Team 33

C.A. No. 13-1246

IN THE UNITED STATES
COURT OF APPEALS FOR THE TWELFTH CIRCUIT

NEW UNION WILDLIFE FEDERATION,
Plaintiff-Appellant,

v.

NEW UNION DEPARMENT OF ENVIRONMENTAL PROTECTION
Intervenor-Appellee

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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JURISDICTIONAL STATEMENT

The District Court had federal question subject matter jurisdiction pursuant to 28 U.S.C. § 1331 (2006) because this was a civil action arising under the federal Clean Waters Act. On June 1, 2012 the district court granted the Jim Bob Bowman's motion for summary judgment, deeming that the New Union Wildlife Federation lacked standing. The New Union Wildlife Federation and New Union Department of Environmental Conservation each filed a timely notice of appeal. The District Court's order is a final decision, and this Court has jurisdiction pursuant to 28 U.S.C. § 1291.

STATEMENT OF THE ISSUES

I. Whether the District Court erred in finding that New Union Wildlife Federation ("NUWF") lacked Article III standing to sue Jim Bob Bowman ("Bowman" or "Respondent") for violating the Clean Water Act ("CWA").

II. Whether the District Court was correct when it found that NUWF's citizen suit was barred as all violations were wholly past following the settlement agreement between New Union Department of Environmental Conservation ("NUDEP") and Bowman.

III. Whether the District Court was correct when it found that NUWF's citizen suit was barred by NUDEP's commencement and diligent prosecution of an enforcement action against Bowman.

IV. Whether the District Court was correct when it found that Bowman violated the CWA when he moved dredge and fill material from one part of a wetland to another part of the same wetland.

STATEMENT OF THE CASE

This is an appeal from a final order of the United States District Court for the District of New Union granting Jim Bob Bowman's motion for summary judgment on all four questions of law. R. at 6-11. NUDEP and Bowman entered into an agreement to resolve any and all issues pertaining to Bowman's violation of the CWA. R. at 4. On August 1, 2012, NUDEP and Bowman incorporated this agreement into an administrative order. *Id.* On August 10, 2012, NUDEP brought suit in the United States District Court for the District of New Union alleging a violation to CWA § 505. R. at 5.

Following NUDEP's suit, the NUWF filed its own complaint against Bowman on August 30, 2012 pursuant to CWA § 505. *Id.* On September 15, 2012, NUWF filed a motion to intervene in NUDEP's August 10, 2012 CWA § 505 action, with NUDEP filing the reciprocal action to intervene in NUWF's August 30, 2012 action. *Id*. The District Court granted NUDEP's motion, thereby consolidating the aforementioned cases into the instant action. *Id.* Additionally, on September 5, 2012, NUDEP filed a motion to enter a decree to embody to terms of the previous agreement between Bowman and NUDEP, which is still pending with the District Court. *Id.*

Following discovery, the parties filed various cross-motions for summary judgment. *Id.* The district court found that NUWF did not have standing to sue Bowman as there was no discernible injury in fact that could be fairly traceable to Bowman's conduct, that NUWF's citizen suit was barred as there was no continuing violation, that NUWF's citizen suit was barred by NUDEP's commencement and diligent prosecution of an enforcement action against Bowman, and that Bowman did not violate § 404 of the CWA because his actions did not constitute the "addition" of a pollutant. R. at 6-10. NUDEP filed a Notice of appeal challenging

the two following findings of the district court: that NUWF lacks standing and that Bowman did not violate § 404 of the CWA. R. at 5. NUWF filed a Notice of Appeal challenging all four holdings rendered by the district court. R. at 1.

STATEMENT OF THE FACTS

Jim Bob Bowman owns a property adjacent to the Muddy River in the State of New Union. R. at 3. Bowman's property encompasses an area of one thousand acres, including a shoreline of 650 feet along the Muddy River. *Id*. The Muddy River exceeds five hundred feet in width and is at least six feet deep in the area where it borders Bowman's property. *Id.* Additionally, the entirety of Bowman's land is located within the one hundred year floodplain of the Muddy, and the property is hydrologically connected to the river. *Id*. The Muddy River is used for upstream and downstream recreational navigation, including the area adjacent to Bowman's property. R. at 4. Further, the Muddy River is used for other recreational activities such as boating, fishing, picnicking, and frogging. R. at 6.

