Team 24

C.A. No. 13-1246

UNITED STATES COURT OF APPEALS

FOR THE TWELFTH CIRCUIT

NEW UNION WILDLIFE FEDERATION,

Plaintiff-Appellant,

v.

NEW UNION DEPARTMENT OF

ENVIRONMENTAL CONSERVATION,

Intervenor-Appellant

v.

JIM BOB BOWMAN,

Defendant-Appellee

APPEAL FROM THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF NEW UNION

APPELLATE BRIEF OF NEW UNION DEPARTMENT OF ENVIRONMENTAL CONSERVATION

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JURISDICTIONAL STATEMENT

Federal District Courts have original jurisdiction over any civil action arising under the laws of the United States, including the Clean Water Act ("CWA"), 33 U.S.C. § 1251 *et seq*. (2006). 28 U.S.C. § 1331 (2006). The United States Court of Appeals for the Twelfth Circuit has jurisdiction to hear appeals from any final decision of the United States District Court for the District of New Union. *Id.* at § 1291 (2006).

STATEMENT OF THE ISSUES

1. Whether New Union Wildlife Federation ("NUWF") has standing to sue Jim Bob Bowman for violating the CWA.
2. Whether there is a continuing or ongoing violation as required by CWA § 505(a) for subject matter jurisdiction.
3. Whether NUWF's citizen suit is barred by New Union Department of Environmental Protection ("DEP")'s diligent prosecution of Mr. Bowman as set out in CWA § 505(b).
4. Whether Mr. Bowman violated the CWA when he moved dredged and fill material from one part of the wetland adjacent to navigable water to another part of the same wetland.

STATEMENT OF THE CASE

On July 1, 2011, NUWF sent a notice of intent to sue Mr. Bowman under the CWA's section 505 citizen suit provision, 33 U.S.C. § 1365 (2006), to Mr. Bowman, the U.S. Environmental Protection Agency ("EPA"), and the State of New Union/DEP. R. at 4. Shortly thereafter, DEP sent Mr. Bowman a notice of violation which asserted that his landclearing, excavation, and ditching activities violated state and federal law. Mr. Bowman and DEP negotiated a settlement agreement. *Id.* DEP incorporated the agreement into an administrative order, which Mr. Bowman consented to on August 1, 2011. *Id.* On August 10, 2011, DEP brought suit in federal court and filed a complaint against Mr. Bowman under CWA section 505. R. at 5. Despite DEP's diligent prosecution, NUWF filed its own section 505 complaint on August 30, 2011, seeking civil penalties and an order requiring Mr. Bowman to remove the fill

material and restore the wetlands. *Id*. DEP also moved to intervene in NUWF's section 505 action. *Id*. On September 5, 2011, DEP filed a motion in its section 505 case to enter a decree, the terms of which are identical to the administrative order. Mr. Bowman consented to the motion and the decree, which is still pending. *Id*. At a November 1, 2011 status conference on both cases, the Court notified the parties that it would not act on the motions in either case, except for DEP's motion to intervene in NUWF's section 505 action, the case at issue here. *Id*.

The parties filed cross-motions for summary judgment after discovery. *Id*. Mr. Bowman filed his motion on four grounds: (1) NUWF lacked standing; (2) this Court lacks subject matter jurisdiction because Mr. Bowman's violations are wholly past; (3) this Court lacks subject matter jurisdiction because DEP had already taken an enforcement action and resolved the violations; and (4) this Court lacks subject matter jurisdiction because his activities did not constitute an addition, as required in a CWA cause of action. *Id.* NUWF filed its motion for summary judgment on only one ground: Mr. Bowman's violated CWA section 404 when he added dredged and fill material to waters of the United States without a permit. *Id.* DEP joined Mr. Bowman in his motion for summary judgment on the continuing violation and diligent prosecution issues and joined NUWF in its motion on the standing and CWA violation issues. *Id.* The District Court granted Mr. Bowman's motion for summary judgment on all counts. R. at 11.

STATEMENT OF THE FACTS

On June 15, 2011, Mr. Bowman commenced land clearing operations on his thousand-acre property, a wooded wetland adjacent and hydrologically connected to the Muddy River. R. at 3-4. Mr. Bowman used bulldozers to level trees and vegetation, which he then pushed into windrows and burned. R. at 4. He used a bulldozer to dig trenches, pushed the burned vegetation remains into the ditches, and leveled the field once more. *Id*. Finally, he excavated soil and

vegetative material in order to form a wide ditch to drain the field into the Muddy. *Id.* However, he left an intact 150-foot wide strip adjacent to the Muddy to clear after the land drained. *Id.*

The Muddy, more than 500 feet wide and more than 6 feet deep where it borders Mr. Bowman's property, is commonly used for recreational navigation. R. at 3. NUWF members use the Muddy for recreation. R. at 6. NUWF is a not for profit corporation whose mission is to protect New Union's fish and wildlife. R. at 4. Some of NUWF's members testified that the leveling and drainage of the wetland caused them to feel a loss; others testify that the Muddy's waters now appear more polluted. R. at 6. One member testified that Mr. Bowman's activities caused a drastic decline in the number of frogs in the area. R. at 6.

After receiving DEP's notice of violation, Mr. Bowman entered into a settlement agreement with the agency, promising to cease wetland clearing activities and convey to DEP a conservation easement. R. at 4. The easement includes the intact 150-foot strip adjacent to the Muddy and an additional 75-foot buffer strip next to Mr. Bowman's field. *Id.* This agreement was incorporated into an administrative order with Mr. Bowman's consent.

STANDARD OF REVIEW

Summary judgment is appropriate only if "there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). Courts of appeal review questions of law under a *de novo* standard of review. *Pierce v. Underwood,* 487 U.S. 552, 558 (1988). The issues regarding NUWF's standing, Mr. Bowman's continuing violation of the CWA, DEP's diligent prosecution of the violations, and whether Mr. Bowman violated the CWA should be reviewed *de novo* because they are questions of law.

SUMMARY OF THE ARGUMENT

Although the District Court correctly granted summary judgment in favor of Mr. Bowman with respect to the CWA section 505 issues, it erred in denying standing to NUWF and

in finding that Mr. Bowman did not violate the CWA when he moved dredged and fill material from one part of a wetland to another part of the same wetland.

Contrary to the District Court's ruling, members of NUWF suffered cognizable injuries. Mr. Bowman's discharge of dredged and fill material caused harm to the recreational and aesthetic enjoyment of NUWF's members by polluting the river, destroying wetlands, and displacing wildlife. Furthermore, this Court's favorable ruling would redress NUWF's injuries because a restoration order issued would enable NUWF's members to better enjoy the aesthetic and recreational benefits of a popular recreational setting. An order of civil penalties against Mr. Bowman could also deter him and others from future environmentally damaging activities.

The District Court further erred when it ruled that Mr. Bowman's activities did not constitute an addition within the meaning of the CWA. Mr. Bowman's excavation, ditching, and landclearing activities fall within the EPA and U.S. Army Corps of Engineers ("Corps") (together, the "Agencies") definition of "discharge of dredged material" and therefore require a permit because they do not fall under one of the section 404 exemptions. Despite EPA's interpretation under CWA section 402, the Agencies have never interpreted section 404 to require that the pollutant come from the "outside world" to constitute an addition. Neither does the EPA's 2008 Water Transfers Rule apply in section 404 cases. Rather, the case law and the Agencies' regulations agree that the discharge of dredged and fill material from one wetland into the same wetland constitutes a violation of section 404. Upholding the District Court's ruling would contradict Congressional intent and the Agencies' rulemakings and litigation positions.

The District Court did correctly determine that this Court lacks subject matter jurisdiction because of DEP's "diligent prosecution" and because Mr. Bowman's activities are "wholly past." DEP diligently prosecuted Mr. Bowman's violations by filing a complaint within the sixty-day

period under section 505, thereby barring a citizen suit. DEP commenced voluntary negotiations with Mr. Bowman soon after sending notice of his violations and obtained his consent on a settlement which was incorporated into an administrative order. NUWF's citizen suit is also barred because Mr. Bowman's last violations occurred well before NUWF filed its section 505 complaint and because Mr. Bowman fully complied with the negotiated consent decree.

ARGUMENT

I. NUWF HAS ORGANIZATIONAL STANDING AS A REPRESENTATIVE OF ITS INJURED MEMBERS TO BRING A CITIZEN SUIT AGAINST MR. BOWMAN FOR HIS VIOLATIONS OF CWA SECTIONS 301(a) AND 404.

