Team No. 25

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 PROTECTION,

Intervenor-Appellant

v.

JIM BOB BOWMAN,

Defendant-Appellee

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

Civ. No. 149-2012 Dated June 1, 2012

BRIEF FOR NEW UNION DEPARTMENT OF ENVIRONMENTAL CONSERVATION
INTERVENOR-APPELLANT

TABLE OF CONTENTS

TABLE OF AUTHORITIES

United States Supreme Court

United States Courts of Appeal

United States District Courts

Constitutional Provisions

Statutes

Federal Rules of Civil Procedure

Other Authorities

Jurisdictional Statement

This case involves an action arising under the Clean Water Act ("CWA"), 33 U.S.C. §§ 1251 *et seq.*, which was filed by Plaintiff-Appellant New Union Wildlife Federation ("NUWF") in the United States District Court for the District of New Union. R. at 1. The District Court has subject-matter jurisdiction over such civil actions that arise under the laws of the United States. 28 U.S.C. § 1331 (2006). Intervenor-Appellant, New Union Department of Environmental Protection ("NUDEP"), appeals the District Court's final judgment granting summary judgment in favor of Defendant-Appellee Jim Bob Bowman ("Bowman") on June 1, 2012. R. at 11. The United States Court of Appeals for the Twelfth Circuit has jurisdiction to hear appeals from any final decision of all district courts of the United States pursuant to 28 U.S.C. § 1291 (2006).

Statement of the Issues

I. Whether NUWF has standing to sue Jim Bob Bowman for violating the CWA.

II. Whether Bowman violated the CWA when he moved dredge and fill material from one part of a wetland adjacent to navigable water to another part of the same wetland.

III. Whether there is a continuing or ongoing violation as required by § 505 of the CWA for subject matter jurisdiction.

IV. Whether NUWF's citizen suit has been barred by NUDEP's diligent prosecution of Bowman as set out in § 505(b) of the CWA.

Statement of the Case

NUWF filed an action under the citizen suit provision of the CWA, 33 U.S.C. § 1365 (2006), against Bowman, for filling wetlands without a permit in violation of §§ 301(a) and 404 of the CWA, *Id.* §§ 1311(a), 1344. R. at 3. NUDEP intervened in this action. *Id.* After discovery, both NUWF and Bowman filed motions for summary judgment. *Id.* The Court granted

Bowman's motion and denied NUWF's motion, holding that NUWF lacked standing, that the Court lacked subject matter jurisdiction because all violations are wholly past, that the Court lacked subject matter jurisdiction due to prior state action, and that there is no violation of the CWA. R. at 11. Both NUWF and NUDEP filed motions of appeal. R. at 1. While NUWF disputes each of the Court's holdings, NUDEP appeals only the holdings that NUWF lacked standing to bring suit and that Bowman did not violate § 404 of the CWA.

Statement of Facts

Bowman's Property

Bowman owns one thousand acres of wetlands in Mudflats, New Union. R. at 3. The property is adjacent to the Muddy River, which forms the border between New Union and the State of Progress. *Id.* Where it borders Bowman's property, the Muddy is more than five-hundred feet wide and more than six feet deep; it is commonly used for recreational navigation for miles upstream and downstream of the property. *Id.*

Bowman concedes that his property is a wetland, according to the U.S. Army Corps of Engineers' Wetlands Determination Manual. *Id*. at 4. It includes 650 feet of shoreline on the Muddy, and is covered in vegetation that is characteristic of wetlands. *Id.* at 3. The property is entirely within the river's one-hundred year flood plain, and when the river reaches its annual high point, portions of the property flood. *Id.* at 3. The property is hydrologically connected to the Muddy River. *Id*.

Bowman's Activities

Without obtaining a permit, Bowman began land-clearing operations on this wetland property on June 15, 2011. *Id.* at 4. Using bulldozers, he knocked down trees and leveled vegetation, which he burned. *Id.* He buried the ashes and remains of vegetation in trenches that

he had dug with the bulldozer, and he pushed soil from high portions of the land into these trenches and other low lying areas. *Id.* Bowman then created a ditch that ran from the back of his property to the Muddy that allowed the field to drain into the river. *Id.* These activities were completed on or about June 15, 2011. *Id.* The portion of his property that was adjacent to the river was too wet to work with the bulldozer. *Id.* Bowman intended to clear this section after it had drained. *Id.* This uncleared portion forms a strip of land 150 feet wide that runs along the 650 foot length of river frontage on the property. *Id.*

NUWF and NUDEP's Response to Bowman's Activities

NUWF is a not-for-profit corporation. *Id.* It is organized under the laws of New Union for the purpose of protecting the fish and wildlife of the state by protecting their habitats. *Id.* It is a membership organization, funded by the dues and contributions of its members. *Id.*

Members of NUWF use the Muddy and its banks for recreational boating, picnicking, and frogging. NUWF's members became aware of Bowman's land clearing activities. *Id.* Shortly thereafter, on July 1, 2011, the organization sent notice of intent to sue Bowman under the citizen suit provision of the CWA, 33 U.S.C. § 1365, to Bowman, EPA, and NUDEP, to which the EPA has delegated authority to implement the CWA. *Id.* Shortly after this notice, NUDEP contacted Bowman, sending him a notice of violation that informed him that his land-clearing activities had violated state and federal law. *Id.*

Bowman's Settlement

Bowman entered into a settlement agreement with NUDEP, despite his contention that he had not violated any law. *Id.* Under the terms of the settlement, he agreed not to clear any more wetlands in the area, to convey to NUDEP a conservation easement on the 150 foot wide strip of uncleared wooded property adjacent to the Muddy as well as an additional 75 foot buffer zone

between the wooded area and the cleared property, and to construct and maintain a year-round wetland on the 75 foot buffer zone. *Id.* He agreed that he would not develop the easement in any way other than the construction and maintenance of the wetland. *Id.* The public is permitted to use the easement during the day only for appropriate recreational activities. *Id.*

