Team No. 27

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

IN THE UNITED STATES
COURT OF APPEALS FOR THE TWELFTH CIRCUIT

NEW UNION WILDLIFE FEDERATION

Appellant

v.

NEW UNION DEPARTMENT OF ENVIRONMENTAL PROTECTION

Cross-Appellant and Cross-Appellee

v.

JIM BOB BOWMAN

Appellee

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

Brief for the NEW UNION DEPARTMENT OF ENVIRONMENTAL PROTECTION,
Cross-Appellant and Cross-Appellee

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JURISDICTIONAL STATEMENT

The judgment of the United States District Court for the District of New Union was entered on June 1, 2012. The District Court had proper federal question jurisdiction over issues arising under the Clean Water Act (CWA), 33 U.S.C. § 1251 *et seq*. 28 U.S.C. § 1331 (2012). This Court has jurisdiction to review the final decision of the District Court pursuant to 28 U.S.C. § 1291 (2012), and granted the petition for review on September 14, 2012.

STATEMENT OF THE ISSUES

I. Whether NUWF has representational standing as an association to bring a claim challenging the unpermitted destruction of wetlands when it has alleged that its members have suffered recreational and aesthetic injuries as a result of the loss of the wetlands, the interests it seeks to protect are germane to its organizational purpose, and the lawsuit will not require the participation of individual members.

II. Whether there is a continuing or ongoing violation as required by § 505(a) of the CWA for subject matter jurisdiction when the Defendant has ceased all land clearing activities and there are no indications that land clearing activities will continue in the future.

III. Whether NUWF's citizen suit has been barred by NUDEP's diligent prosecution of the Defendant as set out in § 309(g) and § 505(b) of the CWA when NUDEP and the Defendant have entered into an administrative consent decree and NUDEP litigation is currently pending against the Defendant in federal court.

IV. Whether the Defendant violated section 301(a) of the CWA by discharging a pollutant into waters of the United States when he cleared his land, burned and buried the resulting refuse, then leveled and drained the wetland in order to transform it into dry land, without obtaining a section 404 permit.

STATEMENT OF THE CASE

The New Union Department of Environmental Protection (NUDEP) and New Union Wildlife Federation (NUWF) each filed a complaint in federal district court against Jim Bob Bowman (Defendant) under § 505 of the CWA, 33 U.S.C. § 1365 (2012), on August 10, 2011 and August 30, 2011 respectively. (R. at 5.) On September 5, 2011, NUDEP filed a motion, which is still pending, in its federal case to enter a consent decree identical to an administrative order to which the Defendant had already consented. (R. at 5.) NUWF filed motions on September 15, 2011 requesting intervention in NUDEP's action, consolidation of both actions, and a denial of entry of NUDEP's proposed consent decree. (R. at 5.) NUDEP then filed a motion to intervene in NUWF's action. (R. at 5.)

The district court granted NUDEP's motion to intervene in NUWF's action and did not act on any other motion. (R. at 5.) NUWF and the Defendant filed cross motions for summary judgment. (R. at 5.) NUWF requested summary judgment on the basis that the Defendant violated the CWA by adding dredge and fill material to navigable waters from a point source without a section 404 permit. (R. at 5.) The Defendant requested summary judgment on the grounds that: 1) NUWF lacked standing; 2) there is no continuing violation; 3) NUDEP is diligently prosecuting the violations; and 4) there was no CWA violation because the Defendant's action did not qualify as "addition." (R. at 5.)

On June 1, 2012, the district court granted the Defendant's motion for summary judgment on all grounds and denied NUWF's motion for summary judgment on all grounds. (R. at 3.) Following the grant of summary judgment for the Defendant, NUWF and NUDEP each filed a Notice of Appeal. (R. at 1.) NUWF takes issue with all four grounds of the District Court's

order. NUDEP takes issue with the first and fourth grounds of the district court's holding regarding NUWF's standing and the existence of a CWA section 404 violation. (R. at 1.)

STATEMENT OF THE FACTS

The NUDEP is a state agency charged with administering the duties of the United States Environmental Protection Agency (EPA) under the CWA in the State of New Union. The Defendant owns one thousand acres of wetlands adjacent to the Muddy River in the State of New Union, and therefore is within NUDEP's jurisdiction. (R. at 3.) This property includes 650 feet of the shoreline of the Muddy River where the river is five hundred feet wide and six-feet deep and is used for recreational navigation. (R. at 3.) The entire property is within the one hundred year floodplain of the Muddy River and portions of the one thousand acres are inundated annually. (R. at 3.) Due to this saturation, the property is hydrologically connected to the Muddy River and supports vegetation characteristic of wetlands. (R. at 3.)

From June 15, 2011 to July 15, 2011, the Defendant engaged in dredge and fill operations on his property. (R. at 4.). First, he cleared his property by removing trees and vegetation, burning the vegetation, and burying the burned material in trenches he dug. (R. at 4.) Then, he leveled the field and dug a ditch to drain the field into the Muddy. (R. at 4.) He could not complete work on a 150 feet wide and 650 foot long portion of his property along the Muddy River because it was too saturated. (R. at 4.) Only by September 2011 was the field sufficiently drained to support dryland agriculture and the Defendant was able to sow winter wheat. (R. at 5.) The Defendant has not engaged in any dredge and fill operations since July 15, 2011. (R. at 7.)

On July 1, 2011, NUWF, a non-profit membership organization whose mission is to protect the state's fish and wildlife through habitat conservation, sent a notice of its intent to file a CWA § 505 citizen suit against the Defendant to the Defendant, EPA, and NUDEP. (R. at 4.)

NUWF members use the Muddy River in the vicinity of the Defendant's property for recreational boating and fishing and picnicking. (R. at 6.) They are concerned that because of the important ecological functions of wetlands, the Defendant's destruction of the wetlands on his property will increase pollution in the Muddy River; in fact, some feel that it already has. (R. at 6.) In addition, one member of NUWF, Zeke Norton, has used the Defendant's property for recreational and subsistence frogging. (R. at 6.)

In response to NUWF's concerns, NUDEP immediately sent the Defendant a notice of violation of state and federal law under section 301(a) of the CWA. (R. at 4.) After receiving NUDEP's notice, NUDEP and the Defendant were able to negotiate a settlement agreement where the Defendant: 1) agreed not to clear more wetlands in the area; 2) conveyed the uncleared portion of his property plus an additional 75 foot "buffer" to NUDEP as a conservation easement; and 3) agreed to create and maintain a wetland on the 75 foot buffer zone. (R. at 4.) This settlement agreement was confirmed by an August 1, 2011 administrative order. (R. at 4.) Although NUDEP has the authority to levy administrative penalties, it chose not to include these penalties in the order at that time. (R. at 4.)

STANDARD OF REVIEW

This is an appeal of the District Court's grant of summary judgment for the Defendant. (R. at 3.) A court may grant summary judgment to a moving party where "there is no genuine issue as to any material fact." FED. R. CIV. PR. 56(c). An appeal of a district court's grant of summary judgment is reviewed de novo and cross-motions do not alter this standard. *Mass. Museum of Contemporary Art Found. v. Buchel*, 593 F.3d 38, 52 (1st Cir. 2010).

SUMMARY OF THE ARGUMENT

The New Union Department of Environmental Protection (NUDEP) desires to exercise its administrative authority under the CWA, properly delegated to it by the United States Environmental Protection Agency (EPA) without interference from NUWF and resistance from the Defendant.

The lower court erred in its determination that NUWF lacked standing to bring its citizen suit. NUWF members have demonstrated that the Defendant's destruction of the wetlands has caused them to suffer aesthetic, recreational, and subsistence injuries sufficient to support standing, and NUWF can represent those members in federal court.