On June 15, 2012, Bowman began to clear the land in order to make it suitable for farming. R. at 4. Bowman used bulldozers to level trees and other vegetation. *Id.* He pushed the remains into windrows, which he then burned. *Id.* Bowman then dug trenches with the bulldozers and pushed the remaining vegetation and ashes into the trenches. *Id.* Bowman left a strip of land immediately adjacent to the bank of the Muddy River uncleared. *Id.* This strip of land was approximately 150 feet wide and extends the entire length of Bowman's property directly along the Muddy. *Id.* He completed the land-clearing operations on or about July 15, 2012. *Id.*

On July 1, 2012, NUWF gave notice to Bowman, the Environmental Protection Agency ("EPA"), and the State of New Union, acting through NUDEP, of its intent to bring suit under §

505 of the CWA. *Id.* NUDEP notified Bowman that he was in violation § 404 of the CWA. *Id.*

NUDEP's settlement agreement required Bowman to cease any additional land-clearing operations within the wetland area. R. at 4. Moreover, the agreement mandated that Bowman surrender the portion of his land next to the river for a conservation easement, making the land open to the public for recreational use. *Id.* This area is approximately 225 feet wide, and spans the entire length of Bowman's property along the river. *Id.* This 225 feet wide easement consists of the 150 feet wide area that remained uncleared, plus an additional 75 feet wide artificial wetland buffer that Bowman is required to create and maintain. *Id.* Bowman consented to the settlement with NUDEP and the agreement was incorporated into an administrative order on August 1, 2012 under the state statute version of §§ 309(a) and (g) of the CWA. R. at 4.

STANDARD OF REVIEW

An appellate court reviews a lower court's decision *de novo*, thus the reviewing court analyzes the determinations anew without showing deference to the lower court. *Salve Regina Coll. v. Russell*, 499 U.S. 225, 238 (1991). During appellate review, "summary judgment is appropriate if there is no genuine issue as to any material fact." *Universal Money Ctrs., Inc. v. Am. Tel. & Tel. Co.*, 22 F.3d 1527, 1529 (10th Cir. 1994) (quoting Fed. R. Civ. P. 56(c)). The party moving for summary judgment bears the burden of proof to show that there is no material fact at issue. *Id.* (quoting *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986)). The court examines the facts and the record "in the light most favorable to the party opposing summary judgment." *Adickes v. S. H. Kress & Co.*, 398 U.S. 144, 158-159 (1970). The court must determine whether the record as a whole supports a finding that there was no issue of material fact. *City of Chi. v. Envt'l Def. Fund*, 948 F.2d 345, 347 (7th Cir. 1991).

SUMMARY OF THE ARGUMENT

The District Court erred in finding that NUWF lacked standing to bring forth the instant case. NUWF has standing to pursue a civil action as it has satisfied its article III "case and controversy" requirements. Specifically, NUWF properly alleges an injury in fact, tracing that injury in fact to the Respondent Jim Bob Bowman's actions, and, finally, explaining how this Court can redress the harms caused by Bowman.

The District Court was correct in granting summary judgment for lack of continuing or ongoing violation as required for subject matter jurisdiction under § 505 of the Clean Water Act. There was no realistic prospect of a continuing violation given Bowman's compliance with the settlement agreement required by NUDEP. The settlement agreement made any violations wholly past, thus prohibiting citizen suit jurisdiction.

The District Court correctly held that NUWF's citizen suit was barred by NUDEP's actions toward Bowman. NUDEP commenced and diligently prosecuted an enforcement action against Bowman when it entered into a settlement agreement with Bowman and filed a lawsuit in United States District Court to finalize the administrative order. Under § 505 of the CWA, NUDEP's action bars NUWF's citizen suit.

