-inundated wetland will provide a richer habitat than the former, occasionally-inundated wetland. (R. 6). The Appellant, therefore, cannot sufficiently claim that its members "feel a loss from the destruction of the wetlands" when the wetlands will in fact be improved. Furthermore, Bowman is also required under the NUDEP order to refrain from clearing any more wetlands in the area or developing the easement area in any other way other than constructing and maintaining the artificial wetland. (R. 4). Thus, the Appellant cannot sufficiently claim that its members "fear that the Muddy will be far more polluted if other adjacent wetlands are cleared and drained" when Bowman is obligated under law to refrain from doing so. These statements are general averments and conclusory allegations that do not show any specific facts supporting their allegations of injury-in-fact. As a result, Appellants are unable to establish injury-in-fact and therefore lack standing.

3. Zeke Norton's testimony does not prove that the clearing of Bowman's field imposed on Norton's recreational frogging because Norton was not frogging in a legal manner; therefore, he has suffered no injury-in-fact.

In addition to his affidavit, Norton testified that he knowingly trespassed on Bowman's property for years for recreational and subsistence purposes, despite the numerous "no

trespassing" signs on Bowman's property. (R. 6). Norton claimed that the Bowman property would yield at least a dozen "good-sized frogs" in the right season. (R. 6). Norton now claims that he "is lucky to find two or three good sized frogs in the remaining woods and buffer area." (R. 6). Norton admitted in his deposition that he is aware that Bowman's private property was posted under state law against trespassing and that he knowingly violated the law. (R. 6). This gives rise to the doctrine of "unclean hands," where a court of equity is not accessible to one who has participated in illegal behavior relative to the matter in which he seeks relief. *Precision Instrument Mfg. Co. v. Auto. Maint. Mach. Co.*, 324 U.S. 806, 814 (1945). Norton admitted in his deposition that his frogging constituted trespassing on Bowman's land, which is illegal behavior relative to the matter in which he seeks relief. The "unclean hands" doctrine, therefore, prevents Norton from claiming an injury-in-fact.

For the reasons stated above, the Appellee respectfully requests that this Court affirm the District Court's summary judgment on the issue of standing. The undisputed evidence demonstrates that neither NUWF nor its members endured an injury-in-fact and therefore lack standing. Consequently, the ruling should be affirmed.

II. Summary judgment on Appellant's continuing violation claim was proper because Bowman ceased filling the land on July 15, 2011, and his only subsequent actions have included planting seeds and draining the property; therefore, there is no continuing violation and subject matter jurisdiction cannot be established.

If this Honorable Court finds that NUWF and its members lack standing, then the issue of whether there is a continuing violation does not need to be addressed. However, if this Honorable Court finds that NUWF and its members do have standing, then this Honorable Court should find that the district court's decision to grant Bowman's Motion for Summary Judgment was proper on the issue of whether there was a continuing violation, which is required under § 505(a) of the CWA to establish subject matter jurisdiction. Section 505(a) of the CWA states

that any citizen may bring suit against any person alleged to be in violation of the CWA for injunctive relief and/or civil penalties under the jurisdiction of the district courts. 33 U.S.C. § 1365(a) (2006). However, the United States Supreme Court has held that § 505 of the CWA requires that these alleged violations be continuing or ongoing as a matter of subject matter jurisdiction. *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Found.*, 484 U.S. 49, 49 (1987). For a violation to be continuing or ongoing, there must be "a reasonable likelihood that a past polluter will continue to pollute in the future." *Id.* at 56-57. When there is "no reasonable likelihood that a past polluter will continue polluting in the future," the case is moot and subject matter jurisdiction cannot be established. *Id.* at 66 (quoting *United States v. Aluminum Co. of Am.*, 148 F.2d 416, 448 (2d Cir. 1945)); *see also United States v. Concentrated Phosphate Exp. Assn.*, 393 U.S. 199, 203 (1968) ("A case might become moot if subsequent events made it absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur."). Thus, in order to establish subject matter jurisdiction, NUWF must prove that Bowman's alleged violations are ongoing and continuous based on the fact that there is a reasonable likelihood that Bowman will pollute again in the future.

