C.A. No. 13-1246

In the United States Court of Appeals for the Twelfth Circuit

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NEW UNION WILDLIFE FEDERATION,

Plaintiff-Appellant,

v.

NEW UNION DEPARTMENT OF ENVIRONMENTAL PROTECTION,

Intervenor-Appellant,

v.

JIM BOB BOWMAN,

Defendant-Appellee

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

BRIEF FOR NEW UNION DEPARTMENT OF ENVIRONMENTAL PROTECTION

Intervenor-Appellant

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STATUTORY PROVISIONS INVOLVED

33 U.S.C. § 1311. (in relevant part)

> Except as in compliance with this section and sections 1312, 1316, 1317, 1328, 1342, and 1344 of this title, the discharge of any pollutant by any person shall be unlawful.

33 U.S.C. § 1342. (in relevant part)

> Except as provided in sections 1328 and 1344 of this title, the Administrator may, after opportunity for public hearing, issue a permit for the discharge of any pollutant, or combination of pollutants, notwithstanding section 1311(a) of this title, upon condition that such discharge will meet either (A) all applicable requirements under sections 1311, 1312, 1316, 1317, 1318, and 1343 of this title, or (B) prior to the taking of necessary implementing actions relating to all such requirements, such conditions as the Administrator determines are necessary to carry out the provisions of this chapter.

33 U.S.C. § 1344. (in relevant part)

> The Secretary may issue permits, after notice and opportunity for public hearings for the discharge of dredged or fill material into the navigable waters at specified disposal sites

33 U.S.C. § 1362. (in relevant part)

> (12) The term "discharge of a pollutant" and the term "discharge of pollutants" each means (A) any addition of any pollutant to navigable waters from any point source, (B) any addition of any pollutant to the waters of the contiguous zone or the ocean from any point source other than a vessel or other floating craft.
>
> (14) The term "point source" means any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation, or vessel or other floating craft, from which pollutants are or may be discharged. This term does not include agricultural stormwater discharges and return flows from irrigated agriculture
>
> (16) The term "discharge" when used without qualification includes a discharge of a pollutant, and a discharge of pollutants

33 U.S.C. § 1365. (in relevant part)

> No action may be commenced--
>
> (1) under subsection (a)(1) of this section--

(A) prior to sixty days after the plaintiff has given notice of the alleged violation (i) to the Administrator, (ii) to the State in which the alleged violation occurs, and (iii) to any alleged violator of the standard, limitation, or order, or

(B) if the Administrator or State has commenced and is diligently prosecuting a civil or criminal action in a court of the United States, or a State to require compliance with the standard, limitation, or order, but in any such action in a court of the United States any citizen may intervene as a matter of right

JURISDICTIONAL STATEMENT

This case involves an appeal from the United States District Court for the District of New Union. The district court had proper subject matter jurisdiction over the case because the issues arise under the Clean Water Act (CWA), a law of the United States. 28 U.S.C. § 1331 (2006). On June 1, 2012, the district court granted respondent's motion for summary judgment. New Union Department of Environmental Protection (NUDEP) and New Union Wildlife Federation (NUWF) each filed a Notice of Appeal. The United States Court of Appeals for the Twelfth Circuit has jurisdiction to hear appeals from any final decision of the United States District for the District of New Union. 28 U.S.C. § 1291 (2006).

STATEMENT OF THE ISSUES

I. Whether NUWF has standing to bring this case on behalf of its members when its members have alleged a present harm to their recreational and aesthetic interests in the Muddy River, the type and location of the harm alleged is the kind likely to be caused by Bowman's land clearing activities, and this court has authority to issue injunctive relief to remedy the alleged harm.

II. Whether NUWF has alleged a continuing or ongoing violation of the Clean Water Act as required by § 505(a) when Bowman's discharging had ceased at the time NUWF's complaint was filed and there is no evidence that Bowman intends to resume or will resume his discharging activities.

III. Whether NUDEP has diligently prosecuted Bowman, activating the citizen suit bar of § 505(b), when NUDEP filed suit against Bowman within sixty days of NUWF's notice to file suit, NUDEP reached a settlement with Bowman where he agreed to stop his violation and take remedial measures at his own expense, and NUDEP issued an administrative order of the settlement compelling Bowman to act

IV. Whether Bowman's actions of burning and redepositing biological material on his wetland property and channeling it into the Muddy River constituted an "addition" under § 404 of the CWA when the material did not come from outside of his property and the wetlands are hydrologically connected to the river.

STATEMENT OF THE CASE

NUWF filed a complaint in the United States District Court for the District of New Union against Bowman for filling wetlands without a permit in violation of §§ 301(a) and 404 of the CWA. 33 USC §§ 1311(a), 1344. R. at 1. NUDEP intervened in this action, alleging that while NUWF has standing to bring suit, its action is precluded under § 505 because Bowman's violation is not continuing, and NUDEP has already diligently prosecuted Bowman. R. at 1. NUDEP also alleged that Bowman violated the CWA, in agreement with NUWF. *Id.*

After discovery, all parties filed cross-motions for summary judgment. Bowman filed a motion for summary judgment on four grounds: 1) NUWF lacks standing to sue because NUWF members have not suffered an actual injury traceable to Bowman's conduct, 2) there is no subject matter jurisdiction because Bowman's violations are wholly past, 3) there is no subject matter jurisdiction because the State of New Union has diligently prosecuted an action against Bowman and resolved the violations, and 4) there is no subject matter jurisdiction because "addition," an element of §§ 301(a) and 404 CWA violations, is not satisfied. *Id.* NUDEP joined Bowman on the second (continuing violation) and third (diligent prosecution) issues and joined NUWF in its motion for summary judgment on the first (standing) and fourth (CWA violation) issues. *Id.*

The district court granted Bowman's motion for summary judgment on all counts, and denied NUWF's motion all counts. R. at 11. NUDEP and NUWF each filed a notice of appeal. R. at 1. NUWF takes issue with the decision of the lower court with respect to its holding that 1) there was no standing, 2) the violation was not continuing, 3) NUDEP diligently prosecuted an action, and 4) there was no addition under the CWA. *Id.* NUDEP is in agreement with NUWF on issues 1 and 4, concerning standing and the CWA violation, respectfully. *Id.* This Court granted review on September 14, 2012. R. at 2.

STATEMENT OF THE FACTS

Respondent Jim Bob Bowman ("Bowman") owns one thousand acres of land in the State of New Union. R. at 3. His property contains a wetland, as determined by the Army Corps of Engineers' Wetlands Determination Manual. R. at 4 Additionally, his property is hydrologically connected the Muddy River ("the Muddy"), which forms the border between New Union and Progress. R. at 3.

On June 15, 2012, Bowman destroyed vegetation and trees on his property with a bulldozer and pushed the biological material into windrows. R. at 4. He then burned the windrows, converting the material into ash. *Id.* Next, Bowman channeled the ash into trenches on his property, and drained the ash and other biological material into the Muddy. *Id.*

On July 1, 2012, New Union Wildlife Federation ("NUWF"), a nonprofit organization incorporated under the laws of New Union, sent a notice of intent to sue Bowman under § 505 of the Clean Water Act ("CWA") to Bowman, the State of New Union, and the EPA. *Id.* Three NUWF members have testified that their recreational and esthetic enjoyment of the environment has been damaged due to Bowman's actions. R. at 6. These members claim they use the Muddy for boating and fishing, and have often picnicked on Bowman's property. *Id* One member, Dottie Milford, stated the Muddy looks more polluted than it did prior to Bowman's land clearing activities. *Id.* Another member, Zeke Norton, testified that there used to be many frogs on Bowman's property. *Id.* Now, there are no frogs in the drained field and considerably fewer in the wooded area, which have negatively impacted his frogging pastime. *Id.*

Shortly after NUWF sent its notice of intent to sue, the New Union Department of Environmental Protection ("NUDEP") contacted Bowman and informed him that he had violated state and federal law by clearing the field. R. at 4. While Bowman claimed he had not violated the law, NUDEP and Bowman were able to reach a settlement agreement where Bowman was

compelled to take several corrective actions. *Id.* First, Bowman agreed not to clear any more wetland area. Next, he agreed to convey a conservation easement to NUDEP on the still-wooded area of his property and construct and maintain a 75 foot buffer zone between the wooded and cleared areas in a wetland state. *Id.* Under the agreement, Bowman must construct and maintain the wetland at his own expense. R. at 8. The conservation easement allows public entry for recreational purposes and forbids Bowman from developing it in any way, other than to maintain the wetland. R. at 4. A biologist has testified that these remedial measures will ensure an even richer wetland habitat in the buffer zone and a flourishing population of frogs. R. at 6.