The agreement between NUDEP and Bowman was incorporated into an administrative order, which NUDEP issued to Bowman and to which Bowman consented on August 1, 2011. *Id.* NUDEP had authority to issue such an order pursuant to a state statute virtually identical in relevant part to applicable sections of the CWA. *Id.* NUDEP chose not to exercise its authority to levy an administrative penalty of up to $125,000. *Id.*

Federal Lawsuits

On August 10, 2011, after issuing the administrative order, NUDEP filed a complaint against Bowman in federal court under the citizen suit provision of the CWA, 33 U.S.C. § 1365. *Id*. at 5. The CWA defines such agencies as "citizens" for the purpose of the statute. *Id.* § 1362(5). On August 30, 2011, NUWF filed its own citizen suit complaint. *Id.* NUWF sought civil penalties and an order mandating that Bowman remove the fill material from the field and restore the wetlands. *Id.* NUDEP filed a motion to intervene in the NUWF suit, which the court granted.

NUDEP's case against Bowman is still pending.

SUMMARY OF THE ARGUMENT

The district court erred in holding that NUWF lacked standing to sue and that Bowman did not violate §§ 301 and 404 of the CWA. However, the court's decisions that there is not continuing violation, as required by § 505 of the CWA for subject matter jurisdiction, and that NUWF's citizen suit is bared by NUDEP's diligent prosecution of Bowman were proper.

NUWF has standing to bring a suit against Bowman pursuant to § 505 of the CWA, which is the "citizen suit" provision. NUWF has shown that specific members have standing to sue, and has satisfied the requirements for "associational" standing. The district court held that standing had not been established, finding that members of NUWF had not suffered an "injury in fact" fairly traceable to the clearing of Bowman's field. The court erred, however, in failing to consider the harm to the members' legally protected recreational interests. The court also erred by focusing on the lack of evidence of harm to the environment, rather than on the harm to the plaintiff's members.

The district also erred in concluding that Bowman did not violate § 404 of the CWA by discharging dredged or fill material without a permit. The court held that, because the dredged and fill material was not from the same piece of property rather than the "outside world," it was not "added" to navigable waters. In its holding, however, the court misapplied the "outside world" definition, because this definition has only been applied in contexts regarding the § 402 NPDES permitting program. Because the pollutants within these provisions are fundamentally different, the term "addition" must be applied according to the context of each provision. Further, even if the "outside world" definition applies to dredged and fill material under § 404, Bowman's actions resulted in the addition of pollutants from the "outside world."

The district correctly determined that the dredge and fill material violation does not constitute an ongoing violation because Bowman's activities are wholly past. As a matter of subject matter jurisdiction, courts have determined that violations arising under § 402 must be ongoing or likely to recur. This interpretation should be interpreted to apply to § 404 as well, because the effect of the language and structure of the statute are consistent with such an

interpretation. Under this interpretation, Bowman's violation would be considered wholly past, because it was the result of a single project, and was never sporadic or intermittent.

Finally, the court also properly held that NUWF's citizen suit is barred by NUDEP's diligent prosecution of Bowman. Because government or agency action is preferred over citizen action, the citizen suit provision bars citizen suits when an agency such as NUDEP has commenced action prior to the citizen filing a claim and when the agency's prosecution of that action has been diligent. As indicated by the record, NUDEP filed their claim prior to NUWF's filing. Further, NUDEP can show that it diligently prosecuted its claim, because the terms of its consent decree with Bowman were calculated to achieve compliance with the law.

STANDARD OF REVIEW

The standard of review depends on the nature of the underlying judgment. Because the underlying judgment granted Bowman's motion for summary judgment, this Court should exercise plenary review, applying the same standards the district court was required to apply. *Connection Training Servs. v. City of Phila.*, 358 Fed. Appx. 315, 317 (3d Cir. Pa. 2009) (internal citations omitted). Summary judgment is proper if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986); FED. R. CIV. P. 56(c).

ARGUMENT

I. NUWF has standing to bring a lawsuit against Jim Bob Bowman for his violations of the CWA because several of the association's members meet the requirements for Article III standing and because NUWF can establish associational standing.

Jurisdiction of federal courts is limited by Article III of the Constitution to "cases" and "controversies." U.S. CONST. art. III, § 2. The doctrine of standing serves to identify matters

that meet this "case and controversy" requirement. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992). For an individual or group to bring an action in federal court, that individual or group must establish standing to do so under Article III. *Id.*

To demonstrate Article III standing, the party invoking federal jurisdiction must establish three elements: 1) that the party is threatened with or has suffered an "injury in fact" that is a) "concrete and particularized" and b) "actual and imminent, not conjectural or hypothetical," 2) that the injury is "fairly traceable to the challenged action of the defendant," and 3) that it is likely that the injury will be redressed by a favorable decision. *Defenders of Wildlife*, 504 U.S. at 560 *; Summers v. Earth Island Institute*, 555 U.S. 488, 493 (2009).

Organizations may establish "associational" standing to bring suit in federal court on behalf of its members, provided that 1) any member would otherwise have Article III standing, 2) the interests sought to be protected by the suit are related to the purpose of the organization, and 3) the individual member(s) need not participate in the suit. *Hunt v. Washington State Apple Advertising Commission*, 432 U.S. 333, 343 (1977).

NUWF's members have fulfilled the requirements for Article III standing, and NUWF has fulfilled the require associational standing,

a. Individual members of NUWF have Article III standing.

Individual members of NUWF can establish Article III standing under the three-part test articulated in *Defenders of Wildlife*. They have suffered an injury to their legally protected interest in recreational enjoyment, there is a causal connection between these injuries and the defendant's challenged activities, and their injuries are likely to be redressed by a favorable decision.

i. Members of NUWF have suffered or are threatened with an "injury in fact."

