Team #29

UNITED STATES COURT OF APPEALS

FOR THE TWELFTH CIRCUIT

C.A. No. 13-1246

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 Order of the United States District Court for the District of New Union,

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

Brief for JIM BOB BOWMAN, Defendant-Appellee

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Jurisdictional Statement

The U.S. District Court for the District of New Union had jurisdiction pursuant to 28 U.S.C. § 1331 (2006) and the Administrative Procedure Act (APA), 5 U.S.C. § 702 (1976). On June 1, 2012 the district court granted summary judgment in favor of the defendant on all counts and denied plaintiff's motion for summary judgment on all counts. This appeal seeks review of that final decision, rendering appellate jurisdiction in this Court proper pursuant to 28 U.S.C. § 1291 (2006).

Statement of the Issues Presented for Appeal

This appeal presents the following issues:

I. Whether the district court was correct in holding NUWF lacked Constitutional standing in their suit against Bowman for violations of the Clean Water Act?

II. Whether the district court was correct in holding that there is no continuing violation of the Clean Water Act by Bowman as required for subject matter jurisdiction?

III. Whether the district court was correct in holding NUWF's citizen suit against Bowman is barred by NUDEP's diligent prosecution of Bowman?

IV. Whether the district court was correct in holding Bowman did not violate the Clean Water Act when he moved dredged and fill material from one part of his wetland to another part of the same wetland?

Statement of the Case

On July 1, 2011 New Union Wildlife Federation (NUWF) sent a notice of intent to sue to Jim Bob Bowman (Bowman) under § 505 of the Clean Water Act (CWA) citizen suit provision. (R. at 4.) NUWF alleged Bowman violated the CWA for dredging wetlands on his property without a permit in violation of §§ 301(a) and 404 of the CWA. 33 U.S.C. §§ 1311(a), 1344.

Shortly after NUWF sent their notice of intent to sue, New Union Department of Environmental Protection (NUDEP) contacted Bowman and sent him a notice of violation informing him that he had violated both state and federal law by clearing the wetlands on his property. *Id*. The EPA has delegated authority to implement the CWA to NUDEP. *Id*. In response, Bowman maintained he had not violated state or federal law but subsequently entered into a settlement agreement with NUDEP. *Id*. The settlement agreement between NUDEP and Bowman stipulates; Bowman agrees not to clear anymore wetlands in the area, to convey a conservation easement to NUDEP on his property and to construct and maintain a year-round wetland on a 75 foot area of land on his property. *Id*.

NUDEP and Bowman incorporated their agreement into an administrative order which Bowman consented to on August 1, 2011. *Id*. NUDEP has authority to issue administrative orders pursuant to a state statute virtually identical to §§ 309(a) and (g) of the CWA. See 33 U.S.C. §§ 1319(a), (g). After issuing the administrative order, on August 10, 2011, NUDEP brought suit in federal court filing a complaint against Bowman in this Court under § 505 of the CWA's citizen suit provision. *Id*. at 5, see 33 U.S.C. § 1365(g).

Then on August 30, 2011, NUWF filed its own § 505 complaint with this Court alleging Bowman violated §§ 301(a) and 404 of the CWA. NUWF is seeking civil penalties and an order requiring Bowman to remove the fill material and restore the wetlands. *Id*. NUDEP subsequently filed a motion to intervene in this NUWF action, which this Court granted. *Id*.

On September 5, 2011, NUDEP in its own § 505 case filed a motion to enter a decree identical to the state administrative order with Bowman. *Id*. Bowman consented to both the motion and the decree, which is still pending. *Id*.

Finally, on November 1, 2011, this Court granted NUDEP's motion to intervene in NUWF's § 505 action against Bowman. *Id.* After discovery, Bowman and NUWF filed cross-motions for summary judgment. *Id.* Bowman filed summary judgment on four grounds: 1) NUWF lacks Constitutional standing because none of its members suffered an injury traceable to Bowman's alleged violations; 2) this Court lacks subject matter jurisdiction because any alleged CWA violation by Bowman is wholly past; 3) this Court lacks subject matter jurisdiction because the State of New Union has already taken an enforcement action and fully resolved any violation; and 4) this Court lacks subject matter jurisdiction because a key element of a CWA cause of action is not satisfied: addition. *Id.*

NUWF filed its motion for summary judgment on one ground: Bowman violated the CWA because he added dredge and fill material to navigable waters from a point source without a § 404 permit. *Id.*

Lastly, NUDEP joined Bowman in his motion for summary judgment that there is no continuing violation and that NUWF's citizen suit is barred. Id. Also, NUDEP joined NUWF in its motion for summary judgment claiming NUWF has standing and that Bowman violated the CWA. *Id.*

Statement of the Facts

Bowman owns 1,000 acres of land adjacent to the Muddy River in Mudflats, New Union. (R. at 3.) In particular, Bowman's land includes 650 feet of shoreline located along the Muddy River. *Id.* Bowman's property is connected to the Muddy River. *Id.* Along this area the Muddy River is commonly used for recreational activities by the public. *Id.* Being covered with trees and

other vegetation, Bowman's property is considered a wetland as determined by the U.S. Army Corps of Engineers' Wetland Delineation Manual. *Id*. at 4.

On June 15, 2011, Bowman began land clearing operations on his property. *Id*. Bowman knocked down trees and leveled other vegetation with a bulldozer, and then pushed the remains into windrows. *Id*. Bowman burned the windrows and pushed all of the remaining vegetation and ash into trenches he had dug. *Id*. Bowman then leveled the field, from where the trees and vegetation had stood, by pushing soil from higher elevated parts to lower elevated parts and also into the trenches. *Id*. Finally, Bowman formed a ditch, which ran from the back of his property to the Muddy River, in order to drain the newly cleared field into the Muddy River. *Id*. When Bowman finished this land clearing operation on July 15, 2011, a 150 foot wide strip of mostly wooded land still remained on his property, which runs along the 650 feet of land adjacent to the Muddy River. *Id*.

Summary of the Argument

The district court properly awarded summary judgment in favor of Bowman because NUWF cannot sufficiently prove there are any genuine issues of material fact from which reasonable minds may differ.