The District Court erred when it held that Bowman's actions did not constitute the "addition" of a pollutant pursuant to § 404 of the CWA. The District Court was incorrect to apply the Environmental Protection Agency's ("EPA") definition of "addition" because the EPA is not the agency that administers § 404 and using the EPA's definition severely limits the application of § 404, contrary to Congressional intent.

ARGUMENT

I. NUWF HAS STANDING TO PURSUE A CIVIL ACTION AS IT HAS SATISFIED ITS ARTICLE III REQUIREMENTS FOR STANDING BY ASSERTING AN INJURY IN FACT, BY DEMONSTRATING THAT THE INJURY WAS FAIRLY TRACEABLE TO BOWMAN, AND BY SHOWING THAT THE COURT CAN REDRESS NUWF'S GRIEVANCES.

Bowman contends that NUWF lacked standing and, as a result, the trial court did not have jurisdiction over NUWF'S grievances. R. at 3. As typical in environmental cases, plaintiffs are frequently not themselves the object of a governmental agency's regulatory efforts or a private party's action. Martin A. McCrory, Standing in the Ever-Changing Stream: The Clean Water Act, Article III Standing, and Post-Compliance Adjudication, 20 Stan. Envtl. L.J. 73, 87 (2001). Instead, the plaintiffs will often assert that the outcome of the government's or private party's decision adversely affects the environment, which everyone has a right to enjoy or has an interest. *Id.* Article III of the Constitution provides that a plaintiff has standing to bring forth a cause of action so long as the plaintiff has incurred an injury in fact, said injury is fairly traceable to the defendant actions, and that the court can redress and alleviate the plaintiff's injury. *Allen v. Wright*, 468 U.S. 737, 748, (1984); *See also Lujan v. Friends of Wildlife,* 504 U.S. 555, 558 (1992); *Steel Co. v. Citizens for a Better Env't,* 523 U.S. 83, 107 (1998). As the NUWF has satisfied all the elements for Article III standing, it has the right, regardless of the merits of its arguments, to bring forth its cause of action.

A. NUWF Has Met Its Burden of Alleging an Injury in Fact.

Bowman argues that the NUWF lack standing because there is no demonstrated proof of harm. R. at 6. However, the NUWF has a valid injury in fact due to the loss of aesthetic enjoyment and the general environmental well-being of Bowman's property. *Id.* Courts have interpreted the Article III limitation on standing as requiring litigants to be specifically harmed,

and not allege a generalized grievance, in order to file a claim. *Allen*, 368 U.S. at 739. In fact, citizen suits are thought to vindicate the public's interest in an environmental right. *Lujan*, 504 U.S. at 561. The purpose of standing law is to ensure that courts are not flooded with suits brought by people who have not been harmed, and to ensure that the litigants before the court are those best suited to vigorously present the case. *Id.* at 557; *City of Los Angeles v. Lyons*, 461 U.S. 95, 102 (1982) (requiring an injury in fact be "concrete" and "real, not hypothetical."). In *Sierra Club v. Morton*, the Supreme Court stated that concrete injury would be felt by those who use the park in question and "for whom the aesthetic and recreational values of the area will be lessened by the [... actions of the defendant]." 405 U.S. 727, 735 (1972).

In *Friends of Earth v. Laidlaw Environmental Services*, a member of the environmental group CLEAN, Angela Patte, testified that she and her husband would like to purchase a home in Roebuck near the river, but will not do so because of the pollutants discharged by the polluter. 528 U.S. 167, 178 (2000). CLEAN members Kenneth Lee Curtis and Gail Lee testified that the values of their homes were negatively affected due to the polluter's conduct. *Id.* Courts have recognized that plaintiffs often suffer concrete injuries in fact based on the public perception, loss in economic value, and loss in aesthetic enjoyment or ability to recreate. *Id.* One need not feel a tangible injury in order to seek redress from the court. This idea was further developed in *Lujan v. Defenders of Wildlife*, where Supreme Court stated, "[o]f course, the desire to use or observe an animal species, even for purely aesthetic purposes, is undeniably a cognizable interest for purpose of standing." 504 U.S. 555, 560 (1992) (citing *Sierra Club*, 504 U.S. at 562-563). NUWF would therefore satisfy the injury in fact requirement if it can show that its members' aesthetic enjoyment of the waterway has been lessened by Bowman's violations of the CWA.