To establish standing to bring a citizen suit under the CWA, citizen plaintiffs must demonstrate that they have suffered or are threatened with an "injury in fact." *Defenders of Wildlife*, 504 U.S. at 560. Such an injury is characterized by the court as the "invasion of a legally protected interest." *Id.* The injury must be "concrete" and affect the plaintiff in a "personal and individual way," and harm must be actual and imminent. *Id.* at 560 n. 1. Under environmental laws, aesthetic or recreational interests are legally protected interests, and evidence of injuries to such interests are sufficient to establish an "injury in fact." *Sierra Club v. Morton*, 405 U.S. 727, 734 (1972).

Environmental groups have demonstrated that they have standing to sue by providing evidence that particular members have used the specific area affected by the challenged action or that they have concrete plans to do so in the future, and that their ability to use and enjoy the site has been or will be harmed by the defendant's activities. *Friends of the Earth v. Laidlaw Environmental Services*, 528 U.S. 167, 182 (2000) ("injury in fact" established when a member of an environmental group averred in affidavits that he had used an area near defendant's industrial facility for camping, swimming, or picnicking, but had stopped doing so because he feared discharges from the facility had polluted the area; another member of the group similarly averred that she once engaged in picnicking, walking, and bird watching along the area of the river in question, but no longer did so because of her concern about pollutants; and a third member stated in her deposition testimony that she lived within one quarter mile of the industrial facility and would have used the river and surrounding land for hiking, picnicking, camping, and boating, but for her concerns about illegal discharges); *Summers v. Earth Island Institute*, 555 U.S. at 494 (government conceded that the allegations that a member of an environmental group

repeatedly visited the site of the contested action, had "imminent plans" to do so again, and would suffer harm to his interest in observing the plants and animals at the site would have been sufficient to establish standing had harm not been redressed by an earlier proceeding).

Generalized harm to unspecified future visitors is not sufficient to show an "injury in fact." *Sierra Club*, 405 U.S. at 734 ("injury in fact" not established by allegations that development in a National Park would impair enjoyment for future generations where no specific members were alleged to be effected), as well as arguments that members of an environmental group use "unspecified portions of an immense tract of territory," some portion of which may be affected by the challenged action, *Lujan v. National Wildlife Federation*, 497 U.S. 871, 889 (1990). The court has also held that the harm alleged must be "imminent" rather than "conjectural." *Defenders of Wildlife*, 504 U.S. at 564 (a professed intent to visit Sri Lanka, the site of contested actions, without any description of concrete plans to do so, does not meet the "actual or imminent" requirement for an "injury in fact").

Here, the "injury in fact" requirement is met because NUWF has identified specific members who use the affected area and whose legally protected recreational interests have been diminished by the activities in question. Unlike the generalized assertions that unspecified individuals would be harmed by the challenged action advanced by the plaintiff in *Sierra Club*, NUWF has presented the sworn affidavits of Dottie Milford, Zeke Norton, and Effie Lawless, who are individual members. R. at 6. Further, the members actually use the river and its banks on and around Bowman's property, much as the members in *Friends of the Earth* used the site of the contested action in that case. *Id.* This actual use is distinct from the members in *Defenders of Wildlife*, whose vague intentions to visit a site did not meet the requirement that harm be "imminent."

Also like the *Friends of the Earth* members, the three members of NUWF have alleged that Bowman's land-clearing activities have negatively affected their ability to use and enjoy the site for recreational activities such as boating and picnicking. *Id.* Because they know that wetlands' absorption of pollutants and buffering against flooding are vital to maintaining the integrity of the river, the members fear that the Muddy is more polluted as a result of the land-clearing, and at least one member believes that the river looks more polluted than it did prior to the activity. *Id.* Bowman's destruction of the wetlands on his property has diminished NUWF's members' ability to use and appreciate the river in its natural state, and has therefore actually harmed their legally protected recreational and aesthetic interests.

The factual evidence of this harm must speak to the injury suffered by or threatened to the plaintiff him or herself; it is not necessary to allege a specific harm to the environment. *Friends of the Earth, Inc.*, 528 U.S. at 169 (plaintiff organization's failure to present a "demonstrated proof of harm" to the environment or to human health from defendant's challenged activities was irrelevant; plaintiff's allegations that its members recreational and aesthetic interests were adversely affected were sufficient to demonstrate an "injury in fact"). Here, there is evidence of harm to the plaintiff's members' legally protected interest in recreational enjoyment; it is not necessary to present evidence regarding the harm to the environment. Thus, the District Court's assertion that the environment may ultimately benefit from the artificially created wetland in the buffer zone is not relevant to the determination of whether the plaintiff's members have suffered an "injury in fact." R. at 6.

Because, like other environmental plaintiffs who have successfully established standing, the plaintiffs have specific members that have alleged that they regularly use the affected area for legally protected recreational purposes, and that their recreational enjoyment is diminished by

the defendant's challenged land-clearing activities, they have satisfied the Supreme Court's requirements that an "injury in fact" invades a legally protected interest that has a personal and individualized effect and that the harm is actual or imminent.

ii. There is a causal connection between members' injuries and Bowman's land clearing activities.

In addition to an "injury in fact," Article III standing requires a "causal connection between the injury and the conduct complained of." *Defenders of Wildlife*, 504 U.S. at 560. The injury must be "'fairly . . . trace[able] to the challenged action of the defendant, and not . . . th[e] result [of] the independent action of some third party not before the court." *Id.* quoting *Simon v. Eastern Kentucky Welfare Rights Organization*, 426 U.S. 26, 41-42 (1976). Plaintiffs are not, however, required to show that their injuries are caused exclusively by the defendant's alleged violations and not by any third party action. *Student Public Interest Research Group of New Jersey, Inc. v. Tenneco Polymers, Inc.*, 602 F. Supp. 1394, 1397 (D.C.N.J.1985) (plaintiff's assertion that they were injured by the general pollution of a river, rather than any of defendant's specific discharges, was sufficient to establish causation).