The lower court was correct in holding that there was no ongoing violation as required by § 505(a) of the CWA. The Defendant's landclearing activities are wholly past, and the mere presence of the Defendant's altered field does not constitute a continuing violation. Furthermore, there was no indication that the Defendant would engage in any more alleged CWA violations. There must be a reasonable likelihood of a future continuous or intermittent violation, and NUWF has been unable to produce any evidence of future violations.

The lower court also correctly ruled that it lacked subject matter jurisdiction under the diligent prosecution provisions of §§ 309 and 505 of the CWA. Section 309(g)(6) bars citizen suits if the State or EPA is diligently prosecuting an administrative action against a defendant. NUDEP and the Defendant had entered into an administrative consent order before NUWF filed its citizen suit. Although NUDEP did not levy penalties in this administrative order, it still precluded any citizen suit seeking either civil penalties or injunctive relief.

The Defendant's actions met all four requirements for a violation of § 301(a) of the CWA. This Court should reverse the lower court's holding that the Defendant's discharge of

dredge and fill material did not qualify as an "addition" under the Act for three reasons. First, the purpose and plain language of the CWA and its accompanying regulations support a broad interpretation of "addition" in the context of § 404. Second, the conversion of a one thousand acre wetland property to a dryland property suitable for wheat agriculture does not qualify as de minimis or incidental fallback. Third, the EPA's Water Transfer Rule is inapplicable to § 404 and the agency's interpretation regarding this inapplicability should receive *Chevron* deference. Because the Defendant met all the requirements for a discharge of a pollutant under the CWA, he was required to obtain a § 404 permit before discharging dredge and fill material.

ARGUMENT

I. NUWF HAS STANDING TO CHALLENGE THE DEFENDANT'S ACTIVITES IN ITS REPRESENTATIONAL CAPACITY AS A VOLUNTARY MEMBERSHIP ORGANIZATION.

The United States Constitution limits the power of the federal courts to adjudicating cases or controversies. U.S. Const. art. III, § 2. Standing "is an essential and unchanging part of the case-or-controversy requirement of Article III." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992).

An organization can meet the constitutional requirements of Article III standing as a representative of its harmed members. *Hunt v. Wash. State Apple Adver. Comm'n*, 432 U.S. 333, 342 (1977). Representational standing is recognized when a voluntary membership organization can show: (a) its members would otherwise have standing to sue; (b) the interests sought to be protected are germane to the organization's purpose; and (c) the claim asserted and relief requested do not require the participation of individual members. *Id*. at 343.

NUWF has established that it has standing in its representational capacity. It is a non-profit corporation that meets the traditional definition of a voluntary membership organization. *See id*. at 344-45 (noting that organizations whose members fund the organization's activities and elect its leaders meet the definition of a traditional trade association). NUWF members have established that they have standing to sue in their own right, and the interests that NUWF seeks to protect by challenging the Defendant's activities are germane to the organization's purpose. Lastly, the claims asserted, and relief requested, do not require the participation of individual NUWF members. Thus, this Court should reverse the district court's holding and find that NUWF has sufficiently established standing.

A. NUWF Members Have Standing To Sue.

In *Lujan v. Defenders of Wildlife*, the United States Supreme Court set out the three elements that constitute the "irreducible constitutional minimum of standing." 504 U.S. at 560. To meet the constitutional requirement for standing, a plaintiff is required to prove that: (1) he has suffered an injury-in-fact; (2) that is traceable to the challenged action of the defendant; and (3) that the injury likely will be redressed by a favorable decision. *Id*. at 560-61.

Here, three members of NUWF have submitted affidavits and testimony sufficient to establish that they have suffered injuries-in-fact as a result of the Defendant's activities and that those injuries would likely be remedied through a favorable decision.

1. NUWF Members Have Demonstrated That the Defendant's Destruction of Nearly 1000 Acres of Wetlands Has Caused Them To Suffer Injuries Sufficient To Support Standing.

In environmental cases, a plaintiff need not prove actual injury to the environment. *Friends of the Earth v. Laidlaw Environmental Services (TOC), Inc.*, 528 U.S. 167 (2000). Rather, the requisite injury for standing purposes is injury to the plaintiff. *Id.* And this element can be satisfied if the plaintiff has an aesthetic or recreational interest in the particular area that

will be impaired by the defendant's conduct. *Id.* at 183. The injury in fact necessary to support standing need not be large; an "identifiable trifle" of an injury is sufficient. *U.S. v. Students Challenging Regulatory Agency Procedures (SCRAP)*, 412 U.S. 669, 689 n. 14 (1973); *Sierra Club v. Franklin Cnty. Power of Ill., LLC*, 546 F.3d 918, 925-26 (7th Cir. 2008).

The Defendant has created an agricultural field on nearly 1000 acres of land adjacent to the Muddy River. This land was wholly within the Muddy River's 100 year floodplain and, prior to the Defendant's actions, was comprised of wetlands hydrological connected to the Muddy River. As a result of the Defendant's activities, NUWF members who use and recreate in the area have alleged that they have suffered multiple injuries sufficient to support standing.

In *Sierra Club v. Morton*, the Supreme Court recognized that the impairment of aesthetic and recreational interests could constitute an injury for standing purposes. 405 U.S. 727, 735 (1972); *see also Defenders of Wildlife*, 504 U.S. at 562-63 ("Of course, the desire to use or observe an animal species, even for purely aesthetic purposes, is undeniably a cognizable interest for purposes of standing."). Environmental plaintiffs need only show that they use the affected area and are persons "for whom the aesthetic and recreational values of the area will be lessened." *Sierra Club v. Morton*, 405 U.S. at 735.

All three NUWF members have submitted affidavits and testified that they use the Muddy River for recreational boating and fishing in the area of former wetlands, including picnicking on the banks of the river near the Defendant's property. Each of them testified that they "feel a loss from the destruction of the wetlands" and Dottie Milford explicitly testified that the river "looks more polluted to her than it did prior to The Defendant's activities." *Id*.

Here, the district court improperly narrowed its analysis of recreational and aesthetic injuries by finding that the conservation easement shields the Defendant's field from being seen

from boats on the Muddy River. But courts have long recognized that activities far away can cause significant aesthetic and recreational injuries. *See, e.g.*, *Friends of the Earth, Inc.*, 629 F.3d at 395 (noting that discharge from a recycling facility had potential to adversely affect water quality 16.5 miles downstream). Regardless of whether the Defendant's destruction of the wetlands can be viewed from the Muddy River, Ms. Milford has alleged that the resulting pollution can be. And in *Environmental Protection Information Center v. Pacific Lumber Co.* the court held that recreational and conservation interests harmed by increased sediment runoff from logging activities constituted a sufficient injury for standing purposes. 469 F. Supp. 2d 803 (N.D. CA 2007). Therefore, the pollution Ms. Milford has observed in the river, and the resulting loss in aesthetic and recreational enjoyment near the Defendant's property, is a recognized injury-in-fact sufficient to establish standing.

Additionally, NUWF member Zeke Norton testified that he had frogged in the area of the former wetlands for recreational and subsistence purposes. It is recognized that the loss of wetlands can have significant adverse effects on wildlife in an area. *See* 40 C.F.R. §§ 230.32(b), 230.41(b) (noting that loss of wetlands can lower plant and animal diversity and lead to reductions in overall biological productivity). And in *Sierra Club v. U.S. Army Corps of Engineers*, a hunting club was held to have standing to challenge the destruction of wetlands adjacent to its property. 645 F.3d 978, 988 (8th Cir. 2011). There, hunting club members were concerned that the destruction of wetlands over a mile away from the club could substantially impact wildlife in the area. *See id*. The diminishment in hunting ability and loss of aesthetic and recreational value represent injuries in fact that are actual, concrete, and geographically specific to the area surrounding the Defendant's property.