The undisputed evidence demonstrates that Bowman's alleged violations are wholly past, thus the District Court was correct in granting summary judgment on this issue. Bowman has abided by the terms of the legally binding settlement agreement since August 1, 2011; therefore, there is no reasonable likelihood that he will resume them. (R. 4). His actions have been properly remedied by the agreement. Furthermore, the Appellant's usage of *Sasser v. Administrator* in arguing that fill material constitutes a continuing violation unless removed is incorrect as it does not apply to the issue at bar. Rather, the holding in *United States v. Rutherford Oil Corp.* speaks to the current issue and is on point in holding that once a violator

stops adding a pollutant, the violation is over. *United States v. Rutherford Oil Corp.*, 756 F. Supp. 2d 782, 785, 791 (S.D. Tex. 2010). Therefore, no genuine issues of material fact exist as to whether Bowman's activities constitute a continuing violation and consequently subject matter jurisdiction cannot be established.

A. Bowman's alleged violations are not ongoing or continuous and there is no reasonable likelihood that he will resume them.

Bowman's alleged violations of the CWA are not ongoing or continuous as required by § 505 and therefore subject matter jurisdiction cannot be established. First, under the legally binding NUDEP order, Bowman is required to refrain from clearing more wetlands in the area, to place the remaining lands in the conservation easement, and to keep the easement area in its natural state. (R. 4). Furthermore, the landfill is completely full and leveled and Bowman's only activities subsequent to July 15, 2011 include planting winter wheat seeds on the cleared field and draining the field through the ditch he constructed. (R. 4, 7). Bowman, therefore, has abided by the terms of the legally binding agreement for well over a year since it was issued on August 1, 2011. (R. 4). Consequently, there is no reason to believe that the alleged violations will continue notwithstanding the settlement and remand is not necessary.

Additionally, Bowman's alleged § 404 violations are irreversible and therefore not ongoing or continuing. NUWF argues that the § 402 violations in *Gwaltney* were not continuing because they were irreversible and that alternatively, § 404 violations are continuing because they are reversible. (R. 7). Bowman's activities, however, are not reversible. He bulldozed his property's trees and vegetation, formed them into windrows, and burned them. (R. 4). He subsequently buried the fill materials in trenches and leveled the entire field. (R. 4). By removing this fill material, the former wetland will not be revitalized. Rather, by constructing and maintaining an artificial wetland on his property, Bowman has not only remedied the

situation, but improved it. (R. 6). The artificial wetland will provide a richer habitat that the environment will benefit from. (R. 6). As such, the proper remedy has been ordered by the settlement agreement. (R. 4-5). Removing the fill materials would not remedy the effects of Bowman's actions because his actions are irreversible. Therefore, the continued presence of the fill materials does not constitute a continuing violation and summary judgment was proper on this issue.

B. Appellant's use of Sasser v. Administrator regarding ongoing and continuing violations is not on point. Rather, United States v. Rutherford Oil Corp. addresses the current issue at hand.

Appellant cites *Sasser v. Administrator*, which is not binding on this jurisdiction, in alleging that some courts have held that the continued presence of dredged and fill material in a former wetland constitutes a continuing and ongoing violation. (R. 7); *Sasser v. Adm'r*, 990 F.2d 127 (4th Cir. 1993). *Sasser*, however, is not on point. In *Sasser*, there was an amendment to the CWA enacted in 1987 that authorized the EPA to assess administrative penalties. *Sasser*, 990 F.2d at 129. The petitioner's violations took place a year earlier in 1986, and he argued that the amendment could not be retrospectively applied to his violations. *Id.* The Fourth Circuit disagreed, holding that the EPA had subject matter jurisdiction under 33 U.S.C. § 1319(g) (2006) to assess penalties for Sasser's pre-1987 violations because they were continuing. *Id.* *Sasser* is not on point in the instant case, however, because it does not speak to the issue of whether the continued presence of fill material constitutes a continuing violation for the purposes of subject matter jurisdiction in a citizen suit alleging a § 404 violation.

Sasser's irrelevance to the current issue is further solidified by *United States v. Rutherford Oil Corp.* 756 F. Supp. at 785, 791. In that case, where the United States alleged §§ 402 and 404 violations when an oil company's prop washing resulted in the discharge of

pollutants into navigable waters without authorization, the Southern District of Texas held that "[o]nce the violator stops adding a pollutant in violation of a permit, the violation itself is over. What remains are the effects of the violation, but absent a continuing obligation that is itself violated, the effects are not themselves violations." *Rutherford Oil*, 756 F. Supp. at 791 (citing *United States v. Scruggs*, Civ. A. No. G-06-776, 2009 WL 81921, at *6, *11 (S.D. Tex. Jan. 12, 2009)). The discharge is not a continuing violation simply because the alleged violator has not remedied its effects. *Id.*