In the instant case, the harm to the members' recreational use and enjoyment of the Muddy River is causally connected to Bowman's illegal land-clearing activities. The members' affidavits identify Bowman's activities as the source of their loss of enjoyment in and concern about the river, stating that the members "feel a loss from the destruction of the wetlands" and that they "[fear] the Muddy is more polluted as a result" of Bowman's actions. R. at 6. Even though some third party may exist that has also polluted the river, members do not need to identify Bowman as the exclusive source of the pollution that concerns them. *Student Public Interest*, 602 F. Supp. at 1397. Because the members' injuries are traceable to Bowman's challenged land-clearing activities, there is a causal connection between the two.

iii. Members' injuries are likely to be redressed by a favorable decision.

The final element plaintiffs must fulfill to establish Article III standing is redressability. "[I]t must be 'likely,' as opposed to merely 'speculative,' that the injury will be 'redressed by a favorable decision." *Defenders of Wildlife*, 504 U.S. at 561. In *Defenders of Wildlife*, the court found that redressability was not demonstrated because the plaintiffs did not challenge specific violations of law, because it was not clear that the defendant exercised sufficient control over the challenged action to implement change, and because it was not clear that the relief requested would stop or lessen the harmful activity. *Id.* at 568-71. Because plaintiffs could not show that their injuries were likely to be redressed by a decision in their favor, they were deemed not to have standing to bring suit. *Id.*

Here, the members' injuries are highly likely to be redressed by a favorable decision. NUWF seeks both civil penalties and an order instructing Bowman to remove the fill material and restore the wetland. R. at 5. Unlike the suit in *Defenders of Wildlife*, this suit challenges a specific violation of law: filling a wetland without a permit. This case is also distinguished from *Defenders of Wildlife* because the requested relief would be binding on the specific individual, Bowman, who exercises sufficient control over the challenged action that he can take action if the court so orders. Further, the requested relief would mitigate the harmful activity. Injunctive relief instructing Bowman to restore the wetlands would restore the members' enjoyment of the natural environment of the Muddy, and civil penalties would deter Bowman from such violations in the future.

Because Dottie Milford, Zeke Norton, and Effie Lawless can demonstrate that they have suffered an "injury in fact," that is causally connected to the defendant's illegal activity and that

such injury is likely to be redressed by a favorable decision, they have established Article III standing.

b. NUWF has standing to bring suit in federal court on behalf of its members.

An organization has standing to bring suit in federal court on behalf of its members if 1) any member would otherwise have Article III standing, 2) the interests sought to be protected by the suit are related to the purpose of the organization, and 3) the individual member(s) need not participate in the suit. *Hunt,* 432 U.S. at 343. Because these elements are satisfied, NUWF has standing to bring suit against Bowman on behalf of its members. As has been illustrated above, NUWF has fulfilled the first requirement, because three of its members can establish Article III standing.

The second requirement is fulfilled by an analysis that simply examines the purpose of the organization in relation to the goals of the suit. *See American Civil Liberties Union of Ohio Foundation, Inc. v. Ashbrook*, 375 F.3d 484 (6th Cir. 2004). NUWF's stated purpose is to "protect the fish and wildlife of the state by protecting their habitats." R. at 4. NUWF's CWA lawsuit seeks to mitigate a violation that negatively impacts habitats of fish and wildlife both in the wetlands on Bowman's property and in the hydrologically connected Muddy River. This objective is closely related to the organization's purpose, which fulfills the second element of the test for associational standing.

Finally, if members of the organization must participate in the suit, associational standing cannot be established. *Concerned Parents to Save Dreher Park Center v. City of West Palm Beach*, 884 F. Supp. 487, 489-90 (S.D. Fla. 1994). For example, some statutes require proof at trial as to the injury to each claimant, and sometimes the requested relief would necessitate an assessment of the needs of each individual plaintiff. *Id.* (relief under the Americans With

Disabilities Act requires a case-by-case assessment of individual plaintiff needs to determine measures that must be taken for any complainant's relief). In these instances, because individual members would need to participate in the suit, associational standing cannot be established. In the instant case, by contrast, there is no statutory requirement of proof at trial with respect to individual claimants. Further, civil penalties and injunctive relief under the CWA are granted without a particularized, individual assessment of the members.

NUWF can established the elements required for associational standing, including the requirement that individual members have standing themselves under Article III of the Constitution, to bring a lawsuit on behalf of its members. Because associational standing can be established, the District Court's decision that NUWF cannot bring a lawsuit against Bowman for his violations of the CWA should be reversed.

II. Bowman violated the CWA by moving dredged and fill material from one part of a wetland to another part of the same wetland.

Bowman's land-clearing activities violated §§ 301 and 404 of the CWA because he discharged dredged and fill materials into his wetland property without a permit. According to § 301 of the CWA, the "discharge of any pollutant" is prohibited, except in compliance with permits issued under §§ 402 or 404 of the CWA. 33 U.S.C. § 1311 (2006). Section 402 of the CWA establishes the National Pollutant Discharge Elimination System ("NPDES"), while § 404 establishes permitting requirements for the discharge of "dredged or fill materials." *Id*. §§ 1342, 1344. For an action to require a permit under either §§ 402 or 404, it must involve the "discharge of any pollutant." The CWA defines the "discharge of a pollutant" as "any addition of any pollutant to navigable waters from any point source." *Id*. § 1362(12). Therefore, to require a permit issued under either §§ 402 or 404, a discharge must be a 1) pollutant from a 2) point source that is 3) added to a 4) navigable water. The district court correctly found that the dredged

and fill materials from Bowman's land-clearing activities were pollutants discharged from a point source into navigable waters; however, it erred when it determined that such activity did not constitute an "addition," and consequently did not require a § 404 permit. In its reasoning, the court erroneously applied EPA interpretations of "addition" with respect to the § 402 NPDES permitting program. Even if this court determines that the EPA's § 402 interpretations of "addition" should be applied to § 404 permits, however, Bowman's activities have resulted in the addition of pollutants to a navigable water.

a. An "outside world" definition should not be applied to additions of pollutants that are dredge and fill materials requiring permits under § 404 .