NUWF has standing to bring suit pursuant to CWA section 505, 33 U.S.C. § 1365, because Mr. Bowman violated CWA section 301(a), 33 U.S.C. § 1311(a) (2006), and CWA section 404, 33 U.S.C. § 1344 (2006). This Court has judicial authority over "cases" and "controversies" arising under the laws of the United States. U.S. Const. art. III § 2, cl. 1. The Supreme Court has construed this authority to impose three requirements upon litigants that must be satisfied in order to show individual standing: (1) a concrete and particularized "injury in fact" that is "actual or imminent, not conjectural or hypothetical"; (2) a showing of a "fairly traceable" causal connection between the injury and the conduct of the defendant; and (3) a reasonable likeliness that the injury will be redressed by a favorable decision. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992).

An organization may have standing based on an injury to the organization itself or as a representative of injured members. *Warth v. Seldin*, 422 U.S. 490, 511 (1975). An organization suing on behalf of its members must establish the following:

> [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.

Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc., 528 U.S. 167, 169 (2000) (citing *Hunt v. Wash. State Apple Adver. Comm'n*, 432 U.S. 333 (1977)). All three requirements are satisfied in this case, and thus NUWF may validly assert organizational standing for its members.

A. NUWF and Its Members Have Article III Standing to File Suit.

The addition of dredged and fill material to Mr. Bowman's wetlands, which are hydrologically connected to the Muddy River, has hampered the recreational and aesthetic enjoyment of at least three NUWF members. These injuries are directly traceable to Mr. Bowman, who is the cause of the pollution. And an order compelling Mr. Bowman to restore the wetlands and to pay civil penalties could redress the injuries suffered by the plaintiffs and could serve as a deterrence to future unpermitted water pollution by Mr. Bowman or others in the area. Therefore, NUWF has met each of the three standing requirements under *Lujan*.

1. Harm to the Aesthetic and Recreational Interests of NUWF Members Resulting from the Discharge of Dredged and Fill Material Constitutes an Injury in Fact.

When assessing the injury in fact prong of a suit, courts generally recognize that the "relevant showing for Article III standing is not injury to the environment but injury to the plaintiff[s]." *Laidlaw*, 528 U.S. at 181. An injury is adequately alleged "when [plaintiffs] aver that they use the affected area and are persons 'for whom the aesthetic and recreational values of the area will be lessened' by the challenged activity." *Id.* at 183 (citing *Sierra Club v. Morton*, 405 U.S. 727, 735 (1972)). In this case, NUWF's members have alleged the very same injury acknowledged to be sufficient in *Laidlaw* and *Morton*: three of NUWF's members have alleged that they all use the Muddy for recreational boating and fishing, one alleged aesthetic harm resulting from the polluted look of the Muddy River, and another alleged harm to his recreational interests resulting from the destruction of the wetlands. R. at 6.

In *Laidlaw*, the Supreme Court concluded that the plaintiff ("FOE") met the injury in fact prong when it presented evidence that its members suffered recreational injuries because Laidlaw was not complying with its section 402 permit. *Id.* at 177, 183. FOE argued that its members would like to fish, camp, swim, and picnic near the river between three and fifteen miles downstream, but their enjoyment of the river had lessened because of Laidlaw's discharges. *Id.* at 181-82. According to the Supreme Court, the affidavits and testimony from FOE were sufficient to establish injury in fact for the purposes of standing. *Id.* at 184.

In a similarly analogous case, the Fifth Circuit addressed an issue of standing that involved the draining of wetlands without a section 404 permit. The court found that "harm to aesthetic, environmental, or recreational interests is sufficient to confer standing." *Save Our Cmty. v. EPA*, 971 F.2d 1155, 1161 (5th Cir. 1992). The plaintiffs alleged that some of them lived within the vicinity of the wetlands and enjoyed the wildlife, aesthetics, and open space that the wetlands provided, but that the harm from the drainage was reducing that enjoyment. *Id.* at 1160-61. The court found standing, noting that "these injuries need not be large; an 'identifiable trifle' will suffice." *Id.* at 1161 (internal citations omitted).

However, there are restrictions on establishing the injury in fact prong; the Supreme Court in *Lujan* has clarified that injury to plaintiffs cannot be too speculative. *Lujan*, 504 U.S. at 555. In *Lujan*, plaintiffs sought to establish injury by submitting affidavits that overseas government projects would affect their ability to observe affected wildlife. *Id.* at 562. The Court rejected their argument that such injuries confer standing because plaintiffs had no plans to visit those areas in the near future, and thus their injuries were not "imminent." *Id.*

In the present case, NUWF submitted evidence through affidavits and deposition testimony that is similar to the evidence given in *Save Our Community*. As in that case, NUWF's

members allege that they feel a loss as a result of the destruction of the wetlands. Like the plaintiffs in *Save Our Community*, NUWF members enjoyed "the wildlife, aesthetics, open space, ecological and other values of the wetlands." 971 F.2d at 1161. Further, members fear that the Muddy is more polluted as a result of the wetland's destruction which may reduce their ability to enjoy the area, and courts have consistently acknowledged that this fear or deterrence is sufficient to establish injury in fact. *See Ecological Rights Found. v. Pac. Lumber Co.*, 230 F.3d 1141, 1151 (9th Cir. 2000) (emphasizing that injury in fact is established through limitations in "use of a particular area because of *concerns* about violations of environmental laws, not . . . actual environmental harm") (emphasis added).

NUWF's three affiants testified that they use the Muddy for recreational boating and fishing, in addition to picnicking on the Muddy's banks nearby Mr. Bowman's property. Furthermore, one affiant testified that the destruction of the wetlands has limited the population of frogs. Although it may have been illegal for Zeke Norton to trespass on the wetlands to catch frogs, his legal right to observe them and appreciate their presence has now been reduced. This case is distinguishable from the speculative injuries in *Lujan*, which involved "someday intentions—without any description of concrete plans" to visit an environmentally affected area. *Lujan*, 504 U.S. at 564. Unlike the plaintiffs in *Lujan*, Norton has visited the area frequently for years. All of the affiants in this case testified that they often participate in recreational activities on the Muddy, on or in the vicinity of Mr. Bowman's property. In contrast to *Lujan* where the injuries were much more trivial and remote, here the injured plaintiffs have concrete aesthetic and recreational interests in the Muddy that play a significant part in their lives.

2. The Injuries Suffered by NUWF's Members Are Fairly Traceable to Mr. Bowman's Land Clearing Operations.

In order to establish causation for an environmental injury under the CWA, "plaintiffs need not show that a particular defendant is the only cause of the injury." *Natural Res. Def. Council v. Watkins*, 954 F.2d 974, 980 (4th Cir. 1992). Instead, plaintiffs need only "show that a defendant discharges a pollutant that causes or contributes to the kinds of injuries alleged." *Piney Run Pres. Ass'n v. Comm'rs of Carroll Cnty.*, 268 F.3d 255, 263-64 (4th Cir. 2001) (internal citations omitted).

NUWF has made the required showing: affidavits submitted by its members show that Mr. Bowman's excavating, ditching, and draining activities significantly harmed their aesthetic and recreational interests in the Muddy and the surrounding wetlands. Mr. Bowman cleared trees and other vegetation, burned the materials in windrows, and then pushed the burned material back into the wetland. Subsequently, he excavated a wide ditch and left the water, soil, and plant material to drain into the Muddy River. Not only did these activities pollute the Muddy, Mr. Bowman also leveled a significant portion of wetlands, which has reduced the number of at least one species of frogs in the affected area. Thus, the second prong of *Lujan* is satisfied.

3. A Favorable Decision by this Court would Likely Redress the Injuries Suffered by NUWF Members.

A plaintiff establishes redressability by showing that there is a substantial likelihood that a favorable judicial decision will redress the injury. *Laidlaw*, 528 U.S. at 181. The Supreme Court clarified this requirement by stating, "[i]n other words, a plaintiff satisfies the redressability requirement when he shows that a favorable decision will relieve a discrete injury to himself. He need not show that a favorable decision will relieve his every injury." *Id.* at n.15.

NUWF filed suit against Mr. Bowman seeking civil penalties and an order requiring Mr. Bowman to remove the fill material and restore the wetlands. The Supreme Court in *Steel Co. v.*

Citizens for a Better Env't, 523 U.S. 83, 106 (1998) held that imposing civil penalties for the purpose of deterring future conduct by the offender might not adequately redress an injury to the plaintiff. However, *Laidlaw* casts doubt on *Steel*'s relevance to this case because the Court in *Laidlaw* held that "[i]nsofar as they encourage defendants to discontinue current violations and deter future ones, [civil penalties] afford redress to citizen plaintiffs injured or threatened with injury." 528 U.S. at 169.