The district court in *Rutherford Oil* further held that *Sasser* is "not based on the statutory duty to refrain from the unauthorized discharge of pollutants." *Id.* at 791. Rather, the language Appellant cites regarding continuing violations in *Sasser* comes from cases with irrelevant issues: "a case that involved an injunction instead of violations of the CWA itself, [*United States v. Tull*, 615 F. Supp. 610, 626 (E.D. Va. 1983)]…[and] another case that merely included the failure to remedy environmental damage as one factor favoring civil penalties, [*United States v. Ciampitti*, 669 F. Supp. 684, 699-700 (D.N.J. 1987)]." *Id.* at 791-92. *Rutherford Oil*, on the other hand, comports with the instant case regarding the continuing violation issue because § 404 violations are asserted. *Id.* at 784. The instant case is not regarding whether the EPA has jurisdiction to assess civil penalties for continuing violations in light of a new amendment to the CWA. Rather, the instant case is regarding whether discharges of fill materials constitute continuing violations in alleged § 404 violations unless removed. *Rutherford Oil* addresses this issue, and answers it in the negative. 756 F. Supp. at 792. Therefore, the fill materials on Bowman's property do not constitute an ongoing or continuous violation. As such, all alleged § 404 violations are wholly passed and subject matter jurisdiction cannot be established.

For the reasons stated above, the Appellee respectfully requests that this Court affirm the District Court's summary judgment on the issue of whether there is a continuing or ongoing violation as required by § 505(a) of the CWA for subject matter jurisdiction. The undisputed evidence demonstrates that there are no ongoing or continuous violations and that Bowman has abided by the terms of the settlement agreement. Therefore, there is no realistic prospect that he will continue to violate the CWA as alleged in NUWF's complaint. Consequently, there are no genuine issues of material fact and summary judgment should be affirmed.

III. Under § 505(b) of the CWA, NUDEP diligently prosecuted Bowman and therefore NUWF's citizen suit under § 505(a) is barred; thus, subject matter jurisdiction cannot be established and summary judgment was proper.

If this Honorable Court finds that Bowman's activities do not constitute an ongoing or continuous violation, then the issue of diligent prosecution does not need to be addressed. However, if this Honorable Court does find that Bowman's activities constitute a continuing or ongoing violation, then this Honorable Court should find that NUDEP diligently prosecuted Jim Bob Bowman under § 505(b) of the CWA and that NUWF's citizen suit is therefore barred. Under § 505(b)(1)(B) of the CWA, no citizen suit shall be commenced unless the plaintiff has given the EPA, the state, and the alleged violator sixty days' notice. 33 U.S.C. § 1365(b)(1)(B) (2006). However, under § 505(b)(1)(B), a citizen suit shall *not* be commenced if the government is "diligently prosecuting" an action involving the same violations. *Id.* (emphasis added). Therefore, "these provisions permit a citizen suit to begin if the appropriate state or federal authorities have not acted within the sixty-day notice period." *Atlantic State Legal Found., Inc. v. Eastman Kodak Co.*, 933 F.2d 124, 127 (2d Cir. 1991).

Summary judgment was proper on the issue of diligent prosecution. NUDEP timely filed suit and engaged in a settlement with Bowman within the requisite sixty-day period.

Additionally, Bowman has abided by the terms of the settlement agreement since August 1, 2011 and there is no reasonable prospect that he will continue the alleged § 404 violations. As such, there are no genuine issues of material fact as to whether NUDEP diligently prosecuted Bowman under § 505(b) and therefore subject matter jurisdiction cannot be established.

A. NUDEP timely filed suit and diligently worked to achieve settlement with Bowman within the sixty-day time period required under § 505(b)(1)(B).

In the instant case, the appropriate authorities diligently acted within the sixty-day notice period. NUWF sent a notice of its intent to sue to Bowman, the EPA, and the State of New Union/NUDEP on July 1, 2011. (R. 4). The validity of this notice is not contested by any party. (R. 4). Shortly thereafter, NUDEP notified Bowman that he violated both state and federal law by clearing the field. (R. 4). Although he maintained that he did not violate state or federal law, Bowman entered into a settlement agreement with NUDEP, which was incorporated into an administrative order issued to Bowman on August 1, 2011. (R. 4). On August 10, 2011, NUDEP filed suit against Bowman in federal court, well within the requisite sixty-day period under § 505(b)(1)(B). As such, under § 505(b)(1)(B), NUDEP's action was timely and this diligent prosecution bars NUWF from bringing suit against Bowman. U.S.C. § 1365(b)(1)(B) (2006). Consequently, NUWF cannot establish subject matter jurisdiction due to prior state action and the District Court's summary judgment should be affirmed.