NUDEP incorporated the settlement agreement in an administrative order, which Bowman consented to on August 1, 2012. *Id.* Because the administrative order and the settlement agreement are identical, NUDEP did not include an administrative penalty, though it could have penalized Bowman up to $125,000. *Id*. On August 10, 2012, NUDEP issued the administrative order and filed a complaint against Bowman under § 505 of the CWA. R. at 5. Almost three weeks later, on August 30, 2012, NUWF filed its own § 505 action, seeking civil penalties and an order requiring Bowman to remove the fill material and restore the wetlands. *Id.*

On September 5, 2012, NUDEP filed a motion to enter a decree, the terms of which are identical to the settlement and administrative order. *Id.* Bowman consented to the motion and the decree. Id. Then on September 15, 2012, after NUDEP had motioned for a decree and Bowman had consented to it, NUWF filed a motion to consolidate the NUDEP and NUWF actions. Id. NUWF also opposed entry of NUDEP and Bowman's decree. *Id.* Sometime in September, Bowman sowed the cleared field on his property with winter wheat. *Id.*

On November 1, 2012, this Court notified the parties that it would not act on any pending motions in the NUDEP or NUWF cases, other than permitting NUDEP to intervene in NUWF's S505 action, which will be addressed in this case. *Id.*

STANDARD OF REVIEW

This is an appeal from the district court's grant of summary judgment. A trial court may only grant a motion for summary judgment when "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." Fed. R. Civ. P. 56(c); *Celotex Corp v. Caltrett*, 477 U.S. 317, 322 (1986). Because the issues on appeal are questions of law, the Court reviews the claims de novo and affords no deference to the conclusions of the lower court. *Pierce v. Underwood*, 487 U.S. 552, 558 (1988).

SUMMARY OF ARGUMENT

NUWF has standing to bring their suit because individual members of the organization suffered an injury in fact, the injury is fairly traceable to Bowman, and the injury is redressable by the court. Bowman's land clearing activities impaired their recreational and aesthetic enjoyment of the Muddy River, which is sufficient to establish a concret, particularized, and actual injury. It is undisputed that Bowman's activities contribute to the kinds of injuries alleged by the plaintiff, meaning that the traceability element of standing has been satisfied. Finally, this Court has the authority to grant relief for the injury, satisfying the redressability element.

Although NUWF has standing, they are precluded from bringing their § 505 suit because there is no continuing violation. § 505 requires a continuing violation in order to confer subject matter jurisdiction on the plaintiff, which may be proven either by showing ongoing violations at the time of the suit or likelihood of a recurrence of intermittent or sporadic violation. NUWF's

contention that Bowman's violation is ongoing because the fill material remains in place conflates continuing violations with continuing effects. Bowman is no longer discharging pollutants, and therefore cannot be considered to be presently in violation of the CWA. Furthermore, Bowman has demonstrated an intention to comply with NUDEP's administrative order. NUWF has not adduced any evidence that Bowman will discharge again, meaning that they have failed to demonstrate a likelihood of a recurrence of intermittent or sporadic violation.

Even if this Court finds a continuing violation in this case, NUWF's suit is precluded by NUDEP's diligent prosecution under § 505(b) of the CWA. NUDEP filed a civil action in a court of the United States against Bowman. In addition, NUDEP reached a thorough settlement agreement and issued an administrative order, actions which constitute diligent prosecution in preventing citizen suits from supplanting government action. These actions were diligent because NUDEP commenced them within sixty-days notice of NUWF's intent to sue, there is no potential Bowman will violate the CWA again, the lack of penalty is not dispositive of diligent prosecution, and NUDEP's actions will cure NUWF's injury-in-fact. NUWF's suit therefore must be barred under § 505(b).

Bowman violated §§ 301(a) and 404 of the CWA when he burned vegetation and dumped the resulting ash into his wetland property and the Muddy River without a permit. Bowman satisfied the "addition" requirement of "discharge of a pollutant" when he transformed trees and vegetation on his property into incinerator residue, a pollutant under the CWA, by burning them. A transformation of a nonpollutant into a pollutant clearly constitutes an addition under the plain text of the Clean Water Act. Furthermore, the EPA's "outside world" requirement and "unitary navigable waters" theory cannot apply to Section 404 permits. The EPA has explicitly stated that its "unitary navigable waters" theory does not apply in the 404 context, and its "outside

world" requirement is only a litigation strategy and cannot be afforded Chevron deference. Furthermore, these theories would be inappropriate in the 404 context because these interpretations conflict with Congress's intent that dredging be regulable under the CWA. As Bowman added a pollutant to the wetlands and the Muddy when he burned vegetation, transforming a nonpollutant into a pollutant, he violated Sections 301(a) and 404 of the CWA.

ARGUMENT

I. NUWF HAS STANDING BECAUSE 1) INDIVIDUAL MEMBERS OF NUWF SUFFERED AN INJURY IN FACT, 2) THAT INJURY IS FAIRLY TRACEABLE TO THE LAND CLEARING ACTIVITIES PERFORMED BY BOWMAN, AND 3) THE INJURY IS REDRESSABLE BY THE COURT.

An environmental organization has standing to sue on behalf of its members when "(a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purposes; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit." *Hunt v. Washington State Apple Advertising Com'n*, 432 U.S. 333, 343 (1977). As NUWF is a non-profit dedicated to protecting fish and wildlife habitats, there is no dispute that the interests being protected by NUWF in this suit are germane to its organizational purpose. Additionally, the claims and relief requested by NUWF do not require participation by their individual members. Rather, the defendant contends, and the district court agreed, that the individual members of NUWF lack standing to sue in their own right.

Individual members have standing to sue in their own right if 1) they have suffered an injury in fact that is concrete and particularized, and actual or imminent, 2) the injury is fairly traceable to the actions of the defendant, and 3) the injury will likely be redressed by a favorable ruling by the court. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992). Because all

three elements for standing under the *Lujan* test are satisfied with respect to NUWF's individual members, NUWF has standing to bring their citizen suit under § 505.

A. Because the individual members of NUWF used the Muddy River for recreational and aesthetic purposes, Bowman's addition of fill material to the river and wetlands impaired their use and aesthetic enjoyment, constituting an injury in fact to NUWF members that is actual, concrete, and particularized.

NUWF has alleged a cognizable injury in fact under the Supreme Court's well-settled standing doctrine. To prove an injury in fact, a plaintiff must show "an invasion of a legally protected interest which is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical." *Lujan*, 504 U.S. at 560 (citations and internal quotations omitted). In an environmental suit, the injury in fact inquiry does not turn on "injury to the environment but injury to the plaintiff." *Friends of the Earth, Inc. v. Laidlaw Envt'l Services, Inc.*, 528 U.S. 181 (2000). In other words, a plaintiff may demonstrate an injury to his interests sufficient to establish standing without proof of substantial environmental damage. In a citizen suit brought by an environmental organization, standing is established by showing that "[defendant's] discharges, and the affiant members' reasonable concerns about the effects of those discharges, directly affected those affiants' recreational, aesthetic, and economic interests." *Id.* at 183-84.

Recreational or aesthetic use of land or water can serve as the basis of an injury in fact for standing in environmental citizen suits. *Id.* at 167 ("We have held that environmental plaintiffs adequately allege injury in fact when they aver that they use the affected area and are persons 'for whom the aesthetic and recreational values of the area will be lessened' by the challenged activity") (citing *Sierra Club v. Morton*, 405 U.S. 727, 735 (1972)). In *Laidlaw*, the Supreme Court found that an environmental organization had standing to sue a hazardous waste facility when the facility violated their CWA discharge permit by discharging pollutant into a river. As

in our case, the injury to the individual members in *Laidlaw* was to their recreational and aesthetic enjoyment of the river. *Laidlaw,* 528 U.S. at 181-183. Because of concerns about the pollution in the river, the individual members no longer used the river to fish, camp, swim, and picnic in and near the river. *Id.* The harm to the plaintiff's recreational use of the river, even without a showing of environmental damage, was sufficiently concrete, particularized, and actual to establish standing.