Furthermore, NUWF filed suit for more than just civil penalties. It also sued for injunctive relief compelling Mr. Bowman remove the fill material and to restore the wetlands. Courts have held that orders to "repair and remediate all damage to wetlands and adjacent property . . . is likely to redress the imminent future residential, economic, recreational, and aesthetic injuries." *Gulf Restoration Network v. Hancock Cnty. Dev., LCC*, 772 F. Supp. 2d 761, 767 (S.D. Miss. 2011). Here too, NUWF members would benefit from the restoration of the wetlands because they could better enjoy the aesthetic and recreational advantages that cleaner rivers and wetlands have.

DEP's consent decree does not negate NUWF's case for standing. As the Court stated in *Steel*, standing is determined at the outset of the case, before the merits of the case are even discussed. 523 U.S. at 91. The relevant question for redressability is thus "whether the plaintiff's injuries would be remedied *if he were to succeed on the merits*." Martin McCrory, *Standing in the Ever Changing Stream: The Clean Water Act, Article III Standing*, 20 Stan. Envtl. L.J. 73, 110 (2001) (emphasis added). NUWF's claims may ultimately fail because of other issues in this case, but it can establish standing regardless of its success on the merits. NUWF's members' aesthetic and recreational injuries constitute an injury in fact that were caused by Mr. Bowman's

dredging and filling, and such injuries could be remedied through civil penalties and an order to restore the wetlands and remove the fill material.

B. The Interests at Stake in This Case Are Germane to NUWF's Purpose.

The second element for organizational standing addresses germaneness of the interests to the organization's purpose. *See United Food & Commercial Workers Union Local 751 v. Brown Grp., Inc.*, 517 U.S. 544, 555 (1996). Its function is to ensure that the organization "[has] a stake in the resolution of the dispute." *Id.* at 556. In this case, NUWF is a not for profit corporation that organizes for the purpose of protecting fish and wildlife by protecting their habitats. By commencing this action against Mr. Bowman, NUWF is acting pursuant to its mission.

C. Neither the Claim Alleged Nor the Relief Requested Requires Individual Participation of NUWF's Members as Construed under *Hunt.*

Hunt's third prong is a prudential standard "focusing on matters of administrative convenience and efficiency." *Id*. at 557. The requirement precludes an organization from seeking monetary damages on behalf of its members at the risk that the awards will not be paid over to its members. *Id.* at 551. It also protects against the possibility that the organization is not adequately representing members' interests. *See Harris v. McRae*, 448 U.S. 297, 320-21 (1980). The first requirement is met since the members are not seeking civil penalties for themselves; the civil penalties sought against Mr. Bowman, if granted, would be delivered to the U.S. Treasury. *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Found.*, 484 U.S. 49, 53 (1987) ("civil penalties [are] payable to the United States Treasury"). The second requirement is met because the facts indicate that NUWF's members all oppose Mr. Bowman's environmentally destructive behavior and the order for civil penalties need not require individual participation by NUWF members.

D. NUWF Has Met CWA's Subject Matter Jurisdiction Requirements for Standing.

A plaintiff asserting an interest under the CWA satisfies the statutory standing threshold by meeting the Article III standing requirements. *Friends of the Earth, Inc. v. Gaston Copper Recycling Corp.*, 629 F.3d 387, 396 (4th Cir. 2011) ("The Clean Water Act confers standing on any 'person or persons having an interest which is or may be adversely affected'").

The plain language of section 505(a) allows a citizen suit for a section 404 violation. Under CWA section 505(a), "any citizen may commence a civil action on his own behalf–(1) against any person . . . alleged to be in violation of (A) an effluent standard or limitation." The definitions of a violation of an "effluent standard or limitation" include, *inter alia*, a violation of CWA section 301(a), which prohibits discharge "except as in compliance with this section and sections . . . 1342, and 1344 of this title." 33 U.S.C. § 1311. Therefore, NUDEP has a cause of action under CWA section 301(a) to bring a citizen suit because Mr. Bowman discharged dredged and fill material without a permit. *See N.C. Shellfish Growers Ass'n v. Holly Ridge Assocs., L.L.C.*, 200 F. Supp. 2d 551, 553 (E.D.N.C. 2001) (holding that because section 505(a) references to "effluent standards" include the permit requirements under section 404, plaintiffs were authorized to bring a section 505 citizen suit for Defendant's alleged failure to comply with section 404 of the CWA).

Recently, the Fifth Circuit in *Atchafalaya Basinkeeper v. Chustz* barred a citizen suit under section 404 by holding that the CWA did not confer subject matter jurisdiction upon an environmental group who alleged violations of a section 404 permit. 682 F.3d 356, 357 (5th Cir. 2012). There, the appellants brought a citizen suit under 33 U.S.C. § 1365(f)(1), which provides for a citizen suit against "any person . . . in violation of . . . an effluent standard or limitation." *Id.* at 358. The court held allowing challenges of permit conditions under § 1365(f)(1) would render

§ 1365(f)(6) redundant because § 1365(f)(6) also provides a cause of action for violations of permit conditions made under 33 U.S.C. § 1342 (2006). *Id.* at 359.

However, NUWF's case is different from *Atchafalaya* because CWA section 505(f)(6) relates only to violations of "a permit or condition thereof issued under [§] 1342 of this title." In Mr. Bowman's case, NUDEP had not issued a permit before Mr. Bowman violated section 404 of the CWA and thus § 1365(f)(1) applies and does not render § 1365(f)(6) redundant. R. at 4. Since § 1365(f)(6) does not relate to discharges without permits like in this case, allowing NUWF to proceed under § 1365(f)(1) would not create a redundancy.

II. THERE IS NO CONTINUING OR ONGOING VIOLATION AS REQUIRED BY CWA SECTION 505(a).

Although NUWF has standing, its citizen suit is unviable because Mr. Bowman's violations were neither continuous nor ongoing at the time NUWF filed its complaint.

A. Mr. Bowman's Violations are Wholly Past.

NUWF's section 505 claim fails because Mr. Bowman's violations are "wholly past." *See Gwaltney*, 484 U.S. at 60. Section 505(a) allows any citizen to commence a civil action on his own behalf and:

> against any person . . . who is alleged to be in violation of (A) an effluent standard or limitation under this chapter or (B) an order issued by the Administrator or a State with respect to such a standard or limitation.

The Supreme Court has interpreted the statute to require that alleged CWA violations must be "continuous or intermittent," and not "wholly past" to uphold a citizen suit. *See Gwaltney*, 484 U.S. at 60. Prohibiting citizens from enforcing past violations is consistent with the purpose of the CWA's notice provision, which requires the alleged violator to receive sixty days' notice of the citizens' intent to sue; if the Administrator or State commences an enforcement action within the sixty day period, then government action makes the citizen suit unnecessary. *See id.* at 60.

The notice provision "give[s] [the alleged violator] an opportunity to bring itself into complete compliance with the CWA and thus . . . render unnecessary a citizen suit." *Id.* at 61.

In *Gwaltney*, environmental groups brought a citizen suit against an entity who violated a permit under CWA section 402. *Id.* at 53. The permit holder repeatedly exceeded effluent limitations for three years before installing new equipment that controlled the discharge. *Id.* The permit holder's last recorded violations occurred after the environmental groups sent a notice of intent to commence a citizen suit, but before they actually filed suit. *Id.* The Court held that the environmental groups could not maintain an action based on wholly past CWA violations, but that they could make a good-faith allegation of an ongoing violation under section 505(a). *Id.* at 64. The Court explained, however, that the provision "does not give litigants license to flood the courts with suits premised on baseless allegations." *Id.* at 66.

Mr. Bowman's violations are wholly past, having last occurred on July 15, 2011. On this date, Mr. Bowman ceased land clearing activities in violation of the CWA and established CWA compliance by entering into a settlement agreement with DEP. NUWF filed its complaint on August 30, more than a month after Mr. Bowman's last violation. Therefore, NUWF cannot allege in good faith that Mr. Bowman will violate, or is continuing to violate the CWA.

