Team No. 31

CA. No. 13-1246

In the United States
Court of Appeals for the Twelfth Circuit

NEW UNION WILDLIFE FEDERATION,

Plaintiff-Appellant,

v.

NEW UNION DEPARTMENT OF ENVIRONMENTAL PROTECTION,

Intervenor-Appellant,

v.

JIM BOB BOWMAN,

Defendant-Appellee.

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

BRIEF FOR NEW UNION DEPARTMENT OF ENVIRONMENTAL PROTECTION
Intervenor-Appellant

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STATEMENT OF JURISDICTION

This is an appeal from an order entered by the United States District Court for the District of New Union granting summary judgment to Jim Bob Bowman ("Bowman"), and denying summary judgment to the New Union Wildlife Federation ("Federation"). This matter was properly before the district court pursuant to the court's original jurisdiction for federal questions under 28 U.S.C. § 1331 (2006) concerning the Federation's citizen suit brought against Bowman under the Clean Water Act ("Act") § 505, 33 U.S.C. § 1365 (2006), for his alleged violations of §§ 301(a) and 404 of the Act, *id.* §§ 1311(a), 1344. The New Union Department of Environmental Protection ("Department") intervened in the district court action.

The district court's order entered on June 1, 2012, is final and appealable as required by Fed. R. App. P. 4(a)(1)(A) and as defined in Fed. R. App. P. 4(a)(7)(A)(i). Both the Federation and the Department filed timely Notices of Appeal consistent with Fed. R. App. P. 3(a). This Court granted the appeal on September 14, 2012, and has jurisdiction pursuant to 28 U.S.C. § 1291 (2006).

STATEMENT OF THE ISSUES PRESENTED FOR APPEAL

I. Whether the Federation has standing to sue Bowman for violating the Act.

II. Whether the Federation's citizen suit has been barred by the Department's diligent prosecution of Bowman as set out in § 505(b) of the Act.

III. Whether Bowman violated the Act when he moved dredged and fill material from one part of a wetland adjacent to navigable water to another part of the same wetland.

IV. Whether there is a continuing or ongoing violation as required by § 505(a) of the Act for subject matter jurisdiction.

STATEMENT OF THE CASE

On July 1, 2011, the Federation sent notice of its intent to file a citizen suit under the Act, 33 U.S.C. § 1365, against Bowman for filling wetlands without a permit in violation of §§

1311(a) and 1344. (R. at 4.) One month later, the Department entered into an administrative compliance order with Bowman. (R. at 4.) Only ten days after issuing the order, the Department sued Bowman in federal court. (R. at 5.) The Federation filed its own complaint against Bowman twenty days later seeking civil penalties and the removal of the fill material. (R. at 5.) The district court later granted a request to consolidate the two actions. (R. at 5.)

On September 5, 2011, the Department filed a motion to enter a consent decree with terms identical to that of the administrative order. (R. at 5.) And Bowman consented to that motion which is still pending. (R. at 5.)

After discovery, the parties filed cross-motions for summary judgment. (R. at 5.) On June 1, 2012, the district court granted Bowman's motion and denied the Federation's motion. (R. at 5.) The court held that: (1) the Federation lacked standing to bring a citizen suit against Bowman; (2) the court lacked subject matter jurisdiction because all violations were wholly past; (3) the court lacked subject matter jurisdiction because of prior state action; and (4) Bowman did not violate the Act. (R. at 11.)

The Federation and the Department each filed a Notice of Appeal. The Department and the Federation appeal the district court's holding that Bowman did not violate the Act. (R. at 2.) The Federation also appeals the court's finding that the Federation lacked standing to bring its claim. (R. at 1.) Finally, the Federation takes issue with the court's holding that the court lacked subject matter jurisdiction on the separate bases that the violations were wholly past and the prior state action precluded the claim. (R. at 2.) This Court granted review on September 14, 2012. (R. at 2.)

STATEMENT OF THE FACTS

Bowman's Land

Bowman owns 1,000 acres of wooded or previously wooded land that is adjacent to the Muddy River. (R. at 3.) His land is located entirely within the State of New Union. (R. at 3.) The Muddy River serves as a border between New Union and Progress for at least forty miles in either direction from Bowman's property. (R. at 3.) The river is large, at 500 ft. wide and more than six ft. deep. (R. at 3.) The river is primarily used for recreational navigation. (R. at 3.)

Bowman's land has 650 ft. of river shoreline and is located completely within the one-hundred-year flood plain of the river. (R. at 3.) Parts of the flood plain, including Bowman's land, are inundated with water each year when the river is high. (R. at 3.) All parties agree that Bowman's land is a wetland. (R. at 4.) The land is hydrologically connected to the river and is covered with trees and vegetation consistent with the characteristics of wetland vegetation. (R. at 3-4.)

Clearing the Land

On June 15, 2011, Bowman began to clear his land for agricultural use. (R. at 4.) Using bulldozers, he knocked down the trees and leveled vegetation, and pushed the remains into windrows which he then burned. (R. at 4.) He continued to level the land by pushing soil, ash, and the remaining vegetation into the trenches and low-lying areas. (R. at 4.) He formed a ditch to allow the field to drain into the river. (R. at 4.) Bowman left a strip of land untouched because it was hard to clear due to its saturated nature. (R. at 4.) This land is approximately 150 ft. wide and runs the entire 650 ft. of Bowman's river frontage. (R. at 4.)

The Federation and its Members

The Federation is a not-for-profit corporation that serves to protect the state's fish and wildlife. (R. at 4.) The Federation is organized and funded by its members. (R. at 4.) Dottie Milford, Zeke Norton, and Effie Lawless are members of the Federation. (R. at 4.) These members testified that they use the river for recreational boating, picnicking, and fishing, often nearby Bowman's land. (R. at 4.) The members testified that they believe the river is more polluted than it used to be and fear that the river will become even more polluted if additional wetlands are cleared and put to agricultural use. (R. at 4.) Zeke Norton in particular testified that there are fewer frogs to hunt for now than there used to be near Bowman's land, though he also acknowledged that frogging on Bowman's land may be illegal trespass. (R. at 4.) And the members also acknowledged that they cannot see a difference in the land either from the river or its banks. (R. at 6.)

Bowman and the Department Reach an Agreement

Bowman completed his clearing activities approximately one month after he started. (R. at 4.) The Department, pursuant to its authority granted by the EPA, entered into a settlement agreement (essentially a compliance order) with Bowman. (R. at 4.) The Department agreed not to seek the penalties authorized under the Act if Bowman would agree to: (1) refrain from clearing any more wetlands in the area; (2) convey to the department a conservation easement on the 150-foot strip of property adjacent to the river plus a seventy-five-foot buffer area between the strip and the field; (3) construct and maintain a year-round wetland on that seventy-five-foot area; (4) maintain it as an artificial wetland; and (5) allow the public to enter for recreational purposes via the conservation easement. (R. at 4.) The Department's biologist testified that the

new year-round wetland contemplated by the agreement will provide a richer and higher-quality wetland habitat than did the former wetland. (R. at 6.)