Proving an injury in fact based on recreational or aesthetic interests is a low threshold to establishing standing. A plaintiff in an environmental suit may establish an injury in fact if they can show "an aesthetic or recreational interest in a particular place, or animal, or plant species and that that interest is impaired by a defendant's conduct." *Ecological Rights Found. v. Pacific Lumber Co.*, 230 F.3d 1141 (9th Cir. 2000). In *Pacific Lumber*, creek users testified that pollution made their trips to the creek less frequent, and the dirtier water made one user enjoy his recreational activities less due to the creek's poorer aesthetic quality. *Id.* at 1145-46. The Ninth Circuit concluded that the plaintiffs satisfied the injury in fact requirement because they used the creek for recreational and aesthetic purposes and the value of the creek for those purposes was lessened. *Id.* at 1151. Similarly in *American Canoe Ass'n v. Murphy Farms, Inc*., the Fourth Circuit found an injury in fact where runoff from hog farm waste drained into a creek and river. 326 F.3d 505 (4th Cir. 2003). An affiant who had used the creek for recreational purposes testified that the creek had become darker, had more algae, and had fewer fish swimming in it. *Id.* at 518. Another affiant testified that the uncleanly appearance of the water "offend[ed] his aesthetic tastes." *Id.* at 519. These impairments to the recreational and aesthetic quality of the bodies of water were sufficient to establish an injury in fact.

NUWF has met the low threshold for showing an injury in fact. The organization has presented affidavits of members Dottie Milford, Zeke Norton, and Effie Lawless describing their use of the Muddy River for recreational and aesthetic purposes. The three testified that they regularly use the Muddy River for boating, fishing, and picnicking. Milford testified that the Muddy River looks more polluted since Bowman's land clearing operations, and all three testified that they were aware of the differences to the river as a result of the wetlands being damaged. In addition, Norton testified that he has frogged the Muddy River area on and around the Bowman property for years. Since Bowman has cleared his field, Norton has seen a noticeable drop in the number of frogs in the drained field and wooded and buffer areas. The lower court dismissed this injury because Norton admitted on cross-examination that Bowman's property was posted for trespassing, and concluding that "[t]he inability to continue illegal activities cannot give rise to an injury to support standing." However, a plaintiff does not have to "show that he has a right of access to the site on which the challenged activity is occurring, or that he has an absolute right to enjoy the aesthetic or recreational activities that form the basis of his concrete interest." *Cantrell v. City of Long Beach*, 241 F.3d 674 (9th Cir. 2001).

Although Norton may have lacked a legal right to be on Bowman's property while frogging there in the past, the damage to the ecosystem is an impairment of his aesthetic and ecological interests sufficient to establish standing. And regardless of the illegality of Norton's past frogging activities, NUDEP's administrative order requires Bowman to grant an easement on his wetlands for public recreational use. Norton's future frogging on Bowman's wetlands will be legal. Because the NUWF members have presented testimony that their recreational and aesthetic enjoyment has been impaired by the discharge they have alleged a tangible, specific injury sufficient to satisfy the "concrete and particularized" requirement of *Lujan.*

NUWF also satisfies the "actual or imminent" injury in fact requirement. The district court found these injuries to be "speculative," concluding that the new year-round wetland in the buffer zone may result in benefits to the environment. The Supreme Court has treated alleged injuries as "speculative" when there is little likelihood the injury will actually occur, not when there is an actual injury that will later subsist. *See O'Shea v. Littleton***,** 414 U.S. 488, 497 (1974) (plaintiffs' lacked standing to challenge county's illegal bond setting practice because their injury depended on speculative possibility of future arrest); *City of Los Angeles v. Lyons*, 461 U.S. 95 (1983) (citizen lacked standing to challenge police department's chokehold policy because threat of future injury was merely speculative). In *O'Shea* and *Lyons*, the injuries complained of were unlikely to affect the plaintiff due to remoteness in time; there was no present injury to speak of and little chance of an injury occurring to the plaintiff in the near future. Here, actual harm to the NUWF members occurred when Bowman cleared his property in violation of the CWA. It is true that the newly designated wetland and buffer areas will likely lead to an improvement in the environmental conditions on and around Bowman's property, but it is unclear when the environmental benefits of the new developments will offset the harm caused by Bowman's activities. The fact that the current harms may be alleviated in the future does not change the fact that the injury is presently an "actual" harm. NUWF has shown an injury that is concrete, particularized, and actual.

B. <u>The injury to NUWF's members is traceable to Bowman's land clearing activities.</u>

For the purposes of showing standing, a plaintiff must show that the alleged injury is "fairly traceable" to the defendant's activities. *Lujan*, 504 U.S. at 560. This causation element is lower than what is required to prove proximate causation in a tort claim. *Pub. Interest Research Grp. of New Jersey v. Powell Duffryn Terminals*, 913 F.2d 64, 74 n. 10 (3rd Cir. 1990). In the

context of standing, traceability "does not mean plaintiffs must show to a scientific certainty that a defendant's effluent caused the precise harm suffered by the plaintiffs." *Natural Res. Def. Council v. SW Marine Inc.*, 236 F.3d 985, 995 (9th Cir. 2000). A plaintiff does not need to show the exact origins or type of discharge in a CWA case, but "must merely show that a defendant discharge[d] a pollutant that causes or contributes to the kinds of injuries alleged in the specific geographic area of concern." *Id.*

NUWF has met this burden here. It is undisputed that Bowman cleared and drained his property's fields and wetlands in violation of the CWA. Clearing fields and moving topsoil often results in the accumulation of silt and the discoloration of water, which is consistent with the plaintiffs' affidavits that the river looks more polluted. The draining is also likely to lead to displacement of wildlife and damage to ecological habitats, which is consistent with Norton's testimony that there are fewer frogs on and around Bowman's property. Because it is undisputed that Bowman conducted the challenged activities and the activities "cause or contribute to the kinds of injuries alleged in the specific geographic area of concern," NUWF has satisfied the traceability element for standing.

C. A favorable opinion by the court would likely redress the injury to the NUWF members.

The final showing a plaintiff must make for standing is "redressability." *Lujan*, 504 U.S. at 560-61. The element is satisfied when the plaintiff "shows that a favorable decision will relieve a discrete injury" caused by the defendant, but "he need not show that a favorable decision will relieve his *every* injury." *Massachussetts v. E.P.A.*, 549 U.S. 497, 525 (2007) (quoting *Larson v. Valente*, 456 U.S. 228, 244 n. 15 (1982)). Although NUWF cannot obtain civil damages in this case because there is no continuing violation (*infra* Section II) and they are precluded from suit by § 505 due to NUDEP's diligent prosecution (*infra* Section III), a

favorable decision on their § 505 suit would result in some form of remedy to their alleged injury. If not for the lack of subject matter jurisdiction due to the absence of a continuing violation and the diligent prosecution by NUDEP, the judicial system would have authority to grant relief to NUWF on its alleged injuries. As a result, NUWF has shown all three elements under *Lujan* and has standing under Article III to bring their § 505 suit.

II. THE DISTRICT COURT CORRECTLY CONCLUDED THAT NUWF'S § 505 CITIZEN SUIT IS BARRED BECAUSE BOWMAN'S CWA VIOLATION IS WHOLLY PAST.