1. DEP's Pending Consent Decree Exempts Mr. Bowman's "Wholly Past" Violations.

Mr. Bowman's activities are distinguished from the plaintiff's in *Sasser v. Adm'r*, 990 F.2d 127, 128-29 (4th Cir. 1993). NUWF cites *Sasser* for the proposition that courts have ruled that a section 404 violation is continuous and ongoing until it is removed. R. at 7. While on its face, the court's holding in *Sasser* suggests that continued presence of dredged and fill material in a wetland constitutes an ongoing violation under section 404, but the holding is narrower and

does not apply to this case. Instead, *Sasser* holds that a plaintiff's violation of his consent decree allows a court to find subject matter jurisdiction and assess further civil penalties. *Id.* at 129.

Sasser's holding relies on an important distinction: the plaintiff in *Sasser* blatantly violated his consent decree which led to agency's issuance of a complaint charging violation of 33 U.S.C. § 1311 and a subsequent fine. *Id.* at 128. The Corps and Mr. Sasser had entered into a consent decree requiring Mr. Sasser to desist his activities and submit a wetland restoration plan. *Id*. However, Mr. Sasser failed to comply with the decree and pay the later-imposed fine. *Id.* He brought suit, asserting that he was not subject to the fine because a CWA amendment allowing such penalties came into force after the initial violation. *Id.* Unlike Mr. Sasser, Mr. Bowman has adhered to his consent decree by halting his activities after July 15, 2011 and placing the agreed-upon land in a conservation easement with DEP. R. at 4. Here, the Court does not need to find an ongoing violation to uphold the agency's discretion to enforce the CWA. In contrast to *Sasser*, finding on ongoing violation in Mr. Bowman's case would *undermine* DEP's discretion to enforce the Act through its consent decree and ultimately harm the public interest. *See Gwaltney,* 484 U.S. at 61. Finding an ongoing violation would allow the citizen suit to replace government action, which includes making voluntary agency settlements that institute corrective measures. *See id.* at 60-61; *see also Karr v. Hefner*, 475 F.3d 1192, 1198 (10th Cir. 2007) .

2. NUWF Cannot Allege in Good Faith that Mr. Bowman Will Violate the CWA in the Future.

Any suggestion that Mr. Bowman will violate his agreement with DEP in the future would be "baseless." *See Gwaltney*, 484 U.S. at 66. Mr. Bowman has demonstrated full compliance with DEP. After DEP sent Mr. Bowman the notice of violation, the parties entered into a settlement, forbidding Mr. Bowman from clearing more wetlands in the area and from developing the conservation easement conveyed to DEP. Mr. Bowman ceased clearing land on

July 15, 2011 and agreed to the consent decree incorporating the settlement agreement on August 1, 2011. All of these events occurred well before NUWF commenced suit on August 30, 2011. Therefore, NUWF cannot allege in good faith that Mr. Bowman will likely violate his decree.

III. DEP's Diligent Prosecution Bars NUWF's Citizen Suit.

A. DEP Filed its Complaint Before Section 505's Sixty-Day Waiting Period, which Constitutes Diligent Prosecution.

NUWF's suit is barred by DEP's filing of its own section 505 complaint within the sixty-day waiting period of § 1365(b)(1)(B). The sixty-day period gives the government the opportunity to control the course of the litigation if it acts within that time. *Chesapeake Bay Found. v. Am. Recovery Co., Inc.*, 769 F.2d 207, 208 (4th Cir. 1985). Citizens cannot prosecute their own suit if an administrator has already commenced and is diligently prosecuting its own enforcement action. *Id.* As the court explained, "[j]urisdiction is normally determined as of the time of the filing of a complaint." *Id.* In the case at hand, DEP's filed its complaint on August 10, 2011, well within the sixty-day period which commenced on July 1, 2011 when NUWF sent notice to Mr. Bowman of its intent to sue under section 505.

B. DEP's Consent Decree Qualifies as Diligent Prosecution.

Under 33 U.S.C. § 1365(b)(1)(B), a government agency's diligent prosecution of alleged CWA violations bars a citizen suit. DEP's negotiated settlement with Mr. Bowman and embodiment in a consent decree satisfy diligent prosecution. *See Karr*, 475 F.3d at 1197.

Diligent prosecution is defined broadly. According to the *Karr* court, diligent prosecution does not have to be "far-reaching or zealous" and "an agency's prosecutorial strategy [does not have to] coincide with that of the citizen-plaintiff." *Id.* Though the Supreme Court has not ruled directly on whether a consent decree satisfies diligent prosecution, its reasoning in *Gwaltney* supports the principle that a consent decree bars citizen suits. 484 U.S. at 61.There, the Court

explained that if a defendant remained exposed to a citizen suit whenever the EPA granted it a concession, defendants will have little incentive to negotiate consent decrees. *See id.* The Court stated, "the citizen suit is meant to supplement rather than to supplant governmental action" and citizen suits are proper only "if the Federal, State, and local agencies fail to exercise their enforcement responsibility." *Id.* at 60.

In contrast to the Supreme Court, many circuit courts have found that consent decrees satisfy diligent prosecution. The Eighth Circuit court stated it would be "unreasonable and inappropriate" to find that a voluntary settlement does not satisfy the definition of diligent prosecution. *Ark. Wildlife Fed'n v. ICI Americas, Inc.*, 29 F.3d 376, 380 (8th Cir. 1994). Likewise, the Sixth Circuit in *Ellis v. Gallatin Steel Co.*, 390 F. 3d 461 (6th Cir. 2004), held:

> second-guessing of the EPA's assessment of an appropriate remedy . . . fails to respect the statute's careful distribution of enforcement authority among the federal EPA, the States and private citizens, all of which permit citizens to act where the EPA has 'failed' to do so, not where the EPA has acted but has not acted aggressively enough in the citizens' view.

The Fourth Circuit concurred, finding that the plaintiff failed to meet its burden of proving a lack of diligent prosecution where the parties entered into a consent decree requiring civil penalties and mitigation of water temperature increases. *Piney Run Pres. Ass'n* , 523 F.3d at 460.

One district court case has held that a citizen suit can continue even if the state agency has prosecuted the same violations. *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 890 F. Supp. 470, 490 (D.S.C. 1995). *But see EPA v. City of Green Forest, Ark.*, 921 F.2d 1394, 1403 (8th Cir. 1990) (holding that "citizens' claims brought prior to a government action are properly dismissed when a consent decree is entered in a later-filed EPA action."); *Badgley v. City of New York*, 606 F.2d 358 (2d Cir.1979). In *Laidlaw*, the court stated that an agency's diligent prosecution bars a citizen suit if an opportunity for meaningful public participation had occurred. 890 F. Supp. at 489, 492-93. In that case, the state agency filed its complaint and order

on the last day of the statutory sixty-day notice period under section 505(b), denying the environmental group an opportunity to be heard on the merits of the consent order. *Id.* at 489-90. *Laidlaw*'s holding is inapplicable to Mr. Bowman's case since NUWF intervened in DEP's section 505 action on September 15, 2011. *See id.*

1. DEP's Consent Decree Requires CWA Compliance and Satisfies Diligent Prosecution.

The consent decree between DEP and Mr. Bowman constitutes CWA compliance and satisfies diligent prosecution. In addition to the conveyance of the conservation easement, the decree required Mr. Bowman to construct and maintain a year-round, partially-inundated wetland at "considerable initial expense and an indeterminable future expense." R. at 8.

Courts have looked to the substantive outcomes of consent decrees to determine whether it should bar a citizen suit. As the Seventh Circuit explained, a government enforcement action will be considered diligent if "is capable of requiring compliance with the Act and is in good faith calculated to do so." *Friends of Milwaukee's Rivers v. Milwaukee Metro. Sewerage Dist.*, 382 F.3d 743, 760 (7th Cir. 2004); *see also Laidlaw*, 890 F. Supp. at 497 (stating that the agency's failure to recover or determine the economic benefit that the defendant received by not complying with its permit was persuasive in holding that the citizen suit was not barred by agency action.); *Envtl. Conservation Org. v. City of Dallas*, 529 F.3d 519, 529 (5th Cir. 2008).

DEP's consent decree satisfactorily meets the goals of the Act at significant cost to Mr. Bowman. While NUWF's request for relief redresses their injury and establishes standing, upholding the agency's discretion to enforce the Act through the consent decree assures a good outcome collectively for the environment and the community. The decree does not have to necessarily match the precise action that the plaintiff wants or with the "alacrity" that the plaintiff desires. *Milwaukee's Rivers*, 382 F.3d at 761. Requiring remediation efforts instead of

imposing penalties is a choice that the government may make and is not indicative, nor a requirement, for compliance to be assured. *Id.* at 762; *see also Gwaltney*, 484 U.S. at 60. Mr. Bowman's costly construction and maintenance of a year-round wetland will provide an "enhanced environment for frogs" and allow NUWF members to frog legally. The decree also preserves the viewscape of the Muddy River and enhances the wetland on site. Lastly, upholding the agency's discretion to enforce through the decree ensures compliance for future CWA enforcement.