SUMMARY OF THE ARGUMENT

Citizen-Suit Standing

The district court erred in holding that the Federation lacked standing to bring a citizen suit against Bowman. The lower court reasoned that illegal frogging could not give rise to an injury in fact to establish standing because individuals do not have rights in illegal activities. However, the Federation does not claim that it has standing because of the illegal frogging. The Federation has standing because its members have suffered at least two injuries from Bowman's destruction of the wetlands. First, the rights of the members to use the Muddy River for aesthetic and recreational activities has been diminished. Second, the members have a reasonable fear that the Muddy River has been and will continue to be polluted because of the wetland's destruction. Since the Federation can prove that its members did, in fact, suffer an injury in fact, it has standing to bring a citizen suit against Bowman.

The Department's Diligent Prosecution as a Bar to the Federation's Citizen Suit

The district court was correct in holding that it lacked subject matter jurisdiction to decide the Federation's complaint. The Department has already taken several actions—which are more than enough—to correct Bowman's violation. It has done more than enough to correct this situation. It has agreed to a beneficial settlement, which alone requires substantial financial and time commitments of Bowman. And it has filed a formal complaint against Bowman in federal court for violating the Act. But most importantly, the Department's diligent prosecution serves the best interest of all parties involved—the public gains a right to the recreational use of a natural wetland, which will enhance the local ecosystem, and Bowman keeps his land while avoiding significant penalties. These prior actions taken by the Department bar the Federation from bringing a citizen suit against Bowman because Bowman's violation has already been

diligently prosecuted. Therefore, the district court was correct in holding that it lacked subject matter jurisdiction.

Addition

The district court erred in holding that Bowman did not violate the Act. The court found that in consideration of both the outside world and the unitary navigable waters theories, Bowman did not add a pollutant to the wetland. But the Federation has unequivocally shown Bowman did add pollutants under the Act because the bulldozer created the dredged spoil that Bowman later redeposited into the wetland. The Federation posits that these theories are merely persuasive and do not merit full *Chevron* deference. Courts have recognized that these theories are nothing more than informal opinions that are inconsistent with congressional intent. But even if this Court grants *Chevron* deference to either the unitary waters or outside world approaches, Bowman's sidecasting and redeposit of the dredged spoil meets the addition element—and is a violation—under the Act.

Continuing Violation

The district court properly dismissed the Federation's suit for lack of subject matter jurisdiction because there was no continuing violation. Courts do not have subject matter jurisdiction over a citizen suit under § 505 for wholly past violations; there must be a continuous or intermittent violation. A continuing violation will be found if it occurs on or after the date of filing the complaint or if there is a reasonable likelihood that past violations will be continued in the future. Courts have found the filling of wetlands to be a continuing violation when the polluter refuses to acquiesce to an agency's enforcement attempts. Here, however, Bowman has willingly entered into a settlement agreement with the Department, which requires him to maintain the property along the river as a recreational wetland and to refrain from any further

filling activities. There is no reasonable likelihood that Bowman will violate the terms of the agreement. And the continued presence of the fill in the acreage outside the conservation easement is not a continuing violation because (1) all fill activities ceased prior to the Federation's filing of its complaint and will not be resumed, (2) the current state of the wetland has been implicitly approved by the Department via the settlement agreement, and (3) the wetland will enhance rather than harm the local ecosystem going forward. Because there is no continuing violation, there can be no subject matter jurisdiction over the Federation's citizen suit.

STANDARD OF REVIEW

Appeals from a district court's grant of summary judgment are reviewed *de novo*. *Range Road Music, Inc. v. East Coast Foods, Inc.*, 668 F.3d 1148, 1152 (9th Cir. 2012). Summary judgment is properly granted when the moving party is entitled to judgment as a matter of law because there are no legitimate issues of material fact. Fed. R. Civ. P. 56(c). The court's review of subject matter jurisdiction is also *de novo* because jurisdiction is a question of law. *WildEarth Guardians v. Public Service Co. of Colorado*, 690 F.3d 1174, 1181 (10th Cir. 2012).

ARGUMENT

I. THE DISTRICT COURT ERRED WHEN IT HELD THAT THE FEDERATION LACKED STANDING TO BRING A CITIZEN SUIT AGAINST BOWMAN FOR VIOLATING THE ACT.

Two facets of standing are at issue in this case: constitutional and statutory. Under Article III of the United States Constitution, the power of federal courts is limited to deciding actual "cases" and "controversies." U.S. Const. art. III, § 2. To satisfy the case-or-controversy requirement and establish standing, plaintiffs must show (1) an injury in fact, (2) that is causally connected to the defendant's alleged violation, and (3) that will likely be redressed by the court with a favorable decision. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992). For an organization to have standing to sue on behalf of its members, it must additionally show that (1) its members would have standing in their own right, (2) their interests are germane to the organization's purpose, and (3) the members are not required to participate in the suit. *Hunt v. Washington State Apple Advertising Commission*, 432 U.S. 333, 343 (1977). And § 505 of the Act provides that any citizen can bring a suit against any person alleged to be in violation of the Act. 33 U.S.C. § 1365.

Because the district court focused on injury-in-fact and did not reach the second and third prongs of the *Lujan* test (causation and redressability), the Department's standing analysis is similarly limited to injury-in-fact. The Federation established that it had standing to bring a citizen suit on behalf of its members, because they would have standing to sue in their own right for two reasons. First, Bowman's destruction of the wetlands caused them to suffer injuries to their aesthetic and recreational interests. *Sierra Club v. Morton*, 405 U.S. 727, 738 (1972). Second, Bowman's destruction of the wetlands created a reasonable fear in the members that additional pollution to the Muddy River would occur. And that fear existed at the time the

complaint was filed. *Friends of the Earth, Inc. v. Laidlaw Environmental Services*, Inc., 528 U.S. 167, 184-85 (2000). Thus, the members suffered an injury-in-fact and this Court should reverse the district court's holding and find that the Federation established standing and satisfied the requirements of Article III.

A. The Federation's members suffered an injury in fact because their use of the Muddy River for aesthetic and recreational activities was diminished by Bowman.

The Supreme Court has recognized that environmental well-being plays a significant role in our society's quality of life and held that, in environmental cases, an injury in fact may be "aesthetic, conservational, [or] recreational" rather than solely economic. *Morton*, 405 U.S. at 738. Those who live near a body of water care about its physical beauty. The same is true for those who use a body of water for recreation, even if the use is infrequent. Showing that environmental ruin of the area is injurious to an individual requires only a current recreational use and an honest assertion that such use will continue in the future. *Ecological Rights Foundation v. Pacific Lumber Co.*, 230 F.3d 1141, 1148 (9th Cir. 2000) (citing *Friends of the Earth v. Consolidated Rail Corp.*, 768 F.2d 57, 61 (2d Cir. 1985)). It is this flexible approach to aesthetic and recreational interests that provides the basis for standing in environmental cases. *Id.* (citing *Morton*, 405 U.S. at 734).