An environmental plaintiff can also demonstrate an injury-in-fact by asserting a reasonable fear or concern that the defendant's action will affect his use and enjoyment of the area. *Friends of the Earth, Inc. v. Gaston Copper Recycling Corp.*, 629 F.3d 387 (4th Cir. 2011); *see also Sierra Club v. Cedar Point Oil Co.*, 73 F.3d 546 (5th Cir. 1996) (holding that citizens concern for water quality sufficed as an injury based upon the fear that challenged discharges would impair their enjoyment of a waterbody). Notably, the decrease of in recreational activities as a result of learning about unpermitted dredging and filling of wetlands in a particular area has been held to support standing. *See Ogeechee-Canoochee Riverkeeper, Inc. v. T.C. Logging, Inc.*, 2009 WL 2390851 at *7 (S.D. Georgia 2009) (finding plaintiffs' enjoyment of swimming, fishing, and boating negatively impacted by knowledge of unpermitted dredging and filling of wetlands supported standing).

All three NUWF members testified that they were aware of the loss of the wetlands and feared that the Muddy River is more polluted as a result of The Defendant's actions. These fears are reasonable because increased siltation and degradation of water quality is a recognized result of the loss of wetlands. 40 C.F.R. § 230.41(b) (describing negative effects of the loss of wetlands including: degraded water quality, destruction of habitat for fish and wildlife, and increased erosion). Fear that the loss of a significant amount of wetlands has resulted in increased pollution to the Muddy River, and therefore a decrease of recreational and aesthetic enjoyment, is deserving of judicial review.

2. The Injuries Suffered By Members of NUWF Are A Result of the Defendant Draining And Filling Wetlands And Would Be Remedied By A Favorable Decision.

The district court made no findings regarding the remaining two elements of Article III standing, causation and redressability. The injuries suffered by NUWF members are fairly traceable to the Defendant's actions and would be remedied by a favorable decision.

In order to satisfy the causation prong of standing, environmental plaintiffs are not required to show that a particular defendant is the only cause of an alleged injury, and that absent the defendant's activities, the plaintiff would enjoy undisturbed use of a resource. *Natural Res. Defense Council, Inc. v. Watkins*, 954 F.2d 974, 981 (4th Cir. 1992). Rather, to meet the fairly traceable requirement "plaintiffs must merely show that a defendant's [actions] causes or contributes to the kinds of injuries alleged by the plaintiffs." *See id.* (internal quotations omitted).

Here, all the injuries alleged by NUWF members are fairly traceable to the conduct of the Defendant, as he has admitted to destroying the wetlands and creating a field for farming. And the type of injuries alleged are consistent with those one might expect from the loss of wetlands. *See* 40 C.F.R. § 230.41(b). Traceability does not require that the NUWF members prove their injuries were a result of the Defendant's actions with scientific certainty. *See Piney Run Pres. Ass'n v. County Comm'rs of Carrol Cnty*, 268 F.3d 255, 263-64 (4th Cir. 2001). Moreover, all three NUWF members testified that they felt a loss as a direct result of the destruction of the wetlands. R. at 6. Therefore, NUWF members have clearly satisfied the traceability requirement for Art. III standing.

NUWF member injuries are also likely to be remedied by a favorable decision. NUWF is seeking civil penalties and an order requiring the Defendant to remove the fill material and restore the wetlands. A complete restoration of the wetlands would address each injury alleged by the three NUWF members. Thus, the NUWF members also satisfy the third and final requirement of Art. III standing.

Because NUWF members have sufficiently alleged actual, concrete injuries-in-fact that are fairly traceable to The Defendant's actions and would be remedied by a favorable decision, this Court should find that the individual members of NUWF have standing to sue in their own right.

B. NUWF's Lawsuit Seeks to Protect Interests That Are Germane to the Organization's Purpose And Does Not Require the Participation of Individual Members.

In addition to establishing that its individual members have standing, an organization seeking to establish representational standing must also show that the interests it seeks to protect are germane to the organization's purpose and the lawsuit does not require the participation of individual members. *Wash. State Apple Adver. Comm'n*, 432 U.S. at 343.

Here, NUWF has been incorporated for the explicit purpose of protecting the fish and wildlife of the state of New Union by protecting their habitats. The protection and restoration of wetlands is certainly germane to this organizational purpose, as the loss of wetlands adversely impacts fish and wildlife. *See* 40 C.F.R. §§ 230.32(b), 230.41(b). And the prospective relief sought by NUWF – an order requiring the restoration of the wetlands – can reasonably be expected to "inure to the benefit of [its] members, making individual participation unnecessary." *Florida Public Interest Research Group Citizen Lobby, Inc. v. E.P.A.*, 386 F.3d 1070, 1085 n. 16 (11th Cir. 2004); *see also Warth v. Seldin*, 422 U.S. 490, 515 (1975).

Therefore, because NUWF members meet the constitutional requirements to sue in their individual capacity; the interests NUWF seeks to protect are germane to its organization purpose; and the lawsuit does not require participation of individual NUWF members, this Court should reverse the district court and find that NUWF has standing to bring its claim.

II. THE DISTRICT COURT LACKED SUBJECT MATTER JURISDICTION BECAUSE THERE WAS NO CONTINUING VIOLATION AS REQUIRED BY § 505(a) OF THE CWA.

The lower court correctly granted summary judgment for Defendant on the grounds that there was no continuing violation as required for subject matter jurisdiction under § 505(a) of the CWA. 33 U.S.C. § 1365(a) (2012). Section 505(a)(1) of the CWA allows a citizen to commence a civil action against any person who is "alleged to be in violation" of either CWA effluent rules or an order issued pursuant to those rules. *Id.* § 1365(a)(1). The controlling interpretation of the meaning of "alleged to be in violation" can be found in the Supreme Court case *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Found., Inc.*, in which the Court held that § 505(a) does not permit citizen suits for "wholly past" violations, but confers jurisdiction in the event of good faith allegations of "continuous or intermittent violation." 484 U.S. 49, 64 (1987). Such an allegation passes muster if there is a reasonable likelihood that the polluter will continue to pollute in the future. *Id.* at 57.

There is some disagreement among courts about whether already-deposited fill material automatically constitutes an ongoing violation that invites jurisdiction under § 505, thereby precluding the need to even perform a "reasonable likelihood" analysis, or instead represents a wholly past violation, which would bar a citizen suit. *See Sasser v. Administrator,* 990 F.2d 127, 129 (4th Cir. 1993). Some courts have held that fill material, once deposited, does not constitute an ongoing violation, thus precluding jurisdiction. *See, e.g., Orange Env't, Inc. v. County of Orange*, 923 F. Supp. 529, 538-40 (S.D. N.Y. 1996).

As set forth in greater detail below, the district court correctly ruled that it lacked subject matter jurisdiction under § 505(a) of the CWA because the presence of fill material does not constitute an ongoing violation, and because there was no reasonable likelihood that the Defendant would continue any landclearing activity.

A. The Landclearing Activity was Wholly Past and the Presence of Fill Material does not Represent an Ongoing Violation.

The Defendant's prior landclearing activity does not represent an ongoing violation as required for subject matter jurisdiction under § 505(a) of the CWA. 33 U.S.C. § 1365(a) (2012). The Supreme Court has held that any § 505 action cannot be based on "wholly past" violations. *Gwaltney*, 484 U.S. at 64. However, courts disagree on how to treat fill material cases under this "wholly past" standard. *Compare Sasser*, 990 F.2d at 129 (holding that each day the dredged and fill material remained in the wetland without a permit constituted an additional day of violation), *and Stillwater of Crown Point Homeowner's Ass'n, Inc. v. Kovich*, 820 F. Supp. 2d 859, 895 (N.D. Ind. 2011) (holding that the continued presence of fill material in the waterway represents a continuing violation), *with Prisco v. New York*, 902 F. Supp. 374 at 397 (S.D.N.Y. 1995) (holding that a violation ended when defendants stopped discharging fill material), *and Orange Env't, Inc.*, 923 F. Supp. at 538-40 (holding that despite the presence of deposited fill material, because defendants had complied with off-site mitigation plan, there was no continuing violation).