First, NUWF lacks Constitutional standing needed to challenge Bowman's alleged CWA violations. In order to have sufficient standing NUWF must have suffered an injury in fact, caused by Bowman clearing the wetlands from his property. NUWF fails this prong of the standing analysis because it has not presented any evidence of a concrete injury. Instead, NUWF has presented evidence of hypothetical injuries to a few members of their organization. An injury in fact must be concrete and actual, not hypothetical or conjectural to satisfy an injury for

standing. Therefore, since NUWF has not presented actual evidence of its alleged injury, NUWF lacks Constitutional standing needed to bring suit against Bowman.

Second, this Court lacks subject matter jurisdiction to hear NUWF's citizen suit because any alleged violation is wholly past. For this Court to have subject matter jurisdiction over NUWF's citizen suit, the CWA requires that alleged violations be continuing or ongoing. However, Bowman's land clearing activities have ended and NUWF has no reason to believe they will continue. Bowman has agreed with the NUDEP, through a consent decree, not to further clear any wetlands on his property. Therefore, since NUWF cannot prove Bowman's alleged violation is continuous or ongoing, this Court lacks subject matter jurisdiction.

Third, this Court additionally lacks subject matter jurisdiction due to prior state action in regards to NUDEP's diligent prosecution of Bowman. Citizen suits are barred under the CWA when a state has brought and is diligently prosecuting an action to require compliance. NUWF alleges NUDEP's actions against Bowman do not satisfy diligent prosecution. However, Bowman and NUDEP's consent decree is in good faith calculated for Bowman to be in compliance with the CWA. Bowman has agreed to convey a conservation easement over to NUDEP and to construct and maintain a new wetland on his property. The end result of the consent decree will preserve the viewspace of the Muddy River while creating new wetlands on Bowman's property. Therefore, since the consent decree with NUDEP asserts Bowman is in compliance with the CWA and is in good faith calculated to do so, NUWF citizen suit is barred.

Finally, NUWF cannot sufficiently prove Bowman has violated the CWA because Bowman's actions do not satisfy all of the elements required for his alleged CWA violations; most importantly the addition element. Bowman only pushed pollutants from one part of his

former wetland to another part, thus never adding pollutants from outside his former wetland. Therefore, without an addition of a pollutant Bowman has not violated the CWA under the EPA's "outside world" definition for addition, nor do his actions satisfy addition under the EPA's "unitary navigable waters" theory.

Argument

STANDARD OF REVIEW

On appeal, "[courts] will review a district court's grant of summary judgment de novo." *Lee v. Blue Cross/Blue Shields of Alabama*, 10 F.3d 1547, 1549 (11th Cir. 1994) (quoting *Jones v. Firestone Tire & Rubber Co.*, 977 F.2d 527 (11th Cir. 1992)).

Summary judgment is appropriate "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." *Celetox Corp. v. Catrett*, 477 U.S. 317, 322. (1986).

In response to a properly filed motion for summary judgment, the nonmoving party must "go beyond the pleadings and their own affidavits, or by the depositions, answer to interrogatories, and admissions on file, designate specific facts showing that there is a genuine issue for trial." *Celetox*, 477 U.S. at 324. If the nonmoving party fails to show a genuine issue of material fact, the trial judge shall award judgment as a matter of law in favor of the moving party. *Id*.

Under the Administrative Procedure Act (APA), "[a] person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the

meaning of a relevant statute, is entitled to judicial review thereof." 5 U.S.C. § 702. "Where judicial review is available, the statute authorizes the reviewing court to set aside agency action that is arbitrary, capricious, an abuse of discretion, or not otherwise in accordance with the law." 5 U.S.C. § 706(2).

I. THE DISTRICT COURT PROPERLY AWARDED SUMMARY JUDGMENT IN FAVOR OF BOWMAN BECAUSE NUWF LACKS STANDING TO CHALLENGE THE ALLEGED CWA VIOLATION AGAINST BOWMAN.

Article III of the Constitution confines the federal courts to adjudicating actual "cases" or "controversies." *Allen v. Wright*, 468 U.S. 737, 750 (1984). The case-or-controversy doctrine places fundamental limits on the federal judicial power and one of these limitations requires a litigant to have "standing." *Id*. In essence, the question of standing is whether a litigant is entitled to have the court decide the merits of the dispute. *Warth v. Seldin*, 422 U.S. 490, 498 (1975).

To satisfy standing the plaintiff has the burden of establishing three elements: First, they have suffered an "injury in fact;" second, there must be a "causal connection" between the injury and the conduct complained of; and third, it must be likely that the injury will be "redressed" by a favorable decision. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992). *Lujan* further clarified what must be proven to satisfy each element: to satisfy an "injury in fact" the plaintiff must have suffered an invasion of a legally-protected interest which is "concrete and particularized" and also "actual or imminent" and not "conjectural or hypothetical." *Id*. at 560. Next, to satisfy a "causal connection" the alleged injury has to be "fairly traceable" to the challenged action of the defendant. *Id*. Finally, it must be "likely" as opposed to "merely speculative," that the injury will be redressed by a favorable decision. *Id*.

Therefore, since NUWF has not presented concrete evidence of an actual injury to any of its members, the district court properly awarded summary judgment in favor of Bowman.

A. For an organization to satisfy standing, it must be able to prove its individual members have sufficient standing on their own.

NUWF argues its members have suffered an injury as a result of Bowman's land clearing operations. (R. at 6.) NUWF furthers its argument from the testimony of three of its members who claim Bowman's actions have damaged wetlands on his property and as a result they feel a loss from the destruction of the wetlands. *Id*.

The Supreme Court has held, "an association has standing to bring suit on behalf of its members when its members would otherwise have standing to sue in their own right, the interests are germane to the organization's purpose, and neither claim asserted nor the relief requested requires the participation of individual members in the lawsuit." *Friends of the Earth, Inc. v. Laidlaw Envtl. Services (TOC), Inc.*, 528 U.S. 167, 167-68 (2000).

Therefore, based on the Supreme Court holding in *Friends of the Earth*, an organization can maintain a suit on behalf of its members when individual members would have sufficient standing on their own. 528 U.S. at 168. Thus, an individual member must be able to show they have suffered a concrete, actual injury in fact, caused by the defendant's conduct, which can be redressed from a favorable decision by the courts. *Lujan*, 504 U.S. at 560.

