Team 32

C.A. No. 13-1246

THE UNITED STATES COURT OF APPEALS FOR THE TWELFTH CIRCUIT

NEW UNION WILDLIFE FEDERATION,

Plaintiff-Appellant

v.

JIM BOB BOWMAN,

Defendant-Appellee

v.

NEW UNION DEPARTMENT OF ENVIRONMENTAL PROTECTION,

Intervenor-Appellee-Cross-Appellant

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

Civ. No. 149-2012

BRIEF FOR APPELLANT
NEW UNION WILDLIFE FEDERATION

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STATEMENT OF JURISDICTION

Appellant New Union Wildlife Federation ("NUWF") filed suit in the United States District Court for the District of New Union seeking review under Clean Water Act ("CWA" or "Act") Section 505, 33 U.S.C. § 1365 (2006), based on general federal question jurisdiction, 28 U.S.C. § 1331 (2006). On June 1, 2012, the district court granted Jim Bob Bowman's ("Bowman") motion for summary judgment and denied NUWF's cross motion for summary judgment. The district court's order is a final decision, and jurisdiction is proper in this court pursuant to 28 U.S.C. § 1291 (2006).

STATEMENT OF THE ISSUES

I. Whether decreased aesthetic and recreational enjoyment of the Muddy River caused by Bowman's illegal fill of wetlands establishes standing for NUWF members.

II. Whether the district court has subject matter jurisdiction under CWA Section 505(a)(1) when previously dredged and excavated materials are used to fill a wetland, continue to harm the integrity of jurisdictional waters, and can be remediated by the defendant.

III. Whether Bowman's destruction of hundreds of acres of wetlands constitutes an "addition" in violation of the CWA's prohibition on unpermitted discharges and the long-standing interpretation from the Environmental Protection Agency ("EPA") that an "addition" includes the "redeposit" of materials into a water of the United States.

IV. Whether a state enforcement action that alleges violations separate from the violations alleged in a citizen suit, assesses no penalty for any alleged past violations, and is co-drafted with the defendant, triggers the "diligent prosecution" bar under CWA Section 505(b)(1)(B).

STATEMENT OF THE CASE

This is an appeal from a final order of the District Court for the District of New Union granting Bowman's motion for summary judgment and denying NUWF's motion for summary judgment. Record ("R.") at 11. After NUWF discovered Bowman's discharges without a permit, it sent notice of its intent to sue to all appropriate parties pursuant to CWA Section 505. *Id*. at 4. The New Union Department of Environmental Protection ("NUDEP"), after receiving NUWF's notice, contacted Bowman to negotiate a settlement agreement regarding the violations of both state and federal law. *Id*. Bowman and NUDEP separately negotiated a settlement agreement, and this side agreement was incorporated into a state administrative order on August 1, 2011. *Id*. There was no administrative penalty assessed for Bowman's violations of state and federal law, despite NUDEP having the authority to issue an administrative penalty of up to $125,000. *Id*.

NUDEP filed a suit under Section 505 of the CWA on August 10, 2011, and moved to enter a decree on terms identical to the settlement agreement. *Id*. at 5. NUWF filed a separate citizen suit under Section 505 on August 30, 2011, seeking penalties for Bowman's continuing violation of the Act, requiring Bowman to remove the fill material and restore the wetlands. *Id*. On September 15, 2011, NUDEP filed a motion to intervene that the court subsequently granted. *Id*. NUWF also filed a motion with the district court to consolidate the suit, oppose the decree proposed by NUDEP and Bowman, and to intervene in NUDEP's August 10, 2011 citizen suit. *Id*. The district court declined to act on NUWF's pending motions. *Id*.

Following discovery, Bowman filed a motion for summary judgment. *Id*. NUWF and NUDEP filed cross motions for summary judgment. *Id*. The district court held that NUWF did not have standing to challenge Bowman's failure to secure a Section 404 permit, the court lacked subject matter jurisdiction over the destruction of wetlands on Bowman's property because the

violations were wholly past, Bowman did not violate the CWA, and NUDEP's lawsuit barred NUWF's citizen suit. *Id*. at 11.

NUWF filed a Notice of Appeal challenging the entirety of the district court's decision. *Id*. at 1. NUDEP filed a Notice of Appeal challenging the district court's decision in two regards: first, that NUWF did not have standing, and second, that Bowman's actions did not violate Section 404 of the Act. *Id*.

STATEMENT OF THE FACTS

Bowman owns 1,000 acres of land that borders 650-feet of the Muddy River in the State of New Union. R. at 3. The U.S. Army Corps of Engineers' ("Corps") has classified, and all parties agree, that Bowman's property is a wetland pursuant to the Corps' Wetlands Delineation Manual. *Id*. at 3–4. On June 15, 2011, Bowman commenced land-clearing operations without consulting the NUDEP or the Corps, or procuring an appropriate permit. *Id*. at 4. Over the course of a month, Bowman used bulldozers to knock down trees, level vegetation, and move trees and vegetation into windrows. *Id*. After burning the windrows, Bowman dug trenches with a bulldozer and pushed vegetation, ashes, and soil to level the field into the trenches. *Id*. Bowman completed his land-clearing project by digging a wide ditch or swale to drain water from the newly created field into the Muddy River. *Id*. A small portion of the 1,000 acres, an approximately 150-foot wide strip, along the 650-foot river frontage portion of Bowman's land, was left to clear after the wetland was drained. *Id*.

NUWF is a non-profit conservation group dedicated to protecting habitat and native New Union species. *Id*. at 4. Three of NUWF's members established that they use the Muddy River for recreational boating, fishing, and picnicking on the Muddy River banks on or in the vicinity of

Bowman's property. *Id*. at 6. In September, 2011, Bowman planted winter wheat in the cleared field, except for in the 225-foot easement running adjacent to the Muddy River. *Id*. at 5.

STANDARD OF REVIEW

Appellate courts use a *de novo* standard of review when evaluating a district court's denial of summary judgment. *See Eastman Kodak Co. v. Image Tech. Servs., Inc.*, 504 U.S. 451, 466 n.10 (1992); *Byrne v. Rutledge*, 623 F.3d 46, 52 (2d Cir. 2010). Summary judgment is appropriately granted when "there is no genuine issue of material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P 56(c)(2); *Cordiano v. Metacon Gun Club, Inc.*, 575 F.3d 199, 204 (2d Cir. 2009).

SUMMARY OF THE ARGUMENT

The Court should reverse the decision of the district court on all four grounds. NUWF has standing to bring its claims, the Court has subject matter jurisdiction, Bowman's activities constitute a violation of the CWA, and NUWF's citizen suit is not barred. Thus, the Court should reverse the grant of summary judgment to Bowman, and grant summary judgment to NUWF.

First, NUWF has standing to bring this citizen suit under the CWA because its members have alleged injuries that are caused by Bowman's activities. NUWF satisfies the constitutional standing requirement of having a concrete injury-in-fact. NUWF members suffered cognizable aesthetic and recreational injuries sufficient for standing. The district court erred in concluding that the potentially illegal activity of one NUWF affiant undermines standing. NUWF may establish standing based on aesthetic injury regardless of whether there was a trespass. Moreover, the injuries are fairly traceable to Bowman's illegal discharge because the loss of recreational enjoyment, opportunities for frogging, and aesthetic deterioration of the wetland are directly caused by Bowman's discharges.

Second, this Court has subject matter jurisdiction to hear NUWF's claims because violations of the CWA under Section 404, where the dredged or fill material remains in the wetland, are continuing violations. Under Supreme Court precedent, citizens may not bring suits under the CWA for wholly past discharges, but the discharge of dredged or fill material is a present violation as long as the materials remain in place. The type of permit required depends on the type of pollutant at issue. In this case, the discharge was dredged or fill material without a permit under Section 404. Because the CWA does not define discharge of dredged or fill material, the Corps has defined "discharge of dredge material" and "discharge of fill material" in federal regulations. The Corps' regulations consider the ongoing effects of the discharges, and the agency should be afforded deference for its interpretation. Therefore, discharges of dredged or fill material continue until the material is removed from the wetland.