It is well recognized that the Act aims to ensure that the nation's waters are "fishable and swimmable." *Friends of the Earth, Inc. v. Gaston Copper Recycling Corp.*, 204 F.3d 149, 156 (4th Cir. 2000) (citing *Shanty Town Associates Ltd. Partnership v. EPA*, 843 F.2d 782, 784 (4th Cir. 1988)). Accordingly, the courts have recognized several forms of interests in aesthetic and recreational use sufficient to establish an injury in fact. For example, an organization had standing to sue because its members were no longer able to participate in photography, bird watching, hunting, and studying the history of the area. *Sierra Club v. United States Army Corps*

of Engineers., 645 F.3d 978 (8th Cir. 2011)); *see also Sierra Club, Lone Star Chapter v. Cedar Point Oil Co., Inc.*, 73 F.3d 546 (5th Cir. 1996)) (explaining that swimming, canoeing, and bird watching are recognized interests); *see also Gaston Copper*, 204 F.3d 149 (explaining that fishing and swimming are recognized interests).

Further, individuals need only establish a connection to the water at issue to establish an injury in fact. A connection can be made by making a good-faith allegation that life would be less enjoyable because aesthetic or recreational activity is or will be ruined. As little as a "fraction of a vote, a $5 fine and costs, and a $1.50 poll tax" has been found sufficient to establish an injury in fact. This Court need not adopt a more restrictive test. *National Wildlife Federation v. Agricultural Stabilization and Conservation Service*, 901 F.2d 673, 677 (8th Cir. 1990). For example, in *Laidlaw*, members of the organization testified that they suspected the river was polluted. Some members lived near the river. Some did not. Some used the river for recreational purposes in the past. And some would have used the river but for their fear of pollution. *See Laidlaw*, 528 U.S. 167. Each of these connections was enough.

In our case, the Federation's members testified, at a minimum, that they used the Muddy River recreationally for boating, fishing, and picnicking. The district court focused on the fact that illegal frogging could not give rise to an injury and establish standing because individuals do not have rights in illegal activities. But even if we take frogging out and do not consider it in the analysis, the members still established an injury in fact because Bowman's destruction of the wetlands and pollution of the river negatively affected their ability to continue their legitimate recreational activities.

B. The Federation's members also can show injury in fact because they have a reasonable fear that the Muddy River has been polluted and will be further polluted by Bowman.

For purposes of establishing standing, individuals must adequately document their injuries to show more than mere general averments and conclusory allegations. *Laidlaw*, 528 U.S. at 169. In *Laidlaw*, the affiants would have continued to use the river for recreational activities but for the defendant's discharge. The Court stated that the testimony added up to more than general averments and conclusory allegations which was adequate for standing under *Lujan*. *Id.* No matter how the fear is formed, the Supreme Court has not allowed standing where an affiant was vague and failed to name a specific injury. *Summers v. Earth Island Institute*, 555 U.S. 488, 495 (2009). An individual must be able to name (1) the particular activity that interferes with his or her interest and (2) a firm intent to visit an area affected by that activity in the future. *Id.* Specifically, individuals must document the nature of their use and what changed about that use to further prove that their fears were reasonable and that the defendant's actions directly affected their interests. *Id.* While Bowman may attempt to argue that the Federation's alleged injury is merely speculative because the members' water use has not been documented, *see, e.g.*, *Morton*, 405 U.S. at 735, the Federation has provided documentation similar to that found to be sufficient in other cases. For example, members in *Cedar Point Oil* stated in affidavits that they used a nearby bay for swimming, canoeing, and bird watching. 73 F.3d at 556.These members were more than mere bystanders. *Id.* They had a direct stake in the lawsuit because they feared the discharge would impair their enjoyment of the bay. *Id.*

In another example, members that studied, used, and enjoyed the water for years testified that storm-water discharge decreased their use and enjoyment of the land and water. *National Resource Defense Council v. U.S. EPA*, 437 F.Supp.2d 1137, 1146-47 (C.D. Cal. 2006). The

members were able to show through their personal experience and observations reasonable fears that the sedimentation, turbidity, and pollution existed and lessened their ability to enjoy the water in the same way they had before. *Id.* The court found standing. *Id.*

Where an individual's fear is reasonable, actual knowledge of pollution or a violation is not required for standing. In *Cedar Point Oil*, the members of the plaintiff organization testified that they were familiar with the discharge activities taking place in the bay and that they were concerned that it would negatively impact the quality of the water and wildlife. 73 F.3d at 556. The court stated that whether the members were concerned or knew to a moral certainty was of little significance in the standing analysis. *Id.* at 556. The court found that those members had established standing. *Id.* at 558. In another case, members testified that they were concerned about the pollution and contamination of aquatic life caused by storm-water discharge. *Natural Resources Defense Council v. Southwest Marine, Inc.*, 236 F.3d 985 (9th Cir. 2000). The court again found standing. *Id.*

While not required, knowledge of a violation or pollution is helpful to establish a reasonable fear. This is especially true if that knowledge created the fear in the first place. For example, a member was concerned about the harm that the continued pollution would have on the quality of water, its fish, and its plant life because he no longer felt safe fishing, swimming, or canoeing in the river. *American Canoe Association, Inc. v. City of Louisa Water & Sewer Commission*, 389 F.3d 536, 539-40 (6th Cir. 2004). He testified that the river smelled of petroleum and appeared darker than usual and that he was aware that the defendant was violating its permit to discharge. *Id.*at 540. The court found that the member had standing to sue in his own right. *Id.*at 545-47 Another court found that the evidence was sufficient to show that fears were reasonable where a family testified that they swam less and ate less fish from the water

because they feared pollution given their knowledge of the violations and negative health effects of the pollution. *Gaston Copper*, 204 F.3d at 157.

The district court in our case found that because there was no proof of concrete harm to establish injury in fact, the Federation lacked standing. But concrete harm has already been established in our case because the members' recreational and aesthetic interests were negatively affected and their fears that those interests will continue to be negatively affected are reasonable. The members in our case testified that they perceived a negative environmental change in the area because of Bowman's wetland destruction. They named the Muddy River as the affected area. They have testified that Bowman's destruction of the wetlands is the particular activity that caused the harm. And they intend to visit the river for the same uses in the future but fear the pollution. As a result, the members have met the requisite injury in fact to establish standing for the Federation to bring a citizen suit in this matter.

II. THE DISTRICT COURT CORRECTLY HELD THAT IT LACKED SUBJECT MATTER JURISDICTION OVER THE FEDERATION'S CITIZEN SUIT BECAUSE OF PRIOR STATE ACTION.

A citizen suit is barred if a government agency has diligently prosecuted a civil action that requires an individual to comply with the Act. 33 U.S.C. § 1365(b)(1)(B). The goal of a citizen suit is to supplement governmental action, not to supplant governmental action. *Gwaltney of Smithfield v. Chesapeake Bay Foundation*, 484 U.S. 49, 60 (1987) ("*Gwaltney I*"). As a result, a plaintiff seeking a citizen suit has the burden of proving that the defendant's prosecution was not diligent; this is a heavy burden to prove because the courts must presume that the agency's prosecution was diligent. *Karr v. Hefner*, 475 F.3d 1192, 1198 (10th Cir. 2007); *see also Community of Cambridge Environmental Health and Community Development Group v. City of Cambridge*, 115 F. Supp. 2d 550, 554 (D. MD. 2000).