In *Sasser*, the Fourth Circuit held that fill material, discharged in the process of constructing an impoundment for duck hunting, remained an ongoing violation for every day it remained in the waterway without a permit. 990 F.2d at 129. The government was thus able to hold the defendant liable for the existing fill material, as well as impose retroactive penalties for every day the defendant was in violation. *Id.*

Despite the apparent similarities that *Sasser* bears to the case at hand, there are several key facts that distinguish it from the Defendant's situation. First, *Sasser* was decided in the context of CWA § 309 administrative penalty jurisdiction, whereas the suit at hand is a § 505 citizen suit. *Id.* Although § 309 uses the language "is in violation," 33 U.S.C. § 1319(a)(1)

(2012), which may seem similar to § 505's "to be in violation of" provision, § 505 is designed to be prospective in nature, whereas § 309 is able to encompass violations that may have occurred in the past. *Gwaltney*, 484 U.S. at 59. Thus, the burden of showing a § 309 violation in *Sasser* was not as onerous as it would have been if the court were forced to operate within *Gwaltney's* clear requirements that a violation not be based solely on prior violations.

Second, it should be noted that in *Sasser*, the defendant repeatedly refused to comply with Corps and EPA requests and orders, 990 F.2d at 128, whereas here, the Defendant immediately cooperated and complied with NUDEP mitigation orders Given the prospective nature of § 505, the Defendant's prompt responses and diligent efforts to remediate the property helped him comport with *Gwaltney's* instructions that a citizen suit must be based on likely future violations. 484 U.S. at 64.

That the mere presence of fill material *does not* constitute an ongoing violation is the prudent rule to adopt in the case at hand, especially because the Defendant has complied with a wetland restoration order, just as the defendant did in *Orange Env't, Inc.* 923 F. Supp. at 538-40. In *Orange Env't, Inc.*, the defendant created off-site wetlands as part of an EPA remediation order. *Id.* at 538. The court held that although the fill material was never actually removed from the violation site, and the new artificially-created wetlands were not located anywhere near the violation site, the ongoing remediation contributed greatly to their decision that the presence of the fill material was not an ongoing violation. *Id.*

In the case at hand, the Defendant's remediation and preservation of the wetlands on his property serve to make any prior discharge of fill material a wholly past violation. Just like in *Orange Env't, Inc.*, where a remediation agreement rendered the violation moot, *id.*, the Defendant has agreed to remediate and preserve the uncleared wetland and even create new

wetlands at the property. Furthermore, the Defendant's remediation efforts are taking place on site, whereas the remedial measures in *Orange Env't, Inc.* were at a distant off-site location. 923 F. Supp. at 538. On-site preservation of ecosystems and recreational opportunities are superior to the creation of wetlands at an off-site location, so any of the considerations of the *Orange Env't, Inc.* court should apply with even greater force to the present case.

The Second Circuit has held that the prior discharge of pollutants does not constitute an ongoing violation, even if the pollutants remain in the water and continue to spread. *Connecticut Coastal Fishermen's Ass'n v. Rermington Arms Co.*, 989 F.2d 1305, 1312 (2d Cir. 1993). *Connecticut Coastal Fishermen's Ass'n* involved the discharge of lead ammunition and clay target debris into Long Island Sound. *Id.* At the time of the suit, discharge had ceased for months. *Id.* Even though the lead was likely to continuously leach into water, the court held that "[t]he present violation requirement of the Act would be completely undermined if a violation included the mere decomposition of pollutants." *Id.* at 1313. The court's analysis turned on when the actual discharge of the material had ceased, not on any potential lasting effect from the material's presence in the water. *Id.*

Here, the mere presence of fill material likewise does not amount to an ongoing violation. Like in *Connecticut Coastal Fishermen's Ass'n*, where the discharge of materials had ceased, thereby prompting the court to rule that there was no ongoing violation, *id.* at 1312, the Defendant's land clearing activities had ceased at time of suit, rendering them wholly past. Furthermore, the discharged materials in *Connecticut Coastal Fishermen's Ass'n* were toxic, and could potentially continue polluting the water once deposited, and yet the discharge was not considered ongoing. *Id.* at 1313. The presence of fill material on the Defendant's property should

also classified as wholly past, because the fill is arguably much less dangerous than the decomposing toxic chemicals in *Connecticut Coastal Fishermen's Ass'n*.

Adoption of the "no continuing violation" standard for previously-deposited fill material is also supported by the need for some kind of certainty regarding statutes of limitations, which would be obviated if a violation were allowed to persist indefinitely. *See United States v. Telluride Co.*, 884 F. Supp. 404, 408 (D. Colo. 1995) (holding that unlawful discharge does not constitute a continuing violation for purposes of the statute of limitations; to hold otherwise would rob the statute of limitations of any meaning in the CWA context) *rev'd on other grounds*, 146 F.3d 1241 (10th Cir. 1998).

B. There was no Continuous or Intermittent Violation, nor was There any Reasonable Likelihood that the Defendant would Continue the Landclearing.

The Defendant's landclearing activity cannot constitute a CWA violation because under *Gwaltney*, § 505 citizen suits must be based on a good-faith allegation of "continuous or intermittent violation." 484 U.S. at 64. A plaintiff is required to show a "reasonable likelihood that a past polluter will continue to pollute in the future." *Id.* at 57. *Accord Friends of the Earth, Inc. v. Gaston Copper Recycling Corp.*, 629 F.3d 387, 402 (4th Cir. 2011); *Connecticut Coastal Fishermen's Ass'n*, 989 F.2d at 1311; *Sierra Club v. Union Oil Co. of Cal.*, 853 F.2d 667, 671 (9th Cir. 1988).

Here, the Defendant voluntarily agreed to not clear any more wetlands, to convey a conservation easement to NUDEP, and to maintain an ecological buffer zone on his property. The Defendant has affirmed these assurances twice, first in his consent to the settlement agreement incorporated into the August 1, 2012 NUDEP administrative order, and again in his consent to NUDEP's September 5 civil decree motion (the terms of which are identical to the administrative order). These actions are clear evidence that the Defendant has no intention of

continuing any of the earth moving work at his property, and in fact intends to comply with remediation measures. NUWF cannot produce any reasonable evidence or inferences that it was likely that the Defendant would continue the activity at the site. Thus, *Gwaltney*'s "reasonable likelihood" test is left unsatisfied.

Courts have also held that the "critical time for determining whether there is an ongoing violation [under § 505] is when the *complaint* was filed," not when notice is issued. *Connecticut Coastal Fishermen's Ass'n*, 989 F.2d at 1311 (emphasis added). *Accord Atlantic States Legal Found. v. Tyson Foods, Inc.*, 897 F.2d 1128, 1134 (11th Cir. 1990); *Chesapeake Bay Found. v. Gwaltney of Smithfield, Ltd.*, 890 F.2d 690, 693-94 (4th Cir. 1989).