For the case at bar, in order for NUWF to have sufficient standing to challenge Bowman's alleged CWA violation, NUWF's individual members must be able to explicitly show by Bowman removing and filling the wetlands on his property he has caused an injury in fact to at least one of the members.

B. NUWF lacks standing because its individual members have not suffered an actual, concrete injury as a result of Bowman's land clearing operations.

The district court properly awarded summary judgment in favor of Bowman on this issue because the allegations from NUWF's members do not constitute an injury in fact fairly traceable to the clearing of Bowman's field. (R. at 6.)

When an organization can show its individual members have been directly, negatively impacted by an alleged violator's actions, the Supreme Court has held that is enough for a sufficient injury in fact. *Friends of the Earth*, 528 U.S. at 168. In *Friends of the Earth*, the defendant had been found dumping excessive amounts of mercury and other pollutants into a nearby river. *Id*. at 167. In response plaintiffs, members of an environmental group brought a citizen suit under the CWA against the defendant for discharging pollutants not authorized by their permit. *Id*. The injury alleged by the plaintiffs was that as a result of mercury contamination in the river, the river was now highly dangerous to use for any purpose; in particular plaintiffs could no longer use the river for recreational activities. *Id*. at 181-82. The Supreme Court held, "environmental plaintiffs adequately allege injury in fact when they aver that they use the affected area and are persons 'for whom the aesthetic and recreational values of the area will be lessened by the challenged activity.' " *Id*. at 183 (*quoting Sierra Club v. Morton*, 405 U.S. 727, 735 (1972)). Therefore, an injury in fact was found sufficient because the plaintiffs could easily show they had used the river in the past and as a direct result of the defendant's actions they could no longer use the river for any purpose. *Id*. at 181-182.

Similarly, in *Massachusetts v. EPA*, the state of Massachusetts was able to satisfy the injury in fact analysis of standing because they were also able to show an "actual" and "imminent" injury as a result of EPA conduct. *Massachusetts v. E.P.A.*, 549 U.S. 497, 499 (2007). The EPA had been alleged to not have taken action under the Clean Air Act to monitor and control greenhouse gas emissions. *Id*. at 504. To satisfy the injury in fact element, Massachusetts identified a number of environmental changes that had already inflicted significant harm including, "…global retreat of mountain glaciers, reduction in snow cover extent, earlier spring melting of rivers and lakes, and the accelerated rate of rising sea levels…" *Id*. at 521. The Supreme Court held in favor of Massachusetts, validating its decision based on Massachusetts presenting concrete evidence of greenhouse gas emissions causing a global rise in sea levels and as a result Massachusetts' coastal land had shrunk in size. *Id*. at 522.

Both *Friends of the Earth* and *Massachusetts* adequately show what must be proven to adequately satisfy the injury in fact element needed for standing. In both cases the plaintiffs were able to show a direct, imminent and actual injury as a result of the defendant's conduct.

In contrast, when an environmental group cannot show any of their members were "adversely" or "directly impacted" by an alleged violator's actions, the Supreme Court has denied standing. *Lujan*, 504 U.S. at 556. In *Lujan*, the plaintiffs, an environmental group, claimed they had suffered an injury in fact in regards to being denied the opportunity to see endangered species abroad as a result of defendant's refusal to implement part of the Endangered Species Act. *Id*. at 555. The Supreme Court denied the plaintiffs' claim based on standing grounds, holding the injury presented was far too "speculative" to satisfy an injury in fact. *Id*. The plaintiffs did not present any concrete plans to go abroad and see the endangered animals in question, instead only mentioning some intent to someday go abroad and see the animals.

Therefore, the Court reasoned that having "some-day" intentions, without any concrete plans or specification, did not support a concrete, actual, or imminent injury needed for standing. *Id*. at 565.

For the case at bar, NUWF does not satisfy the standing requirements because NUWF has not presented any concrete evidence of an actual injury to its members. Instead, like the plaintiffs in *Lujan*, NUWF has only presented testimony from three of its members who claim to have suffered an injury. In particular, one member of NUWF testified that the River looks more polluted, while another member testified that he had been illegally trespassing on Bowman's property for "frogging" purposes and now there are not as many frogs left. (R. at 6.)

More importantly, NUWF's members also expressly stated that they cannot physically see a difference in the land in the area, but they are aware of the differences from the removal of the wetlands and fearing the Muddy is more polluted. (R. at 6.) Thus, unlike the plaintiffs in *Friends of the Earth* and *Massachusetts*, NUWF has not presented actual facts showing how Bowman's actions caused an injury to its members. Both plaintiffs in *Friends of the Earth* and *Massachusetts* were able to produce concrete facts supporting their injuries caused by the defendant. Furthermore, both plaintiffs were able to prove extensive use of the land prior to the defendant's illegal conduct and as a result of such conduct, they could no longer use the land to the same extent as before, unlike NUWF's members in the present case.

Here, the only direct injury is the inability for one member from NUWF to continue illegal activities on Bowman's property. *Id*. However, the inability to do illegal activities cannot give rise to an injury to support standing. The other alleged injury from a NUWF member was speculative testimony of the river looking more polluted without any facts or evidence to support

that allegation. Therefore, as was the case in *Lujan*, without presenting any concrete evidence or facts to support their testimony, these allegations of an injury are completely speculative.

Therefore, since NUWF cannot sufficiently show its members have suffered an actual, concrete injury, NUWF lacks Constitutional standing needed to challenge Bowman's land clearing operations. There has not been any evidence presented by NUWF showing a direct injury to one of its members. Instead, NUWF has only presented testimonial evidence of speculative injuries and evidence of the inability to continue illegal activities. Following the holding in *Lujan*, by not presenting concrete facts showing an injury or the immediate potential of an injury, NUWF fails the first prong of the standing analysis and summary judgment was properly awarded to Bowman.

II. THE DISTRICT COURT PROPERLY AWARDED SUMMARY JUDGMENT IN FAVOR OF BOWMAN BECAUSE ANY CWA VIOLATION IS WHOLLY PAST.

Section 505(a) of the CWA, allows any citizen to bring a citizen suit "against any person…who is alleged to be in violation of an effluent standard of limitation under the CWA." 33 U.S.C. § 1365(a). However, the Supreme Court has held, these § 505 citizen suits require alleged violations be continuing or ongoing for a court to have subject matter jurisdiction. *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Foundation*, 484 U.S. 49 (1987). Therefore, citizen suits under the CWA for "wholly past violations" lack subject matter jurisdiction needed for the court to hear the dispute. *Id*. at 64.