The structure and purpose of the CWA support the conclusion that violations without a Section 404 permit are continuing. The CWA imposes penalties for each day of violation, including days that the dredged or fill material is left in place. If Section 404 did not give rise to a continuing violation, then polluters would be incentivized to conduct unpermitted, covert discharges of dredged or fill material in one day and elude liability.

Third, Bowman's activities constitute a violation of the CWA because all four elements of a CWA violation are met. Bowman discharged a pollutant, in this case, dredged or fill material. Bowman's bulldozer was a point source, and the wetlands were jurisdictional waters under the CWA. Bowman's land-clearing activities were an addition of a pollutant because the redeposit of a pollutant within a water body is an addition under the CWA. The plain language of the CWA, the joint Corps and EPA regulations, and numerous federal court decisions make clear that redeposits within a wetland are additions. Bowman's ditch digging and land clearing

resulted in redeposits of pollutants without a permit. The district court's focus on Section 402 is inapposite—Section 402 is a different regulatory scheme that calls for distinct implementation.

Fourth, NUWF's claims are not barred by CWA Section 505(b)(1)(B) because NUDEP is not prosecuting an action against Bowman. NUDEP failed to order compliance with the CWA, and did not address the past and continuing violations of the CWA in the settlement agreement. Additionally, NUDEP failed to assess penalties to Bowman, evidencing a lack of diligent prosecution. Finally, the timing and coordination with Bowman generate suspicion that NUDEP is working too closely with the subject of the agency's prosecution. Public policy reasons, including the importance of citizen suits to effectuating Congress's goals in the CWA, should weigh in favor of allowing this suit to proceed. For these reasons, the Court should grant summary judgment to NUWF.

ARGUMENT

I. NUWF has standing to challenge Bowman's illegal destruction of wetlands under CWA Section 505(a)(1).

Federal courts have jurisdiction over "cases" and "controversies" under Article III of the Constitution. Const. art. III, § 2, cl. 1; *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 178 (2000). To establish standing, a plaintiff must prove three elements. First, the plaintiff must have suffered "an injury in fact;" second, that is "fairly . . . trace[able] to the challenged action of the defendant;" and third, that will likely be redressed by a favorable decision.[1] *Lujan v. Defenders of Wildlife (Defenders)*, 504 U.S. 555, 560–61 (1992) (internal quotations omitted). An organization has standing to sue if at least one of its members would

[1] There is no question that NUWF's injuries are redressable. NUWF seeks "civil penalties and an order requiring Bowman to remove the fill material and restore the wetlands." R. at 5. If Bowman becomes subject to permit conditions, NUWF's injury would be remediated because the pollution and continuous harm would be abated. *See Laidlaw*, 528 U.S. at 184–87. In addition to injunctive relief, the deterrence value of civil penalties provides redressability where there is a possibility of future violations. *Id*. at 185.

otherwise have standing. *See Laidlaw*, 528 U.S. at 181 (citing *Hunt v. Wash. State Apple Adver. Comm'n*, 432 U.S. 333, 343 (1977)). The only real dispute at the district court was whether an individual NUWF member has standing to sue. R. at 6.

A. NUWF has standing because it has demonstrated a concrete injury-in-fact.

NUWF can establish organizational standing if at least one of its members is directly affected by Bowman's illegal discharging. R. at 4; *Defenders*, 504 U.S. at 563; *see also Baker v. Carr*, 369 U.S. 186, 204 (1962) (injury-in-fact requires an allegation of "a personal stake in the outcome of the controversy"). NUWF has established standing because its members all suffer aesthetic and recreational injuries due to Bowman's illegal fill activities. R. at 6.

1. NUWF members suffer cognizable aesthetic and recreational injuries.

An injury-in-fact exists where it is "concrete and particularized" and "actual or imminent, not conjectural or hypothetical." *Defenders*, 504 U.S. at 560 (citations and quotation marks omitted). Environmental plaintiffs adequately allege an injury 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. *Sierra Club v. Morton*, 405 U.S. 727, 735 (1972). The Supreme Court affirmed the central holding from *Morton* in *Laidlaw*, concluding that a plaintiff suffers an injury-in-fact when the aesthetic and recreational enjoyment of natural resources is impaired by environmental degradation. *Laidlaw*, 528 U.S. at 181.

Courts recognize aesthetic and environmental injuries because "[a]esthetic and environmental well-being . . . are important ingredients of the quality of life in our society;" thus, there is no question that "this type of harm may amount to an 'injury-in-fact.'" *Morton*, 405 U.S. at 734. The gravity of the injury itself, "'need not be large, an indefinable trifle will suffice.'" *LaFleur v. Whitman*, 300 F.3d 256, 270 (2d Cir. 2002) (quoting *Sierra Club v. Cedar Point Oil*

Co., Inc., 73 F.3d 546, 557 (5th Cir. 1996)); *see also Doe v. Cnty. of Montgomery*, 41 F.3d 1156, 1159 (7th Cir. 1994) ("[A]n identifiable trifle is enough for standing to fight out a question of principle . . . ." (citation omitted)).

2. NUWF members satisfy the Supreme Court's standards from *Morton* and *Laidlaw*.

Courts have uniformly followed the Supreme Court's holding that an activity that "would destroy or otherwise adversely affect the scenery, natural and historic objects and wildlife of the park" can be the basis of a cognizable aesthetic injury under Article III. *Morton,* 405 U.S. at 734; *accord Defenders*, 504 U.S. at 562–63 ("Of course, the desire to use or observe an animal species, even for purely esthetic purposes, is undeniably a cognizable interest for purposes of standing."). In *Laidlaw*, the Court recognized an aesthetic injury where the plaintiffs used specific areas in and around the North Tyger River to picnic, birdwatch, walk, and swim, but alleged that they would no longer be able to do so because of the pollution from the defendant's facility upstream. 528 U.S. at 182. Importantly, the Court did not require actual use of the river to establish standing. *Id*. The impacts on a specific litigant, such as those established in *Morton* and *Laidlaw*, demonstrate particularized and concrete interests distinct from the public at large. *Defenders*, 504 U.S. at 562–63.

The standard for establishing an aesthetic injury has been satisfied in this case. In a closely analogous case, the Ninth Circuit addressed an alleged aesthetic injury based on the planned future uses of a closed naval station. *Cantrell v. City of Long Beach*, 241 F.3d 674, 676 (9th Cir. 2001). The appellants opposed the destruction of buildings and bird habitat on the Naval Station. *Id*. at 676–77. The court held that the "plaintiffs have alleged a concrete aesthetic injury because they assert that their ability to view the birds and their habitat from the publicly accessible areas surrounding the station will be drastically limited, if not destroyed, by the

Navy's actions." *Id*. at 681. There was no requirement that the bird population actually be diminished. *Id*. at 682.

NUWF's three affiants have unequivocally satisfied the *Morton* aesthetic injury standard and the affidavits closely resemble those from *Cantrell*. All three of NUWF's affiants, Dottie Milford, Zeke Norton, and Effie Lawless, testified that they "use the Muddy for recreational boating and fishing, often picnicking on its banks, on or in the vicinity of the Bowman's property." R. at 6. Dottie, Zeke, and Effie established that "they are aware of the differences and feel a loss from the destruction of the wetlands," and "fear the Muddy is more polluted." *Id*. Dottie also testified that the "Muddy looked more polluted" after Bowman's illegal fill activities. *Id*. Zeke separately established that he has frogged in the area for years and that there were "no frogs in the drained field" and only a few "in the remaining woods and buffer area." *Id*. These affidavits are enough to establish that the use and enjoyment of the Muddy River has been diminished by Bowman's illegal activities.

As in *Cantrell*, Dottie, Zeke, and Effie all presently suffer from diminished aesthetic enjoyment of the Muddy River. 241 F.3d at 681; R. at 6. Furthermore, like the affiants in *Cedar Point*, NUWF's member's future use and enjoyment has been diminished because of Bowman's illegal fill activities. 73 F.3d at 556. For example, in *Cedar Point*, the affiants "expressed fear that the discharge of produced water will impair their enjoyment of these activities because these activities are dependent upon good water quality." *Id.* That an "injury is couched in terms of future impairment rather than past impairment is of no moment." *Id*. Dottie, Zeke, and Effie all express valid fear of the future condition of the Muddy River. R. at 6.