The Federation is barred from bringing a citizen suit against Bowman because the Department diligently prosecuted him by (1) entering into an extensive settlement agreement with Bowman, and (2) filing a complaint against Bowman in federal court. These actions taken by the Department establish that there has been a prior state action regarding Bowman's violation of the Act. Therefore, the Federation is barred from bringing a citizen suit and the district court was correct when it held that it lacked subject matter jurisdiction to decide the Federation's complaint.

A. Absent a showing of bad faith, the Department is presumed to have diligently prosecuted a violation under the Act.

Under § 505(b)(1)(B), a citizen suit is barred if there is a diligent prosecution of an alleged violation. 33 U.S.C. § 1365(b)(1)(B). In *Gwaltney I*, the Supreme Court held that a "citizen suit is meant to supplement rather than to supplant governmental action." 484 U.S. at 60. The Court also noted that Congress did not intend for a citizen suit to intrude on an agency's discretion. *Id.* at 61. Therefore, the courts must presume that the prosecution was diligent unless the plaintiff can provide persuasive evidence that the prosecution was done in bad faith. *See Citizen for Clean Power v. Indian River*, 636 F.Supp.2d 351, 357 (D. Del. 2009); *Community of Cambridge*, 115 F. Supp. 2d at 554.

The presumption that courts will defer to governmental agencies is well established. *See Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). In the realm of citizen suits, "[s]uch deference serves an important practical purpose: if citizens could file suit "in order to seek the civil penalties that [the government] chose to forgo, then [the government's] discretion to enforce the Act in the public interest would be curtailed considerably." *Sierra Club v. ICG E., LLC*, 833 F. Supp. 2d 571, 578 (N.D.W. Va. 2011) (quoting *Gwaltney I*, 484 U.S. at 61). Failure to apply this presumption would have an extremely

detrimental impact on agency discretion and would hamper the ability of an agency to carry out its work.

In our case, the district court was correct in finding that the Department diligently prosecuted Bowman . The Department is responsible for protecting the State of New Union's environment. Like all other agencies, it is entitled to this Court's deference concerning its resolution of Bowman's violation. Congress, an elected body accountable to the people, has granted the Department the lawful authority to both correct and settle violations. For this Court to find otherwise would undermine the Department's discretionary authority, especially since the Department has acted swiftly to protect the state's environment by requiring Bowman to preserve and maintain a public wetland. Because the Department has exercised its properly delegated discretion and authority and settled with Bowman, it should be presumed that the Department diligently prosecuted Bowman.

B. The Department's enforcement actions do not have to meet or exceed the expectations of citizens in order to be diligent.

Though a court will presume that an agency's prosecution was diligent, this deference is not unlimited. *Friends of Milwaukee's Rivers v. Milwaukee Metropolitan Sewerage District,* 382 F.3d 743, 760 (7th Cir. 2004). Some courts state that when determining whether there was a diligent prosecution, the analysis requires more than a mere acceptance of the potentially self-serving statements of the agency. *Id.* This analysis requires that the agency's actions achieve compliance with the law. *Id.* at 759.

Aside from the notion that governmental agencies are entitled to substantial deference, courts recognize that an agency needs flexibility to proceed in the "best interests of all the parties involved." *See Community of Cambridge*, 115 F. Supp. 2d at 554 (citations omitted). Section 505(b)(1)(B) only requires that there be a diligent prosecution—not a zealous or far-reaching

prosecution. *Karr*, 475 F.3d at 1197. In *Karr*, the Tenth Circuit held that a governmental agency's prosecutorial strategy in a citizen suit does not need to coincide with the plaintiff's strategy. *Id.* That court relied on the Sixth Circuit's reasoning that "second-guessing a governmental agency's assessment of an appropriate remedy . . . fails to respect the . . . [Act's] careful distribution of enforcement authority among [governmental agencies] . . . ." *Id.* Therefore, citizens are permitted to act only where an agency fails to do so; not where an agency acted but failed to act in the aggressive manner that the citizen expected. *Id.*

Moreover, the Supreme Court has recognized the importance of deference to consent decrees. *Gwaltney I*, 484 U.S. at 60-61. And most courts reason that if a defendant faces future exposure to a citizen suit, a defendant will have little incentive to negotiate a consent decree. *Karr*, 475 F.3d at 1192. The Seventh Circuit nicely illustrated this point by stating that "[a]n Administrator unable to make concessions is unable to obtain them." *Supporters to Oppose Pollution, Inc. v. Heritage Group*, 973 F.2d 1320, 1324 (7th Cir. 1992). The court in *Karr*, also stressed this point by stating that § 505(b)(1)(B) should not be interpreted in a manner that will undermine an agency's ability to reach a consent decree with a defendant. *Karr*, 475 F.3d at 1198. The court noted that allowing an agency to compromise, does not strip a citizen of the ability to help bring about remedies for violations of the Act. *Id.*

In *ICG*, the court found that a consent decree was diligent, stating that "[e]nforcement actions are considered 'diligent' if they are 'capable of requiring compliance with the Act and [are] in good faith calculated to do so,' and as both parties to this action acknowledge, diligence is presumed." 833 F. Supp. 2d at 578 (quoting *Piney Run Preservation Association v. County Commissioners of Carroll County Maryland*, 523 F.3d 453, 459 (4th Cir. 2008)). The defendant in *ICG*, had allegedly violated the Act's effluent-permit requirements but it entered into a

consent decree with a state agency. 833 F. Supp. 2d at 578. Under that consent decree, the defendant was required to take immediate measures to ensure compliance with all of the effluent limitations. *Id.* Additionally, a detailed plan was set to ensure compliance with the law. *Id.* The court held that the consent decree was "surely capable of requiring defendant's compliance;" therefore, the plaintiff was barred from bring its citizen suit because the defendant had been diligently prosecuted via the consent decree. *Id.* at 579.

On the other hand, in *Ohio Valley Environmental Coalition Inc. v. Maple Coal Company*, 808 F.Supp.2d 868, 884-85 (S.D.W. Va. 2011), a state agency's enforcement action against a coal company was not considered to be diligently prosecuted because the state agency filed a complaint that was vague, and it sought neither to enforce the permit as is, nor enforce the draft permit modification, with a compliance deadline. *Id.* The court reasoned that the state agency's actions did not achieve compliance with the law because their actions lacked direction and they did little to nothing to enforce the defendant to comply with the law. *Id.* at 885-88. The court also implied that had the state agency's settlement discussions resulted in a concrete consent agreement, then the results of the case regarding diligence and mootness might have been different. *Id.* at 887.

Our case is more like *ICG* then *Maple Coal*. The Department has exercised its authority and discretion, and it has reached a comprehensive settlement agreement with Bowman. Presumably, the Department has diligently prosecuted Bowman. And diligence does not require that the Department's actions precisely replicate the desires of interested citizens. The Department need not zealously prosecute Bowman using every conceivable means of punishment at its disposal; it simply has to make sure that Bowman complies with the law. Like the consent decree in *ICG*, the settlement agreement that Bowman has consented to is surely

capable of requiring Bowman to comply with law. And unlike the actions taken in *Maple Coal*, the Department is seeking to have the settlement in our case formalized into consent decree in federal court.