As noted by the lower court, § 505 citizen suits require the defendant "to be in violation" of the Clean Water act's effluent standards or orders issued by the government at the time the citizen suit is initiated. 33 U.S.C. § 1365(a)(1). The Supreme Court has interpreted the phrase "to be in violation" as requiring a "continuous or intermittent violation" when the lawsuit was filed. *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Foundation, Inc.* 484 U.S. 49, 57 (1987) ("*Gwaltney I"*). The *Gwaltney I* Court reasoned that § 505's "pervasive use of the present tense" is a strong indication that CWA citizen suits only apply when there is a present violation, and not in cases involving a wholly past violation. *Id.* at 59-60. According to the Court, reading § 505 to allow citizen suits for past violations would "render incomprehensible" the § 505 "intent to sue" notice requirement, which is intended to give defendants an opportunity to become compliant without resorting to a lawsuit and give government an opportunity to take action. *Id.* at 59-60. Finally, "[p]ermitting citizen suits for wholly past violations of the Act could undermine the supplementary role envisioned for the citizen suit" by "chang[ing] the nature of the citizens' role from interstitial to potentially intrusive." *Id.* at 60-61.

On remand from *Gwaltney I,* the Fourth Circuit concluded that a plaintiff must establish an ongoing violation by showing 1) proof that violations have continued on or after the date the

complaint was filed, or 2) adducing evidence from which a jury could conclude that there is a likelihood of a recurrence of intermittent or sporadic violations. *Chesapeake Bay Foundation, Inc. v. Gwaltney of Smithfield, Ltd.*, 844 F.2d 170 (4th Cit. 1988) ("*Gwaltney II*"). Because NUWF has not shown continuing violations on or after the date the complaint was filed or a likelihood of a recurrence of Bowman's violation, they have failed to show that Bowman is "in violation" of the CWA. Their § 505 citizen suit therefore lacks subject matter jurisdiction.

A. Bowman's violation does not constitute a continuing violation because he is no longer discharging fill material into the Muddy River.

In order to show a continuing violation, a plaintiff must present proof of an active discharge at the time of the suit. The CWA defines "discharge" as "a discharge of a pollutant, and the discharge of pollutants." 33 U.S.C. § 1362(16). In other words, the CWA makes the *act* of discharging pollutants, not the failure to remedy lingering effects, a violation of the statute. The most natural reading of § 505 and *Gwaltney I*'s "to be in violation" requirement in the context of § 404 violations is that the defendant must be currently "discharging." To actually "be in violation" of the CWA requires that the defendant be in the process of violating some statutory language of the Act; the violation of the Act is "discharge," not passive ownership of land with previous discharges. If the defendant is no longer actively discharging, they can no longer be said "to be in violation" of § 404 in the present tense for the purposes of a § 505 citizen suit. In such a case, the proper remedy is an enforcement action by the EPA or relevant state agency, which is exactly what NUDEP has undertaken.

This interpretation of the "to be in violation" requirement has been adopted by numerous circuits. In a pre-*Gwaltney* case, the Fifth Circuit concluded that "[an] allegation that residual effects of [a leak] threaten groundwater and grassland does not amount to an allegation that

[defendant] is in violation of the Act." *Hamker v. Diamond Shamrock Chem. Co.*, 756 F.2d 392, 397 (5th Cir. 1985). The court held that even if the discharge continued to disperse and seep into groundwater, the defendant still could not be found to be "in violation" of the CWA in the present tense. § 1311(a) prohibits "discharges of any pollutant," which is defined by § 1362(12) as "any addition of any pollutant to navigable waters, from *any point source*." *Id.* Because a point source is a "discernible, confined, and discrete conveyance," 33 U.S.C. § 1362(14), the disbursement of previously discharged pollutants cannot constitute a new addition from a point source. *Id.* The court concluded that the plaintiff alleged "only that there are continuing *effects* from the past discharge, and such an allegation is insufficient for the purposes of [§ 505]." *Id.* The *Hamker* interpretation was adopted by the First Circuit in another pre-*Gwaltney* case one year later. *See Pawtuxet Cove Marina v. Ciba-Geigy Corp.*, 807 F.2d 1089 (1st Cir. 1986) (dismissing a citizen suit where the defendant facility had ceased operations).

After *Gwaltney*, many courts have continued to follow the *Hamker* rule and require a showing of an actual discharge at the time of the suit, or a likelihood that future discharges will occur. In *Connecticut Coastal Fishermen's Ass'n v. Remington Arms Co., Inc.*, the Second Circuit held that a gun club was not currently in violation of § 404 after they discharged lead and other materials into Long Island Sound. 989 F.2d 1305, 1311-13 (1993). Because the gun club had shut down and was no longer discharging materials, they could not be found "to be in violation," even if their previous discharge remained in the water. *Id.* at 1313 ("The present violation requirement of the Act would be completely undermined if a violation included the mere decomposition of pollutants"). Many courts have followed, or cited favorably, the *Hamker* rule by requiring proof of actual discharges rather than the mere presence of previously discharged material. *See, e.g., Sierra Club v. El Paso Gold Mines, Inc.*, 421 F.3d 1133, 1141

(10th Cir. 2005) (noting that the argument that seepage or migration is not a continuing violation has "considerable force" when there is no point source actively delivering discharges); *Aiello v. Town of Brookhaven*, 136 F. Supp. 2d 81, 120 (E.D.N.Y. 2001) (concluding that citizens may not bring suit "for the ongoing migrating leachate plume"); *Wilson v. Amoco Corp.*, 33 F. Supp. 2d 969, 975-76 (D. Wyo. 1998) (holding that "migration of residual contamination from previous releases does not constitute an ongoing discharge").

Other courts have reached the opposite conclusion, and have found ongoing violations where previously discharged § 404 material remains in place. NUWF relies on *Sasser v. Administrator*, 990 F.2d 127 (4th Cir. 1993), to argue that § 404 violations are continuing unless and until the fill material is removed. In *Sasser*, the Fourth Circuit concluded that a landowner who had filled wetlands on his property was subject to civil penalties for each day the fill remained in place. *Id.* at 129. The landowner argued that because he filled the wetlands prior to the CWA amendment authorizing civil penalties, the assessment of penalties was retroactive. The Fourth Circuit rejected this argument, concluding that "Dr. Sasser's violation of the Act is a continuing one. Each day the pollutant remains in the wetlands without a permit constitutes an additional day of violation." *Id.* at 129.

This approach stretches the concept of "violation" beyond its ordinary meaning, allowing plaintiffs to essentially avoid the requirement for a continuing violation altogether. The CWA violation in this case is an unpermitted § 404 discharge. Treating a defendant's failure to remove discharged material as a § 404 violation is to rewrite the statute, creating a new type of § 404 violation that is not found in the text. Since § 404 makes discharging unpermitted fill material a violation of the CWA, it follows that "to be in violation" of § 404 means *to be* discharging unpermitted fill material. The fact that there are continuing *effects* of Bowman's past, illegal

discharge after the date of the discharge does not mean that Bowman continues to discharge from a point source. To treat lingering effects of past violations as "discharges" from a point source would be to alter the meaning of "discharge" in the context of citizen suits.

NUWF's suggestion that the term "continuing violation" should have different meanings in § 402 and 404 violations is unsound. First, as the lower court recognized, some § 402 violations can be reversed or removed from the water, yet *Gwaltney I* squarely held that ongoing discharges or likely future discharges are required under § 402 for a continuing violation to exist. Second, requiring removal of deposited fill material before treating a § 404 violation as terminated has the potential to undermine the purpose of the CWA. In many cases, it may be more harmful than beneficial to remove the deposited fill material. Disturbing sediment through excavation can create large amounts of harmful silt deposits, which would further erode the bodies of water the CWA is designed to protect. Such an approach would put defendants in the untenable situation where they must either remain in violation of § 404 in perpetuity, or remove the fill and risk worsening the environmental conditions. Requiring dredged and fill material to be removed, rather than simply allowing it to settle and taking alternative remedial steps, would place an onerous burden on the defendant and enormous strain on many water bodies.