Here, NUWF's citizen suit against Bowman alleges violations which have all ceased at the time this suit was brought. NUWF has no reason to speculate Bowman's alleged violations will occur in the future because NUDEP has already taken appropriate legal action against Bowman by requiring him to cease any further potential violations of the CWA. Without a

continuing or ongoing violation, this Court lacks subject matter jurisdiction and Bowman was properly awarded summary judgment on this issue.

A. Bowman's alleged CWA violations have ceased and NUWF has no reason to believe they will continue in the future.

NUWF's citizen suit alleges as a result of Bowman's actions during his land clearing operations, he is presently violating the CWA. However, the district court properly denied NUWF's claim holding any alleged violation by Bowman is wholly past and there is no evidence to conclude the alleged violation would occur in the future. (R. at 7.)

As the Supreme Court held in *Gwaltney,* in order for a court to have subject matter jurisdiction over a citizen suit any violation must be continuing or ongoing. *Gwaltney*, 484 U.S. at 54. In *Gwaltney,* a citizen suit was brought against the defendant alleging past and future violations of the effluent limitations standard of their § 402 permit. *Id*. at 53. Defendant responded that any past violations of the effluent limitation standard could not be litigated because § 505(a) requires that a defendant be violating the Act at the time of suit. *Id*. at 54-55. Moreover, the defendant revealed its last recorded violation had occurred several weeks before the plaintiff filed their complaint and thus, the court lacked subject matter jurisdiction over the plaintiffs claim. *Id*.

After hearing both arguments the Supreme Court held, the "…harm sought to be addressed by the citizen suit lies in the present or the future, not in the past." *Id*. at 59. The basis of their decision was the legislative history of § 505(a), which states citizen suits are only appropriate when the government has failed to take action. *Id*. at 60. Although the Supreme Court did not decide the case on its merits, they did remand the case back down to the lower

courts to decide if there is a basis for allegations of a continuing violation, and not to consider the past violations. *Id*. at 67.

The Second Circuit was also faced with a similar citizen suit in *Connecticut Coastal Fisherman's Association v. Remington Arms Co.*, 989 F.2d 1305 (2d Cir. 1993). In *Remington*, a citizen suit was brought against a skeet shooting club for not having a CWA § 402 permit for discharging pollutants into surrounding waters. *Id*. at 1309. The Second Circuit first noted that the citizen suit must be made under a "good faith" belief of a continuing violation, which is not wholly past, to satisfy the citizen suit provision under the CWA. *Id*. at 1311. Further, the court noted to survive a motion for summary judgment on the issue, plaintiffs in a citizen suit must allege more than just a good faith belief of a continuing or future violation. *Id*. Plaintiffs must present evidence that after the suit was filed, the violations are indeed continuing or evidence that the violations are likely to occur in the future. *Id*.

The Second Circuit held in favor of the defendant on this issue holding the plaintiffs did not show a violation that is continuing in the present or in the future. *Id*. at 1313. In coming to their decision the court held the defendant had closed the gun club by the time plaintiff filed suit and thus, any discharge by the defendant had subsequently ceased prior to suit. *Id*. at 1312. Additionally, the court denied plaintiff's claim for a potential future violation because the gun club made a final decision never to reopen. *Id*. Thus, the plaintiffs did not meet their burden of presenting evidence from which the fact-finder could find a likelihood of continuing violations. *Id*.

As both *Gwaltney* and *Remington* show, in order for a court to have subject matter jurisdiction over a citizen suit, the plaintiffs must produce evidence in good faith showing a

violation is ongoing and not wholly past at the time of suit, or present sufficient evidence to show that a violation is more than likely to occur in the future.

For the case at bar, Bowman had ceased his land clearing operations on June 15, 2011, and NUWF's citizen suit was not filed with this Court until August 30, 2011. (R. at 4.) Therefore, at the time NUWF filed its citizen suit against Bowman, any alleged CWA violation had ended and cannot be said to be ongoing. Bowman's only subsequent actions have included planting wheat seeds and draining his property through a drainage ditch, neither which constitutes adding dredged spoil or fill to the property. (R. at 5, 6.) Furthermore, NUWF cannot sufficiently prove Bowman will resume anymore land clearing operations. Bowman has agreed with NUDEP through a consent decree to cease any land clearing operations that could potentially violate the CWA and he has placed the only remaining land he owns in the area in a conservation easement with NUDEP. *Id.*

B. The continued presence of dredged and fill material in Bowman's former wetland does not constitutes a continuing or ongoing violation.

Next, NUWF alleges that the continued presence of dredged and fill material in the former wetland is a continuing or ongoing violation. (R. at 7.) However, NUWF's claim would hinder the continuing violation requirement in § 505 of the CWA because all violations would be continuing and would conflict with the statute of limitations because it would never run. Thus, the district court properly denied plaintiffs claim on this issue. *Id.*

Numerous courts have held that continuing effects resulting from a discharge are not a continuing discharge. *Aiello v. Town of Brookhaven*, 136 F. Supp. 2d 81, 120 (E.D.N.Y. 2001). The rationale favored by courts adopting this perspective is that the continuous or ongoing "…violation requirement of the CWA would be completely undermined if a violation included

the mere decomposition of pollutants." *Id*. This requirement would be weakened because essentially every day that a defendant fails to retrieve pollutants they have already discharged, is a day they are in violation and therefore would always be a continuing or ongoing violation. Moreover, if a violation is always continuous and ongoing until the pollutants are removed, then citizen suits under the CWA could be brought against violators every day until removed, consequently resulting in numerous lawsuits against a violator.

Therefore, to follow the holding in *Gwaltney*, that citizen suits are only allowed when a continuous or ongoing violation is present at the time of suit, many courts have held continuing effects from a discharge are not a continuing discharge. *Aiello*, 136 F. Supp. 2d at 120. "Migration of residual contamination resulting from previous releases is not an ongoing discharge within the meaning of the [CWA]." *Friends of Santa Fe County v. LAC Minerals, Inc.*, 892 F. Supp. 1333, 1354 (D.N.M.1995).