Thus the timing of the events surrounding NUWF's § 505 action is quite important in showing that there was no continuous or intermittent violation. The Defendant had completed all landclearing work on June 15, long before NUWF filed its § 505 complaint on August 30. And although NUWF may have filed its June 1 notice of suit before the Defendant stopped work on June 15, this is moot, because the ongoing violation determination depends on the actual *complaint* date, not on the *notice* date. *Connecticut Coastal Fishermen's Ass'n*, 989 F.2d at 1311. The Supreme Court has stated that "the purpose of notice to the alleged violator is to give it an opportunity to bring itself into complete compliance with the Act and thus . . . render unnecessary a citizen suit." *Gwaltney*, 484 U.S. at 60.

NUWF may also argue that the July 15 work completion date does not indicate complete cessation of the alleged § 505 violations, because the Defendant merely stopped on that date due to the difficulties in leveling the remaining saturated land adjacent to the Muddy, and therefore would likely continue the work. But not only did the Defendant stop work before the complaint was filed, he also entered into the August 1 settlement with NUDEP (in which he agreed to (1)

not clear any more wetlands, (2) convey a conservation easement to NUDEP, and (3) maintain the buffer zone) before NUWF filed suit on August 30.

To summarize, the work at the site had stopped before NUWF filed suit. Furthermore, the NUDEP administrative order settlement, which contains the Defendant's consent and express assurances that the work would not continue in the future, was signed 30 days before NUWF filed suit. The only date that NUWF can point to that predates either the cessation of the Defendant's work at the site or his settlement agreement was when notice of its suit was filed. Therefore, because NUWF filed suit after it became clear that the work at the Defendant's property would not continue, the district court was correct in ruling that there was no ongoing violation, that it lacked subject matter jurisdiction, and that NUWF's claim is barred.

The Defendant's landclearing work is a wholly past activity that does not represent an ongoing violation as required for subject matter jurisdiction under § 505(a) of the CWA. Furthermore, there was no continuous or intermittent violation, nor was there any reasonable likelihood that there would be any discharges in the future.

III. NUDEP'S DILIGENT PROSECUTION OF ADMINISTRATIVE AND CIVIL ACTIONS IS A BAR TO NUWF'S CITIZEN SUIT.

The lower court correctly held that NUWF's citizen suit is barred by NUDEP's ongoing action against the Defendant. 33 U.S.C. §§ 1365(b), 1319(g) (2012). Under § 505(b), the CWA bars a citizen suit if the EPA or a State "has commenced and is diligently prosecuting a civil…action in a court of the United States." *Id.* § 1365(b)(1)(B). Section 309(g)(6) of the CWA also bars § 505 citizen suits if an EPA or State administrative enforcement action is underway. *Id.* § 1319(g)(6).

The Supreme Court has held that "[t]he great volume of enforcement actions [are intended to] be brought by the State," and citizen suits are proper only "if the Federal, State, and

local agencies fail to exercise their enforcement responsibility." *Gwaltney*, 484 U.S. at 60 (quoting S. REP. NO.92-414, p.64 (1971), reprinted in 2 A Legislative History of the Water Pollution Control Act Amendments of 1972, p.1482 (1973)). If the State agency has "specifically addressed the concerns of an analogous citizen's suit, deference to the agency's plan of attack should be particularly favored." *North & S. Rivers Watershed Ass'n v. Scituate*, 949 F.2d 552 (1st Cir. 1991).

A. The § 309(g) Administrative Action Diligent Prosecution Bar.

NUWF's citizen suit is precluded because § 309(g)(6) of the CWA bars a § 505 citizen suit if the EPA or State is diligently prosecuting an administrative enforcement action. 33 U.S.C. § 1319(g)(6).

The First Circuit has held that a citizen suit is precluded even if no penalty was levied in an administrative enforcement action. *North & S. Rivers Watershed Ass'n*, 949 F.2d at 552. In *North & S. Rivers*, the State alleged that the defendant town was discharging pollutants from its sewage treatment plant without a permit. *Id.* at 553. The State issued an order requiring the defendant town to take steps to stop such discharge and prevent such discharges in the future. *Id.* at 553-554. The State chose not to assess any financial penalties, although it possessed the power to do so. *Id.* at 554. Two years later, a citizen group filed a CWA § 505 suit against the town for the same discharge violations detailed in the State's order seeking declaratory and injunctive relief. *Id.* The court concluded that "[i]n light of the ongoing and undisputed actions of both [town] and the State, …the State Order represents a substantial, considered and ongoing response to the violation, and…the DEP's enforcement action does in fact represent diligent prosecution." *Id.* at 557. The Court also concluded that the § 309(g) administrative action bar precludes *all* citizen actions – both penalties and injunctions – brought under § 505. *Id.* at 558.

The Eighth Circuit has held that a consent order issued against a defendant bars a citizen suit. *Arkansas Wildlife Fed'n v. ICI Ams.*, 29 F.3d 376, 381 (8th Cir. 1994). In *Arkansas Wildlife Fed'n*, a defendant herbicide manufacturer violated some pollutant discharge limits. *Id.* at 377. The State agency and the manufacturer then entered into a consent order, under which the manufacturer agreed to cease discharge and initiate remedial actions. *Id.* After the administrative order was issued, an environmental group filed a § 505 citizen suit against the manufacturer for the same alleged violations addressed in the State's order, seeking declaratory and injunctive relief as well as civil penalties. *Id.* at 378. The court concluded that the environmental group's citizen suit was jurisdictionally precluded by the § 309(g)(6) administrative action bar of the CWA. *Id.* at 383.

In the present case, NUDEP's administrative order satisfies the diligent prosecution requirements of § 309(g)(6) and jurisdictionally bars NUWF's citizen suit. NUDEP's order is directly analogous to the orders issued by State agencies in *North & S. Rivers Watershed Ass'n* and *Arkansas Wildlife Fed'n*, each of which satisfied the diligent prosecution bar of § 309(g)(6). In all three cases, the orders were issued before citizen groups filed § 505 suits. Additionally, all of the orders required defendants to cease the alleged violations and to pursue remedial measures. NUWF argues that NUDEP's decision not to levy an administrative penalty leaves the door open for a citizen suit seeking civil penalties. But as both the *North & S. Rivers Watershed Ass'n* court explained, injunctive relief and civil penalties are sufficiently connected under § 309(g). NUDEP's issuance and oversight of the consent order, and the Defendant's compliance with it, bar NUWF's citizen suit and preclude injunctive relief and recovery of any civil penalties.

B. The § 505(b) Civil Action Diligent Prosecution Bar.

NUWF's citizen suit is precluded because under § 505(b), the CWA bars a citizen suit if the EPA or a State is diligently prosecuting civil action in United States court. 33 U.S.C. § 1365(b)(1)(B).

The United States District Court for the Northern District of Georgia has held that an action was not being diligently prosecuted when the judicial orders entered by the State concerned only an extension of deadlines, and not any substantive action to require compliance with enforcement action. *Culbertson v. Coats Am.*, 913 F. Supp. 1572, 1579 (N.D. Ga. 1995). The court concluded that it is this diligent prosecution to *require compliance* that is crucial to the § 505 jurisdictional bar. *Id.*

Here, NUDEP's suit in federal court is seeking to require the Defendant's compliance with stipulations and remedial measures contained in the administrative consent decree. This federal court action is exactly the kind of substantive effort to ensure compliance that the *Culbertson* court offers as satisfying the § 505(b) preclusion. This litigation is ongoing, as NUDEP's motion is pending with the district court. Thus, NUDEP's judicial ongoing efforts to require compliance preclude NUWF's citizen suit.

Section 505(b) of the CWA expressly preserves the right of a citizen to intervene in ongoing legal proceedings, even if they are precluded from filing their own suit. 33 U.S.C. § 1365(b) (2012). Such intervention is the appropriate course of action in this case. It allows NUWF to protect its interests without intruding upon NUDEP's authority and expertise.