2. Dissatisfaction with DEP's Consent Decree Does Not Abrogate DEP's Diligent Prosecution.

Dissatisfaction with the consent decree does not give NUWF a legitimate claim that DEP has failed to diligently prosecute. "[A]n unsatisfactory result does not necessarily imply lack of diligence." *Karr*, 475 F.3d at 1197. But a decree does not prevent NUWF from helping to remedy CWA violations in ways that can simultaneously avoid costly litigation and uphold DEP's legitimacy to enter agreements with alleged polluters. The Department of Justice's regulations entitle citizens to comment on pending environmental consent decrees. *Id*. at 1198.

IV. MR. BOWMAN'S REDEPOSIT OF DREDGED MATERIAL INTO A PROTECTED WETLAND CONSTITUTES AN "ADDITION" OF A POLLUTANT IN VIOLATION OF THE CWA.

The only contested element of a CWA section 404 violation is whether Mr. Bowman's acts constituted an "addition." R. at 8-10. The District Court erred in finding that Mr. Bowman's "redeposit" of dredged and fill material incident to his mechanized landclearing and ditching operations did not constitute an "addition" where the Agencies' regulations at 33 C.F.R. § 323.2 (2008) specifically describe "addition" as including these activities. The District Court failed to give proper deference to these regulations, promulgated in a notice and comment rulemaking. The Court further erred in concluding that EPA's "'outside world' interpretation of addition" and

EPA's "'unitary navigable waters' theory" control. EPA has explicitly stated that these theories do not apply to section 404 cases. While there is no Twelfth Circuit precedent on point, the District Court's interpretation of "addition" under section 404 is contrary to that of its sister circuits. Therefore, this Court should find as a matter of law that Mr. Bowman violated the Act.

Congress enacted the CWA in 1972 to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a) (2006). Therefore, it prohibits the unauthorized "discharge of any pollutant by any person" into "navigable waters." *See id*. §§ 1311(a), 33 U.S.C. § 1362(7) , (12) (2006). The CWA defines a "discharge" as the "addition of any pollutant to navigable waters from any point source." *Id*. § 1362(12). Sections 402 and 404 create permitting systems for the discharge of pollutants. *See id.* §§ 1342, 1344. To avoid liability, a person must obtain a section 404 permit under from the Corps, or authorized state agencies like DEP, before discharging dredged or fill material.[1] *Id*. § 1344; 33 C.F.R. § 323.3(a) (2010). A discharge without a permit is only allowed if it falls under exceptions enumerated under 33 U.S.C. § 1344(f)(1), and is not recaptured by § 1344(f)(2). Prior to the discharge of all other pollutants, an entity must obtain a permit under the EPA-administered section 402 permitting scheme. *Id*. § 1342.

A. Mr. Bowman Discharged Dredged Material within the Meaning of Section 404 and the Agencies' Regulations.

1. Mr. Bowman's Activities Fall Under the Corps Definition of Addition.

Mr. Bowman's landclearing, ditching, and excavation activities fall squarely within the Agencies' definition of "discharge of dredged material," which includes:

[1] Dredged spoil, a pollutant listed under 33 U.S.C. § 1362(6), "consists of material such as soil, sand, and vegetation excavated from the bottom of a waterbody or wet area." Brief for the U.S. in Opposition, *Friends of the Everglades v. S. Fla. Water Mgmt. Dist.*, Nos. 10-196, 10-252, 2010 WL 4220517 (U.S.), at *12 n.5 (Oct. 22, 2010) (citing 40 C.F.R. 232.2; 33 C.F.R. 323.2(c); *Avoyelles*, 715 F.2d at 924 n.43). Similarly, "fill material" consists of materials like soil, sand, rock, and "overburden from mining or other excavation activities." 33 C.F.R. § 323.2(e)(2).

> [a]ny addition, including redeposit other than incidental fallback, of dredged material, including excavated material, into waters of the United States which is incidental to any activity, including mechanized landclearing, ditching, channelization, or other excavation.

33 C.F.R. § 323.2(d)(1)(iii). On June 15, 2011, Mr. Bowman began large-scale mechanized "land clearing operations" in a wetland protected by section 404, which culminated when he "formed a wide ditch or swale to drain the field." R. at 4. Therefore, Mr. Bowman redeposited dredged material incident to his mechanized landclearing and ditching activities within the meaning of 33 C.F.R. §323.2(d)(1).[2] The District Court erred in concluding otherwise.

Mr. Bowman's activities both "substantially disturb[ed] the root system" and "involv[ed] mechanized pushing, dragging, or other similar activities that redeposit excavated soil material" within the meaning of § 323.2(d)(2)(ii). While § 323.2(d)(2)(ii) specifies that "discharge of dredged material" does not include activities involving "only the cutting or removing of vegetation above the ground," Mr. Bowman far exceeded permissible trimming of vegetation when he used bulldozers to "push the trees and vegetation into windrows," burned the windrows, and "pushed the trees and leveled vegetation" into trenches excavated by his bulldozer. R. at 4. As explained below, several circuits have found CWA liability for activities substantially similar to Mr. Bowman's. *See, e.g.*, *United States v. Huebner*, 752 F.2d 1235, 1243 (7th Cir. 1985) (upholding finding that "the scraping of materials from a wetland constitutes discharge"); *United*

[2] The Agencies' regulations define the term "fill material" as "material placed in waters of the United States" that has the effect of "replacing any portion" of that water with "dry land," or "changing the bottom elevation" of any portion of that water. 33 C.F.R. § 323.2(e)(1)(i). Like "discharge of dredged material," the regulations define the "discharge of fill material" as the "addition of fill material into waters of the United States." *Id*. § 323.2(f). Therefore, to the extent that Mr. Bowman's activities added "fill material" with the effect of replacing portions of the wetland with "dry land," he also discharged fill material within the meaning of the Act. *See, e.g.*, *United States v. Bailey*, 571 F.3d 791, 795 (8th Cir. 2009) (finding that a section 404 permit was required before plaintiff was allowed to fill land for development).

States v. Deaton, 209 F.3d 331, 335 (4th Cir. 2000) (finding a CWA violation where plaintiff engaged in "sidecasting," a practice involving excavating and piling dirt alongside a ditch).

2. The Agencies' Definition of "Discharge of Dredged Material" has Evolved, but Always Captured Mr. Bowman's Activities.

The Agencies' rulemakings defining "discharge of dredged material" have been continuously litigated but have always captured Mr. Bowman's activities. Between 1986 and 1993, the Agencies' regulations defined the "discharge of dredged material" as "any addition of dredged material into the waters of the United States," but excluded from that definition "*de minimis*, incidental soil movement." 1986 Final Rule, 51 Fed. Reg. 41,206, 41,232 (Nov. 13, 1986) (codified at 33 C.F.R. § 323.2(d)). In 1993, the Corps eliminated the *de minimis* exemption in a settlement agreement. The Agencies then jointly promulgated the "Tulloch Rule" which defined the "discharge of dredged material" to include: "any addition, including *any* redeposit, of dredged material." Tulloch Rule, 58 Fed. Reg. 45,008, 45,035 (Aug. 25, 1993)(codified at 33 C.F.R. § 323.2(d)(1) and 40 C.F.R. § 232.2(1)) (emphasis added).

The court in *American Mining Congress v. U.S. Army Corps of Engineers*, 951 F. Supp. 267, 272-76 (D.D.C. 1997) ("*AMC I*"), invalidated the Tulloch Rule for impermissibly regulating "incidental fallback" of dredged material. The D.C. Circuit affirmed in *National Mining Association v. U.S. Army Corps of Engineers*, 145 F.3d 1339 (D.C. Cir. 1998) ("*NMA*"), concluding:

> The straightforward statutory term 'addition' cannot reasonably be said to encompass the situation in which material is removed from the waters of the United States and a small portion of it happens to fall back.

Id. at 1404. The court reasoned that incidental fallback cannot constitute an "addition" because it represents a "net withdrawal." *Id*. However, according to a later court, the *NMA* court took care to "make clear that it was not prohibiting the regulation of *any* redeposit, but only incidental

fallback." *Nat'l Ass'n of Home Builders v. U.S. Army Corps of Eng'rs*, No. 01-0274(JR), 2007 WL 259944, at *1 (D.D.C. 2007) ("*NAHB*").