The CWA does not define addition. To ascertain what constitutes an "addition" of pollutants under the CWA, the district court relied upon EPA interpretations of "addition" that are related to the § 402 NPDES permitting program. R. at 9-10. With respect to § 402 permits, the EPA has argued in litigation that pollutants must come "from the outside world" in order to be constitute an "addition." *Nat'l Wildlife Fed'n v. Gorsuch*, 693 F.2d 156, 175 (D.C. Cir. 1982) (the court gave deference to the EPAs interpretation of the NPDES permitting provision that polluted water passing through a dam from one part of a river to another did not constitute the "addition" of pollutants because "addition" can only occur if the pollutant is introduced from the "outside world").

In a regulatory action, the EPA has also interpreted § 402 to mean that, because all navigable waters are unified, a transfer of pollutants between two navigable waters does not add pollutants from the first to the second. National Pollutant Discharge Elimination System (NPDES) Water Transfer Rule, 73 Fed. Rdg. 33,697 (June 13, 2008) (codified at 40 C.F.R. pt. 122) (incorporating the "unitary waters theory," which proposed that all waters of the United States are one unitary body for the purposes of the NPDES permitting program).

The district court held that these definitions should apply to determinations of what constitutes the "addition" of a pollutant under § 404. R. at 9. However, the EPA has never applied this reasoning to permits issued under § 404. Because of the differences in the actions that are addressed by §§ 402 and 404, "addition" should be read in the context of each provision to give effect to the intent of the statute and to avoid reading § 404 permits out of the CWA.

The district court reasoned that "addition" under the CWA has the same meaning throughout all of the CWA citing the rule that the same term used in different parts of the same statute has the same meaning, unless Congress clearly provides otherwise. *Sorenson v. Sec'y of the Treasury*, 475 U.S. 851 (1986). However, by applying the § 402 definition of "addition" to § 404, the court effectively undermines the purpose of § 404 and frustrates the purpose of the CWA.

The nature of pollutants considered by §§ 402 and 404 are distinct. If they were not, Congress would not have created separate provisions for traditional pollutants and dredged and fill material. It follows that the understanding of what it means to add such pollutants should be considered in the context of the provisions at issue.

Dredged or fill material are unlike traditional water pollutants; they are solids that do not readily wash downstream. *Rapanos v. United States*, 547 U.S. 715, 723 (U.S. 2006). In *Rapanos*, the Supreme Court explained the difference between dredged material and other pollutants, even though the statute which defines the terms does not distinguish the two. *Id*. The *Rapanos* court explicitly distinguished traditional pollutants and dredge and fill materials based upon their physical characteristics, and emphasized that the CWA "recognizes this distinction by providing a separate permitting program" for dredge and fill materials. *Id*. at 744-45. Under this reasoning, it is sensible to determine that the way "addition" is defined with respect to traditional

pollutants may differ from the way "addition" is defined to dredge and fill material, and thus that the "outside world" definition advanced in relation to § 402 should not be applied to § 404.

The "outside world" definition of "addition" should not apply to dredged or fill material because the discharge of dredge and fill materials into wetlands, even when it results from the movement of materials already present in the wetland, can alter their essential character. Through the movement of dredge and fill materials within a wetland, that area can be transformed from a navigable waters over which the federal government has jurisdiction into fields of the type that Bowman created. By contrast, § 402 cases that focus on what constitutes an addition focus on the "flow" water when it is diverted from one location to another. *Gorsuch*, 693 F.2d at 175. Because dredged material does not flow, this analysis and application is useless and it would be unwise to apply the same definition and standard to both § 402 and § 404 cases.

b. Dredged material is a pollutant from the "outside world."

The CWA does not define "addition," but it has defined addition as "from the outside world" in various context. *National Wildlife Fed'n v. Gorsuch*, 693 F.2d 156, 175 (D.C. Cir. 1982). As discussed above, this definition has been applied exclusively to the NPDES permitting program under § 402, not to dredge and fill material under § 404. Even if this definition is applied to § 404 permits, Bowman still violated the CWA because dredged material is a pollutant from the "outside world."

Addition of a pollutant under the *Gorsuch* "outside world" definition refers to an addition of something to the water that was not previously in the water. However, the term pollutant includes dredge spoil. 33 U.S.C. § 1362(6). Given the statutory definition, combined with the outside world definition, adding dredge spoil to the navigable water is in fact adding a pollutant, because the dredge spoil was not originally incorporated into the water in a manner that could be

transferred throughout other navigable waters. The dredged material is a new pollutant that was not previously flowing in any navigable water. Therefore, the dredge material is from the "outside world" by the fact it was not flowing in the water before Bowman's activity.

The District Court wrongly concluded that nothing is added when a defendant moves soil "a mere few feet" within a wetland. This standard is too ambiguous to apply, as there is no way to determine how far someone can move the dredged material without a permit. Allowing this application frustrates the purpose of § 404 by disregarding the statutory language that expressly prohibits the addition of dredged material to navigable waters, because it fails to establish any condition under which the permitting scheme may apply.

The CWA expressly defines dredged material as a pollutant and prohibits its addition to navigable waters, thus the dredged material does meet the "outside world" definition if this definition is applied to § 404.

Bowman violated the CWA when he moved dredge and fill material from one part of his wetland property to another, because this activity constituted the addition of a pollutant from a point source to a navigable water. Although the Court should not apply the EPA's "outside world" definition from § 402 permitting decisions, Bowman's incorporation of a pollutant into his wetland property constituted an addition from the "outside world" in violation of the CWA. Because Bowman violated the CWA, the district court's decision to grant summary judgment on this issue should be reversed.

III. The presence of dredge and fill material in the former wetland does not constitute a continuing or ongoing violation because Bowman's activities are wholly past.