Further, the settlement agreement requires a great deal of Bowman. He must not commit any further § 404 violations. And while the Department did not assess a penalty for his violation, it did require Bowman to deed to the Department a conservation easement over a large portion of his property to establish a wetland preserve. Bowman has agreed to preserve the wetland in its natural state, including constructing and maintaining a year-round wetland, and opening it to the public for recreational use. This requires a considerable expense which will rest solely on Bowman.

Overall, and most importantly, all of the measures taken in the settlement agreement will not only bring Bowman into compliance with the law, but will preserve the aesthetics of the Muddy River and enhance the wetland environment as well. Mr. Norton will be able to legally frog in an area, and the new wetland area will provide a better environment for the frogs to proliferate. The public will be able to enjoy the natural beauty of both the Muddy River and Bowman's wetland.

Because the Department has taken swift corrective action to bring Bowman into compliance with the law, the Federation is barred from bringing this citizen suit. Therefore, the district court was correct when it held that it lacked subject matter jurisdiction to rule on the Federation's case, and its decision should be affirmed.

III. THE DISTRICT COURT ERRED WHEN IT HELD THAT BOWMAN DID NOT VIOLATE THE ACT.

Under § 301(a) of the Act, "the discharge of any pollutant by any person" is prohibited without a permit. 33 U.S.C. § 1311(a) (2006). Pollutant is defined under § 502(12), as "any

addition of any pollutant to navigable waters from any point source" and includes dredged spoil. *Id.* § 1362(12). Section 404 authorizes the United States Army Corps of Engineers ("Corps") to issue permits "for the discharge of dredged or fill material into the navigable waters." *Id.* § 1344. Where an individual satisfies these elements under the Act but fails to obtain a permit from the Corps, the Act is violated.

The key issue in this case is how to define the term "addition" because it is not currently defined by statute or regulation. When reviewing the agency's reasonable interpretation of the term, courts must give great deference to the administering agency where the Act is silent or ambiguous as to a specific question. *Chevron*, 467 U.S. 837. The Environmental Protection Agency ("EPA") has used two approaches to define the term: (1) outside world and (2) unitary navigable waters. But these approaches create a distinction without a difference because both result in a very narrow interpretation of addition. In our case, the term addition is not defined. But the language of the Act and legislative history is not ambiguous. *Catskill Mountains Chapter of Trout Unlimited, Inc. v. City of New York*, 273 F.3d 481, 493-94 (2d Cir. 2001). Therefore, each approach is limited in its persuasiveness under the facts of this case.

The district court erred in finding that there was no violation because Bowman's activities amounted to an addition of pollutants to the wetland under any interpretations applied by the courts: unitary waters, outside world, and sidecasting and redeposit.

A. The unitary waters theory is merely persuasive and should not be afforded full *Chevron* deference.

The unitary navigable waters approach was traditionally based on a dictionary interpretation of addition such as "to join, annex, or unite." *Friends of the Everglades v. South Florida Water Management District*, 570 F.3d 1210, 1217 (11th Cir. 2009). Therefore, an addition under this theory occurred only at the singular moment when a point source introduced

a pollutant to navigable waters for the first time. *Id.* An addition did not occur with a transfer of unaltered water from one navigable water to another. *Id.* That approach, however, did not consider the receiving body of water's condition before the transfer. *Id.* And even if it was pristine before the pollutant was added, it was not an addition. *Id.*

But the extreme application of that test was rejected by the circuit courts and forced to evolve. While the court in *Dubois v. USDA,* 102 F.3d 1273 (1st Cir. 1996), did not use the name unitary waters theory, it rejected the singular waters concept. There the waters involved were two separate waters. *Id.* As a result, a transfer from one water body to another was an addition under the Act. *Id.* In reaching its conclusion, the court considered the aggregate ramifications of water quality. *Id.* The court's reasoning in *Dubois* can also be applied to our case. The Second Circuit went even further and entirely rejected the unitary waters theory, reasoning that the interpretation was inconsistent with the ordinary meaning of addition. *Catskill*, 273 F.3d 481 at 491.

Only one case in the Supreme Court has discussed the unitary waters approach. *South Florida Water Management District v. Miccosukee Tribe of Indians*, 541 U.S. 95, 106 (2004). But the Court did not have to decide if the approach was adequate to find that there was an addition of a pollutant because, as the Court held, the test was prematurely applied under the facts of that case. *Id.* at 96. What the Court did say was that (1) Congress intended to protect both individual bodies of water and the waters of the United States equally, and (2) the unitary waters approach may in fact conflict with the EPA's policy, thus not calling for *Chevron* deference. *Id.* at 106-07. Ultimately, the Court never ruled on the unitary waters interpretation of addition. *Id.*

B. Further, Bowman violated the Act under the outside world approach because the bulldozer was the but-for cause of the addition.

The outside world approach is a narrow interpretation of addition that requires a point source to introduce a pollutant into the navigable water from the outside world. *National Wildlife*

Federation v. Gorsuch, 693 F.2d 156, 165 (D.C. Cir. 1982). The EPA in *Gorsuch* argued that even though the water passing through the dam created water quality changes, it was not an introduction of a pollutant to navigable waters because nothing new was added. *Id.* In making this argument, the EPA relied on the fact that low-dissolved oxygen, supersaturation, sediment, and other water-quality changes were not expressly defined as pollutants under § 502(6). *Id.*

Gorsuch stands for the distinction made by courts in dam cases. Under the outside world approach, where water passes through a point source from one body of water to another without doing more, there is no addition. *Id.* So where pollutants exist in a body of water, the mere deviation in the flow of that water does not create a pollutant and thus is not an addition.

In another example, the court applied the outside world approach in a case where water passed through a point source, i.e., a pump. *National Wildlife Federation v. Consumers Power Co.*, 862 F.2d 580 (6th Cir. 1988). The court found that the facility's water pumps did not add pollutants to the lake even though the pumps pulled in live fish and aquatic life, destroyed them, and deposited the remains back into the same lake. *Id.* The court reasoned that in order to be an addition, the fish would have had to have been removed in the first place. *Id.* at 585. And the fish had not been removed. *Id.*

It is worth noting that *Gorsuch* and *Consumers Power* involved § 402 discharge permits rather than a § 404 permit. And in both cases, the water ended up where it would have gone anyway. Our case is distinguishable. For example, unlike *Gorsuch*, our case involves pollutants such as dredged spoil, rock, sand, dirt, agricultural waste, and biological materials. These pollutants are expressly listed in the Act whereas the pollutants involved in *Gorsuch* were not. Moreover, it was the movement of water in *Gorsuch* that created the pollutants. In our case, it was the bulldozer.

And in *Consumers Power*, the fish were never removed from the lake. *Consumers Power*, 862 F.2d at 585. In our case, the bulldozer removed the material from the wetland in two distinct ways. First, the bulldozer took the dead plant and tree material from the wetland and put the material into windrows before burning it. Second, it pushed the biological material and ash from the windrows down into the trenches to fill them in. The movement of pollutants in our case is not analogous to the systematic passing of water through pumps as seen in *Consumers Power*.