B. There is no realistic prospect that Bowman's activities are ongoing or continuous.

Bowman's activities do not exhibit an ongoing or continuous violation. In *Atlantic State Legal Found., Inc. v. Eastman Kodak Co.*, where an environmental group brought a citizen suit against an alleged violator who had already entered into a settlement agreement with state authorities, the Second Circuit held that a citizen suit must be dismissed "[i]f the state enforcement proceeding has caused the violations alleged in the citizen suit to cease without any

likelihood of recurrence." *Atlantic State*, 933 F.2d at 127. Additionally, the citizen group may not challenge the terms of that settlement agreement unless there is a "realistic prospect" that the alleged violations will continue in breach of that agreement. *Id.* In reaching this determination, the court reasoned that:

> The purpose of the citizen suit is to stop violations of the Clean Water Act that are not challenged by appropriate state and federal authorities. However, we do not believe the Clean Water Act can or should be read to…prevent state or local authorities from achieving a settlement as to conduct that is the subject of a citizen complaint. To hold otherwise would likely lead to underenforcement of the Clean Water Act.

Id.

In the instant case, the facts are similar to those in *Atlantic State*. *Id.* On August 1, 2011, Bowman and NUDEP entered into an agreement whereby Bowman was required to cease further alleged violations of § 404 and to deed a conservation easement of a 225-foot tract of his land. (R. 4, 7). Regarding this tract of land, the agreement requires him to relinquish its agricultural and developmental value, to preserve the land in its natural state, and to open the land to appropriate public use. (R. 4, 7). Accordingly, this agreement has forced the alleged violations in NUWF's citizen suit to cease without any likelihood of reoccurrence.

In *Atlantic State*, the Court remanded the case to determine whether there was a realistic prospect that the violator would continue to violate the CWA as alleged in the citizen suit complaint. 933 F.2d at 128. However, in that case, Atlantic State alleged multiple CWA violations that took place within the two months after the settlement agreement. *Id.* at 127. In the instant case, there is no such evidence of post-settlement violations whatsoever. Rather, Bowman has abided by the terms of the agreement for over a year since it was issued on August 1, 2011. (R. 4). As a result, there is no realistic prospect that the alleged violations will continue notwithstanding the settlement and remand is not necessary. NUWF's suit has thus been barred

by NUDEP's diligent prosecution of Bowman's case; therefore, summary judgment was proper on this issue.

Although not binding, the Fifth Circuit recently held that the "diligent prosecution" question is not a jurisdictional bar. *Louisiana Environmental Action Network v. City of Baton Rouge*, 677 F.3d 737, 748-49 (5th Cir. 2012). However, even if this Court does have jurisdiction, the question remains whether the "diligent prosecution" provision bars NUWF's action. *Id.* at 749. This question, again, comes down to whether the state authorities properly took timely action and if the violation is continuing. *Id.* at 750. As previously established, there are no genuine issues of material fact regarding the timeliness of the action or the continuing nature of the alleged violation. NUDEP properly and timely took action against Bowman within the requisite sixty days regarding his alleged violations. A settlement agreement was reached that prevents Bowman from continuing these alleged violations. Lastly, Bowman has shown no signs of breaching this agreement whatsoever in the past fourteen months. Therefore, summary judgment for Bowman was appropriate on this issue.

For the reasons stated above, the Appellee respectfully requests that this Court affirm the District Court's summary judgment on the issue of whether NUWF's citizen suit has been barred by NUDEP's diligent prosecution. The undisputed evidence demonstrates that NUDEP took action within the requisite sixty days and reached a settlement with Bowman whereby he must discontinue all alleged violations of § 404. (R. 4-5). Bowman has since abided by the terms of this agreement; therefore, there is no realistic prospect that he will continue to violate the CWA as alleged in NUWF's complaint. Consequently, summary judgment should be affirmed.

IV. Bowman did not add pollutants to his wetlands; therefore, he did not violate § 404 of the CWA because the requisite element of "addition" was not satisfied.