The district court also correctly noted that application of the continuing violation doctrine to require complete removal of fill material would "obviate application of the statute of limitations, for it would never start to run." Courts have recognized this anomaly in rejecting the application of the continuing violations doctrine to statute of limitations issues in environmental cases.[1] *3M Co v. Browner*, 17 F.3d 1453 (D.C. Cir. 1994) (rejecting the EPA's contention in a TCSA case that the continuing violations doctrine tolls the statute of limitations so long as the

[1] Although the ultimate question in statute of limitations issues, i.e., when the violation "accrues" for the purpose of starting the statute of limitations clock, is different than the question in citizen suits, the rationale for rejecting the continuing violations applies with equal force to both.

harm continues); *United States v. Tellluride Co.*, 884 F. Supp. 404 (D. Colo. 1995) (rejecting the position that "the statute of limitations [in a CWA case] does not begin to run until the fill is removed"), *rev.'d on other grounds*, 146 F.3d 1241 (10th Cir. 1998). In doing so, courts have recognized that "the concept of a *continuing discharge* must be distinguished from a *continuing impact*." *In re Robert J. Heser and Andrew Heser*, 2007 WL 4618371 at *9 (EPA 2007) (citing *Telluride*, 884 F. Supp at 408). This conceptual distinction applies with equal force here. NUWF's continuing violations approach conflates the discharge violation with the effects of the violation, allowing continuing effects to substitute for continuing violations.

This Court should follow *Hamker* and its progeny in requiring an ongoing discharge of fill material in violation of § 404 in order to establish a continuing violation. § 505's subject matter jurisdiction requirement that the violation be continuing would be rendered meaningless if the presence of the fill material on its own constituted a continuing violation. Such an approach conflates the violation of the statute (the discharge) with the effects of the violation, and would prevent the statute of limitations from running in § 404 cases. Finally, this approach would force defendants to either engage in potentially harmful excavation activities to remove previous discharge, or remain in violation of the CWA in perpetuity. Such an approach contravenes the purposes of the CWA and, absent explicit congressional instruction to the contrary, should be rejected. This Court should require a showing of an active discharge from a point source to establish a continuing violation. Because NUWF has presented no evidence that Bowman is currently engaged in discharging pollutants, there is no continuing violation and NUWF's § 505 suit lacks subject matter jurisdiction.

B. NUWF has adduced no evidence from which a reasonable trier of fact could conclude that there is a likelihood of a recurrence of intermittitent or sporadic violations.

Since NUWF has failed to show that Bowman is currently engaged in the discharge of pollutants, they must show a likelihood of recurrence of intermittent or sporadic violations. *Gwaltney II*, 844 F.2d at 171-72. In order to do so, a plaintiff must present evidence from which a factfinder could find a likelihood of continued violations, and this burden is not met by simply averring such a likelihood. *Remington Arms*, 989 F.2d at 1312. Courts consider "whether remedial actions were taken to cure violations, the *ex ante* probability that such remedial measures would be effective, and any other evidence presented during the proceedings that bears on whether the risk of defendant's continued violation" has been abated. *Gwaltney II*, 844 F.2d at 171-72. In general, courts have found a likelihood of recurrence in cases where there have been numerous discharges in the past or there is a particular reason that the defendant will pollute again. For example, in *American Canoe Ass'n v. Murphy Farms*, the fact that the five discharges at issue were the result of spraying equipment malfunctions that had not been corrected meant that they were likely to recur. 412 F.3d at 536, 539-40 (4th Cir. 2005). On the other hand, courts have refused to find continuing violations where the defendant showed that the reason for past discharges has been abated. *Remington Arm*s, 989 F.2d at 1312-13; *Wilson*, 33 F. Supp. 2d at 975-76 (D. Wyo. 1998).

NUWF has adduced no evidence that Bowman will discharge again in the future. Bowman's discharge was the result of a one-time land clearing operation, not a long-term, intermittent series of violations. There is no evidence in the record indicating that Bowman intends to conduct additional land clearing activities in violation of the CWA, and all evidence in the record points to Bowman's intent to comply with NUDEP's administrative order and settlement. Bowman has agreed to take affirmative steps to restore the wetlands he has damaged.

This will occur under the watch of NUDEP, which will likely take further action against Bowman in the event of future noncompliance. As a result, the reason for Bowman's past discharge has been remedied. Although it is possible that Bowman *could* pollute the water again, the plaintiff has presented no evidence showing any likelihood of this happening.

The lack of evidence of repeated violations in the past and the evidence that Bowman intends to comply are strong indications that Bowman is not at risk of likely recurrence of intermittent or sporadic violations. NUWF has failed to adduce evidence showing that Bowman will likely pollute again, meaning they have failed to meet their burden on this issue. Because NUWF has failed to establish a continuing violation, they lack subject matter jurisdiction to bring their citizen suit under § 505.

III. THE DISTRICT COURT CORRECTLY HELD THAT NUDEP HAD DILIGENTLY PROSECUTED AN ACTION AGAINST BOWMAN, PRECLUDING NUWF'S CITIZEN SUIT.

Even if Bowman's violation of § 404 of the CWA is continuing, NUWF's suit is still precluded because NUDEP has diligently prosecuted Bowman for his violation. § 505(b) of the CWA states:

> "No action may be commenced—
>
> . . .
>
> (B) if the Administrator or State has commenced and is diligently prosecuting a civil or criminal action in a court of the United States, or a State to require compliance with the standard, limitation, or order, but in any such action in a court of the United States any citizen may intervene as a matter of right."

33 U.S.C.A. § 1365(b).

Due to the circuit split and uncertainty concerning continuing violations, NUDEP commenced its own § 505 action 20 days before NUWF brought suit.[2] Before bringing suit, NUDEP reached a thorough settlement agreement with Bowman and issued an administrative order compelling Bowman to stop land-clearing activities and maintain the wetland in its natural state at his own expense. As NUDEP has pursued multiple avenues to prosecute Bowman and its actions will remedy NUWF's injury, NUWF's civil suit would be redundant and supplant government action. The lower court therefore correctly held that NUDEP had diligently prosecuted Bowman for his violation, barring NUWF's suit.

A. If Bowman's violation is continuing, NUWF's § 505 suit is necessarily precluded because NUDEP has already diligently prosecuted under § 505.

It is largely undisputed that government filing of a suit may constitute diligent prosecution to bar citizen suits under § 505. *See Friends of the Earth v. Consol. Rail Corp.*, 768 F.2d 57, 62 (2nd Cir. 1985); *Jones v. City of Lakeland, Tennessee*, 224 F.3d 518, 522 (6th Cir. 2000). As NUDEP is currently prosecuting an enforcement action in court under § 505, NUWF's § 505 suit is barred by the express language of § 505(b).

Allowing NUWF to file a complaint under the same provision under which NUDEP has already filed suit would supplant government action, contrary to the purpose of § 505's citizen suit provision. The Supreme Court has held that § 505's bar on citizen suits after governmental action has commenced "suggests that the citizen suit is meant to supplement rather than to supplant governmental action." *Gwaltney I*, 484 U.S. at 60. Likewise, legislative history indicates that government, and not citizens, is intended to be the primary enforcer of the CWA. S. Rep. No. 91-1196, at 36-37 (1970). As NUDEP has already commenced a civil action against

[2] NUDEP maintains that a 505 action against Bowman is untenable because there is no continuing violation. *See supra* Section II. However, NUDEP filed the 505 action in case the violation was found to be continuing, in order to thoroughly prosecute Bowman's violation.

Bowman, in addition to reaching a settlement agreement and issuing an administrative order, a citizen suit would only function to supplant its actions.[3]

B. If Bowman's violation is not continuing, then NUDEP's settlement agreement and administrative order are actions that may satisfy § 505(b)

NUDEP diligently prosecuted Bowman by reaching a settlement and issuing an administrative order requiring Bowman to cease dumping pollutants into the Muddy River and maintain a portion of the wetland area in its natural state. While § 505(b) explicitly identifies "civil or criminal action in a court" as "diligent prosecution," several courts have held that settlements and administrative orders may render citizen suits moot and activate the bar of § 505(b). *See Atl. States Legal Found., Inc. v. Eastman Kodak Co.*, 933 F.2d 124, 127 (2d Cir. 1991) (government's settlement eliminated need for citizen suit); *Envtl. Conservation Org. v. City of Dallas*, 529 F.3d 519, 528 (5th Cir. 2008) (government's consent decree mooted the plaintiff's citizen suit); *Friends of Milwaukee's Rivers v. Milwaukee Metro. Sewerage Dist.*, 382 F.3d 743 (7th Cir. 2004) (finding that a settlement agreement can in some instances preclude a citizen suit); *Comfort Lake Ass'n, Inc. v. Dresel Contracting, Inc.*, 138 F.3d 351, 355 (8th Cir. 1998) (holding that a stipulation agreement constituted diligent prosecution); and *Karr v. Hefner*, 475 F.3d 1192 (10th Cir. 2007) (finding consent decrees to be diligent prosecutions under the CWA). These circuits have held that failing to recognize non-judicial actions as diligent prosecutions would frustrate the purpose of the CWA by supplanting government action.