Moreover, the relevant inquiry is whether the pollutant would have been added to the water but for the point source. *Miccosukee Tribe of Indians of Florida v. South Florida Water Management District*, 280 F.3d 1364, 1368 (11th Cir. 2002). And in making that decision, the Court must look at the receiving body of water. *Id.* While *Miccosukee* involved a § 402 permit to discharge rather than a § 404 permit, the analysis can be applied in our case to reach a similar conclusion. But for Bowman's bulldozer, the biological material and ash would not have been added to the wetland.

C. Moreover, the outside world approach does not merit full *Chevron* deference because the interpretation was never formalized.

Under *Chevron*, courts must give great deference to the administering agency where the Act is silent or ambiguous as to a specific question and the agency's interpretation is reasonable. *Chevron*, 467 U.S. at 843. In our case, the term addition is not defined. But the language of the Act and legislative history is not ambiguous. *Catskill*, 273 F.3d at 493-94.

The courts in *Gorsuch* and *Consumers Power*, for example, gave significant *Chevron* deference to the EPA in those cases. The deference afforded to the EPA resulted in a narrow interpretation of the Act. But the outside world approach was never formalized in a rulemaking or formal adjudication. *Catskill*, 273 F.3d at 490. If it had been, deference might be appropriate. *Id.* The Supreme Court has already found that interpretations in opinion letters, agency manuals,

policy statements, and enforcement guidelines do not carry the force of law. *Id.* Such interpretations require respect to the extent that they are persuasive, but *Chevron* deference is not warranted. *Id.* at 491. Because the outside world approach was only taken in opinion letters and reports, it follows that *Chevron* deference is not appropriate in its review. *Id.* at 489.

D. Regardless, Bowman's sidecasting and redeposit of the dredged spoil into the wetland is an addition under the Act.

Sidecasting involves adding dredged or excavated material from a removal site to a disposal site. *United States v. Cundiff*, 555 F.3d 200, 204-05 (6th Cir. 2009). The purpose is to dry out wetlands and make land useable. *Id.* Once material is dug up, it becomes dredged spoil which is a pollutant under the Act. *Id.* (citing *United States v. Deaton*, 209 F.3d 331, 335 (4th Cir. 2000)). It does not matter if the material was already present in the wetlands in a less threatening form. *Cundiff*, 555 F.3d. at 214. Once a material is excavated from a wetland, it changes, and creates a pollutant that was not there before. *Id.*

Further, any argument made by Bowman that the sidecasting involved in our case resulted in a de minimis or incidental movement constituting an exception to the addition element should be discredited. The biological material combined with the ash was moved with purpose to fill the wetland and impacted roughly 1,000 acres. So the result is hardly incidental or de minimus. The result is an addition of a pollutant to waters of the United States.

In a similar case to ours, the property contained eighty-five acres of wetlands. *Cundiff*, 555 F.3d 200. The owner excavated drainage ditches and cleared trees to make the land suitable for farming. *Id.* As in our case, this was done without a permit. *Id.* The dredged material was used to fill the wetlands, which is known as sidecasting. *Id.* The court held that sidecasting constituted an addition of a pollutant under the Act. *Id.* at 214.

In another example, an owner intended to build a residential subdivision and dug a drainage ditch to dry a twelve-acre parcel containing a wetland. *Deaton*, 209 F.3d 331. The court reasoned that while the Act's definition of the term addition is ambiguous, the underlying rationale is not. *Id.* at 336. Natural materials such as dirt, rock, sand, and biological materials are pollutants under the Act. *Id.* So it follows that reintroducing these dredged materials, without more, can harm the environment because it would have a negative effect on the hydrology and chemical makeup of the waters. *Id.* The court found that the redeposit of trees and vegetation dredged from the wetland was an addition. *Id.*

In a case where 20,000 acres of wetlands were cleared for agricultural use, the owner used a bulldozer. *Avoyelles Sportmen's League, Inc. v. Marsh*, 715 F.2d 897 (5th Cir. 1983). Exactly as in our case, the remains were put into windrows, burned, and then mixed in with the rest of the land to level it. *Id.* at 901. The court reasoned that an addition, as used to define discharge, reasonably included redeposit. *Id.* at 923. To prohibit redeposit is to be consistent with the Act's goal to "restore and maintain the chemical, physical, and biological integrity of the nation's waters." 33 U.S.C. § 1251(a). The court found that the redeposit of materials was a discharge requiring permit under the Act. *Avoyelles*, 715 F.2d at 897.

Sidecasting and redeposit cases have not been addressed by the Supreme Court, but the circuits support the inclusion of these activities as prohibited additions under the Act. *United States v. M.C.C. of Florida, Inc.*, 772 F.2d 1501, 1506 (11th Cir. 1985) (redeposit of spoiled sea grass churned up by tug boat propellers was a discharge of pollutant under the Act); *Rybachek v. EPA*, 904 F.2d 1276, 1285 (9th Cir. 1990) (dirt and gravel excavated and then redeposited into a stream by gold miners was an addition).

In our case, we have dirt dredged from the wetland combined with biological material and ash. Our case does not involve incidental fallback or the movement of a small amount of dirt. Bowman dredged and cleared vegetation and trees across roughly 1,000 acres. Those remains were then burned and redeposited into the wetland. The negative impact on the hydrological characteristics and the chemical makeup of the wetland were significantly altered when this was done. As a result, Bowman's activities constitute a redeposit prohibited as an addition under the Act.

IV. THE DISTRICT COURT PROPERLY DISMISSED THE FEDERATION'S CLAIMS AGAINST BOWMAN UNDER THE ACT RECOGNIZING ITS LACK OF SUBJECT MATTER JURISDICTION IN THE ABSENCE OF A CONTINUING VIOLATION.

Section 505 of the Act provides limited jurisdiction for citizen suits "against any person . . . who is alleged *to be in violation* of . . . an effluent standard or limitation under this chapter." 33 U.S.C. 1365(a)(1) (emphasis added). A violation of an "effluent standard or limitation" occurs when a person discharges any pollutant—including fill materials—into the waters of the United States without a permit. 33 U.S.C. §§1311(a), 1344. Wetlands adjacent to navigable waters are considered "waters of the United States" for purposes of the Act. *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 106 S. Ct. 455 (1985). All parties agree that Bowman's property is a wetland subject to the Act.

The Supreme Court considered the meaning of the statutory phrase "to be in violation" in *Gwaltney I*, concluding that to establish jurisdiction, a citizen plaintiff must "allege a state of either continuous or intermittent violation—that is, a reasonable likelihood that a past polluter will continue to pollute in the future." 484 U.S. at 57. Thus, jurisdiction will not exist where the alleged violation is "wholly past." *Id.* at 64.

A. Citizen suit jurisdiction does not extend to wholly past violations such as those alleged by the Federation against Bowman.