Members of the NUWF have shown that they use or would use the river and that their

enjoyment of the Muddy has been adversely affected by Bowman's land-clearing operations. R. at 3. NUWF members Dottie Milford, Zeke Norton, and Effie Lawless, have all attested that they have previously enjoyed recreational boating, fishing, and picnicking on or nearby Bowman's property. R. at 6. Their knowledge that the property has been cleared creates a discernible injury because it detracts from the their ability to enjoy the land.

B. The Injury In Fact Is Fairly Traceable to Bowman's Conduct.

In addition to alleging a valid injury in fact, NUWF has standing because it can trace said injury to Bowman's actions. The "fairly traceable" element of the Article III standing test requires a nexus between the plaintiff's injury and the actions of the defendant. *Lujan*, 504 U.S. at 555. The plaintiff does not need to show exactitude or scientific certainty or that the defendant's actions caused the precise harm suffered by the plaintiff. *Id.* Instead, it is required that the plaintiff establishes that there exists a "substantial likelihood" that the defendant's actions caused the plaintiff's injury. *Id.*

In *Natural Res. Def. Council, Inc. v. Texaco Ref. & Mktg., Inc.*, the plaintiffs testified that they disliked the sight and smell of pollution in the vicinity of the refinery, that they did not eat local fish because of concern about toxic chemicals, and that the river had an "oily sheen" as a result of the defendant's actions. 2 F.3d 493, 499-505 (3d Cir. 1993). While the plaintiffs, in the Third Circuit's eyes, had shown that the kinds of pollutants discharged by the defendant could be responsible to the harms alleged, the plaintiffs had not adequately proven that the "specific oil compound causing [the] slicks were compounds found in [Defendant's] discharges." *Id.* at 499-502. Despite the plaintiff's inability to specifically tie its grievances to the Defendant's conduct with exactitude, the Court still held that that level of specificity was unwarranted and that the NRDC had made an adequate showing that its injuries were fairly traceable to the polluting

defendant. *Id.*

This is not to say that there are no boundaries on what injuries can be considered "fairly traceable" to the defendants conduct. In *Friends of the Earth, Inc. v. Crown Central Petroleum Corp.,* the court denied standing to a group of bird watchers who were asserting that the defendant's actions in polluting in one small area would affect their ability to bird-watch over an eighteen square-mile area of the lake. 95 F.3d 358, 355 (1996). Also in *Friends of the Earth, Inc. v. Gaston Copper Recycling Corp.*, although the petitioners complained of the "concern that Gaston Copper's conduct has resulted in pollution of water in which [...petitioners] recreated," there was insufficient evidence to show that the area in which the petitioners actually recreated or planned to recreate would be affected. 179 F.3d 107, 113 (4th Cir. 1999) *on reh'g en banc*, 204 F.3d 149 (4th Cir. 2000).

The set of facts before this Court differs from *Friends of the Earth, Inc. v. Crown Central Petroleum Corp.* and *Friends of the Earth, Inc. v. Gaston Copper Recycling Corp.* While in those two cases, the petitioners were unable to point specifically to an area that would be affected, the NUWF is specifically alleging that Bowman's conduct on his particular stretch of land will detrimentally affect NUWF's members ability to enjoy and recreate in the Muddy and the area surrounding his property. R. at 6. Similar to *Natural Res. Def. Council, Inc. v. Texaco Ref. & Mktg., Inc.,* the NUWF cannot in full confidence assert that the Muddy River will be negatively impacted. *Id.* However, to remain consistent with that holding, the NUWF need not show a high level of specificity or exactitude in connecting its grievances to the Bowman's actions. All NUWF must show is that, but-for Bowman's actions, the NUWF members would not have the injuries that they are asserting in the instant case. As such, the injury in fact alleged by the NUWF is fairly traceable to Bowman's conduct, and thus satisfies the second element of

Article III standing analysis.