The CWA provides that citizens may bring suit against any person "alleged to be in violation" of portions of the law, including § 404, which prohibit the discharge of dredge or fill material into navigable waters without a permit. 33 U.S.C. §§ 1365(a), 1344. The Supreme Court

has held that this language does not permit citizens to bring suit for "wholly past" violations arising under § 402 of the CWA. *Chesapeake Bay Foundation v. Gwaltney of Smithfield, Ltd.,* 484 U.S. 49, 57 (1987). Rather, citizen plaintiffs must "allege a state of either continuous or intermittent violation – that is, a reasonable likelihood that a past polluter will continue to pollute in the future." *Id.* The Supreme Court's denial of jurisdiction for wholly past actions arising under § 402, the National Pollutant Discharge Elimination System ("NPDES"), is applicable to § 404. Further, according to tests that arose from the *Gwaltney* cases, Bowman's violations of § 404 of the CWA are wholly past; thus, there is no subject matter jurisdiction.

a. Alleged violations that arise under § 404 of the CWA must be continuing or ongoing as a matter of subject matter jurisdiction.

The citizen suit provision of the CWA permits individuals to file suit against anyone "alleged to be in violation" of either the § 402 NPDES permitting program or the § 404 wetlands permitting program. 33 U.S.C. §§ 1342, 1344. In *Gwaltney,* the Supreme Court interpreted the requirement that a defendant "*be in* violation" to preclude lawsuits for violations that were wholly past, and to permit those that addressed continuing violations or those that are likely to recur. 484 U.S. at 57 (emphasis added). Although *Gwaltney* addressed the § 402 NPDES permitting program, the Supreme Court's interpretation of the citizen suit provision should apply to § 404 wetlands permitting as well.

The court in *Gwaltney* focused closely on the statutory language and structure. The court noted the pervasive use of the present tense throughout the statute. *Id.* The court emphasized that civil penalties and injunctive relief appeared in a single sentence regarding remedies. *Id.* at 58. The court reasoned that, since injunctive relief could not be applied to wholly past violations, the fact that the remedies appeared in the same sentence implied that civil penalties were also to preclude wholly past violations. *Id.* Further, the court indicated that applying the citizen suit

provision to wholly past violations would render the provisions requirement of notice gratuitous. *Id.* at 59. The purpose of the notice provision, reasoned the Court, is to give the alleged violator an opportunity to correct the violation and avoid the suit entirely. *Id.* Permitting citizen suits to go ahead for violations that had been corrected would reduce the violator's incentives to make the correction.

Nothing about the court's reasoning in *Gwaltney* implies that the analysis would be distinguished from citizen suits arising from violations of the § 404 permitting program. The present tense language, the connection between civil penalties and injunctive relief, and the notice requirement are not applied any differently to either section. The Supreme Court's interpretation of the "be in violation" language as excluding suits for violations that are wholly past should apply to § 404 as well as § 402.

b. Bowman's activities do not constitute an ongoing violation under the *Gwaltney II* test.

Although the Supreme Court held that courts have subject matter jurisdiction over violations that are continuing or ongoing, it did not indicate how to determine whether there is a "reasonable likelihood that a past polluter will continue to pollute in the future." *Gwaltney*, 484 U.S. at 57. In *Gwaltney II*, however, which was decided on remand, the Fourth Circuit devised a two-part test to determine whether a violation is ongoing. According to this test, a continuing or ongoing violation can be shown by 1) showing that violations continue on or after the filing of the complaint or 2) providing evidence from which a reasonable trier of fact could "find a continuing likelihood of a recurrence in intermittent or sporadic violations." *Chesapeake Bay Foundation v. Gwaltney of Smithfield, Ltd.*, 844 F.2d 170, 171-72 (4th Cir. 1988).

The court added that violations that are intermittent or sporadic "do not cease to be ongoing until the date when there is no real likelihood of repetition." *Id.* The court further

advised that consideration may be given to whether remedial actions were taken to cure the violations, whether such remedial actions were likely to be effective, and whether there was other evidence that the risk of a continuing violation had been eradicated at the time the suit was filed. *Id*. at 172.

i. Bowman's violation of § 404 did not continue on or after the filing of the complaint.

Determining whether violations continue on or after the filing of the complaint requires little analysis. It is sufficient to show evidence of post-complaint violations of the same type as those alleged prior to the complaint. *Natural Resources Defense Council, Inc. v. Texaco Refining and Mktg., Inc.*, 2 F.3d 493, 496, 501 (3d Cir. 1993) (post-complaint violations of an NPDES permit that had the "same parameters" as pre-complaint violations established that violations were continuing).

Here, Bowman had ceased his land-clearing activities on July 15, 2011, which was more than a month prior to NUWF's August 30, 2011 filing. R. at 5. There are no allegations that he renewed such activities, or activities of the same type, after that date. Bowman has not ceased *all* activity on his property; he sowed his newly leveled field with winter wheat in September 2011. This activity, however, is not of the same type as the dredge and fill activity for which the § 404 violation is alleged, and thus is not a continuing violation according to the *Gwaltney II* test. In addition, the ditch that Bowman constructed to drain his field into the Muddy does not constitute a violation of § 404. Section 404 permits are not required for the maintenance of agricultural drainage ditches unless the ditch impedes the flow or circulation of the navigable water. 33 U.S.C. 1344(f)(1)(c). Because Bowman has not engaged in any violations of the same type that constituted his pre-complaint violation, his violations are not continuing or ongoing.

ii. Bowman's violation of § 404 was not sporadic or intermittent, and is therefore not likely to recur.

Under *Gwaltney II*, the court can find a likelihood of a recurrence in intermittent or sporadic violations. 844 F.2d at 171-72. This language strongly suggests that the likelihood of a recurrence arises from a finding that violations have been intermittent or sporadic in nature. Bowman's violation cannot be characterized as sporadic or intermittent, so a reasonable trier of fact would not find a likelihood of recurrence. Thus, Bowman's violation is wholly past.