If this Honorable Court finds that NUDEP diligently prosecuted Bowman pursuant to § 505(b), then the issue of the alleged § 404 violation does not need to be addressed. However, if this Honorable Court does find that Bowman's activities constitute a continuing or ongoing violation, then this Honorable Court should find that there are no genuine issues of material fact as to whether Bowman moving dredged soil from one part of his property to another does not constitute the requisite "addition" under the CWA. Under § 404 of the CWA, the Secretary of the Army can issue permits "for the discharge of dredged or fill materials into navigable waters." 33 U.S.C. § 1344 (2006). Without such a permit, the "discharge of any pollutant by any person is unlawful." *Id.* § 1311 (2006). Section 502(12) of the CWA interprets "discharge of a pollutant" to mean "any addition of any pollutant to navigable waters from any point source." *Id.* § 1362(12) (2006). Therefore, under § 404 of the CWA, a permit is required for the discharge of dredged or fill materials into navigable waters if the following four elements are met: (1) pollutant, (2) navigable waters, (3) point source, and (4) addition. *Id.* § 1344 (2006).

No party contests whether the elements of pollutant, navigable waters, or point source are met. (R. 8-9). Although the first three elements have been met in order to constitute a § 404 violation, the undisputed evidence shows that the fourth element of "addition" has not been satisfied. The CWA does not define "addition." However, under the two commonly-used, applicable definitions, Bowman's actions do not constitute "addition" and summary judgment should be affirmed.

A. Under the EPA's "from the outside world" definition, Bowman's moving dredged soil from one area of his property to another area of his property does not constitute "addition" for the purposes of the CWA; therefore, there is no violation of § 404.

Under the EPA's "from the outside world" definition of "addition," Bowman's actions do not constitute "addition" and therefore do not violate § 404 of the CWA. The EPA has defined "addition" as "from the outside world." *Nat'l Wildlife Fed'n v. Gorsuch*, 693 F.2d 156, 174-75 (D.C. Cir. 1982). Under this definition, "addition from a point source occurs only if the point source itself physically *introduces* a pollutant into water *from the outside world*." *Id.* at 175 (emphasis added). Bowman did not add a pollutant into his former wetlands from the outside world during his land clearing operations; rather, he moved organic material from one area of his property to another area of his property. Although the defendant's actions changed the nature of some of the material from living to dead, this change does not constitute an addition. *See Nat'l Wildlife Fed'n v. Consumers Power Co.*, 862 F.2d 580, 585 (6th Cir. 1988) (where the Sixth Circuit stated that changing the nature of fish from live to dead did not constitute an addition). Accordingly, the requirement of "addition" is not fulfilled.

There is, however, a line of cases following *Nat'l Wildlife Federation v. Gorsuch* that reject this definition of "addition." In *Catskill Mountains Chapter of Trout Unlimited, Inc. v. City of New York*, the Second Circuit interpreted *Gorsuch*'s definition of "outside world" as "any place outside the particular water body to which pollutants are introduced." 273 F.3d 481, 491 (2d Cir. 2001). In that case, water from one body of water was artificially diverted from its natural course and traveled several miles through a tunnel and into a body of water "utterly unrelated in any relevant sense" to the originating body of water "*and its watershed*." *Id.* at 492 (emphasis added). After finding that this constituted "addition," the Court reversed and remanded the District Court's dismissal of the claim. *Id.* at 494.

However, *Catskill* differs from the instant case in the fact that the alleged "addition" in *Catskill* traveled miles, entered a completely different body of water, and was in the beginning stages of being delivered "to New York City for use as drinking water." *Catskill*, 273 F.3d at 484. In the instant case, the alleged "addition" traveled a few feet and re-entered the same body of water within the same watershed. (R. 3, 10). In *Catskill*, the Court reasoned its decision by stating, "[w]hen the water and the suspended sediment therein passes from the Tunnel into the Creek, an 'addition' of a 'pollutant' from a 'point source' has been made to a 'navigable water,' and the terms of the statute are satisfied." 273 F.3d at 492. The Court's decision hinged on the water's crucial movement from the original body of water and into the new one, stating "[n]o one can reasonably argue that the water in the Reservoir and the Esopus [Creek] are in any sense the 'same.'" *Id.* No such movement took place in the instant case. The fill materials did not exit the property and enter a completely different property that was miles away; rather, the fill materials were removed from Bowman's land and re-deposited back into the same land. Therefore, the element of "addition" is lacking and Bowman's activities do not constitute a violation under § 404 of the CWA.