NUDEP had commenced administrative enforcement action against the Defendant and had also filed suit in federal court before NUWF ever filed its § 505 citizen suit. Thus, under the §§ 309 and 505 "diligent prosecution" bars to citizen suits, NUWF's § 505 suit is precluded.

IV. THE DEFENDANT VIOLATED § 301(a) OF THE CLEAN WATER ACT BY DISCHARGING A POLLUTANT INTO NAVIGABLE WATERS WITHOUT A SECTION 404 PERMIT.

Section 301(a) of the Clean Water Act prohibits the "discharge of any pollutant by any person" except in compliance with §§ 402 or 404. 33 U.S.C. § 1311(a) (2012). The discharge of a pollutant is defined as "any addition of any pollutant to navigable waters from any point source." *Id*. at § 1362(12). Therefore, a CWA violation requires 1) a pollutant, 2) a point source, 3) a water of the United States, 4) an addition, and 5) the lack of a permit if 1-4 are satisfied. The Corps and EPA jointly administer § 404 permits, which are required for the "discharge of dredged or fill materials." *Id*. at § 1344(a)-(c). Here, the EPA has delegated this authority to NUDEP, which is currently trying to remedy this violation in accordance with federal standards.

The lower court correctly held that the Defendant's actions met three of the four requirements for a § 301(a) violation, but incorrectly determined that his actions did not constitute "addition" under the Act. The Defendant's transformation of his land from wetland to dryland, which required clearing, draining, and filling the wetland, is the type of conversion § 404 was intended to prevent. A redeposit is an addition for the discharge of dredge and fill material, because of the purpose of the CWA, the plain meaning of the statute and regulations, and the difference between §§ 402 and 404. Because the Defendant discharged a pollutant into navigable waters without a § 404 permit, he violated § 301(a) of the CWA.

A. The District Court Correctly Determined that the Dredged and Fill Materials are Pollutants, the Bulldozer is a Point Source, and the Defendant's Property is a Water of the United States.

No party disputed the existence of a pollutant, point source, and water of the United States before the lower court. The materials the Defendant discharged qualify as a pollutant under two statutory definitions of pollutant: "dredged spoil" and "biological materials." It is well

established that the type of equipment the Defendant used to place the pollutants into the wetland is a point source. Lastly, the Defendant's property is a water of the United States, because it is a wetland adjacent to a navigable water, and satisfies *Rapanos* by meeting both the plurality's "continuous surface connection" test and Justice Kennedy's "significant nexus" test.

1. The Excavated Soil and Burned Vegetation the Defendant Produced and Used to Dredge and Fill the Wetland are Pollutants.

The CWA's definition of a pollutant includes "dredged spoil," and "biological materials." *Id*. at § 1362(6). "Biological materials" are the "waste product of human or industrial process[es]." The Defendant's burned vegetation and tree remains, the waste product of a human process, are therefore "biological materials."

Second, the excavated soil could also qualify as a "pollutant" under the term "dredged spoil." Although "dredged spoil" is not defined in the CWA, the dictionary definition of "spoil" – "earth and rock excavated or dredged" – is very similar to the EPA's regulatory definition of "dredged material" – "material that is excavated or dredged from waters of the United States." *United States v. Wilson*, 133 F.3d 251, 259 (4th Cir. 1997) (citing *Merriam Webster's Collegiate Dictionary* 1136 (10th ed. 1994) and 40 C.F.R. § 232.2). Because of this similarity, the *Wilson* court held that soil qualified as a pollutant. *Id*.

2. The Defendant's Bulldozer is a Point Source.

The CWA defines a "point source" as "any discernable, confined and discrete conveyance." *Id*. at § 1362(14). This is an "extremely broad" definition. *Borden Ranch P'ship v. Army Corps of Engineers*, 261 F.3d 810, 815 (9th Cir. 2001) *aff'd*, 537 U.S. 99 (2002). The Supreme Court has held that the CWA "makes plain that a point source need not be the original source of the pollutant; it need only convey the pollutant to 'navigable waters.'" *S. Florida Water Mgmt. Dist. v. Miccosukee Tribe,* 541 U.S. 95, 105 (2004). Instead, the "relevant inquiry is

whether–but for the point source–the pollutants would have been added to the receiving body of water." *Id*. at 103.

Many courts have determined that earth-moving equipment and vehicles can be point sources. *Borden Ranch* P'ship, 261 F.3d at 815 (bulldozers are point sources); *Avoyelles Sportsmen's League, Inc. v. Marsh,* 715 F.2d 897, 922 (5th Cir.1983) (bulldozers are point sources under the CWA); *Concerned Area Residents for the Env't v. Southview Farm*, 34 F.3d 114, (2nd Cir. 1994) ("manure spreading" vehicles are point sources); *Parker v. Scrap Metal Processors, Inc*., 386 F.3d 993, 1009 (11th Cir. 2004) (backhoes are point sources).

In *Avoyelles*, the court held a bulldozer was a point source where it was engaged in the same activities the Defendant was engaged in in this case: "collect[ing] into windrows and piles material that may ultimately have found its way back into the waters." *Avoyelles*, 715 F.2d at 922. In *Borden Ranch Partnership*, the court also held that a bulldozer was a point source where it was engaged in the same activities the Appellee was engaged in in this case: "ripping" up soil and filling a wetland with the soil. *Borden*, 261 F.3d at 815. The Defendant's bulldozer conveyed the pollutants to navigable waters and but for the bulldozer the pollutants, both the burned vegetation and excavated soil, could not have been added to the Defendant's property.

3. The Defendant's Property is a Water of the United States.

The CWA defines "navigable waters" as "waters of the United States." 33 U.S.C. § 1362(7). This broad definition of navigable waters encompasses "all waters of the United States including their adjacent wetlands." *United States v. Riverside Bayview Homes, Inc*., 474 U.S. 121, 138 (1985) (quoting H.R. REP. NO. 95-139, at 24 (1977)).

The Muddy River is a "water of the United States," because it is both "navigable in fact" and "relatively permanent." Rivers are "navigable in fact" when "they are used, or are

susceptible of being used, in their ordinary condition, as highways for commerce, over which trade and travel are or may be conducted in the customary modes of trade and travel on water." *PPL Montana, L.L.C v. Montana*, 132 S.Ct. 1215, 1228 (quoting *Daniel Ball*, 77 U.S. 557, 563 (1871)). Such travel does not necessarily need to be commercial. *United States v. Appalachian Electric Power Co.*, 311 U.S. 377, 416 (1940).

Because the Muddy River is currently and commonly used for recreational navigation, it is "navigable in fact." It is also "relatively permanent," as a five hundred foot wide and more than six-foot deep river, and is known in "ordinary parlance" as a river. *Rapanos v. United States,* 547 U.S. 715, 732-33 (2006) (noting that the CWA's definition of "waters of the United States" extends beyond the definition of traditionally "navigable in fact" waters).

The Defendant's property, which runs along the banks of this water of the United States, is a wetland – an area "inundated or saturated by surface or ground water at a frequency and duration sufficient to support . . . . a prevalence of vegetation typically adapted for life in saturated soil conditions." 33 C.F.R. § 328.3(7)(b). It is regularly inundated by the Muddy River and before the Defendant's actions, it supported vegetation characteristic of wetlands. Both the Corps and EPA include "wetlands adjacent to navigable waters" in their regulatory definitions of "waters of the United States." 33 C.F.R. § 328.3(7); 40 C.F.R. § 230.3(s).