The Fourth Circuit in *Friends of the Earth, Inc. v. Gaston Copper Recycling Corp. (Gaston Copper II)*, held that environmental plaintiffs do not need to evidence "actual harm to

the waterway," and that "[t]hreats or increased risk thus constitutes cognizable harm." 204 F.3d 149, 160 (4th Cir. 2000) (en banc). First, this decision is particularly noteworthy because it constituted an en banc reversal by the Fourth Circuit following the *Laidlaw* ruling.[2] *Id*. at 150–51. Second, after *Laidlaw*, the court clarified that Article III "confers standing on a 'broad category of potential plaintiffs' . . . be it actual or threatened, economic or noneconomic." *Gaston Copper II*, 204 F.3d at 155 (citing *Middlesex Cnty. Sewerage Auth. v. Nat'l Sea Clammers Ass'n*, 453 U.S. 1, 16–17 (1981)). Here, the district court claimed that threatened injuries were "speculative," without addressing the validity of the affiants threatened use.

There is nothing speculative about an injury based on future impaired use. The district court below based its conclusion on an argument that ignores a central tenet of *Laidlaw*: "The relevant showing for Article III standing is not injury to the environment but injury to the plaintiff." 528 U.S. at 169; *accord Cantrell*, 241 F.3d at 682 (the allegations that challenged activity "would result in aesthetic harm to the birdwatchers by interfering with their ability to enjoy viewing the birds in their habitats . . . is sufficient"); *Am. Canoe Ass'n v. Murphy Farms, Inc.*, 326 F.3d 505, 520 (4th Cir. 2003) (noting that the "[i]n the environmental litigation context, the standing requirements are not onerous," and were met by affiants that "averred the types of fear and concern found sufficient in those [*Laidlaw* and *Gaston Copper II*]").

This means that the district court's analysis regarding the potential future growth of the Muddy River frog population has no bearing on the harm suffered by Dottie, Zeke, and Effie. *See Wild Equity Inst. v. City & Cnty. of San Francisco*, No. C 11–00958 SI, 2012 WL 1458178, at *1, *7–8 (N.D. Cal. Apr. 26, 2012) (holding that standing for an ESA claim regarding threatened frog species was *not affected* by the potential that the "frog population has enhanced,

[2] The Fourth Circuit originally declined to find an injury-in-fact due to a lack of evidence that the waters were "actually . . . adversely affected by pollution." *Friends of the Earth, Inc. v. Gaston Copper Recycling Corp. (Gaston Copper I)*, 179 F.3d 107, 113 (4th Cir. 1999) *rev'd en banc*, 204 F.3d 149 (4th Cir. 2000).

not diminished"). Simply put, the district court grounded its conclusion that the injuries were speculative based on a wholly irrelevant consideration—the condition of the physical environment rather than allegations of NUWF's members. R. at 6 (finding that "the environment may be benefitted rather than injured by the changes").

3. The district court's focus on affiant Zeke's potentially illegal frogging is a red herring and irrelevant for the purposes of establishing standing.

Zeke, an avid frogger, admitted on cross-examination that he "might have been trespassing" when entering Bowman's property. R. at 6. This single affiant's potentially illegal activity is not sufficient to eliminate NUWF's standing for two reasons.

First, only one of NUWF's members needs to establish standing. *Hunt*, 432 U.S. at 343 (an organization has standing if "at least one of its members would otherwise have standing"). The district court did not address why the aesthetic and recreational injuries of all three affiants would be insufficient without the independent frogging injury. That is because it cannot.

Second, an environmental plaintiff still suffers injury-in-fact even if the exact location of illegal activity under the CWA is inaccessible to the public. In *Cantrell*, for example, the Ninth Circuit held that the private property issue was irrelevant because the plaintiff had alleged "that their ability to view the birds and their habitat from the publicly accessible areas surrounding the station will be drastically limited, if not destroyed, by the Navy's actions." 241 F.3d at 681. Here, the district court erroneously conflated a requirement that the parties have an actual legal property interest in the land with the Article III requirement that the plaintiffs need only demonstrate an "invasion of a legally protected interest." *Defenders*, 504 U.S. at 560–61; *accord The Wilderness Soc'y v. Kane Cnty., Utah*, 581 F.3d 1198, 1211–12 (10th Cir. 2009) (explaining that "[e]nvironmental interests are legally protectable" and that "[t]he 'legally protected interest' phrase should not be used for mischief by denying the reality of an injury in fact").

B. NUWF's injuries are fairly traceable to Bowman's illegal discharge of dredged and fill material.

The "fairly traceable" requirement for Article III standing purposes does not require tort-like "but for" causation. *Duke Power Co. v. Carolina Envtl. Study Grp., Inc.*, 438 U.S. 59, 79 (1978); *Gaston Copper II*, 204 F.3d at 161. The fairly traceable prong "means it must be likely that the injury was caused by the conduct complained of and not by the independent action of some third party not before the court." *Gaston Copper II*, 204 F.3d at 154. There are no alternative culprits in this case—Bowman is the sole cause of the destroyed wetlands. R. at 6. The district court found two intervening causes: first, that the potential illegality of Zeke's frogging hobby extinguished standing. R. at 6. Second, based on the testimony of a NUDEP biologist, the court found that the project would create a better quality habitat for frogs. R. at 6. Neither of the observations constitute an intervening cause sufficient to extinguish standing.

First, the district court asserts that the potential illegality of Zeke's frogging hobby means that the injury is not fairly traceable. R. at 6. Even if Bowman vehemently enforced his property rights, Zeke has still suffered an injury based on decreased aesthetic and recreational enjoyment of the Muddy River. R. at 6. Furthermore, where a plaintiff is challenging the destruction of on-site wetlands, courts merely require a demonstration that it is reasonable to believe that the destruction of the wetlands leads to harm to the plaintiffs' aesthetic and recreational injuries. *Save Our Cmty. v. Envtl. Prot. Agency*, 971 F.2d 1155, 1161 (5th Cir. 1992) (holding that upstream pond destruction by a landfill harmed habit and injured the plaintiff's "aesthetic, environmental, and recreational interests"). The Seventh Circuit directly addressed a similar question and ruled, "it is possible for an aesthetic interest to be the basis of a lawsuit even if the interest is in the use made of property that one is not permitted to enter." *Solid Waste Agency of*

N. Cook Cnty. v. U.S. Army Corps of Eng'rs, 101 F.3d 503, 506 (7th Cir. 1996). So too here, NUWF's members suffer an injury-in-fact irrespective of their right to enter Bowman's property.

The future environmental conditions of the Muddy River are irrelevant as to the issue of causation under an Article III standing inquiry because NUWF need only show "that there is a substantial likelihood that defendant's conduct caused plaintiffs' harm." *Pub. Interest Research Grp. of N.J., Inc. v. Powell Duffryn Terminals, Inc.*, 913 F.2d 64, 72 (3d Cir. 1990) (internal quotations omitted). The district court ignored the fact that scientific proof of environmental degradation is not required to meet the fairly traceable requirement. *Gaston Copper II*, 204 F.3d at 159 (explaining that no circuit has "required additional scientific proof where there was a direct nexus between the claimant and the area of environmental impairment"). NUWF's members demonstrated that they are well beyond the category of mere "concerned bystanders." *Id.*; R. at 6. NUDEP's opinion regarding the *future* environmental condition of the Muddy is simply irrelevant to the *present* aesthetic and recreational injuries. Therefore, the district court's ruling on standing was erroneous and should be reversed.

II. This Court has subject matter jurisdiction because Bowman's illegal wetland fill constitutes a continuing violation under the CWA.

This Court should reverse the district court on the issue of subject matter jurisdiction because NUWF has alleged a continuing violation of the CWA. Bowman conducted unpermitted dredging and filling in a wetland in violation of CWA Section 301, 33 U.S.C. § 1311 (2006), and left the dredged and fill materials in place without a permit under Section 404, 33 U.S.C. § 1344 (2006). Leaving unpermitted dredged and fill material in a wetland constitutes a continuing violation for three reasons. First, the Supreme Court in *Gwaltney* expressly permitted Section 505 citizen suits for continuing violations. Second, because the CWA is ambiguous, the Court should look to the Corps regulations, which define violations of Section 404 to include the

lasting physical effects of wetland fills. Third, the structure and purpose of the CWA require finding that violations of Section 404 continue until the dredged or fill material is removed. Therefore, this Court has subject matter jurisdiction over NUWF's claims.