In response to the *NMA* decision, the Agencies issued the "1999 Rule." *See* 1999 Rule, 64 Fed. Reg. 25,120, 25,123 (codified at 33 C.F.R. § 323.2 and 40 C.F.R. § 232.2). The 1999 Rule removed "any" as a modifier for the term "redeposit," and excluded "incidental fallback" from the definition of "discharge of dredge material." *Id*. Accordingly, the 1999 Rule's definition of "discharge of dredged material" still included:

> any addition, including redeposit other than incidental fallback, of dredged material, including excavated material . . . incidental to any activity, including mechanized landclearing, ditching, channelization or other excavation.

Plaintiffs again brought suit after the Agencies promulgated the 1999 Rule, asserting that it "violated the [*AMC I*] injunction by asserting unqualified authority to regulate mechanized landclearing." 2008 Final Rule, 73 Fed. Reg. 79,641, 79,642 (Dec. 30, 2008)(codified at 33 C.F.R. § 323.2 and 40 C.F.R. § 232.2). The district court in *American Mining Congress v.U.S. Army Corps of Engineers*, 120 F. Supp. 2d 23, 29 (D.D.C. 2000) ("*AMC II*"), upheld the rule because it "eliminated § 404 jurisdiction over incidental fallback, and removes the language asserting jurisdiction over 'any' redeposit of dredged material." *Id*.

In January 2001, the Agencies promulgated a further revised rule which presumed that a "discharge of dredged material" resulted from mechanized landclearing and ditching, unless the proposing party "demonstrates that only incidental fallback will result from its activity." 2001 Rule, 66 Fed. Reg. 4550, 4575 (codified at 33 C.F.R. § 323.2(d)(2)(I) and 40 C.F.R. § 232.2(2)(I). The 2001 Rule specified examples of incidental fallback, including: "when dirt is shoveled and the back-spill that comes off a bucket . . . falls into substantially the same place from which it was initially removed." *Id.*

In January 2007, the *NAHB* court found that this violated the CWA because it used volume to determine incidental fallback. *NAHB*, 2007 WL 259944, at *3. According to the court,

> [t]he difference between incidental fallback and redeposit is better understood in terms of . . . : (1) The time the material is held before being dropped to earth and (2) the distance between the place where the material is collected and the place where it is dropped.

Id. The court instructed the Corps to reconsider its presumption that use of mechanized earth-moving equipment results in a discharge unless project-specific evidence shows otherwise. *Id*.

The Agencies, therefore, promulgated their 2008 final rule, in pertinent part returning to the never-overturned 1999 Rule. 2008 Final Rule, 73 Fed. Reg. at 79,643. Now, according to the Agencies, "deciding when a particular redeposit of dredged material is subject to [CWA] jurisdiction will entail a case-by-case evaluation, consistent with our [CWA] authorities and governing case law." *Id*.

3. Mr. Bowman's Discharge of Dredged Material Does Not Constitute "Incidental Fallback" as Construed in the *Tulloch* Line of Cases.

Because Mr. Bowman's activities do not constitute incidental fallback, the *Tulloch* cases do not control. As the D.C. Circuit in *NMA* explained, its decision only regulated incidental fallback but did not limit Corps' jurisdiction to regulate other forms of redeposit. 145 F.3d at 1405. Mr. Bowman's landclearing, ditching, and excavation activities constituted regulable redeposits because they involved "purposeful relocation" rather than incidental fallback. *See United States v. Bay-Houston Towing Co., Inc.*, 33 F. Supp. 2d 596, 605 (E.D. Mich. 1999) (Silberman, J., concurring). Mr. Bowman removed materials from the wetland, and after a "varying periods of time, deliberately redeposit[ed] the materials in other locations" within the wetland at "varying distances." *Id*; *see NAHB*, 2007 WL 2599944, at *3 (explaining that the difference between incidental fallback and redeposit is best understood in terms of the time material is held before dropped and the distance between the collection and redeposit sites).

The *Tulloch* cases suggest that unlike incidental fallback, Mr. Bowman's land clearing activities are precisely the type of activities that section 404 was designed to regulate. According to the *AMC I* court, "'[s]idecasting,' which involves placing removed soil alongside a ditch, and sloppy disposal practices involving significant discharges into waters, have always been subject to § 404." *AMC I*, 951 F. Supp. at 270 n.4; *see also Deaton*, 209 F.3d at 335; *United States v. Cundiff*, 555 F.3d 200, 213-14 (6th Cir. 2009). Likewise, the court in *Huebner* found that the use of bulldozers to spread excavated material over several acres of wetland constituted a "discharge of dredged material onto a wetland." *Huebner*, 752 F.2d at 1242; *see also Avoyelles v. Marsh*, 715 F.2d 897, 921 (5th Cir. 1983) (finding that discing, "shearing, windrowing and chunk raking" activities constituted a discharge under the Act). Mr. Bowman's ditching, clearing, and excavation activities, which are substantially similar to the activities above, have therefore "always been subject to § 404." *AMC I*, 951 F. Supp. at 270 n.4. Indeed, the preamble to the Tulloch Rule explained that the Corps had regulated channelization and excavation activities under section 404 "because they involved substantial discharges." Tulloch Rule, 58 Fed. Reg. at 45,013. Therefore, this court should find that Mr. Bowman's activities fall under the Act.

B. The Corps' Definition of Addition Requires *Chevron* Deference.

Chevron deference applies here because the Agencies promulgated a 2008 rulemaking in which they issued a reasonable interpretation of "discharge of dredged material" under section 404. Further, the *AMC II* court upheld the 1999 Rule's definition of "discharge of dredged material," identical to the current regulation, because it "eliminated § 404 jurisdiction over incidental fallback, and removes the language asserting jurisdiction over 'any' redeposit of dredged material." 120 F. Supp. at 29.

Courts apply the two-step approach prescribed in *Chevron, U.S.A, Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984), when a case involves an agency's interpretation of a

statute it administers. *See, e.g., United States v. Hubenka*, 438 F.3d 1026, 1031 (10th Cir. 2006) (applying *Chevron* in a CWA case). Under the first step a court asks "whether Congress has directly spoken to the precise question at issue." *Id.* (citing *Chevron*, 467 U.S. at 842-43). "[I]f the statute is silent or ambiguous with respect to the specific issue," then the second step follows, and "the question for the court is whether the agency's answer is based on a permissible construction of the statute." *Chevron*, 467 U.S. at 842-43. A court should defer to the agency's "reasonable interpretation" and "may not substitute its own construction of a statutory provision." *Id.* at 844. "Such legislative regulations are given controlling weight unless they are arbitrary, capricious, or manifestly contrary to the statute." *Id.*

Here, the litigation history on what constitutes an "addition" suggests that the statute is ambiguous. Therefore, the court should defer to the Agencies' reasonable interpretation. *See Cundiff*, 555 F.3d at 214 ("And even if the statute was ambiguous on whether the prohibition on the 'addition' of pollutants included sidecasting, it is nevertheless a reasonable agency interpretation and must be accorded deference." (citing *Chevron*, 467 U.S. at 843)). As noted by the District Court, it is a rule of statutory construction that identical words used in different parts of the same statute are intended to have the same meaning. *See* R. at 9. However, as explained below, the courts and Agencies have found Congressional intent for a distinct reading of "addition" under section 404. These findings are backed by common sense—had Congress intended "addition" under section 404 to mean the same thing as under section 402, it would have combined discharges of dredged and fill material with other discharges regulated under section 402. Congress did not do so because it intended to treat those discharges differently.

As the Fourth Circuit noted, "Congress had good reason to be concerned about the reintroduction" of "seemingly benign substances like rock, sand, cellar dirt, and biological

materials" because dredging of wetlands may "suddenly" release pollutants that had been trapped prior to dredging and redepositing material. *Deaton*, 209 F.3d at 336 (citing Office of Tech. Assessment, U.S. Congress, *Wetlands: Their Use and Regulation* 49, 124 (1984)). Therefore, it is reasonable for the Agencies to interpret that these materials "are not pollutants while in their original place; rather, they become pollutants only when they are excavated." Brief for the U.S. in Opposition, *Friends of the Everglades v. S. Fla. Water Mgmt. Dist.*, Nos. 10-196, 10-252, 2010 WL 4220517 (U.S.), at *12 n.5 (Oct. 22, 2010) ("Opposition Brief"). And as the Agencies' regulations at 40 C.F.R. § 230.41(b) (2010) explain, discharge of dredged or fill material can degrade water quality, "obstruct[] circulation patterns," and interfere with water filtration. Because key physical differences exist between the activities regulated by the two permitting schemes, there is no absurd result from different interpretations. Rather, the Agencies' reasonable interpretation that an addition occurs when dredged material is moved within the same water body deserves deference because it is grounded in specialized expertise and physical reality.