B. Under the EPA's Water Transfers Rule, all navigable waters are one for the purposes of the CWA; therefore, Bowman's moving soil from one part of the former wetland to the other did not constitute an "addition."

Alternatively, should the Court choose not to utilize the "outside world" definition for addition, the EPA has also interpreted "addition" to incorporate the "unitary navigable waters" theory. Under this theory, all navigable waters are one for the purposes of § 301(a) of the CWA. National Pollutant Discharge Elimination System (NPDES) Water Transfers Rule, 73 Fed. Reg. 33,697 (June 13, 2008) (codified at 40 C.F.R. § 122). The "addition" element is not met if existing pollutants are moved from one navigable water to another. *Friends of Everglades v. S.*

Florida Water Mgmt. Dist., 570 F.3d 1210, 1217 (11th Cir. 2009). Rather, "addition" only occurs when pollutants first enter navigable waters. *Friends of Everglades*, 570 F.3d at 1217. Appellant cites *United States v. Deaton*, where the Fourth Circuit held that the deposit of dredged material from a wetland back into that same wetland constituted addition. 209 F.3d 331 (4th Cir. 2000). This case, however, took place before the Water Transfers Rule of 2008. In light of the EPA's new rule adopting the "unitary navigable waters" theory, *Deaton* is now called into question in its applicability to the instant case because of the more recent rule and Eleventh Circuit case law giving effect to that rule. *Friends of Everglades*, 570 F.3d at 1228.

The Supreme Court of the United States has adopted the following metaphor in explaining "the unitary waters" doctrine: "If one takes a ladle of soup from a pot, lifts it above the pot, and pours it back into the pot, one has not 'added' soup or anything else to the pot." *S. Florida Water Mgmt. Dist. v. Miccosukee Tribe of Indians*, 541 U.S. 95, 110 (2004) (quoting *Catskill*, 273 F.3d at 492).

The Eleventh Circuit elaborated by stating, "the navigable waters of the United States are not a multitude of different pots, but one pot. Ladling pollution from one navigable water to another does not add anything to the pot. So no NPDES permit is required to do that." *Friends of Everglades*, 570 F.3d at 1217. Bowman simply moved dredged soil from one side of the former wetland to the other. (R. 4). He did not introduce new pollutants to these navigable waters form a point source. An "addition" only occurs under the "unitary navigable waters" theory if Bowman first introduced the dredged material to his land. Therefore, under the "unitary navigable waters" theory, Bowman's actions did not amount to "addition" and thus were not in violation of § 404 of the CWA.

Although *Friends of Everglades* was addressing alleged violations of § 402, this analysis should be applied to alleged § 404 violations as well. Again, if a term has been used in different sections of a statute, then the term has the same meaning throughout the statute unless Congress explicitly provides otherwise. *See Sorenson v. Sec'y of the Treasury of the United States*, 475 U.S. 851, 851-52 (1986). Congress has not explicitly provided otherwise regarding "addition" in the CWA; therefore, the analysis used in *Friends of Everglades* should be applied to the alleged § 404 violation in addition to alleged § 402 violations.

1. The EPA's Water Transfers Rule, which is based on the "unitary navigable waters" theory, is a reasonable interpretation of an ambiguous statute; therefore, the regulation is permissible and this Honorable Court should give effect to it.

While there is a line of circuit court case law that rejects the "unitary waters" theory[1], all of these cases took place prior to the EPA's June 2008 issuance of the regulation regarding NPDES Water Transfers. *Friends of Everglades*, 570 F.3d at 1218. This 2008 regulation, known as the NPDES Water Transfers Rule, was adopted to "clarify that water transfers are not subject to regulation under the National Pollution Discharge Elimination System (NPDES) permitting program. This rule defines water transfers as an activity that conveys or connects waters of the United States without subjecting the transferred water to intervening industrial, municipal, or commercial use." *Id.* at 1218-19 (quoting NPDES Water Transfers Rule, 73 Fed. Reg. 33,697-708 (June 13, 2008) (codified at 40 C.F.R. § 122.3(i))). Through this regulation, the EPA has adopted a final rule specifically addressing the question of what constitutes "addition." As long as the regulation is a reasonable construction of an ambiguous statute, it is entitled to *Chevron* deference. *Friends of Everglades*, 570 F.3d at 1219 (citing *Chevron, U.S.A., Inc. v.*

[1] *See, e.g., Catskill*, 273 F.3d at 491 ("the transfer of water containing pollutants from one body of water to another, distinct body of water is plainly an addition and thus a 'discharge' that demands an NPDES permit."); *Dague v. City of Burlington*, 935 F.2d 1343, 1354-55 (2d Cir. 1991) (rejecting the idea that pollutants are "added" only on first entry into any navigable water).