A. *Gwaltney* does not bar this Section 505 suit because Bowman's activity constitutes a continuous violation.

Section 505 of the CWA confers subject matter jurisdiction to suits brought by citizens against any person "who is alleged to be in violation of an effluent standard or limitation." 33 U.S.C. § 1365(a)(1). Under CWA Section 301(a), a violation includes the "discharge of any pollutant by any person" without a permit. 33 U.S.C. § 1311(a). In this case, NUWF alleges that Bowman is in violation of Section 301(a) because Bowman did not receive a permit under Section 404, which governs the dredging and filling of wetlands.

The Supreme Court has interpreted Section 505 to bar citizens from bringing claims based only on wholly past violations. *Chesapeake Bay Found. v. Gwaltney of Smithfield, Ltd.*, 484 U.S. 49, 56 (1987). In *Gwaltney*, a group of citizens brought a lawsuit under Section 505 based on unpermitted discharges of pollutants that occurred entirely in the past and with no reasonable prospect for resuming in the future. *Id*. at 53–54. A central rationale for the Court's conclusion was that Section 505's language, "to be in violation, " used the present tense and thus required a present violation. *Id*. at 59.

The district court erroneously applied *Gwaltney* to this lawsuit. R. at 7. The violation of the CWA that NUWF alleges is not wholly past because Bowman continues to violate Section 404 by allowing the discharges to remain in the wetland. Discharges of dredged or fill material in violation of Section 404 are continuing violations as long as the pollutant remains in the wetland. *Sasser v. Adm'r*, 990 F.2d 127, 129 (4th Cir. 1973) ("Each day the pollutant remains in the wetland without a permit constitutes an additional day of violation."). A continuing violation is

not a wholly past violation; therefore, *Gwaltney* does not bar subject matter jurisdiction in Section 404 cases. *See Informed Citizens United, Inc. v. USX Corp.*, 36 F. Supp. 2d 375, 377 (S.D. Tex. 1999) ("a violation is 'continuing' for purposes of the statute until illegally dumped fill materials have been removed").

B. Violations under Section 404 are continuing because Corps regulations define "discharge of fill material" and "discharge of dredged material" as the physical effects of the activity.

The CWA does not define the "discharge of dredged or fill material," and thus Congress left a gap in the statutory scheme. In determining whether violations based on the discharge of dredged or fill material are continuing violations, this Court should look to the definitions of "discharge" promulgated by the Corps.

1. A violation under Section 301 of the CWA is predicated on the type of discharge at issue, and Section 404 discharges specifically deal with the discharge of dredged or fill material.

Section 301(a) of the CWA provides that, "[e]xcept as in compliance with this section" or Section 402 or 404, among others, "the discharge of any pollutant by any person shall be unlawful." 33 U.S.C § 1311(a). The underlying premise of a violation of the CWA is thus based on the discharge of pollutant without a permit. *Id*. "Discharge of a pollutant" is defined by the statute as "any addition of any pollutant to navigable waters from any point source." 33 U.S.C. § 1362(12) (2006). The discharge of dredged or fill material under Section 404 of the Act is undefined. *See Chevron U.S.A., Inc. v. Natural Res. Def. Council,* 467 U.S. 837, 842–43 (1984) (Where "the statute is silent or ambiguous," the question is "whether the agency's answer is based on a permissible construction of the statute."). In this manner, a "discharge" in violation of Section 301 depends on which permitting program applies—either Section 402 or 404.

2. Unpermitted discharges under Section 404 are continuing as defined by the agency's regulations, which are entitled to deference.

In determining whether unpermitted discharges under Section 404 are continuing violations, this Court should look to the definitions of "discharge" promulgated by the Corps. 33 C.F.R. § 323.2 (2011). The Corps defines "discharge" to include dredging and filling wetlands, as well as the ongoing physical effects of the dredging and filling. Therefore, a violation of Section 404 continues as long as the effects continue, or as long as the dredged or fill material remains in the wetland. *See City of Mountain Park v. Lakeside*, 560 F. Supp. 2d 1288, 1296 (N.D. Ga. 2008) ("violations of the Clean Water Act are ongoing for as long as the pollutants remain in the wetlands").

Under the Corps regulations, "discharge of fill material" means adding fill material to a water of the United States. 33 C.F.R. § 323.2(f). The Corps uses an effects-based test to determine if material is "fill material." 33 C.F.R. § 323.2(e). Discharge of fill material includes the following physical structures that result from the act of adding fill material to a water: "site-development fills," "causeways or road fills," "dams and dikes," and "artificial islands." 33 C.F.R. § 323.2(f). The fact that these physical structures continue to exist in the water body demonstrates an ongoing violation regardless of whether the actual activity of adding fill material has ceased. This is because the Corps has defined "discharge of fill material" based on the ongoing effects of fills, not solely the activities of adding fill material.

Similarly, "discharge of dredged material" means the addition of dredged material to a water of the United States as well as the ongoing effects of the addition. 33 C.F.R. § 323.2(d)(1). The regulations specify that "discharge of dredged material" includes but is not limited to the act of adding material to waters or wetlands. *Id*. Importantly, "discharge of dredged material" includes the ongoing physical effects of the addition, such as "the runoff or overflow from a

contained land or water disposal area." 33 C.F.R. § 323.2(d)(1)(ii). Therefore, a discharge of dredged material is not defined by a singular act but by its continuing effects.

Because the Corps has defined discharge of fill material and dredged material in federal regulations, the agency's interpretation is entitled to deference so long as the regulations are reasonable. *See Chevron*, 467 U.S. at 843–44 (deferring to an agency's permissible construction of a silent or ambiguous statute). Moreover, the Corps has consistently interpreted the definitions of "discharge of fill material" and "discharge of dredged material" to mean that the violations continue as long as the material remains in place. *See United States v. Ciampitti*, 669 F. Supp. 684, 700 (D.N.J. 1987); *United States v. Reaves*, 923 F. Supp. 1530, 1533 (M.D. Fla. 1996); *United States v. Telluride Co*., 884 F. Supp. 404, 406 (D. Colo. 1995), *rev'd*, 146 F.3d 1241 (10th Cir. 1998). Because the Corps has reasonably interpreted the meaning of "discharge of dredged or fill material" to include continuing violations, that interpretation should be entitled to deference. *Chevron*, 467 U.S. at 843–44 (a gap in a statute indicates that Congress delegated authority to the agency "to elucidate a specific provision of the statute by regulation").

C. The structure and purpose of the CWA demonstrate that violations of Section 404 are continuing violations.

This Court should also conclude that the structure and purpose of the CWA demonstrate that violations of Section 404 are continuing violations. First, the CWA enforcement scheme imposes penalties for each day of violations, including each day that the dredged or fill material remains in place. Second, the purpose of the CWA, to protect and remediate the nation's navigable waters, would be frustrated by a determination that Section 404 violations were not continuing. Third, Congress and the regulatory agencies created significant differences in the structures and purposes of Section 402 and Section 404, supporting the idea that a violation of

Section 404 may be continuing even though an analogous violation of Section 402 is not continuing.