In the wake of *Gwaltney I,* Circuit Courts of Appeal faced with the question of whether a violation is ongoing have required plaintiffs to (1) show that violations occurred on or continued after the date the complaint was filed, or (2) produce evidence "from which a reasonable trier of fact could find a continuing likelihood of a recurrence in intermittent or sporadic violations." *Sierra Club v. Union Oil Co. of California*, 853 F.2d 667, 671 (9th Cir. 1988) (quotations and citations omitted); *Chesapeake Bay Foundation, Inc. v. Gwaltney of Smithfield, Ltd.*, 890 F.2d 690, 693 (4th Cir. 1988) ("*Gwaltney II*"); *Carr v. Alta Verde Industries, Inc.*, 931 F.2d 1055, 1062 (5th Cir. 1991); *Atlantic States Legal Foundation, Inc. v. Stroh Die Casting Co.*, 116 F.3d 814, 825 (7th Cir. 1997); *Sierra Club v. El Paso Gold Mines, Inc.*, 421 F.3d 1133, 1136-37 (10th Cir. 2005). But if the "risk of defendant's continued violation ha[s] been completely eradicated" by the time the suit is filed, the violation is wholly past. *Gwaltney II*, 890 F.2d at 693, quoting *Chesapeake Bay Foundation, Inc. v. Gwaltney of Smithfield, Ltd.*, 844 F.2d 170, 172 (4th Cir. 1988).

That test was applied in *United States v. Cumberland Farms of Connecticut, Inc.*, 826 F.2d 1151 (1st Cir. 1987), a factually similar case to the case at bar. There, Cumberland leased a 2,000 acre wetland and, beginning in 1972 and continuing through 1985, engaged in dredge and fill activities to convert the swamp into farmland. *Id.* at 1153. The process included removing standing timber, bulldozing stumps and roots, digging drainage ditches, and leveling the soil for agricultural use. *Id.* Initially, the Act did not apply to Cumberland's property; however, when the Act was revised in 1975 to extend jurisdiction to wetlands, Cumberland was required to apply for a permit. *Id.* at 1153-54. Between 1978 and 1985, Cumberland had converted 674.4 acres of the 2,000 acre wetland to farmland. *Id.* at 1154. When the Corps asserted jurisdiction and ordered

the defendant to restore the wetland to its 1977 state, the defendant refused. The district court determined that the defendant's activities constituted "a serious, ongoing violation" of the Act. *Id.* at 1162.

It bears noting that *Cumberland* was decided about four months prior to *Gwaltney I*. But even if the result in *Cumberland* post-*Gwaltney I* would be the same, *Cumberland* is readily distinguishable from our case in one critical aspect. Cumberland was continuing to dredge and fill the wetlands (a process which had already gone on for more than a decade) and planned to ultimately convert the entire 2,000 acres. Cumberland actively defied the government's attempts to assert jurisdiction and even stated that it would not stop until told to do so by some power higher than the Corps. Here, not only has Bowman promised not to fill any more of his wetland, but he has granted a conservation easement to the Department covering a two-hundred twenty-five foot strip running the full 650 foot length of his property along the river. He has further agreed to rebuild and maintain the seventy-five foot buffer zone as a year-round wetland.

Unlike *Cumberland*, where Cumberland's clearing activities were continuing and planned to continue into the future, Bowman's clearing activities are wholly past. He ceased all clearing activity a month and a half before the Federation filed its complaint, and he has no intention of resuming those activities. In fact, there is no land left for him to clear except that which is subject to the conservation easement. Thus, as in *Gwaltney II*, the risk of Bowman resuming activities in violation of the Act has been "completely eradicated." Despite the basic fact similarities of the cases, the immediate case begs a different result.

B. The continued presence of fill in a wetland does not automatically give rise to a continuing violation.

The Federation relies on the Fourth Circuit's holding in *Sasser v. Administrator, United States EPA*, 990 F.2d 127 (4th Cir. 1993), to support its claim that Bowman continues to be in

violation of the Act based on the continued presence of the fill on his property. Sasser filled wetlands. *Id.* at 128. First the Corps, and then the EPA, ordered Sasser to cease his activities and restore the property to its original state. *Id.* Sasser refused, leading to the enforcement action. *Id.* The court held that "[e]ach day the pollutant remains in the wetlands without a permit constitutes an additional day of violation." *Id.* at 129.

Setting aside that *Sasser* involved an agency enforcement action rather than a citizen suit, as here, the glaring difference between this case and *Sasser* is that Sasser was, much like Cumberland, *supra*, openly defiant of the government's orders to restore the wetlands to their pre-violation state. Not only was the risk of continued violation by Sasser and Cumberland not completely eradicated, but both were in active violation at the time the enforcement action was taken against them. To the contrary, Bowman's risk of continued violation has been completely eradicated, because there is no wetland remaining for him to fill. And he has submitted to the Department's authority, agreeing to work with the Department—not against it.

Moreover, the court's holding in *Sasser* states that pollutants remaining in a wetland "*without a permit*" constitute an ongoing violation. 990 F.2d at 129 (emphasis added). Bowman has reached an agreement with the Department and is in compliance with its terms. Bowman does not have an individual permit because one is unnecessary under the circumstances. The Department has implicitly granted its permission for the fill on Bowman's property to remain and has further demonstrated its intent that the condition is not a continuing violation.

To be sure, agencies charged with enforcing the Act have argued, and courts across the country have found, that a discharge of dredge or fill in violation of the Act can be a continuing violation. But the circumstances in those cases are very different from the case at bar. For example, the United States argued in *United States v. Telluride Co.*, 884 F.Supp 404 (D. Colo.

1995), *rev'd* on other grounds 146 F.3d 1241 (10th Cir. 1998), where the defendant had unlawfully excavated and disposed of soil in wetlands in violation of the Act, that "the discharge of dredged or fill materials into waters of the United States is a 'continuing violation' as long as the adverse effects of the fill continue." The government urged (1) that such a position was consistent with the purpose of the Act "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters," 33 U.S.C. § 1251(a), and (2) further that "Congress must have intended the offense of illegally filling a wetland and not taking corrective action to be treated as a continuing one." *Telluride,* 884 F.Supp at 408. But the court disagreed, finding, at least within the context of the statute of limitations on enforcement actions, that a single discharge of pollutants is not continuing, because the statute would never be triggered. *Id.*

Even if the court in *Telluride* had agreed with the government's argument, the key lies in the phrase: "as long as the adverse effects of the fill continue." There are no continuing adverse effects from Bowman's fill activities. The Federation's members' general fears aside, expert testimony provided indicates that the current state of the wetland will actually have a positive effect on the surrounding environment going forward. The Department has given implicit approval of the current state of Bowman's wetland property and there is a distinct lack of hard evidence that there will be any lingering environmental damage if the status quo is maintained. There is simply no basis to find a continuing violation.

As the Court in *Gwaltney I* aptly noted, citizen suits are supposed to "supplement, not supplant," agency enforcement of the Act. 484 U.S. at 50. Congress could not have intended to allow citizens to file suit "months or years later, in order to seek the civil penalties that the [agency] chose to forgo." To find otherwise would seriously hamper an enforcing agency's ability to resolve violations in a manner that within its discretion best serves the public interest.

Id. at 61. Here, the Department has simultaneously achieved Bowman's compliance with the law and enhanced the wetland environment. There can be no continuing violation.

C. Courts have found no continuing violation even where the lingering effects of the offending discharge were decidedly more negative than have been alleged by the Federation against Bowman.