The Second Circuit followed this interpretation for a continuing discharge in *Remington*, when the court held the presence of fill material in the waters does not constitute as a continuing violations. 989 F.2d at 1313. Plaintiffs in *Remington* tried to show a continuing violation as the result of the presence of lead and clay in waters that were discharged by the gun club during the operations of their business. *Id*. at 1308. However, the court did not agree with the plaintiffs' continuing violation theory and following the holding in *Gwaltney*, the court held the presence of lead and clay in the water did not constitute a continuing violation. *Id*. at 1313.

Therefore, the district court did not error when it held that the continued presence of dredged and fill material in the former wetland did not constitute a continuing or ongoing violation. If the district court had ruled in the contrary, then the Supreme Court's holding in

Gwaltney would have been undermined because all violations would be continuing and there would be no need for the jurisdictional requirement.

Since NUWF cannot sufficiently prove Bowman has continued to violate the CWA or has the potential to violate in the future, the district court properly awarded summary judgment on this issue in favor of Bowman.

III. NUWF'S CITIZEN SUIT AGAINST BOWMAN IS BARRED UNDER § 505(b) OF THE CWA BY NUDEP'S DILIGENT PROSECUTION OF BOWMAN.

As noted earlier, § 505 of the CWA allows any citizen to bring a civil suit "against any person…who is alleged to be in violation of an effluent standard of limitation under the CWA." 33 U.S.C. § 1365(a). However, the primary responsibility for enforcement rests with the state and federal governments, private citizens only provide a second level of enforcement by serving as a check to ensure the state and federal governments are diligent in prosecuting CWA violations. *Sierra Club v. Hamilton Cty. Bd. of Cty. Comm'rs*, 504 F.3d 634, 637 (6th Cir. 2007). Therefore, the Supreme Court has held that citizen suits are only proper if governmental agencies "fail to exercise their enforcement responsibilities." *Gwaltney*, 484 U.S. at 60. To ensure states are able to prosecute alleged CWA violators in their jurisdiction, Congress has restricted the right to bring a citizen suit by expressly stipulating that no citizen suit may be brought if the "State has commenced and is diligently prosecuting a civil… action in a court of the United States ... to require compliance" with the CWA. 33 U.S.C. § 1365(b)(1)(B).

For the case at bar, the district court properly awarded summary judgment in favor of Bowman because NUWF's citizen suit against Bowman was procedurally barred under § 505(b)(1)(B) of the CWA by NUDEP's prior commencement and diligent prosecution of Bowman embodied through a consent decree. (R. at 7.)

A. NUDEP's prosecution of and consent decree with Bowman satisfies the diligent prosecution requirements and therefore NUWF's citizen suit is barred.

NUWF argues that the prosecuting actions taken against Bowman by NUDEP do not satisfy the diligent prosecution requirements of § 505(b) of the CWA. (R. at 2.) However, plaintiffs in a citizen suit must meet a high standard to show the state's agency has failed to prosecute a violation diligently. *Karr v. Hefner*, 475 F.3d 1192, 1198 (10th Cir. 2007). This burden is heavy because diligence on the part of the enforcement agency is presumed. *Friends of the Earth,* 890 F. Supp. at 487.

Under the CWA, enforcement actions are considered "diligent" if they are "capable of requiring compliance with the Act" and "are in good faith calculated to do so." *Piney Run Pres. Ass'n v. County Com'rs*, 523 F.3d 453, 459 (4th Cir. 2008).

For the case at bar, NUDEP commenced a civil action in a court of the United States and has diligently prosecuted that action by negotiating a settlement agreement with Bowman, later embodied into a consent decree. (R. at 7.) Thus, in order for NUWF to prevail on their erroneous claim, it has the heavy burden to prove the consent decree between NUDEP and Bowman is incapable of complying with the CWA or was not in good faith calculated to do so.

i. The consent decree between NUDEP and Bowman is capable of requiring compliance with the CWA.

As noted earlier, enforcement actions will be considered "diligent" if the actions are capable of requiring compliance with the CWA and are in good faith calculated to do so. *Piney,* 523 F.3d at 459.

Moreover, when the state agency and the alleged polluter enter into a consent decree designed to cure violations of the CWA, courts must be particularly deferential to the agency's

expertise. *Id*. The 10th Circuit has noted the rationale favoring consent decrees over simultaneous citizen suits is that, "failure to defer to [state agency's] judgment can undermine agency strategy." *Karr*, 475 F.3d at 1197. Therefore, courts should not interpret § 505 in a way that would undermine the EPA's ability to reach voluntary settlements with defendants. *Id*. at 1198. State agencies should be able to proceed in a manner that they consider to be in the best interest of all parties involved. *Cmty. of Cambridge Envtl. Health & Cmty. Dev. Group v. City of Cambridge*, 115 F. Supp. 2d 550, 554 (D. Md. 2000).

Here, NUDEP's consent decree requires Bowman to comply with the CWA and as a result of Bowman's actions, over time the Muddy River will be enhanced. (R. at 8.) The agreement between Bowman and NUDEP specifically requires Bowman to immediately cease any further violations of § 404, while deeding a conservation easement on his property to NUDEP and also constructing and maintaining a year-round, partially-inundated wetland. (R. at 7-8.) These requirements agreed to by Bowman will preserve the viewscape of the Muddy River while enhancing the wetlands environment on the site. (R. at 8.)

Furthermore, in light of strong deference to state agency's prosecution of alleged violators, it is hard to see how NUDEP's consent decree with Bowman will not comply with the CWA. Here, NUDEP choose to investigate and reach a settlement agreement with Bowman concerning the same violations alleged by NUWF. NUWF's citizen suit against Bowman seeks civil penalties and an order to require Bowman to remove the fill material and restore the wetland on his property. (R. at 5.) Similarly, the end result of the consent decree between Bowman and NUDEP requires Bowman to create and maintain new wetlands on his property and requires Bowman to deed a conservation easement over to NUDEP for public use. (R. at 4.) The end result of both NUWF's citizen suit and NUDEP's consent decree will enhance the

Muddy River while restoring wetlands on Bowman's property. Therefore, NUDEP's consent decree with Bowman not only requires compliance with the CWA but also will require more action from Bowman than NUWF's citizen suit.