1. The CWA imposes penalties for each day of a violation, including days where the fill remains in place.

The enforcement and penalty provisions of the CWA demonstrate that violations of Section 301 for the discharge of dredged and fill material are considered continuing. It is well established that violators are subject to separate penalties for each violation and for each day a violation occurs. 33 U.S.C. § 1319(d) (2006); *Borden Ranch P'ship v. U.S. Army Corps of Eng'rs*, 261 F.3d 810, 817 (9th Cir. 2001), *aff'd by an equally divided court*, 537 U.S. 99 (2002) ("The statute imposes a maximum penalty 'per day for each violation.'"). Penalties may be assessed for an ongoing violation for each day that unpermitted material remains in a water of the United States. *See United States v. Cumberland Farms, Inc.*, 647 F. Supp. 1166, 1183 (D. Mass. 1986), *aff'd*, 826 F.2d 1151 (1st Cir. 1987); *Ciampitti*, 669 F. Supp. at 700; *see also Sackett v. Envtl. Prot. Agency*, 132 S. Ct. 1367, 1372 (2012).[3]

In Section 404 cases, penalties have been imposed for each day that an unpermitted discharge is allowed to remain in a wetland. *See Sasser*, 990 F.2d at 129. In *Sasser*, the EPA brought an enforcement action under CWA Section 309 against a defendant who had conducted unpermitted discharges of fill material into a jurisdictional wetland. *Id*. at 129. The EPA sought penalties for each day that the defendant allowed the fill material to remain in the wetland. *Id*. The Fourth Circuit agreed with the EPA, concluding that under Section 309, a fine should be

[3] In *Sackett*, all three opinions relied on the premise that penalties may be assessed for each day that a defendant allows fill material to remain in a water of the United States, although the Court did not rule on that specific question. 132 S. Ct. at 1372 ("each day [the defendants] wait for the agency to drop the hammer, they accrue, by the Government's telling, an additional $75,000 in potential liability"); *id*. at 1375 (Ginsberg, J., concurring) ("[f]aced with an administrative compliance order threatening tens of thousands of dollars in civil penalties per day"); *id*. (Alito, J., concurring) ("[i]f the owners do not do the EPA's bidding, they may be fined up to $75,000 per day . . . EPA may wait as long as it wants before deciding to sue. By that time, the potential fines may easily have reached the millions").

imposed for each day of violation, including each day the defendant allowed the fill material to remain in place. *Id*. The reasoning of *Sasser* is equally applicable to citizen suits under Section 505. *See Informed Citizens United*, 36 F. Supp. 2d at 377; *City of Mountain Park*, 560 F. Supp. 2d at 1296.

2. Finding that violations of Section 404 are not continuing violations would frustrate the purpose of the CWA and allow Bowman to evade liability.

The goal of the CWA is to protect the integrity of the nation's waters. 33 U.S.C. § 1251 (2006). But this policy would be frustrated by limiting Section 404 violations to the singular act of adding dredged or fill material to a water body. In his concurrence in *Gwaltney*, Justice Scalia emphasized that a violation of the CWA "suggests a state rather than an act—the opposite of a state of compliance." *Gwaltney*, 484 U.S. at 69 (Scalia, J., concurring). Allowing unpermitted dredged or fill material to remain in a wetland is a state of non-compliance, flying in the face of Congress's purpose in implementing the Section 404 permitting scheme and allowing citizen suits to enforce those provisions. The risk is two-fold.

First, treating violations of Section 404 as one-time acts would incentivize illegal fill activities and encourage polluters to hide evidence of their discharge. *See City of Mountain Park*, 560 F. Supp. 2d at 1296 (prohibiting citizen suits for past wetland fills would "have the effect of incentivizing polluters to simply conceal their misdeeds, knowing that they will not face CWA liability unless they are essentially caught in the act of polluting"); *see also Informed Citizens United*, 36 F. Supp. 2d at 378. Discharging dredged or fill materials can often be done quickly, in as little as one day. This gives polluters the choice of paying a one-time $37,500 fine and escaping all future liability associated with allowing the dredged or fill material to remain in the wetland. *See id*.; 33 U.S.C. § 1319(d).

Second, concluding that CWA violations are not continuing would virtually eliminate citizen suits to enforce Section 404. Because many discharges of dredged or fill material occur in a short time frame, if citizens do not catch polluters in the act, there would be no ability to enforce Section 404 even if the effects of the discharge continue. *See Stillwater of Crown Point Homeowner's Ass'n v. Kovich,* 820 F. Supp. 2d 859, 896 (N.D. Ind. 2011). The requirement that citizens must file a 60-day notice before commencing a citizen suit ensures that polluters have 60 days to finish their dredging or filling activities, and after the discharge is complete, the polluter would entirely escape liability from a citizen suit. 33 U.S.C. § 1365(b). This is precisely what Bowman did by completing his illegal fill in one month. R. at 4.

D. Congress and the agencies created permissible differences between Section 402 and Section 404.

After *Gwaltney*, courts have concluded that a past discharge of a pollutant in violation of Section 402 does not result in a continuing violation, even if the pollutant remains in the water body. *Conn. Coastal Fisherman's Ass'n v. Remington Arm*, 989 F.2d 1305, 1313 (2d Cir. 1993). Conversely, a violation of Section 404 does result in a continuing violation as long as the pollutant remains in the water. *Sasser*, 990 F.2d at 129. The district court recognized this nuance in its opinion, but ignored the fact that this structural difference is the result of congressional design and agency interpretation. R. at 7.

The Section 402 and 404 permitting programs regulate different pollutants. 33 U.S.C. §§ 1342, 1344 (2006). The Supreme Court recognized this difference, and the possibility of potential overlap between the programs and pollutants involved, but where Section 404 jurisdiction is triggered, the Corps' authority is exclusive. *See Coeur Alaska, Inc. v. Se. Alaska Conservation Council*, 557 U.S. 261, 286 (2009). A pollutant under Section 404 may result in a continuing violation even though it would not under the Section 402 program. *N.C. Wildlife*

Fed'n v. Woodbury, No. 87–584–CIV–5, 1989 WL 106517, at *3 (E.D.N.C. Apr. 25, 1989). The court in *Woodbury* reasoned that the materials regulated under Section 404 were fundamentally different than Section 402 because under Section 404 the violation remains capable of correction. *Id*. While some Section 402 violations may be capable of correction, the Corps regulations specifically contemplate either removal of the fill or the procurement of an after-the-fact permit. 33 C.F.R. § 326.3(e) (2011). This Court should acknowledge the statutory scheme set up by Congress and the agency's reasonable interpretation. *See Envtl. Def. v. Duke Energy Corp.*, 549 U.S. 561, 576 (2007) (the EPA was entitled to deference interpreting a singular term as applied under different regulatory programs within the same statute). Therefore, this Court should reverse the decision of the district court and determine that discharges without a permit under Section 404 constitute continuing violations of the CWA.

III. Bowman's land-clearing activity violates the CWA because it constitutes an addition of a pollutant from a point source into a navigable water without a permit.

A central issue before this Court is whether Bowman's destruction of almost 1,000 acres constitutes a violation under the CWA. The text of the CWA, agency regulations, and the majority of courts support NUWF's position: Bowman's activities violate the CWA.

Section 301(a) of the CWA prohibits the discharge of a pollutant from a point source into navigable waters except as in compliance with, for example, CWA Section 404. 33 U.S.C. § 1311(a). Section 404 authorizes the Corps to issue permits for the "discharge of dredged or fill material." 33 U.S.C. § 1344(a). Discharge is defined as "any addition of any pollutant to navigable waters from any point source." 33 U.S.C. § 1362(12). Pollutant means, inter alia, "dredged spoil," "rocks," "biological material," and "sand." 33 U.S.C. § 1362(6). Point source means "any discernable, confined and discrete conveyance." 33 U.S.C. § 1362(14). Navigable waters means "waters of the United States," 33 U.S.C. § 1362(7), and includes, categorically,

wetlands adjacent to navigable waters. *See United States v. Riverside Bayview Homes, Inc.,* 474 U.S. 121, 138 (1985) (deferring to the agencies' regulation establishing jurisdiction over wetlands adjacent to navigable waters). Under the agencies' regulations, adjacent means "bordering, contiguous or neighboring." 33 C.F.R § 328.3(c) (2011). Bowman is in violation of the CWA because his activity involves an addition of a pollutant from a point source into navigable waters without a permit.

A. The materials at issue are pollutants, Bowman's bulldozer is a point source, and the wetland is a water of the United States.