C. NUWF's Injury Can Be Redressed by a Favorable Decision by this Court.

A plaintiff satisfies the redressability requirement when he shows that a favorable decision will "relieve a discrete injury to himself. He need not show that a favorable decision will relieve his every [injury]." *Larson v. Valente*, 456 U.S. 228 243, 248 (1982). The NUWF's injury would be redressed via injunctive relief by this Court or any other penalty the Court would deem appropriate for Bowman's violation of the Clean Water Act. This Court through injunctive relief as well a grant of civil penalties. As such, the NUWF has therefore presented a "case or controversy" and has proven its standing by properly asserting that there is 1) an injury in fact, 2) that injury in fact is fairly traceable to Bowman's unlawful conduct, and 3) the injury in fact is likely to be redressed by the relief requested by the NUWF. *Lujan*, 504 U.S. at 560-561. While NUDEP argues that the injury in fact is likely already assuaged via the August 1, 2012 administrative order, NUWF nonetheless has standing regardless of the merits of its claim.

II. THE DISTRICT COURT CORRECTLY FOUND THAT THERE WAS NO CONTINUING VIOLATION, AS REQUIRED BY § 505 OF THE CWA, BECAUSE THE SETTLEMENT AGREEMENT WITH NUDEP ENDED ANY PRESENT OR FUTURE VIOLATION.

The District Court was correct in granting summary judgment for lack of continuing or ongoing violation as required for subject matter jurisdiction by § 505(a) of the Clean Water Act. As there was no realistic prospect of a continuing violations after the settlement agreement with NUDEP, the violations were wholly past, thus prohibiting citizen suit jurisdiction as held by *Chesapeake Bay Foundation v. Gwaltney of Smithfield, Ltd*, 484 U.S. 49, 64 (1987).

A. The *Gwaltney* Standard Prohibits Citizen Suits For Wholly Past Violations.

Section 505 of the CWA grants jurisdiction by providing that, "…any citizen may commence a civil action on his own behalf against any person who is alleged to be in violation of

an effluent standard or limitation…" 33 U.S.C. § 1365(a). While there is no indication of any additional or continued introduction of dredged or filled materials following Bowman's settlement with NUDEP, NUWF maintains that the mere continued presences of fill material constitutes an ongoing or continuing violation, thus bringing NUWF's citizen suit within the purview of § 505 of the CWA. R. at 7.

In evaluating the meaning of the "to be in violation of" language, the Supreme Court in *Gwaltney* held that, "…§ 505 does not permit citizen suits for wholly past violations…," instead, "… § 505 confers jurisdiction over citizen suits when the citizen-plaintiffs make a good faith allegation of continuous or intermittent violation…" *Gwaltney*, 484 U.S. at 64. The Court focused significantly on the undesired discrepancies that would result from allowing citizens to intervene in situations that the government has already taken action to evaluate and mitigate. *Id.* at 60-61. Regarding issues of jurisdictional authority in terms of continuing or ongoing violation, the Court analyzes from the perspective that "the citizen suit is meant to supplement rather than to supplant governmental action." *Id.* at 60.

Given the incompatible conflict between the settlement advocated by NUDEP and the continued suit by NUWF, the instant facts demonstrate the very evils that the Supreme Court in *Gwaltney* attempted to prevent. The settlement agreement between Bowman and NUDEP ended any violation. By continuing with its citizens suit, NUWF is not aiding in the advancement of NUDEP's goal of bettering the environment, it is interfering with NUDEP's abilities. Bowman has no reason to settle if NUWF could take its own actions, regardless of Bowman's previous agreement with NUDEP. Applying the appropriate use of the citizen suit as explained in *Gwaltney*, the continued presence of fill material does not constitute a continuing violation as required by § 505. By preventing the possibility of any further land-clearing operations by

Bowman, the administrative order issued by NUDEP prevents a continuing violation of the CWA.