Under *Rapanos*, an adjacent wetland must either have a "continuous surface connection" to a navigable water under the plurality's test, or have a "significant nexus" with navigable in fact waters under Justice Kennedy's test. *See Rapanos*. The "significant nexus" test requires that the "wetlands, either alone or in combination with similarly situated lands in the region, significantly affect the chemical, physical, and biological integrity of other conferred waters more readily understood as 'navigable.'" *Id*. at 780. A continuous surface connection does not

require such a connection to exist at all times; otherwise, wetlands by their very nature would never qualify under this test. *United States v. Cundiff*, 555 F.3d 200, 212 (6th Cir. 2009) (determining that the plurality's "continuous surface connection" requires a "kind of dampness such that polluting a wetland would have a proportionate effect on the traditional waterway.").

The Defendant's property meets both *Rapanos* tests, because it is inundated every year by the Muddy River and is "hydrologically connected" to the navigable waterway. In fact, there is such a "significant nexus" and "continuous surface connection" that the Defendant could not complete his dredging and filling of the wetland on the piece of property closest to the Muddy River because it was too saturated.

Because the CWA's jurisdiction covers wetlands that are adjacent to navigable waters either by a continuous surface connection or a significant nexus, the Defendant's property is a "water of the United States" and under the CWA is protected from the discharge of burned vegetation and excavated soil from a bulldozer.

B. The District Erred in Holding that the Defendant's Discharge Did Not Constitute an "Addition" of Pollutants to Waters of the United States.

The CWA defines the discharge of a pollutant as "any addition of any pollutant to navigable waters from any point source" but does not define "addition" elsewhere in the Act. 33 U.S.C. § 1362(12). Neither the Supreme Court nor this Court have addressed the definition of "addition" in the context of § 404, but the language, purpose, and legislative history show that Congress intended to incorporate a redeposit in the context of § 404.

Although the definition of "addition" was narrowed by the EPA in its recent § 402 Water Transfer Rule, the agency itself has stated that this restraint does not apply to discharges regulated under § 404 and should receive *Chevron* deference for this reasonable interpretation.

Because of this distinction between §§ 402 and 404, no prior court has applied the Water Transfer Rule or its predecessor, the "unitary waters theory," to § 404.

1. The Purpose and Plain Meaning of the Act and its Corresponding Regulations Confirm a Redeposit is an Addition under § 404.

Congress's intent in the CWA was to "prevent [the] conversion of wetlands to dry lands." *Borden Ranch P'ship*, 261 F.3d at 815-16 (quoting *United States v. Akers,* 785 F.2d 814, 820 (9th Cir.1986)). Wetlands are unique in that they trap pollutants and prevent them from entering other waters of the United States. *United States v. Deaton*, 209 F.3d 331, 336 (4th Cir. 2000). This function is thwarted when a wetland is dredged and the pollutants are released without sufficient time for their decomposition. *Id*. Consequently, only a broader interpretation of addition as it applies to section 404 is consistent with Congress's purpose "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a).

This broad interpretation of addition is also apparent in the plain language of the Act. The definition of "discharge of pollutant" is framed broadly by the use of "any" as a modifier before addition, pollutant, and point source. *Id*. at 1362(12). Nowhere in the definition of "pollutant" or "discharge of a pollutant" does the Act specify a required amount or volume. *Id*. at § 1362. In addition, the inclusion of "dredged spoil" in the definition of a pollutant demonstrates Congress's determination "that plain dirt once excavated from waters of the United States, could not be redeposited into those circumstances without causing harm to the environment." *Deaton*, 209 F.3d at 336.

The plain language of the agencies' regulations also demonstrates an interpretation of "addition" that includes redeposit. By its own definition dredged material is material that originally comes from the wetland itself. 33 C.F.R. § 323.2(c); 40 C.F.R. § 232.2 (defining "dredged material" as "material that is excavated or dredged from waters of the United States").

As a reflection of this practical application of § 404, the EPA and the Corps have also included a "redeposit" in their definition of "discharge of dredged material." 33 C.F.R. § 323.2(d)(1); 40 C.F.R. § 232.2(1)(iii).

The Fourth, Fifth, and Sixth Circuits have interpreted "addition" as including redeposit in the context of section 404:

> Once you have dug up something, it becomes 'dredged spoil,' a statutory pollutant and a type of material that up until then was not present [in the wetlands]. It is of no consequence that what is now dredged spoil was previously present on the same property in [a] less threatening form . . . . What is important is that once a material was excavated from the wetland, its redeposit in the same wetland added a pollutant where none had been before.

United States v. Cundiff, 555 F.3d at 213-14. (citing *United States v. Deaton,* 209 F.3d at 335, and *Avoyelles,* 715 F.2d at 920-21). When the Defendant excavated the soil it became "dredged spoil," a pollutant that would not have existed in the wetland without the Defendant's digging.

Even if a narrower interpretation of redeposit is improperly applied to this case, the Defendant's actions still qualify as addition. In addition to excavating soil, the Defendant introduced "foreign materials" into waters of the United States by burying ashes in the wetland. The act of burning the vegetation changed the biological and chemical composition of the material. This is not the same as dead fish spun through dam turbines, which were determined to be unchanged because they were never removed from waters of the United States. *Nat'l Wildlife Fed'n v. Consumers Power Co.*, 862 F.2d 580, 585 (6th Cir. 1988). In this case, the vegetation was completely uprooted from the wetland. They were also processed in a way that not only changed the matter from living to dead, which could have occurred without the Defendant's burning, but also processed into a different substance – there is a compositional and linguistic difference between dead vegetation and ash.

2. The Conversion of a Former Wetland to Dryland Does Not Qualify as a De Minimis Redeposit or "Incidental Fallback."

The only courts that have addressed whether a discharge of dredged and fill material constitutes "addition" are those cases turning on whether the action fits within one of the narrow exemptions from § 404 permit requirements. *Cundiff*, 555 F.3d at 213-14 (determining that sidecasting, the addition of dredged soil from ditches to wetlands on the same property, does not qualify as an exemption); *Borden Ranch P'ship*, 261 F.3d at 814 (holding that deep ripping, removing the protective surface layer of soil from a wetland, constitutes addition); *Nat'l Mining Ass'n v. Army Corps of Engineers*, 145 F.3d 1399, 1404 (D.C. Cir. 1998) (finding that a de minimis or inconsequential redeposit qualifies as an exemption under § 404).

The Defendant's activities do not qualify for any exemption, including either the "incidental fallback" or de minimis provisions. 40 C.F.R. § 232.2(2). First, the incidental fallback exception does not apply to "mechanized landclearing, ditching, channelization, or other excavation activity in a water of the United States, which would result in a redeposit of dredged material" unless a person demonstrates to the Corps or EPA prior to commencing the activity that the activity will not have the effect of destroying or degrading any area of waters of the United States. *Id*. at § 232.2(3)(i). The Defendant did not demonstrate to NUDEP prior to commencing these activities that they would not destroy the wetland.

Second, the conversion of one thousand acres from wetland to dryland cannot be reasonably understood as de minimis or "inconsequential." Although the agencies cannot regulate a de minimis amount of redeposit, as held in *National Mining Association*, they may still regulate redeposit in excess of being inconsequential. 145 F.3d at 1404. *National Mining Association* merely held that the Corps could not promulgate a rule giving them authority to regulate "any redeposit" with no limitation. *Id*. The court was concerned that the Corps was

trying to regulate one ton of material added to a water of the United States when the vast majority (99 tons) was completely removed. *Id*.

As a result, NUDEP may regulate the Defendant who has discharged enough dredged material to create land suitable for non-wetland agriculture. The Defendant has converted 996.8 acres of the wetland on his property into dry land (99.68% of his 1,000 acre property). In this case, the Defendant did not take any material away from his property – he transformed it into a pollutant and added it to the wetland in order to convert it to dryland; it is untenable that such a conversion required only one ton of material to fill one thousand acres.

3. The Water Transfer Rule Does Not Apply to § 404 and the EPA's Interpretation of the Rule's Inapplicability to § 404 Deserves *Chevron* Deference.