Bowman's materials involve numerous pollutants under Section 502(6), specifically dredge and fill material. 33 U.S.C. § 1362(6). The vegetation remains and soil that have been moved in the leveling and ditching process are dredged spoils. The district court erred when it narrowly defined "dredging" as occurring only "on open water to excavate a channel or port docking area" for purposes of "commercial navigation" and conflated its definition of "dredging" with dredged spoils. R. at 8. The Corps has defined "dredged spoil" as "material that is excavated or dredged from waters of the United States." 33 C.F.R. §323.2(c). Therefore, the moment materials are removed from a jurisdictional wetland, they are "excavated," and thus dredged spoil. Furthermore, the Corps uses an effects-based test to define "discharge of fill material," to include material that replaces "any portion of a water of the United States with dry land." 33 C.F.R. § 323.2(e)(1)(i). Here, the effect of Bowman's land clearing is to replace the wetland with a field. R. at 4. The district court properly inferred that this fill material contains listed pollutants such as "biological material." R. at 4; 33 U.S.C. § 1362(6).

Bowman's bulldozer is a point source. The bulldozer is either a "container" or "rolling stock" under the CWA. 33 U.S.C. § 1362(14); *Avoyelles Sportsmen's League, Inc. v. Marsh*, 715

F.2d 897, 922 (5th Cir. 1983) ("[B]ulldozers and backhoes" constitute point sources.). No party contests that the point source element is met. R. at 8.

Bowman's property is jurisdictional because it is a wetland adjacent to a navigable water. Adjacent wetlands are categorically within the scope of the CWA. *Riverside Bayview*, 474 U.S. at 138. All parties agree that the Muddy River is a navigable water and that Bowman's property is a wetland. R. at 3–4. The wetlands include "650 feet of shoreline" on the river, R. at 3, and Bowman conducted land clearing up to only 150 feet from the river. R. at 4. This proximity meets the regulatory definition of "bordering, contiguous or neighboring." 33 C.F.R § 328.3(c); *see United States v. Banks*, 873 F. Supp. 650, 658 (S.D. Fla. 1995), *aff'd*, 115 F.3d 916 (11th Cir. 1997) (wetlands at least one-half mile from a navigable water were jurisdictional). Therefore, the wetlands are navigable waters subject to CWA jurisdiction.

B. **Bowman's land-clearing activity constitutes an addition of a pollutant.**

The CWA does not define "addition." The Corps and the EPA define "discharge of dredged material" by regulation as "any addition of dredged material into, *including redeposit* of dredged material other than incidental fallback within, the waters of the United States." 33 C.F.R. § 323.2(d)(1) (emphasis added). First, Bowman's activity constitutes a discharge because the pollutant need not come from outside of the wetland to constitute an "addition" under Section 404. Second, Section 402 has no bearing on Bowman's CWA violations under Section 404.

1. The redeposit of a pollutant within a water body constitutes an addition.

The statutory text, regulations, and an abundance of case law support that a redeposit is an "addition" under Section 502(12). The plain language of the Act indicates that a pollutant need not come from the outside world to be regulated. For example, Section 404(a) specifically provides for the permitting of discharges of dredged material. 33 U.S.C. § 1344(a). In line with

this, "pollutant" explicitly includes "dredged spoil." 33 U.S.C. § 1362(6). As the Fifth Circuit recognized in *Avoyelles*, these provisions are illuminating because "'dredged' material is by definition material that comes from the water itself" and, accordingly, "[a] requirement that all pollutants must come from outside sources would effectively remove the dredge-and-fill provision from the statute." 715 F.2d at 924 n.43. Furthermore, the exemptions in Section 404(f) reveal an assumption that redeposits are properly regulated as additions because they include some activities that ordinarily occur within one waterbody. 33 U.S.C. §§ 1344(f)(1)(A), (C) (providing an exception for, inter alia, "plowing" and "the maintenance of drainage ditches").

Accordingly, the Corps and EPA have promulgated regulations consistent with this principle and those interpretations are entitled to deference. Both agencies have interpreted discharge of dredged material to include redeposits. 40 C.F.R. § 232.2 (2011) (EPA); 33 C.F.R. § 323.2(d) (Corps). The interpretation of addition to include redeposits is reasonable and entitled to deference. *See Chevron*, 467 U.S. at 843 ("[I]f the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute."). First, "addition" is ambiguous as to whether it encompasses redeposits. *See Nat'l Mining Ass'n v. U.S. Army Corps of Eng'rs,* 145 F.3d 1399, 1405 (D.C. Cir. 1998) (concluding that there is not a "bright line" between redeposit and incidental fallback and "a reasoned attempt by the agencies to draw such a line would merit considerable deference"). Second, the regulation of redeposits is reasonable because the Section 404 program, as indicated above, would be eviscerated if redeposits were not regulated. *See Avoyelles,* 715 F.2d at 924 n.43.

At least five circuits have expressly affirmed the agencies' reasonable interpretation that redeposits constitute additions. *See Avoyelles*, 715 F.2d at 923–25 ("addition" encompasses the

redeposit of vegetation within a wetland); *United States v. M.C.C. of Fla., Inc.,* 772 F.2d 1501, 1506 (11th Cir. 1985) (redeposit of soil by tugboat propellers is an addition); *Rybachek v. Envtl. Prot. Agency*, 904 F.2d 1276, 1285–86 (9th Cir. 1990) (redeposit of material within a streambed during mining activity is an addition); *Greenfield Mills, Inc. v. Macklin*, 361 F.3d 934, 947–49 (7th Cir. 2004) (an addition does not require a discharge from the outside world); *Green Acres Enters., Inc. v. United States*, 418 F.3d 852, 856 (8th Cir. 2005) (levee maintenance activities within a waterbody was an addition); *United States v. Hubenka*, 438 F.3d 1026, 1035 (10th Cir. 2006) (moving "river bottom materials" to build "dikes" falls "unquestionably" within the meaning of addition).

Ditching and land clearing results in a redeposit subject to regulation. For example, sidecasting, which is the "deposit of dredged or excavated material from a wetland back into that same wetland" constitutes an addition under the Act. *United States v. Deaton*, 209 F.3d 331, 335 (4th Cir. 2000) (It is "entirely unremarkable," that an addition occurs "when an activity transforms some material from a nonpollutant into a pollutant."). In *Deaton*, the court held that ditching activity involving the removal and redeposit of "earth and vegetable matter" transformed the material into "dredged spoil" and thus added dredged spoil to the water. *Id.* The court explained that the "effects on hydrology and the environment are the same" whether or not the dredged spoil comes from within the same water body. *Id.* Similarly, the Ninth Circuit has held that deep-ripping, which "simply churns up soil that is already there," is an addition. *Borden Ranch,* 261 F.3d at 814.

Bowman's "land-clearing operations" involve numerous additions of pollutants. First, he used a bulldozer to level trees and other vegetation into windrows. R. at 4. He excavated the vegetation, transforming it into "material that is excavated or dredged" or dredged spoils, which

he then added to the wetland. *Deaton*, 209 F.3d at 335–36 (4th Cir. 2000) (once material is "excavated from the wetland, its redeposit in that same wetland *added* a pollutant where none had been before."); *see United States v. Brace*, 41 F.3d 117, 121 (3d Cir. 1994) (addition occurred where a farmer "cleared, mulched, churned, *leveled*, and *drained* [a] formerly wooded and vegetated site") (emphasis added); *United States v. Cundiff*, 555 F.3d 200, 213 (6th Cir. 2009) (land clearing results in an addition because, "[a]lthough it is plausible to read 'addition' as covering only completely foreign materials, that reading is foreclosed because 'pollutant' is *defined* in the Act to specifically include 'dredged spoil'").

Second, he burned the windrows, adding "ashes" to the wetland, R. at 4, which it can be inferred contained biological materials. *See Borden Ranch*, 261 F.3d at 814 (concluding that each separate act of a discharge constitutes a violation); *Deaton*, 209 F.3d at 335 (the transformation of a pollutant in a wetland results in an addition).

Third, Bowman dug trenches to be filled with the "leveled vegetation remains" and ashes, R. at 4, which involves the addition of more dredged spoils. *See Deaton,* 209 F.3d at 335. He then pushed soil from high to low portions of the field and into the trenches, again adding more dredged spoils to the wetland. *See id*; 33 C.F.R. § 323.2(d)(3)(1) (establishing that mechanized land clearing is regulated unless a polluter can prove "that the activity would not have the effect of destroying or degrading any area of waters of the United States").