Bowman's actions constituted a single project, rather than the repeated violations that would justify a characterization of sporadic or intermittent. His activities consisted of leveling and clearing a single field, and were completed within one month. R. at 4. There is no mention in the record that Bowman had previously violated of § 404. It would therefore be highly inaccurate to characterize his land-clearing action as sporadic or intermittent. Because his actions cannot be so characterized, it is not necessary to consider whether it is likely to be repeated.

The district court was correct in applying the § 402 exclusion of suits for violations that are wholly past. Because Bowman's violations do not continue and are not likely to recur, his violations are wholly past. The district court's grant of summary judgment on this issue should therefore be upheld.

IV. NUWF's citizen suit is barred by NUDEP's diligent prosecution of Bowman under § 505(b) of the CWA.

Under § 505 of the CWA, "any citizen may commence a civil action" on his own behalf against any person who is "alleged to be in violation" of a limitation of the act. 33 U.S.C. § 1365(a). However, a citizen may not commence such an action prior to sixty days after giving notice, or if "if the Administrator or State has commenced and is diligently prosecuting a civil or criminal action in a court of the United States, or a State to require compliance." 33 U.S.C. §

1365(b)(1)(B). These exceptions demonstrate a preference for government or agency action over private citizen action. *Am. Canoe Ass'n v. Attalla*, 363 F.3d 1085, 1087 (11th Cir. Ala. 2004).

It is undisputed that NUWF has satisfied the requisite 60 day waiting period after they gave notice of their intent to bring suit. NUDEP has also "commenced and is diligently prosecuting" Bowman's action. Because NUDEP has commenced its action first and has diligently prosecuted the action, NUWF's citizen suit is barred.

a. NUDEP filed a claim before NUWF.

If an agency "commences" an action before the citizen plaintiff, and is diligently prosecuting the action, the citizen suit is barred. *Gwaltney*, 484 U.S. at 60; *Chesapeake Bay Found. V. Am. Recovery Co., Inc.,* 769 F.2d 207, 208 (4th Cir. 1984). This is because citizen suit provisions function primarily to "spur agency enforcement of law." *Envtl. Conservation Org. v. City of Dallas*, 529 F.3d at 529; *see also National Wildlife Federation v. Hanson*, 859 F.2d 313, 317 (4th Cir. N.C. 1988) (citizen suits enacted to encourage litigation to ensure proper administrative implementation of the environmental statutes); *Public Interest Research Group v. Hercules, Inc.*, 50 F.3d 1239, 1246 (3d Cir. 1995) (legislative history indicates that Congress sought here to strike a balance between providing notice recipients with sufficient information to identify the basis of the citizen's claim and not placing an undue **burden** on the citizen).[1] Here, the agency NUDEP commenced an action before NUWF, the citizen plaintiff.

NUWF sent notice to Bowman on July 1, 2011; NUDEP contacted Bowman and sent notice shortly thereafter. R. at 4 Exactly one month after NUWF put Bowman on notice, August

[1] The timing requirement of the citizen suit provision also gives effect to this preference for agency enforcement over citizen enforcement. The requirement that a citizen plaintiff must wait to file suit until 60 days after providing notice both allows the defendant an opportunity to correct violations and gives relevant agencies an opportunity to take action. *Gwaltney*, 484 U.S. at 60.

1, 2011, NUDEP and Bowman incorporated an agreement into an administrative order. *Id.* On August 10, 2011, NUDEP filed a complaint against Bowman in federal court for the same violations; NUWF did not file until August 30, 2011. R. at 5. On September 5, 2011, NUDEP filed a motion to enter a decree identical to that of the administrative order already in force. *Id.*

In effect, the citizen suit provision did exactly what legislatures intended when creating the citizen's right. While Bowman did not take the opportunity to remedy his violation, NUDEP acted very quickly after it received notice from NUWF. Bowman and NUDEP entered into a consent agreement exactly one month after NUWF gave notice, demonstrating the effectiveness of the notice provision in spurring agency action.

b. NUDEP was diligent in prosecuting Bowman's violations of CWA § 309(g)(6) which effectively bars NUWF's private action.

The bar on citizen suits requires not only that the agency files suit prior to the citizen, but also that the agency is "diligently prosecuting" a civil action. 33 U.S.C. § 1365(b)(1)(B). When an agency has filed suit prior to the citizen, the citizen suit is barred unless the agency fails to diligently prosecute the action. *See Friends of Earth v. Conrail*, 768 F.2d 57 (2d Cir. N.Y. 1985); *Envtl. Conservation Org. v. City of Dallas*, 529 F.3d 519 (5th Cir. Tex. 2008); *Comfort Lake Ass'n v. Dresel Contr.*, 138 F.3d 351 (8th Cir. Minn. 1998); *Piney Run Pres. Ass'n v. County Comm'rs*, 523 F.3d 453 (4th Cir. Md. 2008). Thus, when NUDEP filed its claim against Bowman prior to NUWF doing so, NUWF was barred from bring suit unless NUDEP's prosecution of the action was not diligent. Because NUDEP's actions were calculated to achieve compliance with the law, NUDEP diligently prosecuted the action against Bowman.

"Citizen-plaintiffs must meet a high standard to demonstrate that it has failed to prosecute a violation diligently." *Karr v. Hefner*, 475 F.3d 1192, 1198 (10th Cir. 2007). CWA §

505(b)(1)(B) "does not require government prosecution to be far-reaching or zealous. It requires only diligence." *Id.* at 1197. In the instant case, the NUWF has failed to meet this high standard.