Thus, based on a strong deference to a state agencies enforcement action, especially when embodied through a consent decree, NUWF cannot sufficiently prove NUDEP's consent decree with Bowman will not comply with the CWA. Bowman is required to cease future § 404 violations, deed a conservation easement on his property, and maintain a year-round wetland. These requirements will enhance the Muddy River and the wetlands on Bowman's property and hence, comply with the CWA, satisfying this prong of diligent prosecution.

ii. The consent decree between NUDEP and Bowman is in good faith calculated to comply with the CWA.

The next prong for diligent prosecution requires that the consent decree is in "good faith calculated" to comply with the CWA.

Section 505 of the CWA does not require "government prosecution to be far-reaching or zealous, it requires only diligence." *Karr*, 475 F.3d at 1197. Moreover, an agency's prosecutorial strategy need not have penalties that are as stringent with that of the citizen-plaintiff, to be in good faith. *Id*. The Sixth Circuit affirmed this rationale by noting "citizens are permitted to act where the [state] has failed to do so, not where the [state] has acted but has not acted aggressively enough in the citizen's view." *Ellis v. Gallatin Steel Co*., 390 F.3d 461, 477 (6th Cir. 2004).

Furthermore, the CWA expressly stipulates that states "shall take into account the nature, circumstances, extent and gravity of the violation…and, with respect to the violator, ability to pay, any prior history of such violations, the degree of culpability, economic benefit or savings

(if any) resulting from the violation…" when considering an administrative penalty. 33 U.S.C. § 1319(g)(3).

Here, NUDEP could have administered a monetary penalty against Bowman, but it decided in compliance with a state statute (virtually identical to 33 U.S.C. §§ 309(a), (g)), not to administer a monetary penalty on Bowman. (R. at 4.) This statute gives NUDEP authority to include an administrative penalty, but does not specifically stipulate a monetary penalty must be given. *Id*. In lieu of any specific monetary penalties against Bowman, the consent decree requires Bowman to deed a conservation easement over a large portion of his property and requires Bowman to construct and maintain a year-round, partially-inundated wetland. (R. at 7-8.)

As one district court held which was later affirmed by the Third Circuit, in deciding whether the EPA has satisfied [due diligence], "it is necessary to consider the full context of the agency's actions…'diligence' measures comprehensively the process and effects of agency prosecution." *Student Pub. Interest Research Group v. Fritzsche, Dodge & Olcott, Inc.*, 579 F. Supp. 1528, 1535-36 (D.N.J. 1984) aff'd, 759 F.2d 1131 (3d Cir. 1985). Therefore, when looking at the full context of the agency's actions and the effects of the consent decree NUDEP strongly believed the penalties administered on Bowman were in good faith appropriate compared to the gravity of the violation. Notably, the penalties imposed in the consent decree have strong economic ramifications on Bowman. By transferring a large portion of his property into a conservation easement for public use, Bowman relinquishes any property value of that area. (R. at 7.) Additionally, the year-round wetland Bowman must construct and maintain comes at a considerable immediate expense and indeterminable future expense. (R. at 7-8.)

Although these remedies imposed by NUDEP may be less than the plaintiffs would have enforced themselves, that fact alone does not render NUDEP's prosecution lacking in diligence. NUDEP has exercised their discretion to impose some penalties on Bowman and has decided to forego others. As the Sixth Circuit has held, private citizen suits "are not permitted to upset the primary enforcement role of the [agency] by seeking civil penalties that the Administrator chose to forego..." *Envtl. Conservation Org. v. City of Dallas*, 529 F.3d 519, 531 (5th Cir. 2008). If allowed to bring their citizen suit, NUWF would undermine the CWA and the State of New Union because the state agency has the primary responsibility for enforcing the CWA, not citizens. *Comfort Lake Ass'n v. Dresel Contracting, Inc*., 138 F.3d 351, 357 (8th Cir.1998).

Even though no monetary fines were administered against Bowman for his alleged CWA violations in the consent decree, the overall penalties assessed were done in good faith to require compliance with the CWA. Standing alone the fact NUDEP did not impose a substantial monetary penalty will not render non-diligent on the part of NUDEP. *Envtl. Conservation Org.*, 529 F.3d at 531. Therefore, since NUWF cannot prove NUDEP's consent decree with Bowman is not in good faith calculated to comply with the CWA, NUWF fails the second prong of diligent prosecution.

IV. BOWMAN DID NOT VIOLATE THE CWA WHEN HE MOVED DREDGED AND FILL MATERIAL FROM ONE PART OF A WETLAND ADJACENT TO NAVIGABLE WATER TO ANOTHER PART OF THE SAME WETLAND BECAUSE THERE WAS NO ADDITION OF A POLLUTANT AS INTERPRETED BY THE EPA.

NUWF mistakenly alleges Bowman violated §§ 301(a) and 404 of the CWA for filling wetlands without a permit. (R. at 3.) However, NUWF's argument is without merit because NUWF cannot sufficiently prove Bowman violated the "addition" element needed for a CWA

violation. (R. at 10.) Therefore, without showing that Bowman's actions satisfy addition, the district court properly awarded summary judgment in favor of Bowman on this issue.

Under § 301(a) of the CWA "discharge of any pollutant" by any person is prohibited, except in compliance with a permit issued under §§ 402 or 404. 33 U.S.C. § 1311(a). The CWA then defines "discharge of a pollutant" to mean "any addition of any pollutant to navigable waters from any point source." §1362(12). Section 404 states a permit must be issued by the U.S. Army Corps of Engineers, when "dredged or fill material" is "discharged" into navigable waters of the United States. 33 U.S.C. § 1344.

Since Bowman did not have a § 404 permit when he removed the wetlands, NUWF argues he violated the CWA. (R. at 3.) Nevertheless, in order for NUWF to prevail on the alleged CWA violations against Bowman, NUWF must be able to demonstrate Bowman's actions satisfy all four of the requirements under § 502: (1) addition, (2) of any pollutant, (3) to navigable waters, (4) from any point source. 33 U.S.C. § 1362. Section 502 of the CWA defines "pollutant," "navigable waters" and "point source," but does not define "addition," which for the purposes of this case is the only issue on appeal.

A. Bowman's land clearing operations satisfy "pollutant" element of the CWA.

"Pollutant" is defined under the CWA to mean a list of specific and general material, one of which is "biological material." 33 U.S.C. § 1362(6). Here, the trees knocked down by Bowman and the leveled vegetation, are considered to be "biological materials." (R. at 4, 10.) Therefore, the material Bowman moved about his property included pollutants and hence, satisfies the "pollutant" element. No party disputes this issue and the district court was correct in finding this element satisfied.