Fourth, Bowman created a "wide ditch or swale" to drain the wetland, R. at 4, and it can be inferred that more than a *de minimus* amount of dirt was moved in the wetland for this activity and it thus constitutes an addition. *Cf. Nat'l Mining Ass'n,* 145 F.3d at 1405 (The deposit of "incidental fallback" is not an addition.). Therefore, under a long line of judicial authority, and

consistent with the CWA and its implementing regulations, Bowman's activities constituted an addition of pollutants.

2. EPA's regulation under Section 402 is inapposite.

Regulation of redeposits follows unambiguously from CWA Section 404. This is true even in light of how "addition" has been treated under Section 402, the distinct NPDES regulatory program. The term "discharge" in Section 301(a), which is defined as "any addition of any pollutant" in Section 502(12), is a jurisdictional prerequisite to both Sections 402 and 404. EPA has interpreted some activities under Section 402 that occur within a waterbody or between water bodies to not trigger jurisdiction. However, those situations are distinguishable from redeposits under Section 404, which involve dredged spoils. Moreover, under the deference doctrines, the agencies are free to adopt distinct implementation strategies for these inherently different regulatory programs.

There are two special interpretations of a discharge under Section 402 that can be reconciled with Section 404: discharges from dams and the Water Transfers Rule. First, EPA has interpreted the passage of pollutants through dams to not require permits. *See, e.g.*, *Nat'l Wildlife Fed'n v. Gorsuch*, 693 F.2d 156, 175 (D.C. Cir. 1982) (affording deference to EPA's interpretation that when pollutants pass through a dam, no "addition" occur because the dam did not "physically introduce[] a pollutant from the outside world"). EPA's interpretation is consistent with the regulation of additions under Section 404, where, for example, the point source itself adds a pollutant to the wetland by transforming it into dredged spoils. *See Deaton*, 209 F.3d at 335–36. By contrast, in the dam context the pollutant exists before passage through the dam, and occurs in the same form below the dam. *Gorsuch*, 693 F.2d at 183.

Second, Section 404 discharges are not undermined by the Water Transfers Rule, which exempts transfers of "water" from one waterbody into another so long as it is not subject to an "intervening industrial, municipal, or commercial use." 40 C.F.R. § 122.3(i) (2011). On its face the rule only applies to the transfer of *water* and not the discharge of pollutants themselves. Further, the district court erred in suggesting that this rule was based on the unitary waters theory. R. at 9. In fact, the rule was promulgated primarily to give effect to state authority under CWA Section 101(g) to allocate water resources. *See* National Pollutant Discharge Elimination System (NPDES) Water Transfers Rule, 73 Fed. Reg. 33,697, 33,698 (June 13, 2008) (codified at 40 C.F.R. § 122.3(i)); 33 U.S.C. § 1251(g).

Moreover, even if these positions are considered inconsistent, the agency is free to interpret "addition" differently under the separate regulatory programs. *See Duke Energy*, 549 U.S. at 576 (EPA may interpret a single ambiguous word differently in two separate regulatory programs). The Court reasoned that different policy dynamics are at issue in the programs and that including the cross-referenced definition of a term did not "eliminat[e] the customary agency discretion to resolve questions about a statutory definition by looking to the surroundings of the defined term." *Id.* Here, the district court improperly relied on a case concerning statutory interpretation by courts, overlooking the deference doctrines that control judicial interpretation. *See* R. at 9 (citing *Sorenson v. Sec'y of the Treasury*, 475 U.S. 851 (1986)). The Supreme Court has long afforded more leeway to agencies where they have been delegated rule-making authority. *See Chevron,* 467 U.S. at 843–44 ("[A] court may not substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator of an agency.").

The agencies' interpretation is well within the bounds of reasonableness. Congress defined the different programs according to the pollutants that they regulate, and assigned

entirely different regulatory agencies to govern the permitting programs. As such, the Supreme Court has recognized that Sections 402 and 404 apply on a "mutually exclusive" basis. *See Coeur Alaska,* 557 U.S. at 273 ("Section 402 thus forbids the EPA from exercising permitting authority that is 'provided [to the Corps] in' § 404."). Sections 402 and 404, in dealing with pollutants that are inherently different in nature and effect, are the exact type of technical programs calling on agency expertise for interpretation. *See Chevron,* 467 U.S. at 843–44. Contrary to the district court's ruling, this difference is significant. *See, e.g.*, *United States v. Sinclair Oil Co.*, 767 F. Supp. 200, 203–04, 205 n.5 (D. Mont. 1990) (distinguishing the dam cases partially on the grounds that they were decided under the "separate regulatory framework" of Section 402, and holding that redistribution of riverbed materials constituted a "discharge" of fill material). Therefore, Bowman's obliteration of hundreds of acres of wetlands by redepositing material violates the Act.

IV. NUWF's claim is not barred by Section 505(b)(1)(B) because NUDEP is not diligently prosecuting an action.

This Court should reverse the district court's erroneous holding that NUDEP's lawsuit barred NUWF's citizen suit. R. at 7–8. NUWF's lawsuit is not barred by Section 505 because NUDEP is not diligently prosecuting Bowman for his illegal continuing violations.[4]

Section 505(b)(1)(B) only bars an action under Section 505(a) if three elements are met. First, the State or the Administrator must have commenced an action; second, in a court; and third, be diligently prosecuting the action to require compliance with a CWA "standard, limitation, or order." 33 U.S.C. § 1365(b)(1)(B). Although the agency is presumed to prosecute "diligently," that presumption can be overcome by a demonstration of substantive or procedural

[4] The initial administrative order did not result in a Section 309(g) bar because NUWF filed suit within the 120-day safe-harbor window in which nothing that NUDEP does can bar its claim. *See* 33 U.S.C § 1319(g)(6)(B)(ii).

defects of the State's action. *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc. (Laidlaw II)*, 890 F. Supp. 470, 489 (D.S.C. 1995). This inquiry involves an evaluation of numerous factors, including, whether the agency orders compliance, whether the agency is lenient in penalty calculation, whether citizens have the ability to participate, and whether there is an indication that the defendant welcomes the agency action. *See id*. The "overriding concern" of the diligent prosecution analysis is "to assure vigorous enforcement of the CWA to achieve the stated goals of the Act." *Id.*

Here, the lower court ignored this overriding concern and offered scant review of the numerous factors of a proper analysis of diligent prosecution. Instead, it concluded that NUDEP "diligently prosecuted" this action based solely on filing a complaint within a month of receiving the NUWF's notice letter and negotiating a settlement with Bowman. R. at 7. While NUDEP did commence an action in a court when it filed its complaint, it is not diligently prosecuting. This is evidenced by the substantive and procedural deficiencies of the action. Finally, any attempt to broadly construe the diligent prosecution bar without analyzing the meaning of "diligent" conflicts with the mandate of the CWA and the important role of citizen suits.

A. NUDEP is not diligently prosecuting because it is not seeking to order compliance with the CWA.

NUDEP's prosecution does not rise to the level of "diligence" because it merely seeks to file a consent decree based on a lax administrative order. The settlement only requires Bowman to cease further violations of Section 404, and to deed a conservation easement over some of its property to "enhance wetland environment on the site." R. at 7–8. Nothing in the proposed consent order addresses Bowman's land-clearing activity that has occurred and continues to occur. There are two reasons why the settlement is inadequate to bar NUWF's citizen suit. First, the NUDEP "settlement agreement" does not address the continuing violations alleged by

NUWF. Second, NUDEP did not assess any penalties for the violations.

1. NUDEP's action is not diligent because it fails to address past and continuing violations of the CWA.

The lack of *any* order of compliance for Bowman's past and continuous violations—for example, an order to remove the materials, an order to apply for an after-the-fact permit, or an assessment of penalties—is evidence of a lack of diligent prosecution. *Laidlaw II*, 890 F. Supp. at 490 ("The lack of substantial relief in a settlement is properly considered by the court in determining whether the state action was diligently prosecuted."). Where a compliance order fails to address a statutory violation, both the text of the CWA and the case law support allowing a citizen suit under Section 505.