If settlements and administrative orders were not considered diligent prosecutions, then states would be discouraged from pursuing them, leading to under-enforcement of the CWA.

[3] NUWF's motion to consolidate the actions must also be denied because NUWF has not offered any compelling reason to consolidate actions. Fed. R. Civ. P. 42. Additionally, NUDEP's consent decree likely moots NUDEP's action, precluding consolidation. See United States v. Arch Coal, Inc., CIV.A. 2:11-0133, 2011 WL 2493072 (S.D.W. Va. June 22, 2011) (denying consolidation due to the existence of a pending consent decree).

Eastman Kodak, 933 F.2d at 127. To begin with, the overwhelming majority of state environmental enforcement actions are administrative orders. *See* Jeffrey G. Miller, *Theme and Variations in Statutory Preclusions Against Successive Environmental Enforcement Actions by EPA and Citizens Part One: Statutory Bars in Citizen Suit Provisions*, 28 HARV. ENVTL. L. REV. 401, 415 (2004). States direct less than 5% of their enforcement efforts toward judicial actions. *Id.* If settlements and administrative orders did not preclude citizen suits under § 505(b), violators would be reluctant to submit to agreements for fear of being sued, which would eviscerate government enforcement efforts. *See Karr*, 475 F.3d at 1197. As the Seventh Circuit explained, "[t]o say [the government agency] is not 'diligently prosecuting' the action if it does not sue the persons . . . would strip the [agency] of the control the statute provides." *Supporters to Oppose Pollution, Inc. v. Heritage Group*, 973 F.2d 1320, 1324 (7th Cir. 1992). Likewise, the government would be stripped of the control Congress intended it to have over CWA actions if its settlement agreements and administrative orders were not considered diligent prosecutions. Citizen suits would no longer supplement government actions, but would supplant them.

C. The thorough settlement agreement between NUDEP and Bowman, and the resulting administrative order were diligent prosecutions that preclude NUWF's citizen suit under § 505(b).

NUDEP's settlement agreement, administrative order, and consent decree were diligent prosecutions of Bowman's CWA violation. Because of the great deference the state government must be given in enforcement of the CWA, the burden is on the citizen-plaintiffs to rebut the presumption that prosecution was diligent. *Friends of the Earth, Inc. v. Laidlaw Envtl. Services (TOC), Inc.*, 890 F. Supp. 470, 486-87 (D.S.C. 1995). The Tenth Circuit has explained that § 505(b) "does not require government prosecution to be far-reaching or zealous. It requires only diligence." *Karr*, 475 F.3d at 1197. Because NUDEP had already prosecuted Bowman at the

time NUWF filed suit, there is no likelihood that Bowman will violate again, and NUDEP's administrative order will remedy NUWF's injury, NUWF has failed to carry its burden to prove that NUDEP's prosecution was not diligent.

i. NUDEP had already reached a settlement, issued an administrative order, and filed suit when NUWF commenced their citizen suit.

There are several factors courts consider when determining whether a prosecution was diligent, including:

> (1) whether the government required or sought compliance with the standard or limitation asserted in the citizen suit; (2) whether the government was monitoring or enforcing the violator's permits at issue at the time the citizen suit was commenced; (3) whether the violations alleged by the citizens had the potential to continue following the resolution of the government's case; and (4) the severity of the penalties in relation to both the violator's economic stature and penalties imposed for similar violations by the government.

Citizens Legal Envtl. Action Network, Inc, 2000 WL 220464, at *13 (W. D. Mo. 2000).

NUDEP's prosecution has satisfied all of these factors. To begin with, NUDEP reached a settlement and filed suit against Bowman before NUWF filed any suit. NUWF sent Bowman its intention to sue for his violations of the CWA on July 1, 2012. Shortly thereafter, NUDEP contacted Bowman about the violation. By August 10, 2012, Bowman and NUDEP had reached a settlement and NUDEP had issued an administrative order. On that date, NUDEP also filed suit under § 505 against Bowman. Then, on August 30, 2012, NUWF filed suit against Bowman under § 505. On September 5, 2012, NUDEP went further and filed a motion to enter a decree with terms identical to its administrative order.

NUWF's notice sent on July 1 alerted NUDEP that a violation had occurred and encouraged government response, just as Congress intended. *See* S. Rep. No. 91-1196, at 36-37 (1970). § 505 requires citizens to give sixty days notice of intent to sue to the state government

and the violator. *See* 33 U.S.C. § 1365(b)(1)(A). The Supreme Court has stated that the purpose of this sixty-day notice requirement is to provide the state the opportunity to commence its own enforcement action. *See Hallstrom v. Tillamook County*, 493 U.S. 20, 29 (1989). As NUDEP completed a settlement, issued an administrative order, and commenced suit within 60 days of NUWF notifying Bowman of its intent to sue, NUDEP's prosecution was diligent and NUWF's suit unnecessary.

ii. There is no likelihood that Bowman will violate the CWA again.

While some courts have held that prosecution was not diligent when there is a likelihood that the violation will recur, NUDEP's settlement and administrative order were thorough decrees that ensure that Bowman's violation will not recur. Many circuits have held that citizen suits must be dismissed when there is no realistic prospect the violation will continue. *See Eastman Kodak*, 933 F.2d at 127 and *Envtl. Conservation Org.*, 529 F.3d at 528. However, when government conduct is found to not have a meaningful effect on the violator's conduct, there has not been diligent prosecution. In *Atlantic States Legal Found. v. Universal Tool & Stamping Co.*, the court concluded that prosecution was not diligent because a lenient penalty of $10,000 was unlikely to deter a violator who had committed hundreds of violations. 735 F. Supp. 1404, 1416 (N.D. Ind. 1990). In *Friends of Milwaukee's Rivers v. Milwaukee Metro. Sewerage Dist.*, the court found that the government's actions were not diligent because the violations continued over a thirty-year period, despite reaching an agreement requiring the violators to spend $2 billion to resolve their pollutant discharge. 382 F.3d 743, 749 (7th Cir. 2004).

In this case, there is no analogous element that would discourage Bowman from complying with NUDEP's order. While NUDEP chose to forgo issuing a penalty in this case,[4]

[4] *See infra* Section C(iii) for a discussion of penalties.

Bowman will still be forced to foot the cost of preserving the wetlands in its natural state and relinquish his property's agricultural and development value. Furthermore, Bowman's violations are not recurring like in *Friends of Milwaukee* and *Atlantic States*. In fact, this was only Bowman's first offense. As there is no evidence to suggest that the settlement agreement and administrative order will not achieve a permanent end to his violations, NUDEP's prosecution was diligent.

iii. The lack of penalty is not dispositive of diligent prosecution because Bowman will be forced to spend his own funds in order to comply with NUDEP's agreement, and a lack of penalty does not rebut the presumption of diligent prosecution.

In addition to the lack of a realistic possibility that Bowman's violations will continue, NUDEP's decision to forgo issuing a penalty does not rebut the presumption of diligent prosecution. The Supreme Court has recognized that the ability of citizens to file suit solely due to the lack of penalty would severely undermine the government's discretion to enforce the CWA and curtail the public interest. *See Gwaltney*, 484 U.S. at 60-61. In discussing a consent decree, one court pointed out that "[t]he mere fact that a settlement reached by the state is less burdensome to the defendant than the remedy sought in the complaint in the citizen suit does not establish that the state failed to prosecute its action diligently." *See Connecticut Fund for the Environment v. Contract Plating Co.*, 631 F. Supp. 1291, 1294 (D. Conn. 1986). NUWF's preference that Bowman receive a penalty for his violation does not justify their suit, nor demonstrate that NUDEP's prosecution was not diligent.

iv. The settlement agreement and administrative order will achieve the objectives stated in NUWF's suit.