For the definition of "addition," § 402 pollution discharges cannot be equated with § 404 discharges of dredge and fill material, because it would frustrate the purpose and plain meaning of the CWA for the reasons stated in the previous section. Moreover, if the EPA's interpretation in its Final National Pollutant Discharge Elimination System (NPDES) Water Transfers Rule ("Water Transfers Rule") of the CWA's meaning of addition is to be given deference in its application to § 402, its interpretation of "addition" in its application to § 404 must also receive *Chevron* deference.

Sections 402 and 404 cannot be equated with each other, because the Supreme Court has held that two sections in the CWA are not interchangeable if "they serve different purposes and use different language to reach them." *S.D. Warren Co. v. Maine Bd. of Envtl. Prot.,* 547 U.S. 370, 380 (2006) (referring to the use of a section 402 case to define "discharge" in the context of a section 401 certification). Sections 402 and 404 have different purposes, targeted pollutants, and lead agencies. *Compare* 33 U.S.C. § 1342 *with* 33 U.S.C. § 1344. In *Rapanos*, the Supreme

Court asserted that their decision in that case was limited to § 404 and did not "significantly reduce" the scope of § 402, because the CWA "recognizes this distinction [between the two sections] by providing a separate permitting program for such discharges in §1344(a)." *Rapanos*, 547 U.S. at 744.

Prior to the Water Transfer Rule, those courts that upheld such a limited definition of "addition" for § 402 permits did so in an extremely narrow circumstance: dam-caused pollution. *See Nat'l Wildlife Fed'n v. Consumers Power Co*., 862 F.2d 580 (6th Cir. 1988); *Nat'l Wildlife Fed'n v. Gorsuch*, 693 F.2d 156 (D.C. Cir. 1982); *Friends of the Everglades v. S. Florida Water Mgmt. Dist*., 570 F.3d 1210, 1220 (11th Cir. 2009).

However, in a case decided shortly after *Gorsuch* and *Consumers Power* the EPA participated as an amicus curiae and "urged upon [the] court the broader definition of 'addition' employed by the courts in the more recent §404 cases." *Greenfield Mills, Inc. v. Macklin*, 361 F.3d 934, 948 (7th Cir. 2004). The EPA also stated in its amicus brief that courts "have consistently recognized that materials that have been scooped up and then redeposited in the same waterbody can result in a discharge of a pollutant." *Greenfield Mills, Inc*., 361 F.3d at 948 (citing the EPA's Amicus Brief at 5)

In *Friends of the Everglades*, the court acknowledged the "unitary waters theory has a low batting average" and "has struck out in every court of appeals where it has come up to the plate." *Id*. at 1217. In fact, in its decision it recognized the Supreme Court's determination in *Miccosukee* that "several NPDES provisions might be read to suggest a view contrary to the unitary waters approach." 541 U.S. at 107. Applying *Chevron* deference to an ambiguous statute, the court upheld the EPA's Water Transfer Rule as reasonable interpretation of the Act, but only in the context of section 402 permits. *Id*. at 1228.

If the CWA is ambiguous, the EPA's interpretation of "addition" when applied to § 404 must also receive *Chevron* deference if the agency's interpretation of the statutory term is reasonable in the context of § 404. In the Water Transfers Rule, the EPA reasonably interpreted the CWA as not allowing this limited definition of "addition" to apply § 404. 73 Fed. Reg. 33,697, 33,703 (June 13, 2008) (codified at 40 C.F.R. § 122.3). In this rule, the EPA explicitly stated that "today's rule has no effect on the 404 permit program, under which discharges of dredged or fill material may be authorized by permit" and "the statutory definition of 'pollutant' includes 'dredged spoil' which by its very nature comes from a waterbody." *Id*. This is a reasonable interpretation of the CWA in its application to § 404 based on the purpose and plain meaning of the statute.

Because of the purpose and plain meaning of the CWA, the fact that a conversion of a wetland to dryland cannot be classified as de minimis or incidental fallback, and the EPA's reasonable interpretation of the inapplicability of its Water Transfer Rule to § 404, this Court should hold that the Defendant's discharge of dredge and fill materials constituted "addition" under the Act.

C. The Defendant was Required to Obtain a § 404 Permit Before Discharging Dredge and Fill Material.

A § 404 permit is required for the "discharge of dredged and fill material." 33 U.S.C. § 1344. The burden for establishing that the activities fall within a permit exemption is on the proponent of the exemption. *Greenfield Mills, Inc. v. Macklin*, 361 F.3d 934, 935 (7th Cir. 2004). Here, the Defendant does not qualify for any of the exemptions listed in the agency regulations, and even if he did qualify, would be foreclosed from applying them under the "recapture provision."

The discharge of dredged material is "any addition of dredged materials into, including redeposit of dredged material other than incidental fallback within, the waters of the United States;" this includes "landclearing, ditching, channelization, or other excavation." 33 C.F.R. § 323.2(d)(1); 40 C.F.R. § 232.2(1)(iii). The Defendant discharged dredged material when he cleared the land, dug channels, and constructed a drainage ditch to drain the field into the Muddy River. "Fill material" is material that has the effect of changing the elevation or replacing with dry land any portion of a water of the United States. 33 C.F.R. §323.2(e)(1); 40 C.F.R. § 232.2(1). The Defendant discharged fill material when he leveled the wetland and changed many portions of the elevation of the wetland. Therefore, in order to clear, level, and drain the wetland, the Defendant was required to obtain a § 404 permit.

No regulatory exemption frees the Defendant of this obligation. The narrow exemptions for discharges of dredged or fill material include the incidental fallback and de minimis exemptions addressed above, activities for "normal farming, silviculture, or ranching activities," and the maintenance of roads, ditches, and other structures. 40 C.F.R. § 232.2(c). The farming exception does not apply to the Defendant's conversion from wetland to dryland, because it did not "bring an area into farming, silviculture, or ranching use" as a "part of an established operation." *Id*. at § 232.2(c)(1)(B). There is no evidence that the Defendant used this land for farming in the past and it became a wetland over time. The maintenance exception also does not apply to the construction of drainage ditches, only to the maintenance of drainage ditches or the construction of irrigation ditches. 33 U.S.C. § 1344(f)(1)(C); 40 C.F.R. § 232.2(c)(3). In this case, the Defendant constructed a drainage ditch from the wetland into the Muddy River, because its purpose was to drain the inundated area.

Furthermore, according to the "recapture provision," even an activity exempt under one of these categories is prohibited when it is "incidental to any activity having as its purpose bringing an area of the navigable waters into a use to which it was not previously subject, where the flow or circulation of navigable waters may be impaired or the reach of such waters be reduced." *Id*. at § 232.3(b). The "conversion of a section 404 wetland to a non-wetland is a change in the use of the waters of the United States." 33 C.F.R. § 323.4(c). In *Cundiff*, where the defendant excavated ditches to convert the wetlands into dry land for crop production, the court held that even if the activities did fall within an exemption the defendants were required to obtain a permit under the recapture provision. *Cundiff*, 555 F.3d at 215. Similarly, in this case the Defendant has completely altered the hydrological system by converting a wetland into dryland and therefore also would be foreclosed from these narrow exemptions under the recapture provision.

Because none of the exemptions apply to the Defendant's discharge of dredged and fill material, he was required by § 301(a) of the CWA to obtain a § 404 permit before discharging a pollutant into a water of the United States.

CONCLUSION

For the reasons stated above, NUDEP respectfully requests this Court reverse the decision of the District Court to grant the Defendant's motion for summary judgment on the issues of NUWF's standing and whether the Defendant violated the CWA, and affirm the District Court's grant of the Defendant's motion for summary judgment on the issues of a continuing or ongoing violation and diligent prosecution.