B. Bowman's land clearing operations satisfy "point source" element of the CWA.

"Point Source" is defined under the CWA to be "any discernible, confined and discrete conveyance," and further includes a list of examples of point sources. 33 U.S.C. § 1362(14). The Fifth Circuit has held that a bulldozer is a point source for purposes of the CWA. *Avoyelles Sportsmen's League, Inc. v. Marsh*, 715 F.2d 897, 927 (5th Cir. 1983). Thus, by Bowman using a bulldozer to knock down trees and level vegetation, and to further push the vegetation and build trenches, the bulldozer was a pout source, satisfying this element. (R. at 4.) No party contests this issue and the district court was correct in finding this element satisfied.

C. Bowman's land clearing operations satisfy "navigable waters" element of the CWA.

"Navigable Waters" is defined as "the waters of the United States." 33 U.S.C. § 1362(7). The Supreme Court has held that wetlands adjacent to navigable waters are themselves navigable waters. *United States v. Riverside Bayview Homes*, 474 U.S. 121, 139 (1985). Here, all parties agree the Muddy River is navigable water and that Bowman's former woods met the Corp's Wetland Delineation Manual criteria for wetlands and that the former woods therefore are wetlands. (R. at 9.) No party contests this issue and the district court was correct in finding this element satisfied.

D. Bowman's land clearing operations do not satisfy "addition" element of the CWA.

"Addition" is not defined under the CWA and is further not defined by the EPA or the U.S. Army Corps of Engineers in their regulations. (R. at 9.) However, the EPA has defined "addition" in various contexts to mean "from the outside world." *Nat'l Wildlife Fed'n v. Gorsuch*, 693 F.2d 156, 175 (D.C. Cir. 1982). Alternatively, the EPA has interpreted "addition" in its Water Transfer Rule to incorporate the "unitary navigable waters" theory. (R. at 9.) Based

on these two interpretations of addition, NUWF's claim that Bowman's land clearing activities violated the CWA has no basis. Bowman cannot be said to have satisfied addition under these two valid interpretations from the EPA because Bowman added nothing to his wetland when moved material from one part to another part of his wetland. (R. at 10.) Therefore, the district court was correct when they held the "addition" element was not satisfied.

i. Under EPA's definition of addition to mean from the outside world, Bowman did not violate the CWA because pollutants were not added from anywhere outside the wetland.

As noted earlier, the CWA does not define "addition" but the EPA has defined "addition" in various contexts to mean "from the outside world." *Nat'l Wildlife Fed'n v. Gorsuch*, 693 F.2d at 175. As the D.C. Circuit determined, "addition from a point source occurs only if the point source itself physically introduces a pollutant into water from the outside world." *Gorsuch*, 693 F.2d at 175. The D.C. Circuit deferred to the EPA's definition of addition in *Gorsuch* because "…it was likely Congress would have given the EPA… discretion to define addition, had it expected the meaning of the word to be disputed… Therefore, the EPA's definition must be accepted unless manifestly unreasonable, and we do not find it so." *Id.*

After the D.C. Circuit decided *Gorsuch*, the Sixth Circuit had the opportunity to apply "from the outside world" as the definition for addition. *Nat'l Wildlife Fed'n v. Consumers Power Co.*, 862 F.2d 580 (6th Cir. 1988). In *Consumer's Power*, the plaintiffs alleged a hydro-electric facility was in violation of the CWA because the facility was releasing water that contained entrained fish (live and dead fish, and fish remains) not authorized by the permits for that facility. 862 F.2d at 581. In response, the Sixth Circuit disagreed with the plaintiff's claim finding the facility's movement of pollutants already in the water is not an "addition" of pollutants. *Id.*

The Sixth Circuit came to their holding in *Consumer's Power* by first agreeing with the EPA's definition of addition as being, "the introduction of a pollutant from the outside world." *Id*. at 584. The Court affirmed EPA's definition as a permissible interpretation because there was not "any compelling indications in the statutory scheme, legislative history, or anywhere else, that such a construction is wrong." *Id*. Furthermore, it was noted, "construction of a statute by those charged with its execution should be followed unless there are compelling indications that it is wrong...." *Id*. (quoting *E.I. du Pont de Nemours & Co. v. Collins*, 432 U.S. 46, 54–55 (1977)). The Court then went on to hold, "when giving proper deference to the EPA… and its reasonable construction of addition, no pollutant was introduced from the outside world because any entrained fish released at the facility originated in Lake Michigan, and did not enter the Lake from the outside world." *Id*. at 585.

Accordingly, under the EPA's definition of "outside world" NUWF cannot prove Bowman's action satisfy the addition element. The alleged addition claimed by NUWF occurred when Bowman pushed trees and leveled vegetation from one part of his wetlands to another part of the same wetland. (R. at 4, 9.) However following the outside world definition, Bowman did not add any pollutants from outside his wetland because the pollutants were already part of the wetland and only subsequently moved around the premises. Therefore, following the holding from the Sixth Circuit in *Consumer's Power,* no addition occurred because the pollutants originated in Bowman's wetland and as a result, did not enter the wetland from the outside world. 862 F.2d at 585.

In response, NUWF argues the EPA developed its "outside world" definition as a litigation position in § 402 and has never applied it to § 404 cases. (R. at 9.) However, as the Supreme Court has held, "the normal rule of statutory construction assumes that identical words

used in different parts of the same act are intended to have the same meaning*." Sorenson v. Sec'y of Treasury*, 475 U.S. 851, 860 (1986) (quoting *Helvering v. Stockholms Enskilda Bank*, 293 U.S. 84, 87 (1934)). Without the express intent of Congress providing that addition means one thing for § 402 and something else for § 404, NUWF's argument is not a correct assertion. If Congress intended addition to mean different things for § 402 and § 404, then Congress would have expressly stated such in the statutory scheme, legislative history or somewhere else.