Several courts have interpreted *Gwaltney I*'s "wholly past" language very narrowly, finding that continuing consequences—whatever they may be—are insufficient to support a citizen suit. Otherwise, the reasoning goes, the "present violation" requirement of the Act would be meaningless. *Connecticut Coastal Fisherman's Association v. Remington Arms Co.*, 989 F.2d 1305, 1313 (2d Cir. 1993) (finding that lead shot and clay target debris remaining in Long Island Sound from a skeet-shooting range that closed several months earlier was a wholly past violation despite the continued presence of the pollutant and irrespective of any contamination of the water).

In *Hamker v. Diamond Shamrock Chemical Co.*, 756 F.2d 392 (5th Cir. 1985), the Hamkers sued Diamond for a discharge of oil that polluted a creek which flowed on their property. The court dismissed the action for lack of subject matter jurisdiction because § 505 only allows citizen suits for current violations. The complaint in that case "allege[d] only a single past discharge with continuing effects, not a continuing discharge." *Id.* at 397. And in *Pawtuxet Cove Marina, Inc. v. Ciba-Geigy Corp.*, 807 F.2d 1089 (1st Cir. 1986), the Marina sued, *inter alia*, for defendant corporation's violation of its § 402 permit. By the time the complaint was filed, though, defendant had undertaken alternative disposal arrangements for its pollutants and was no longer making any discharges pursuant to its permit. *Id.* at 1091. The court interpreted the statutory language "in violation" to go to activity, rather than status. It further reasoned that the "taint of a past violation" could not render a "ceased improper discharge" a continuing

violation. *Id.* at 1092. Accordingly, the court held, perhaps foreshadowing *Gwaltney I*, that a citizen plaintiff may proceed under § 505 provided a good-faith allegation is made that there is a continuing likelihood that defendant will again violate the act in the absence of an injunction. *Id.* at 1094.

The Federation urges that unless this Court finds that the mere continued presence of fill is a continuing violation, polluters will be incentivized to hide their illegal discharges of fill and will be safe from prosecution unless caught in the act. *See, e.g.*, *North Carolina Wildlife Federation v. Woodbury*, No. 87-584-CIV-5, 1989 WL 106517, at *3 (E.D. N.C. Apr. 25, 1989). This is problematic for many reasons, including the fact that it is only citizen suits that are barred; not agency enforcement actions. And it is just as true that if the discharge of fill is a continuing violation simply because it is recoverable, polluters will be incentivized to discharge in open water where the discharge is unrecoverable, thereby limiting their liability to that one violation rather than risking the accrual of day and days of penalties for a single violation involving a wetland. A discharge into the ocean might continue in perpetuity as by its nature it can't be recovered. It cannot have been the intent of the legislature to allow a polluter to cut off the potential for accruing penalties beyond the date of the actual discharge based solely on the location of the discharge. Such a policy would encourage polluters to dump in open water rather than wetlands, which could have dire environmental consequences. It simply makes no sense to say that the nature of the effects of a violation are irrelevant to the continuing violation analysis for § 402 no matter how harmful, but not for § 404, no matter how harmless.

Additionally, the *Woodbury* court relied on Justice Scalia's concurring opinion in *Gwaltney I* for the proposition that "[t]reating the failure to take remedial measures as a continuing violation is eminently reasonable . . . because it is not the physical act of discharging

dredge wastes itself that leads to the injury giving rise to citizen standing, but the consequences of the discharge in terms of lasting environmental degradation." *Id.* at *2. We are not dealing here with a failure to take remedial measures. Rather, we are dealing with a group of citizens who simply feel that the remedial measures taken are inadequate. That is not a proper basis for undermining the Department's authority and finding Bowman's violation to be continuing.

Here, Bowman's discharge, even if not singular, is certainly past. More importantly, the court in *Hamker* found no continuing violation even where there were demonstrated continuing negative effects from the single discharge of a toxic pollutant. Bowman, on the other hand, discharged fill comprised of material native to the wetland in question. The non-toxic nature of Bowman's discharge coupled with the Department's biologist's testimony that the agreement reached with Bowman to preserve a year-round wetland on the conservation easement will benefit, rather than harm, the area, means there is even less basis in this case to find a continuing violation than there was in *Hamker*.

Neither can the Federation make a good-faith allegation that Bowman will resume his fill activities in violation of the Act. Bowman, like the defendant in *Pawtuxet*, is no longer engaged in the offensive activity the Federation complains of. He has agreed not to fill any additional wetland and to maintain a portion of his property as a permanent wetland for the benefit of the public. Any lingering taint—which is speculative at best considering the biologist's testimony that the arrangement will benefit the area—cannot make Bowman's single violation a continuing violation. Indeed, if the Department feared a lingering negative impact, it could have both required additional restoration measures and sought civil penalties. But neither route was necessary because the matter has been resolved to the benefit of the ecosystem and the public.

CONCLUSION

In reviewing the case at bar, this Court should conclude that: (1) the Federation does have standing to bring a citizen suit against Bowman; but (2) it is barred from pursuing this suit because the district court lacks subject matter jurisdiction over matters that have already been diligently prosecuted; (3) the district court also lacks subject matter jurisdiction because there is no continuing violation; but (4) even if this court finds subject matter jurisdiction, Bowman added a pollutant to wetlands in violation of the Act.

First, the Federation has standing because it can prove that its members suffered an injury in fact. Bowman's violation has diminished the member's recreational and aesthetic uses of the Muddy River. And at the time the complaint was filed, the members had a reasonable fear that the river had been polluted and would continue to be polluted because of Bowman's actions.

Second, the district court is barred from hearing the Federation's complaint because of the prior state actions. The Department diligently rectified Bowman's violation by first agreeing to a settlement with Bowman and then filing a complaint in federal court to reduce the settlement to a consent decree.

Third, although the district court was correct in identifying the EPA's former interpretations of addition under the Act, it gave more deference to those theories than was due and incorrectly classified Bowman's actions as an incidental movement of material. Under any theory, Bowman violated the Act. Bowman dredged and cleared vegetation and trees across roughly 1,000 acres. Those remains were then burned and the pollutants were redeposited into the wetland where they had not been present in that form before. As a result, Bowman added pollutants to the wetland without a permit in violation of the Act.

Finally, the district court was right to dismiss the Federation's citizen suit against Bowman for lack of subject matter jurisdiction in the absence of a continuing violation. If the fill on Bowman's property was a continuing violation, the Department would have pursued additional restoration measures in the settlement agreement. Instead, the Department allowed the fill to remain under the terms of the agreement; thus—for all intents and purposes—it has given its permission for the condition to continue.

PRAYER FOR RELIEF

WHEREFORE, the Department respectfully requests that this Court:

1. Reverse the district court and find that the Federation has standing to bring its citizen suit against Bowman;

2. Affirm the district court's holding that it lacked subject matter jurisdiction over the Federation's citizen suit as it is barred by prior state action;

3. Reverse the district court and find that Bowman's activities constituted an addition in violation of the Act; and

4. Affirm the district court's holding that it lacked subject matter jurisdiction over the Federation's citizen suit as Bowman's activities are wholly past, and not a continuing violation.

Respectfully submitted,

_____

Counsel for New Union
Department of Environmental Protection