NUWF cannot demonstrate that NUDEP has failed to meet the "diligent prosecution" requirement simply because NUDEP's settlement with Bowman was not the course of action desired by NUWF. NUWF's preferred action is irrelevant, as a citizen suit is meant only to supplement, not to supplant an Agency or State action. *Gwaltney*, 484 U.S. at 60; *Karr*, 475 F.3d at 1197; *Piney Run Pres. Ass'n v. County Comm'rs*, 523 F.3d at 456; *La. Envtl. Action Network v. City of Baton Rouge*, 677 F.3d 737, 740 (5th Cir. 2012); *Am. Canoe Ass'n v. Attalla*, 363 F.3d at 1089; *Comfort Lake Ass'n v. Dresel Contr.*, 138 F.3d at 356. This is the prevailing approach among the circuits because the citizen suit is meant purely to spur the government action, as noted above, or to act when the State of Agency cannot or will not act. *Envtl. Conservation Org. v. City of Dallas*, 529 F.3d 519 (5th Cir. 2008); *North & S. Rivers Watershed Ass'n v. Scituate*, 949 F.2d 552, 557 (1st Cir. 1991).

Whether an agency has satisfied the "diligent prosecution" requirement is a fact-specific determination:

> The focus of the diligent prosecution inquiry should be on whether the actions are calculated to eliminate the cause(s) of the violations. Whether an agreement or judgment is capable of, and in good faith calculated to, achieve compliance with the law can usually be (and in most cases should be) determined as of the time it is executed, based on the facts then available to the parties.

Friends of Milwaukee's Rivers v. Milwaukee Metro. Sewerage Dist., 556 F.3d 603, 610 (7th Cir. 2009) (internal case citations omitted).

In this case, NUDEP's actions were "capable of, and in good faith calculated to, achieve compliance with the law." NUDEP's consent decree forced Bowman to stop his actions; grant an easement for a substantial portion of his property for conservation; and maintain the area for

conservation. R. at 4. These actions are sought to remedy the irreparable damage to the area and to ensure that the area is protected into the future.

Although NUDEP decided not to exact a monetary penalty, its agreement with Bowman was sufficiently punitive to deter him from future violations while simultaneously conserving and protecting the area. The conservation easement occupies a large portion of Bowman's property, property that could be of substantial value. The easement also protects the area into the future as an easement runs with the land. Further, Bowman is responsible for bearing any maintenance expenses for the easement. As the District Court recognized, these expenses could potentially go well beyond any monetary penalty NUDEP handed down. R. at 7-8. Unlike a monetary penalty, NUDEP's chosen action with result in the protection of the area for the foreseeable future, as any future owner of the property will be subject to the easement and associated maintenance expenses. RESTATEMENT (FIRST) OF PROP. § 487 (1944). Finally, "environmental injury, by its nature, can seldom be adequately remedied by money damages and is often permanent or at least of long duration, i.e., irreparable." *Amoco Products Co. v. Gambell*, 480 U.S. 531, 545 (U.S. 1987); *see also Michigan v. United States Arm Corps of Eng'rs*, 667 F.3d 765, 788 (7th Cir. Ill. 2011); *Alliance For The Wild Rockies v. Cottrell*, 632 F.3d 1127, 1135 (9th Cir. Mont. 2011); *Sierra Club v. Bosworth*, 510 F.3d 1016, 1033 (9th Cir. Cal. 2007). Thus, NUDEP's failure to impose a monetary penalty is not a failure at all; rather, it was a calculated decision to create and maintain an easement at Bowman's expense. The actions, therefore, were calculated to achieve compliance with the law, and represented a diligent prosecution of Bowman.

When a district court's consent decree in an EPA enforcement action addresses all of the CWA violations alleged in a citizen suit, extracts reasonable civil penalties, and mandates that

the offender undertake significant corrective measures, the citizen suit becomes moot when the consent decree is entered. *Envtl. Conservation Org. v. City of Dallas*, 529 F.3d at 531. Here, NUDEP's consent decree addressed all of the CWA violations that NUWF alleged and mandated significant corrective measures. Although civil penalties were not extracted, Bowman was monetarily penalized by agreeing to construct and maintain a wetland on the conservation easement. NUDEP's actions fulfilled the goals of the CWA *La. Envtl. Action Network v. City of Baton Rouge*, 677 F.3d 737, 739 (5th Cir. 2012) (internal citations omitted) (the CWA was enacted "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters.") While the results may not be immediate, the easement is intended to restore and maintain the waters and is guaranteed to do so for a possibly infinite time into the future. Thus, the consent decree is in fact a diligent prosecution and the citizen suit is moot.

c. NUDEP must have the discretionary power to enter into consent decrees without fear that the decree will later be deemed non diligent.

The agency, rather than the citizen, must have the discretion to determine the appropriate responses to violations of the CWA and to enter into consent decrees that give effect to those determinations. "Particularly when the EPA chooses to enforce the CWA through a consent decree, failure to defer to its judgment can undermine agency strategy. If a defendant is exposed to a citizen suit whenever the EPA grants it a concession, defendants will have little incentive to negotiate consent decrees." *Karr*, 475 F.3d at 1197. If the court determines that NUDEP's consent decree does not represent a diligent prosecution simply because a private group desires a different action, the agency's leverage with future violators will be diminished. Permitting NUWF's suit against Bowman would undermine the authority of NUDEP and thus impair future consent decrees.

Because NUDEP filed its claim prior to NUWF's claim, and because NUDEP has diligently prosecuted its action against Bowman, NUWF's action under the citizen suit provision of the CWA is barred. This Court should therefore uphold the decision of the District Court on this issue.

CONCLUSION

The Court should hold that NUWF has standing to bring suit against Bowman under the citizen suit provision of the CWA because NUWF can establish associational standing. Further, the Court should hold that Bowman violated § 404 of the CWA because he added dredge and fill material to navigable waters without obtaining a permit. Although the District Court correctly concluded that there is not continuing violation as required by § 505 of the CWA and that NUDEP has diligently prosecuted Bowman, this Court should grant NUWF's requested relief of civil penalties and restoration of wetlands pursuant to Bowman's § 404 violations.

Respectfully Submitted,

_____

Council for NUDEP