C. The Agencies Instruct that "Deciding When a Particular Redeposit of Dredged Material" Falls within CWA Jurisdiction Should be Consistent with "Governing Case Law."

The Agencies, in their 2008 rulemaking, instructed that determining whether a "particular redeposit of dredged material" falls within CWA jurisdiction requires individual evaluation consistent with "governing case law." 2008 Final Rule, 73 Fed. Reg. at 79,643. Therefore, the District Court should not have ignored the numerous "decisions holding that land clearing activities violate the CWA without a § 404 permit." R. at 10. Courts have determined what the Agencies can reasonably consider to be an addition, and Mr. Bowman's activities fall squarely within those bounds.

1. Sister Circuits Have Almost Exclusively Found that Discharges like Mr. Bowman's Constitute an Addition of a Pollutant.

In *Deaton*, the Fourth Circuit found that the defendant's ditching and filling activities violated the CWA. 209 F.3d at 334. There, the defendant dug a 1,240 foot ditch intersecting a wetland. *Id*. at 333. Like Mr. Bowman, the defendant engaged in sidecasting, or "the deposit of dredged or excavated material from a wetland back into that same wetland." *Id*. at 333, 335. And like Mr. Bowman, the defendant argued that the Corps could not regulate sidecasting because it "results in no net increase in the amount of material present in the wetland" and therefore cannot qualify as an "addition." *Id*. at 335. The court rejected this argument because the CWA "does not prohibit the addition of material; it prohibits the 'addition of any pollutant,'" *Id*. According to the court, the important factor is that after material is excavated, "its redeposit in that same wetland *added* a pollutant where not had been before." *Id*. at 335-36; *see also United States v. Bedford*, No. 2:07cv491, 2009 WL 1491224, at *10 (E.D. Va. 2009) (finding that "[d]itch-digging . . . spreading of soils, mechanized land clearing, and depositing fill materials into wetlands all constitute the 'addition' of pollutants") (citing *Deaton*, 209 F.3d at 337; *Borden Ranch P'ship v. U.S. Army Corps of Eng'rs*, 261 F.3d 810, 815 (9th Cir. 2001)).

Likewise, the Ninth Circuit would likely find that Mr. Bowman's activities constituted an addition. In *Borden Ranch*, the court found that "deep ripping," a practice in which "four-to-seven-foot long metal prongs are dragged through the soil" in order to drain wetlands prior to planting crops, constituted an addition. 261 F.3d at 812. As in the present case, the plaintiff argued that deep ripping could not "constitute the 'addition' of a pollutant' . . . because it simply churns up soil that is already there, placing it back basically where it came from." *Id*. at 814. Citing *Deaton*, the court found that deep ripping "certainly" is addition of a pollutant, even though it does not cause the addition of any new material. *Id*. at 815; *see also Rybachek v. EPA*,

904 F.2d 1276, 1285 (9th Cir. 1990) ("removing material from a stream bed, sifting out the gold, and returning the material to the stream bed was 'addition' of a 'pollutant'").

Recently, the Sixth Circuit in *United States v. Cundiff* held that a private landowner's sidecasting activities violated the CWA. 555 F.3d at 214. There, the landowner converted a wetland into farmland by excavating drainage ditches and placing the dredged material into the wetland. *Id*. at 204-05. Once the land dried, he planted a crop of wheat. *Id*. at 205. Mr. Cundiff argued that his actions did not constitute an addition because it was unreasonable for the Corps to define "'discharge of a pollutant' to cover situations not involving the introduction of foreign material into the area." *Id*. at 213. The court denied this argument, stating: "'pollutant' is *defined* in the Act to specifically include 'dredged spoil' – the Cundiffs would read that term out of the Act." *Id*. The Court further explained that the CWA concerns the addition of "pollutants," rather than "mere 'material'" because "material can be benign in one spot and seriously disruptive" in another. *See also Avoyelles*, 715 F.2d at 923 ("The word 'addition', as used in the definition of the term 'discharge,' may reasonably be understood to include 'redeposit.'")*; United States v. M.C.C. of Fla., Inc.*, 772 F.2d 1501, 1506 (11th Cir. 1985), *vacated and remanded on other grounds*, 481 U.S. 1034 (1987) ("[g]iven the broad objectives of the Clean Water Act," the action of digging up sediment and vegetation and redepositing it constituted an addition).

This court should follow the Fourth, Ninth, Sixth, Fifth, and Eleventh Circuits to find that Mr. Bowman's activities, which caused redeposit of pollutants, constitute an addition.

D. The District Court Improperly Applied EPA's *Gorsuch* and *Consumers Power* "Outside World" Interpretations to this Section 404 Case.

The District Court's reliance on *Gorsuch* and *Consumers Power* is inapposite. Both of these cases pertain to EPA's regulation of discharges of point-source pollutants from dams under section 402, which is distinct from the pertinent section 404 permitting regime. In these cases,

the court held that the "discharge of pollutants from one body of water to a contiguous one is not an 'addition' because it does not *add* a pollutant from the outside world." *Greenfield Mills, Inc. v. Macklin*, 361 F.3d 934, 948 (7th Cir. 2004); *Nat'l Wildlife Fed'n v. Gorsuch*, 693 F.2d 156 (D.C. Cir. 1982) (upholding EPA's interpretation that dams are not subject to section 402 permits where they do not "*introduce* the pollutant . . . from the outside world" because the pollutant "merely passes through the dam" from one waterbody to another)*; Nat'l Wildlife Fed'n v. Consumers Power Co.*, 862 F.2d 580 (6th Cir. 1988) (similarly deferring to EPA's interpretation). The court should instead defer to EPA's interpretation of the section 404 permitting scheme, which is not affected by *Gorsuch* and *Consumers Power*.

To justify its flawed application of the "outside world" definition to a section 404 case, the District Court stated that section 404's "original intent" was to "provide a permitting scheme for disposal of dredged spoil from dredging harbors and navigation channels at a considerable distance from their point of origin." R. at 9. This interpretation conflates the regulation of "dredging" with that of "discharge of dredged material," which includes the redeposit of dredged materials within the same wetland. *See* Part IV.C.1, *supra*. These activities are distinct: while the CWA regulates the "discharge of dredged material," the practices described by the District Court are regulated under the Rivers and Harbors Act, 33 U.S.C. § 403, "which makes it illegal 'to excavate or fill' in the navigable waters . . . without the Corps' approval," *Bay-Houston*, 33 F. Supp. 2d at 604; *see also NMA*, 145 F.3d at 1410 (Silberman, J., concurring).

For the reasons discussed in *Greenfield Mills*, *Gorsuch* and *Consumers Power* do not control in section 404 cases. In *Greenfield Mills*, the Seventh Circuit invited the Agencies to participate as *amici curiae* to submit an interpretation of their section 404 permitting scheme and clarify the applicability of the EPA position advanced in *Gorsuch* and *Consumers Power*.

Greenfield Mills, 361 F.3d at 947-48. Like Mr. Bowman, the defendants used the two section 402 cases to support their position that they did not violate section 404 by discharging dredged or fill material without a permit. *Id*. And like Mr. Bowman, the defendants argued that there could be no "'addition' of dredged spoil" within "the same body of water." *Id*. at 947.

The Agencies accepted this invitation and urged the court to apply "the broader definition of 'addition' employed by the courts in the more recent § 404 cases." *Id*. at 948. According to the Agencies, section 404 controlled the addition at issue, which consisted of sediment that "settled out of navigable waters," and *Gorsuch* and *Consumers Power* were inapplicable because they concerned "*normal* dam operations that resulted in changes in water quality." Brief of EPA and U.S. Army Corps of Eng'rs as Amici Curiae, *Greenfield Mills*, 2003 WL 22733948, at *6 n.6 ("Agencies' Br."). The Agencies argued:

> The fact that the Act defines the term 'pollutant' to include 'dredged spoil,' 33 U.S.C. § 1362(6), and specifically regulates the discharge of dredged materials, 33 U.S.C. § 1344(a), which typically involves the excavation and deposition of the materials within the same body, *see, e.g.*, [*Avoyelles*, 715 F.2d at 923-24 & n.43], shows that Congress understood such additions to fall within the Act's coverage.