NUWF's citizen suit is superfluous to NUDEP's settlement agreement and administrative order because NUDEP's actions will cure NUWF's alleged injury in fact. In order to diligently

prosecute an action, the government must vindicate the interests of the citizens involved, not achieve everything the citizens may wish upon the violator. Peter A. Appel, *The Diligent Prosecution Bar to Citizen Suits: The Search For Adequate Representation*, 10 WIDENER L. REV. 91, 107 (referencing *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 185-86 (2000)). NUWF's members have alleged harm to their recreational and aesthetic enjoyment of the Muddy River. *See supra* Section I. Bowman never cleared the area of his property that borders the Muddy, so it remains intact in its wetland state. Furthermore, the actions NUDEP has required Bowman to take will have the effect of creating an even richer wetland habitat, leading to an increase in the frog population. Restoration of all the wetland area that Bowman has cleared therefore will not have the effect of remedying NUWF's injury-in-fact because NUDEP's actions have already remedied it.

NUWF's desire to remove the fill material will also not justify its suit. As the Sixth Circuit stated, "[a] mere disagreement over litigation strategy or individual aspects of a remediation plan does not, in and of itself, establish inadequacy of representation." *Bradley v. Milliken*, 828 F.2d 1186, 1192 (6th Cir. 1987). Congress has intended that governments, and not individuals, be the primary enforcers of the CWA. *See* S. Rep. No. 91-1196, at 36-37 (1970). NUDEP's choice not to order Bowman to remove the fill material as part of its remedial measures must be respected. New Union may have recognized that the process of removing fill material could require dredging, an activity that Congress has recognized as an environmentally hazardous process. *See, e.g.* 33 U.S.C. § 1344 (requiring a permit for the discharge of dredged material) and 33 U.S.C. § 1362 (recognizing "dredged spoil" as a pollutant). Or New Union may have come to the conclusion that ordering removal of the fill material would be neither cost-effective nor environmentally warranted, considering Bowman has already planted vegetation in

the area. *See United States v. Huebner*, 752 F.2d 1235, 1245 (7th Cir. 1985) (finding that a restorative injunction was inappropriate because it would destroy newly planted cranberry beds). In order to ensure that NUWF's citizen suit does not supplant NUDEP's action and rob New Union of its authority to prosecute under the CWA, NUWF's suit must be denied.

IV. THE LOWER COURT ERRED IN FINDING THAT BOWMAN DID NOT VIOLATE § 404 BECAUSE HIS ACT OF TRANSFORMING MATERIAL INTO A POLLUTANT CONSTITUTES AN ADDITION OF A POLLUTANT UNDER THE CLEAN WATER ACT.

Bowman violated the CWA by creating new pollutants through bulldozing and burning vegetation, then discharging the resulting fill material into his wetland property and the Muddy River without a permit. § 301(a) of the CWA states in relevant part: "Except as in compliance with this section and [section] . . . 1344 of this title, the discharge of any pollutant by any person shall be unlawful." 33 U.S.C. § 1311(a). § 1344 refers to § 404 of the CWA, which allows permits "for the discharge of dredged or fill material into the navigable waters at specified disposal sites." 33 U.S.C. § 1344. It is undisputed that Bowman did not have a permit to dicharge fill material.

"Discharge of a pollutant" is defined in § 502(12) of the CWA to mean "any addition of any pollutant to navigable waters from any point source." *Id.* § 1362(12). It is further undisputed that Bowman's actions have satisfied the elements of "pollutant," "navigable waters," and "point source." Bowman clearly added a pollutant to his wetland property and the adjacent Muddy River when he cleared and redeposited land, creating new pollutants in the form of incinerator residue and biological material. Under the CWA, the addition does not have to be from the "outside world" because an outside world requirement would eviscerate § 404 permit requirements. *See United States v. Deaton*, 209 F.3d 331, 336 (4th Cir. 2000). Furthermore, the addition cannot be nullified solely by a hydrological connection in § 404 contexts because this

would conflict with Congressional intent. *See* National Pollutant Discharge Elimination System (NPDES) Water Transfers Rule, 73 FR 33697-01. Bowman's actions therefore constitute an addition, satisfying all of the elements of a 404 violation.

A. The redeposit of incinerator residue and biological material is an addition of a pollutant

Through the process of clearing land on his property, Bowman created new pollutants: incinerator residue and biological material. The CWA defines "pollutant" as:

> dredged spoil, solid waste, incinerator residue, sewage, garbage, sewage sludge, munitions, chemical wastes, biological materials, radioactive materials, heat, wrecked or discarded equipment, rock, sand, cellar dirt and industrial, municipal, and agricultural waste discharged into water.

33 U.S.C. § 1362 (2006).

The EPA has defined incinerator residue as "the material that remains after incineration." *See Seaburn Inc. v. EPA*, 712 F. Supp. 218 (D.D.C. 1989). Bowman created incinerator residue when he burned the windrows made from leveled trees and vegetation on his property into ash. Additionally, the materials he burned were vegetation and trees. These are biological materials, which are also identified as pollutants under the CWA.

Bowman's burning of the windrows did not merely transform some material from living to dead, but actually added a pollutant. In *Nat'l Wildlife Fed'n v. Consumers Power Co.*, the Sixth Circuit held that a dam was not adding a pollutant despite transforming water quality, resulting in the death of many aquatic life forms. 862 F.2d 580 (6th Cir. 1988). In this case, Bowman has not just changed biological material from living to dead by burning trees and vegetation, but has actually created a new pollutant under the CWA. As the Sixth Circuit stated in *Consumers Power*, "if the dam itself added pollutants to the water, rather than merely transmitting the water coming into it, in whatever altered form, then it would be subject to the …

permit system." *Id.* at 586. Bowman added incinerator residue, a pollutant under the CWA, to the wetlands and channeled them into the Muddy River.

The addition of biological material as fill material in the present case constitutes an addition of a pollutant, unlike in *Consumers Power*. *Consumers Power* found that the addition of biological material did not constitute an addition of pollutant merely because materials were transformed from living to dead. First, it was uncertain whether the biological material was discharged from a point source, another element of "discharge of pollutant." *Id.* A dam transferred unclean water, which contained no pollutant under the CWA, resulting in the death of many fish transferred through the dam with the water. *Id.* at 585. The court chose to circumvent the "point source" issue by deciding the "addition" issue, reasoning that the issues are related. *Id.* In the present case, it is undisputed that the "point source" element is satisfied by Bowman's bulldozer. Accordingly, there is no similar ambiguity concerning the "addition" element.

Second, *Consumers Power* concerned a § 402 permit, which more broadly governs the discharge of pollutants, while § 404 concerns specifically the discharge of dredged and fill materials containing pollutant. In the 404 context, several courts have found that there has been an addition of a pollutant solely due to the redeposit of material classified as a pollutant under the CWA. *See United States v. Banks*, 873 F. Supp. 650, 657 (S.D. Fla. 1995) (holding that the redeposit of rock fill, dirt, and biological materials through leveling, grading, and filling constituted a 404 violation); *Deaton*, 209 F.3d 331 (finding the creation of dredge spoil from the redeposit of material to be an addition of a pollutant); *Avoyelles Sportsmen's League, Inc. v. Marsh*, 715 F.2d 897, 923 (5th Cir.1983) (holding that the word "addition" may be reasonably understood to include "redeposit"); *Borden Ranch P'ship v. U.S. Army Corps of Engineers*, 261 F.3d 810, 814 (9th Cir. 2001) ("redeposits of materials can constitute an 'addition of a pollutant'

under the Clean Water Act"). Though Bowman added no new material from outside of the wetlands, he transformed biological material into pollutant when he burned it and redeposited it into the wetlands and the Muddy.