The CWA provides that citizen suits are expressly permitted when a party seeks to enforce "an effluent standard or limitation." 33 U.S.C. § 1365(a)(1). A citizen suit is proper where "the federal, state and local agencies fail to exercise their enforcement responsibility." *Gwaltney*, 484 U.S. at 60 (quoting S. Rep No. 92–414 at 64 (1971), *reprinted in* 1972 U.S.C.C.A.N. 3668, 3730). If the Administrator or State has not commenced an action "to require compliance" then the citizen suit is not barred. *Id*. (citing 33 U.S.C. § 1365(b)(1)(B)).

The case law is replete with examples of where a compliance order that fails to cover citizen's alleged violations will not bar a Section 505 suit. *See, e.g.*, *Adkins v. VIM Recycling, Inc.*, 644 F.3d 483, 494 (7th Cir. 2011) (concluding that citizens were only barred when the government and citizen claims were overlapping, under RCRA's substantially similar provision); *Frilling v. Village of Anna*, 924 F. Supp. 821 (S.D. Ohio 1996) (concluding that citizen action would only be barred if the state seeks to require compliance with the same violation that the citizen has alleged in its notice letter). In *Public Interest Research Group of N.J. v. Rice*, the court held that a citizen action was appropriate when an order issued by the EPA did not require

compliance with permit limitations the citizen action sought to enforce. 774 F. Supp. 317, 325 (D.N.J. 1991). The court found that it was presented with "substantial and continuous effluent discharges" and that the court was therefore "required to order the defendant" to comply with the CWA. *Id*. Where the State or Administrator declines to take action, allowing a citizen suit to proceed "represents the vindication of the plaintiff's right to bring suit when the Agency cannot or will not protect the environment." *Id*. In *Hudson River Fishermen's Ass'n v. Westchester County*, the court held that there was not diligent prosecution, even where the government was actively litigating an action, because it did not address the same factual grievances asserted by the citizens. 686 F. Supp. 1044, 1052 (S.D.N.Y. 1988).

The "settlement agreement" issued by the NUDEP is a far cry from the type of action that should bar a citizen suit. R. at 4. NUDEP fails to recognize the legal significance, or pursue claims against Bowman for his past and continuing violations of the CWA resulting from his illegal discharge. R. at 5, 7. Because NUDEP disavows the continuing violation theory, it does not seek to enforce against Bowman's present violations for days that the fill remains in place. As a result, NUWF alleges different violations than those alleged by NUDEP and are not barred by Section 505(b)(1)(B).

Even beyond failing to address Bowman's continuing violations, NUDEP does not seek to enforce Bowman's past violations of the Act. It fails to hold Bowman accountable for any violation, and instead, merely requires him prospectively to abstain from destroying wetland habitat. R. at 4 (In the settlement agreement, Bowman merely "agreed not to clear more wetland in the area."). Furthermore, the settlement should not serve as evidence of diligence because NUDEP's motion to enter the consent decree is still pending, and the court is free to disapprove of it. *Friends of Milwaukee's Rivers v. Milwaukee Metro. Sewerage Dist.*, 382 F.3d 743, 753–54

(7th Cir. 2004) ("A judicial action that never resulted in any legally binding agreement to resolve the violations alleged by the plaintiffs . . . is not a diligent prosecution."). The settlement agreement says nothing about liability for the land-clearing activity in Bowman's wetlands. *Id*. This Court has a duty to order compliance with the CWA. *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 315 (1982) (The purpose of the CWA "is to be achieved by compliance with the Act, including compliance with the permit requirements."); *United States v. Oakland Cannabis Buyers' Co-op.*, 532 U.S. 483, 497 (2001) (The court may not "override Congress' policy choice, articulated in a statute, as to what behavior should be prohibited."). NUWF specifically has a right to enforce these violations where the state cannot or will not address them. *See Envtl. Prot. Agency v. City of Green Forest, Ark.*, 921 F.2d 1394, 1405 (8th Cir. 1990) ("[A]gency inaction is precisely the circumstance in which private action is appropriate.").

2. Failure to assess penalties for the violations demonstrates a lack of diligence.

NUDEP's failure to assess penalties contributes to its lack of diligent prosecution. *Laidlaw II*, 890 F. Supp. at 491 ("A lenient penalty that is far less than the maximum penalty may provide evidence of non-diligent prosecution."). This is true regardless of whether penalties are required for every CWA violation. *See id.* The failure to assess penalties further demonstrates the lack of any order of compliance for past and continuing violations.

Additionally, NUDEP's failure to assess stipulated penalties for potential future violations demonstrates that, even in the one place the order contemplates "compliance," it is particularly lax. *Id*. at 490 (lack of diligence where the order did not, among other things, "contain stipulated penalties for future violations of the Defendant's permit."). The district court in *Laidlaw II* found that the strongest evidence of a lack of diligent prosecution was the agency's failure to calculate the defendant's economic benefit in penalty assessment. *Id*. at 494. The court

was persuaded by the fact that penalties lose their deterrence value if they do not force violators to pay back its "benefit" of noncompliance. *Id.* Likewise here, the failure to assess *any* penalties more seriously undermines the Act's role in deterring violations and demonstrates a lack of diligence. *Id.* at 491 ("A penalty serves as a successful deterrent only if potential violators believe that they will be worse off by not complying with the applicable requirements.").

B. NUDEP's action is procedurally deficient because it is rendered suspect by its timing and Bowman's acquiescence to the order.

Bowman's complacency with the State's action reveals a "pen-pal" relationship between the defendant and the State. NUDEP and Bowman worked together to incorporate the "agreement" into an administrative compliance order. R. at 4. A defendant's involvement in their own prosecution renders that action subject. *Laidlaw II,* 890 F. Supp. at 489 (noting that defendant's contribution to the enforcement action indicates a lack of diligence.). This is further supported by Bowman's apparent contentment to enter into a judicially binding order. R. at 5.

C. Brushing over the express "diligent prosecution" standard is inconsistent with the CWA and undermines the important role of citizen suits.

At least one case has treated the presumption of diligence as conclusive. *See Supporters to Oppose Pollution, Inc. v. Heritage Grp.,* 973 F.2d 1320, 1324 (7th Cir. 1992) (concluding that where the "the agency prevails in all respects, that is the end" of the diligent prosecution analysis). This contradicts the statutory text requiring an inquiry into "diligent prosecution," not whether the agency is satisfied with the outcome. 33 U.S.C. § 1365(b)(1)(B). *Heritage Group* misapplied dicta in *Gwaltney*—that citizen enforcement "supplements" government enforcement—to improperly marginalize the role of citizen suits.

Congress and the courts have recognized the important role of public participation and citizen enforcement as private attorneys general. *Laidlaw II*, 890 F. Supp. at 487 ("The public

must have a genuine opportunity to speak on the issue of protection of its waters . . . The scrutiny of the public . . . is extremely important in insuring expeditious implementation of the authority and a high level of performance by all levels of government and discharge sources." (quoting S.Rep. No. 92-414 at 72)). The court in *Laidlaw II* took this position because Congress did not intend citizen plaintiffs "to be treated as nuisances or troublemakers but rather as welcomed participants in the vindication of environmental interests." *Id.* (internal quotations and citations omitted). Adopting this position does not interfere with the government's ability to come to agreement with polluters based on valid enforcement. The notice requirement enables the government to have the "first shot" at enforcement, *Laidlaw II*, 890 F. Supp. at 487, and diligent prosecution simply ensures that the enforcement is adequate. It is when the government fails to order compliance that citizen enforcement is most essential. *Student Pub. Interest Research Grp. v. Georgia–Pacific Corp.,* 615 F. Supp. 1419, 1427 (D.N.J. 1985) (a presumption of diligence "would render citizen suits impossible when they are required most"). Therefore, NUWF's suit is not barred by CWA Section 505(b)(1)(B).

CONCLUSION

For the foregoing reasons, NUWF respectfully asks this Court to reverse the district court's decision in toto. First, NUWF has established standing to challenge Bowman's illegal destruction of hundreds of acres of wetlands. Second, Bowman's illegal discharges are continuing violations and not barred under the Supreme Court's decision in *Gwaltney*. Third, Bowman's activity violates the CWA because the redeposit of pollutants into the wetland is an "addition." And fourth, NUWF's suit is not barred because NUDEP failed to diligently prosecute a claim against Bowman. Therefore, this Court should grant NUWF's motion for summary judgment.