NUWF next argues that applying the outside world definition to § 404 would read the dredge and fill permit program out of the statute, contrary to congressional intent. (R. at 9.) However, NUWF is again mistaken with this argument. Applying the "outside the world" definition to § 404 would not read the dredge and fill permit program out of the statute. On the contrary, under § 404 the U.S. Army Corps of Engineers would still need to issue a permit when dredge or fill material is discharged into navigable water, but only when the dredged of fill material comes from somewhere other than the wetland or specified disposal site into which it is being placed. This reading may narrow the application of § 404 permitting, but does not read the permit program out of the statute.

ii. Under EPA's interpretation of addition incorporating the Unitary Navigable Waters Theory, Bowman did not violate the CWA because the pollutants were always in navigable water and thus never added to a second navigable water.

In addition to the EPA's from the outside world definition, the EPA has interpreted addition in its Water Transfer Rule to incorporate the "unitary navigable waters" theory, under which all navigable waters are one for the purposes of § 301(a) of the CWA. National Pollutant Discharge Elimination System (NPDES) Water Transfer Rule, 73 Fed. Reg. 33,697 (June 13, 2008) (codified at 40 C.F.R. pt. 122). Under EPA's interpretation of the regulation, transferring pollutants from one navigable water to a second navigable water does not add those pollutants to

the second navigable water because the first and second navigable waters were always one; the pollutants were always in navigable water and therefore could not be added to a second navigable water. (R. at 10.) Bowman argues that the EPA interpreted the unitary navigable waters theory in a regulation and following the holding in *Friends of Everglades v. South Florida Water Management District*, 570 F.3d 1210 (11th Cir. 2009), would entitle its interpretation to *Chevron* deference.

In *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc*., 467 U.S. 837, 842-43 (1984), the Supreme Court declared, when a court reviews an agency's construction of a statute which it administers, it is confronted with a few questions for proper interpretation: First, whether Congress has directly spoken to the question at issue? *Id*. If Congress has and their intent is clear, the court and the agency must give effect to the unambiguously expressed intent of Congress. *Id*. If Congress has not directly addressed the question at issue and the statute is ambiguous on the question at issue, then the court will defer interpretation of the statute to the agency through regulation, unless the agency's regulations are found to be arbitrary, capricious, or manifestly contrary to the statute. *Id*. at 844.

In *Friends of Everglades*, the Eleventh Circuit was asked to address the issue of addition in light of the unitary navigable waters theory to decide whether the regulation is due *Chevron* deference. 570 F.3d at 1218. The Court found, based on both parties arguments, that there are two reasonable ways to read the statutory language "any addition of any pollutant to navigable waters from any point source." *Id*. (quoting 33 U.S.C. § 1362(12)). One could read "any addition ... to [any] navigable waters," or based on the unitary waters theory, the statute could read "any addition ... to navigable waters [as a whole]." *Friends of Everglades,* 570, F.3d at 1227. The Court then held, "the existence of two reasonable, competing interpretations is the very

definition of ambiguity." *Id*. (quoting *United States v. Acosta*, 363 F.3d 1141, 1155 (11th Cir.2004)). Since, the court found ambiguity, they deferred to EPA's interpretation of the statute as clarified through the regulation, which accepts the unitary waters theory, that transferring pollutants between navigable waters is not an addition to navigable waters. *Id*. at 1227. The Court finally held, since the EPA's interpretation was one of the competing options for the Court, they could not find the construction as being arbitrary, capricious, or contrary to the statute, and hence a permissible construction of that language. *Id*. at 1228.

The unitary waters theory makes clear it is not an "addition to navigable waters," to move existing pollutants from one navigable water to another because the first and second navigable waters were always one. An addition occurs, under this theory, only when pollutants first enter navigable waters from a point source, not when they are moved between navigable waters because the pollutants were always in navigable water and therefore could not be added to the second navigable water.

Therefore, under the unitary waters theory, Bowman does not satisfy the addition element because when the pollutant, here the tree and leveled vegetation remains, were originally added to the wetland they were already in navigable waters, and thus would not be added again when they were subsequently moved to another part of the wetland.

In response, NUWF argues the definition of "pollutant" includes "dredged spoil" and would therefore "explicitly forbid the discharge of dredge material except as in compliance" with a § 404 permit. (R. at 10.) NUWF's argument is simply not the case as applied. The inclusion of "dredged spoil" in the definition of "pollutant" only satisfies one of the four required elements for a CWA violation, specifically the "pollutant" element. The inclusion of dredged spoil in the

pollutant definition, does not pertain to the addition element and therefore, NUWF's argument has no basis.

Additionally, NUWF argues EPA's interpretation of "addition" is not entitled to deference because the rule does not define "addition" or even use the word, and therefore was not an interpretation of the CWA made in a formal administrative proceeding. See *United States v. Mead Corp.*, 533 U.S. 218, 230 (2000) ("…the overwhelming number of our cases applying *Chevron* deference have reviewed the fruits of notice-and-comment rulemaking..."). However, NUWF is mistaken because the EPA's interpretation of "addition" as found in the preamble to this proposed rule was the very basis of its rule and was subject to the public comment that was a part of the rulemaking. (R. at 10.) Furthermore, the Supreme Court in *Mead Corp* held, "as significant as notice-and-comment is in pointing to *Chevron* authority, the want of that procedure does not decide the case, for we have sometimes found reasons for Chevron deference even when no such administrative formality was afforded." 533 U.S. at 230-31. Therefore, the fact EPA's interpretation of addition was not an interpretation of the CWA made in a formal administrative proceeding, as NUWF asserts, standing alone would not bar the application of *Chevron*.

Overall, NUWF's claim that Bowman has violated §§ 301(a) & 404 of the CWA, by removing and filing the wetlands on his property cannot be found valid. Specifically, NUWF cannot prove Bowman's action satisfied the "addition" element. When analyzing "addition" under the EPA's "outside world" definition and applying the EPA's "unitary navigable waters" theory to addition, that element cannot sufficiently be satisfied because it is clear Bowman added nothing to his wetland. Therefore, this element is not satisfied.

Conclusion

For the foregoing reasons, this Court should uphold summary judgment in favor of Jim Bob Bowman because there are no genuine issues of material fact about which reasonable minds may differ and Bowman is entitled to dismissal of the suit as a matter of law. NUWF lacks standing, Bowman's alleged violations are wholly past, NUWF's citizen suit is barred by prior state action, and Bowman did not violate the CWA.

Respectfully Submitted,

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Counsel for Jim Bob Bowman