Classifying the redeposit of transformed material as an addition is not an "imaginative piece of verbal metaphysics [that] masks reality" as the lower court colorfully described, but is true to the plain text of the CWA. R. at 10. As the Fourth Circuit pointed out, the CWA "does not prohibit the addition of *material*; it prohibits 'the addition of any *pollutant*.'" *Deaton*, 209 F.3d at 335 (emphasis added). Redeposits of biological material can create a pollutant, and incinerator residue is a pollutant that was not present in the wetlands or the Muddy until Bowman burned the windrows. To say that Bowman did not add any pollutant when he burned and redeposited pollutant-material is an act of cognitive gymnastics that ignores scientific reality: industrial processes can create pollutants when none existed before. Bowman therefore added a pollutant when he bulldozed and burned biological material.

B. There should be no "outside world" requirement for an addition under § 404 because this interpretation gives too much deference to the EPA, ignores hydrologic manipulation, and would cripple the § 404 permit system

i. The EPA's definition of "addition" as from the outside world and "unitary navigable waters theory" should not be afforded Chevron *deference.*

While the EPA has defined "addition of pollutant" in certain contexts to require the pollutant come from the outside world, this definition should not be afforded deference. *See, e.g., Nat'l Wildlife Fed'n v. Gorsuch*, 693 F.2d 156, 175 (D.C. Cir. 1982). In *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, the Supreme Court held that when Congress has not directly spoken to a precise issue, then the court should accept an agency's interpretation as long as it "is based on a permissible construction of the statute." 467 U.S. 837, 842-43 (1984). However, the Supreme Court has since clarified several times that informal agency statements do

not merit *Chevron* deference. *See United States v. Mead Corp.*, 533 U.S. 218 (2001) (finding that classification rulings are "beyond the *Chevron* pale"); *Christensen v. Harris County*, 529 U.S. 576 (2000) (holding that "interpretations contained in policy statements, agency manuals, and enforcement guidelines" lack the force of law and are not entitled to *Chevron*-deference); *EEOC v. Arabian American Oil Co.*, 499 U.S. 244, 256-258 (1991) (interpretative guidelines do not receive *Chevron* deference). The EPA's definition of "addition" as "from the outside world" has never been adopted in a rulemaking or other formal proceeding, but has been solely developed through a series of informal policy statements and consistent litigation positions. *Greenfield Mills, Inc. v. Macklin*, 361 F.3d 934, 948 (7th Cir. 2004) (internal citations omitted). The EPA's interpretation that the pollutant come from the outside world is therefore not entitled to special *Chevron* deference.

ii. The EPA's formal regulation defining "addition" applies only to § 402 permits, and not § 404 permits.

The EPA has adopted a formal regulation that specifically concerns the National Pollution Discharge Elimination System (NPDES) permitting program contained in § 402 of the CWA. In relevant part, the regulation states:

> EPA is issuing a regulation to clarify that water transfers are not subject to regulation under the National Pollutant Discharge Elimination System (NPDES) permitting program. This rule defines water transfers as an activity that conveys or connects waters of the United States without subjecting the transferred water to intervening industrial, municipal, or commercial use.

National Pollutant Discharge Elimination System Water Transfers Rule, 73 FR 33697-01.

The regulation thus incorporates the EPA's "unitary navigable waters" theory, under which all navigable waters that are hydrologically connected are considered one body of water. Under this theory, if a pollutant originates from one navigable water with a hydrologic connection to another, there can be no addition of a pollutant to the connected body of water.

This theory clearly applies only to § 402 permits and not to § 404 permits, and therefore should not be entitled to *Chevron* deference. The regulation is named for the NPDES, which is § 402 of the CWA. *See* 33 U.S.C. § 1342. Furthermore, the regulation explicitly clarifies that the unitary navigable water theory cannot apply to §404 permits because it would contradict congressional intent:

> Because Congress explicitly forbade discharges of dredged material except as in compliance with the provisions cited in CWA section 301, today's rule has no effect on the 404 permit program, under which discharges of dredged or fill material may be authorized by a permit.

Id.

As the EPA has explicitly stated in its own formal regulation that the unitary navigable waters theory cannot apply to § 404, there is no agency interpretation to defer to that applies the unitary navigable waters theory in a 404 context.

iii. The unitary navigable waters theory and the outside world requirement for addition conflict with congressional intent.

In addition to the EPA discouraging application of the unitary navigable waters theory to 404 permits, applying this theory in a 404 context would clearly conflict with congressional intent. The Supreme Court has stated that the same terms used in different parts of the same statute should be interpreted as having the same meaning, unless Congress clearly provides otherwise. *See Sorenson v. Sec'y of the Treasury*, 475 U.S. 851 (1986). As the EPA recognized, Congress clearly did not intend the unitary navigable water theory and outside world interpretation to apply to "addition" in the context of § 404 permits.

By identifying dredged spoil as a pollutant and requiring a permit for dredging under § 404, Congress intended to regulate activities that transform a nonpollutant into a pollutant, regardless of origin. Dredged spoil by definition is only plain dirt excavated from water and then

redeposited. *See. Deaton*, 209 F.3d at 336. By classifying it as a pollutant, Congress recognized that plain dirt, once excavated, could not be redeposited without causing environmental harm. *Id.* Likewise, by requiring a permit for the discharge of dredged or fill material, Congress implicitly recognized the potential damage of material redeposits and sought to regulate them. If the outside world theory were applied to § 404 permits, congressional regulation of dredging would be severely undermined. For example, dredging for the sole purpose of destroying the biological integrity of wetlands would no longer be regulable because the dredged spoil originated from the wetland. Alison M. Dornsife, *From A Nonpollutant into A Pollutant: Revising EPA's Interpretation of the Phrase "Discharge of Any Pollutant" in the Context of Npdes Permits*, 35 ENVTL. L. 175, 199 (2005). As Congress clearly intended to regulate dredging, regardless of the origin of redeposits, "addition" cannot be interpreted to have the same meaning in both 402 and 404 contexts.

iv. The unitary navigable waters theory would not preclude a finding of an addition of a pollutant because Bowman manipulated the directional flow of water.

Even under the unitary navigable waters theory, Bowman has added a pollutant to the Muddy River by manipulating the flow of water. The Second and Eleventh Circuits have concluded that when water is artificially diverted from its natural course into another body of water, there has been an addition, despite a hydrologic connection between the bodies of water. *See Friends of Everglades v. S. Florida Water Mgmt. Dist*., 570 F.3d 1210, 1221-22 (11th Cir. 2009) (finding that waters are not the same under the unitary navigable water theory when directional flow is artificially manipulated); and *Catskill Mountains Chapter of Trout Unlimited, Inc. v. City of New York*, 273 F.3d 481, 492 (2d Cir.2001) (holding that an addition of a pollutant has occurred when water is artificially diverted from its course). Bowman dug a ditch and drained incinerator residue and biological materials into the Muddy River, thereby diverting its

natural course through the wetlands. Even under the unitary navigable waters theory, Bowman added a pollutant into the Muddy River, and violated §§ 301(a) and 404 of the CWA.

CONCLUSION

Petitioners NUWF have established a concrete, particularized, and actual injury to their members' recreational interests caused by Bowman's actions and capable of redress in a court of law, entitling them to standing to bring suit. However, NUWF's § 505 suit lacks subject matter jurisdiction because the key element of a continuing violation is not satisfied. Bowman's violation had ceased at the time NUWF brought suit, and there is no realistic potential that he will violate again. NUWF's § 505 suit is additionally barred by NUDEP's diligent prosecution of Bowman by reaching a settlement agreement, issuing an administrative order, and commencing their own § 505 action before NUWF, in case the violation is found to be continuing by a court of law. Finally, Bowman violated §§ 301(a) and 404 of the CWA when he redeposited incinerator residue and biological material into his wetland property and channeled them into the Muddy River without a permit. In the context of § 404 violations, Congress clearly intended to regulate the redeposit of polluted material, so Bowman's redeposit satisfies the "addition" element of "discharge of a pollutant," regardless of whether the material originated from the outside world or entered bodies of water with a hydrologic connection.

For the forgoing reasons, NUDEP respectfully requests that this Court reverse the lower court's judgment concerning issues I and IV, and affirm the lower court's judgment concerning issues II and III.

Respectfully Submitted,

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Counsel for New Union Department of Environmental Protection