Natural Ress. Defense Council, Inc., 467 U.S. 837, 842-43 (1984)). After applying the *Chevron* test to the EPA's NPDES Water Transfers Rule, it is clear that the statute is ambiguous regarding its definition of "addition" and that the regulation is a reasonable construction of the statute. Therefore, the regulation is permissible and the Court must give effect to it.

a. Section 404 of the CWA is ambiguous because it does not define "addition."

The CWA is ambiguous regarding its definition of "addition;" therefore, the first element under *Chevron* is fulfilled. Under *Chevron*, "if the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." *Chevron*, 467 U.S. at 842-43. However, if the court determines that the statute is ambiguous as to the intent of Congress, the court must then look to whether the agency has provided an answer that is a permissible construction of the statute. *Id.* at 843. The United States Supreme Court in *Chevron* held:

> If Congress has explicitly left a gap for the agency to fill, there is an express delegation of authority to the agency to elucidate a specific provision of the statute by regulation. Such legislative regulations are given controlling weight unless they are arbitrary, capricious, or manifestly contrary to the statute. Sometimes the legislative delegation to an agency on a particular question is implicit rather than explicit. In such a case, *a court may not substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator of an agency.*

Id. at 843-44 (emphasis added).

Because "addition" is not defined under the CWA, the statute is ambiguous. In *Friends of Everglades*, the Eleventh Circuit conducted a thorough analysis of whether the CWA's definition of "addition" is ambiguous according to the *Chevron* test.[2] 570 F.3d at 1221-27. The Court looked at three factors in determining whether the term "addition" was ambiguous: the

[2] This Court should give particular deference to the Eleventh Circuit's holding in *Friends of Everglades* because petitions for judicial review of the EPA's Water Transfers Rule have been consolidated in the Eleventh Circuit. (R. 10).

statutory language, the context in which the language is used, and the broader context of the statute as a whole. *Friends of Everglades*, 570 F.3d at 1221-27. The Eleventh Circuit held that the CWA's usage of "addition" was, in fact, ambiguous, reasoning that the statutory language could be interpreted in two different ways: "one is that it means 'any addition…to [any] navigable waters;' the other is that it means 'any addition…to navigable waters [as a whole].'" *Id.* at 1227. The court further stated, "[a]s we have held before, 'the existence of two reasonable, competing interpretations is the very definition of ambiguity.'" *Id.* (quoting *United States v. Acosta*, 363 F.3d 1141, 1155 (11th Cir. 2004)). In the instant case, there are also two different interpretations of "addition." As such, the statute is inherently ambiguous under the first step in the *Chevron* analysis.

Additionally, regarding the context of the language used, the Eleventh Circuit held that the remainder of the statutory scheme did not make the contested language any more clear. *Id.* at 1225. The court analyzed the CWA's usage of the term "navigable waters," noting that Congress frequently uses the term "*any* navigable waters" throughout the CWA. *See, e.g.*, 33 U.S.C. § 1254(a)(3) (2006); 33 U.S.C. § 1314(f)(2)(F) (2006). The Court reasoned:

> [t]he common use by Congress of 'any navigable water' or 'any navigable waters' when it intends to protect each individual water body supports the conclusion that the use of the unmodified term 'navigable waters' in § 1362(12) (or the use in its definition, 'the waters of the United States,' at § 1362(7)) means the waters collectively.

Friends of Everglades, 570 F.3d at 1224.

Still, the Eleventh Circuit did not find this to be conclusive of Congress's intent, and so it looked at the broader context of the statute as a whole. In this analysis, the Court took into consideration the preamble of the CWA, which espouses the CWA's ambitious and broad goals:

> The objective of this chapter is to restore and maintain the chemical, physical, and biological integrity of the Nation's waters. In order to achieve this objective it is

> hereby declared that, consistent with the provisions of this chapter-(1) it is the national goal that the discharge of pollutants into the navigable waters be eliminated by 1985....

Friends of Everglades, 570 F.3d at 1225 (quoting 33 U.S.C. § 1251(a) (2006)).