Id. at 5. Moreover, the Agencies recognized that "courts of appeals have consistently recognized that materials that have been scooped up and then redeposited in the same water body can result in a discharge of a pollutant." *Id*.

The Seventh Circuit followed the Agencies' position for three reasons. *Id*. at 948-49. First, it found EPA's reading compatible with the Act's purpose to "restore and maintain the chemical, physical and biological integrity of the Nation's waters." *Id*. (quoting 33 U.S.C. § 1251). Second, the court found it "logical" that soil and vegetation moved from one part of a wetland and redeposited in another part could "disturb the ecological balance of the affected areas." *Id*. at 949. Third, the court found that a contrary holding "would effectively remove the dredge-and-fill provision from the statute." *Id*. (quoting *Avoyelles*, 715 F.2d at 924 n.43).

Therefore, the court followed the Agencies' interpretation and other circuit caselaw to find that the removal and redeposit of dredged material in the same body of water constituted an "addition." *Id*. Likewise, this Court should defer to the Agencies' position that the "outside world" theory does not extend to the section 404 permitting scheme, and find that Mr. Bowman's activities constituted an addition. Further, this Court should defer to the Agencies' position that the fact that the CWA regulates the discharge of dredged materials, which typically involves excavation and deposition in the same water body, shows that Congress understood these additions to fall under the Act. Agencies' Br., 2003 WL 22733948, at *5.

While the Agencies' positions were not subject to sufficiently formal procedures to merit *Chevron* deference, *see United States v. Mead Corp.*, 533 U.S. 218, 234, 238 (2001), the Agencies' interpretation of their own regulatory scheme is entitled deference. *Auer v. Robbins*, 519 U.S. 452, 461-63 (1997); *see also Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 212 (1988) ("Petitioners complain that the Secretary's interpretation comes to us in the form of a legal brief; but that does not, in the circumstances of this case, make it unworthy of deference."). Therefore, the District Court erred in failing to defer to the Agencies' interpretation that Congress understood excavation and deposition within the same water body to constitute an addition, "because it is not 'plainly erroneous or inconsistent with the regulation[s].'" *Coeur Alaska, Inc. v. S.E. Alaska Conservation Council*, 557 U.S. 261, 284 (2009) (citing *Auer*, 519 U.S. at 461). Under the proper standard of deference, the conclusion is inevitable that Mr. Bowman's operations fall within the Corps' section 404 purview.

E. This Court Should Defer to EPA's Position that its "Unitary Navigable Waters" Definition of Addition Has No Effect on the 404 Program.

Mr. Bowman argues that the Court should afford *Chevron* deference to EPA's interpretation of "addition" in its 2008 Water Transfer Rule, and that therefore the "unitary

navigable waters" theory advanced in the 2008 Rule also applies to section 404. R. at 9. In contrast, NUWF argues that EPA's interpretation of "addition" to the proposed and final rule should not apply. Both interpretations miss the mark.

In 2008, EPA issued the Water Transfers Rule ("WTR") pursuant to its CWA authority. Water Transfers Rule, 73 Fed. Reg. 33,687 (June 13, 2008) (codified at 40 C.F.R. pt. 122). The WTR provides that a transfer of water from one body of to another without alteration or "intervening" use is not subject to the section 402 permitting program. 40 C.F.R. § 122.3.

Contrary to NUWF's assertion, EPA's interpretation of its own rule should be afforded substantial deference. As the *Chevron* Court stated, "considerable weight should be accorded to an executive department's construction of a statutory scheme it is entrusted to administer." 467 U.S. at 837; *see Friends of the Everglades v. S. Fla. Water Mgmt. Dist.*, 570 F.3d 1210 (11th Cir. 2009) (applying *Chevron* deference to uphold the 2008 Rule). However Mr. Bowman's argument for selective deference cannot prevail where EPA made clear in promulgating the WTR that it does not affect the section 404 permitting program. In the WTR's preamble, EPA stated:

> Because Congress explicitly forbade discharges of dredged material except as in compliance with the provisions cited in CWA section 301, today's rule has no effect on the 404 permit program.

73 Fed. Reg. at 33,703. EPA's entire interpretation is entitled substantial deference.

Even if EPA's interpretation in the preamble to the 2008 Rule does not merit *Chevron* deference, it is still entitled to *Auer* deference. *See Auer*, 519 U.S. at 461-63 (recognizing agency interpretations of their own regulations merit substantial deference). Indeed, the EPA has maintained the crucial distinction between the section 402 and 404 permitting programs before various courts. Furthermore, EPA's position that the WTR does not affect the section 404 permitting program is "evidence of context or intent" and should be used to interpret the regulation. *City of Las Vegas, Nev. v. F.A.A.*, 570 F.3d 1109, 1117 (9th Cir. 2009).

In *S. Fla. Water Mgmt. Dist. v. Miccosukee Tribe of Indians*, 541 U.S. 95, 107 (2004), the Court declined to defer to a "longstanding EPA view" and "adopt the 'unitary waters' approach" because the Government failed to "identify any administrative documents in which EPA ha[d] espoused that position." Rather, the Court cited an *amicus* brief filed by former EPA officials arguing that "the agency once reached the opposite conclusion." *Id*. Similarly, here, Mr. Bowman points to no documents where the Agencies espouse the position that the movement of dredged or fill material from one portion of a wetland to another portion of the same wetland does not constitute an addition of under section 404. On the contrary, the EPA explicitly stated that the WTR does not alter the section 404 permitting scheme. 73 Fed. Reg. at 33,703.

Likewise, EPA has continually upheld its position that the WTR does not apply to the section 404 permitting scheme. In a 2010 brief before the Supreme Court, the Agencies reiterated their position: "As EPA made clear in promulgating the 2008 regulation, its water-transfer rule does not affect the section 404 permitting program." Opposition Br., *Friends of the Everglades*, 2010 WL 4220517, at *12 n.5. EPA also restated its long-held position that the materials that comprise "dredged spoil" "are not pollutants while in their original place; rather, they become pollutants only when they are excavated." *Id*. at n.5. According to the Agencies, despite the WTR and EPA's section 402 "unitary waters" interpretation, section 404 permits are "still required" because dredged spoil "is not 'inherently' part of the waters of the United States." *Id*. Because the WTR in no way altered the Agencies' definition of "addition" under section 404, the case law discussed above remains persuasive. *Cf. Friends of the Everglades*, 570 F.3d at 1221.

F. Mr. Bowman's Actions Do Not Fall within an Exemption to the Prohibition on Discharging Dredged and Fill Material without a Permit.

33 U.S.C. § 1344(f) provides exemptions that allow the "discharge of dredged or fill material" without a Corps permit. However, neither the farming exemption, nor the drainage

ditch maintenance exemptions apply. Mr. Bowman's actions do not fall within the farming exemption, 33 U.S.C. § 1344(f)(1)(A), because it provides that activities "must be part of an established (i.e., on-going) farming, silviculture, or ranching operation." 33 C.F.R. § 323.4(a)(1)(ii). Nor is the drainage ditch exemption, 33 U.S.C. § 1344(f)(1)(C), applicable to Mr. Bowman's new construction because it "only applies to the *maintenance* of drainage ditches and not their construction." *Cundiff*, 555 F.3d at 215 (citing 33 C.F.R. § 323.4(a)(3)).

Assuming, *arguendo*, that Mr. Bowman's actions were exempt, they are recaptured by 33 U.S.C. § 1344(f)(2). The recapture provision brings otherwise exempted activities back under the scope of the CWA where: 1) the violator undertakes activities with the "purpose [of] bringing an area" into a new use and 2) where the activity impairs "the flow or circulation of navigable waters" or reduces the "reach of such waters." 33 U.S.C. § 1344(f)(2). Mr. Bowman purposefully undertook his activities to bring his land into a condition suitable for farming. He succeeded in sufficiently altering the wetlands' hydrological regime, such that he sowed a crop of wheat after the field drained. R. at 5. These activities do not escape recapture because they "involve precisely what is prohibited: the wholesale modification of a major aquatic system." *United States v. Cumberland Farms of Ct., Inc.*, 647 F. Supp. 1166 (D. Mass. 1986).

CONCLUSION

For the foregoing reasons, Intervenor-Appellant DEP respectfully requests that this Court uphold the District Court's determination that there is no continuing or ongoing violation as required by CWA section 505(a) for subject matter jurisdiction and that NUWF's citizen suit is barred by DEP's diligent prosecution; but that it overturn the District Court's holding that NUWF did not have standing and that Mr. Bowman did not violate CWA section 404.