In this analysis, the Eleventh Circuit notes that the legislative process forces the lofty goals of a preamble into compromise, and the NPDES permitting program is a prime example. *Id.* at 1227. The "competing interests and a face-off of battling factions" from the legislative process results in a legislation that is "often less pure than the preamble promises." *Id.* Therefore, "[i]t is not difficult to believe that the legislative process resulted in a Clean Water Act that leaves more than one gap in the permitting requirements it enacts." *Id.* As a result, the Court found that the broader context of the statute did not eliminate the ambiguity and ultimately concluded that the statute is ambiguous. *Id.* Therefore, using the reasoning of the Eleventh Circuit, where petitions for judicial review of the EPA's Water Transfers Rule are consolidated, this Honorable Court should also conclude that the language from the CWA regarding "addition" is ambiguous.

b. The EPA's interpretation is a permissible construction.

After this Honorable Court has determined the ambiguity of the statute, the Court must then decide whether the EPA's regulation is based on a permissible construction of the statute. In *Friends of Everglades v. S. Florida Water Mgmt. Dist.*, the Eleventh Circuit held that because the Clean Water Act's language is ambiguous, the EPA's NPDES Water Transfers Rule, which is wholly based on the "unitary navigable waters" theory, "is a reasonable, and therefore permissible, construction of the language. Unless and until the EPA rescinds or Congress overrides the regulation, we must give effect to it." 570 F.3d at 1228. As such, in applying the

"unitary navigable waters" theory encompassed by the Water Transfers Rule to the instant case, Bowman's activities do not constitute an "addition."

Consequently, this Honorable Court should reach the same conclusion as the Eleventh Circuit did in *Friends of Everglades.* In that case, the U.S. Army Corps of Engineers dug a series of canals throughout the Everglades Agricultural Area in order to collect rainwater and runoff from sugar cane fields and the surrounding residential and industrial areas. *Friends of Everglades*, 570 F.3d at 1214. These canals, which collected a gamut of chemical contaminants, were connected to Lake Okeechobee through pump stations that pump the water from these canals into the lake. *Id.* The pump stations, however, did not add anything more to the water than what it already contained. *Id.* Two environmental organizations filed suit seeking an injunction to force the Water District to obtain an NPDES permit before pumping the polluted canal water into the lake. *Id.* In this suit, it was uncontested that the first three elements of a § 404 violation were met. *Id.* at 1216. Rather, the sole question was "whether moving an existing pollutant from one navigable water body to another is an 'addition ... to navigable waters' of that pollutant." *Friends of Everglades*, 570 F.3d at 1216.

Likewise, in the instant case, the sole issue regarding the alleged § 404 violation is whether there is an addition to navigable waters. Under the EPA's Water Transfers Rule, which the Eleventh Circuit adopted in *Friends of Everglades*, "navigable waters" refers to waters as a collective one and "addition" only takes place when a new additive is first introduced. *Id.* at 1217, 1228. Addition does not occur when pollutants are moved between waters. *Id.* at 1217. Under this rule, Bowman's activities do not equate to an "addition." Bowman simply removed materials from a navigable water and re-deposited these same materials back into the same

navigable water. (R. 3). He did not introduce any new pollutants to a navigable water. Consequently, under the Water Transfers Rule, the element of "addition" is not met.

In applying *Chevron* deference, it is clear that the EPA's Water Transfers Rule, which incorporates the "unitary navigable waters" theory, is a permissible construction of an ambiguous statute. This reasonable interpretation should be controlling, as "a court may not substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator of an agency." *Chevron*, 497 U.S. at 843-44. Regardless of how well-founded a court's interpretation might be, the EPA's interpretation is controlling. Here, that controlling interpretation is the Water Transfers Rule, and this Honorable Court should give effect to it. Under this rule, the fill materials on Bowman's property were already part of the wetland, and re-introducing them back into the wetland does not constitute "addition." Therefore, the fourth element of "addition" is not satisfied. Thus, there are no genuine issues of material fact regarding the alleged violation of § 404 and summary judgment was proper.

CONCLUSION

Based on the above reasons, the District Court properly dismissed Appellant NUWF's claims by granting the Appellee Jim Bob Bowman's Motion for Summary Judgment. NUWF has failed to show there is a genuine issue of material fact for trial.

Therefore, Appellee respectfully requests that the Court of Appeals for the Twelfth Circuit affirm the District Court's grant of summary judgment on NUWF's § 404 violation allegations.

RESPECTFULLY SUBMITTED this 29th day of November, 2012.