B. *Gwaltney* Applies to § 404 Violations.

NUWF argues that *Gwaltney* does not apply to the facts at hand because the analysis in *Gwaltney* is specific to a § 402 violation, as opposed to the §404 violation being dealt with here. R. at 7. NUWF specifically contends that *Gwaltney's* analysis under § 402 is incompatible for application to a § 404 violation given the irreversible nature associated with pollutants flowing away. *Id.* However, a closer examination of *Gwaltney* reveals the broad nature of its application to § 505 citizens suits, beyond just those of § 402 violations. *Gwaltney*, 484 U.S. at 52. Returning to the language in the *Gwaltney* case itself, the Court makes the scope of its decision clear at the outset of the case by explaining that, "…we must decide whether § 505(a) of the Clean Water Act…confers federal jurisdiction over citizen suits for wholly past violation." *Id.*

The Court does not narrow its analysis solely to § 402 violations, but instead clarifies that within the application of a § 505 citizen suit, "…[o]ne of these specified sections is § 402." *Id.* Nowhere in the *Gwaltney* decision does the Court limit application of its analysis to any specific subject matter under which a § 505 Citizen Suit may arise. *Id.* at 52-68. In fact, the Supreme Court has applied the *Gwaltney* analysis to a different statute altogether, thus, proving that the application of the *Gwaltney* analysis is not confined to § 402 of the CWA. *Hallstrom v. Tillamook*, 493 U.S. 20, 28 (1989) (*Gwaltney* analysis applied to a violation to the Resource Conservation and Recovery Act ("RCRA")).

As it relates to the case at bar, the fact that the *Gwaltney* analysis has been proven to be used outside the § 402 context is devastating to NUWF's argument. The Second Circuit, in

Connecticut Coastal Fishermen's Association v. Remington Arms Co., Inc., utilizes the *Gwaltney* analysis in disposing of a §404 violation claim. 989 F.2d 1305, 1311 (2d Cir. 1993). Not only does the Second Circuit employ the 'wholly past' reasoning in *Gwaltney*, the court disposes of the issue by declaring that, "…we find plaintiff's citizen suit must be dismissed under *Gwaltney* …" *Id.* NUWF's argument that the *Gwaltney* analysis should only be applied to § 402 violations is inaccurate, given that both the Supreme Court and the Second Circuit have employed the *Gwaltney* analysis for environmental citizen suits in other contexts. R. at 7.

NUWF's failure to apply the *Gwaltney* analysis is substituted with an incorrect reliance on *Sasser v. Adm'r, U.S. E.P.A.* 990 F.2d 127 (4th Cir. 1993). While *Sasser* contains many similar facts to the instant case, mainly that defendant deposits fill material into adjoining wetlands in order to divert waters, a crucial factor makes *Sasser* inapplicable to the instant case facts. *Id.* at 128. The action taken against Dr. Sasser was *solely* by a state actor rather than by a CWA § 505 citizen suit. *Id.* at 128-29. As espoused in *Gwaltney*, "…it is little questioned that the Administrator may bring enforcement action to recover civil penalties for wholly past violations." *Gwaltney,* 484 U.S. at 58. The principles in *Sasser* cannot be used to determine the existence of a continuing violation in the instant case, because enforcement actions taken by a state actor fundamentally affect the status of the effluent, and thus the status as a violation.

C. The Mere Presence of a Settlement Does Not Make a Violation Wholly Past.

The courts do not blindly take the word that the defendant will cease future violations or that state authority has created a settlement that will assure no present or future harm to the environment. The Fifth Circuit, in *Carr v. Alta Verde Industries, Inc.*, explains the analysis required for determining if a violation is continuing after a state authority has acted in an apparently dispositive manner. 931 F.2d 1055, 1065-65 (5th Cir. 1991). The court explains, "[a]

suit may be dismissed because the defendant complies with the Act subsequent to the complaint if the defendant's compliance moots the action." *Id.* at 1065. The safeguard required by the court demands that, "[i]n order to prove mootness, however, the defendant must adduce evidence from which it is '*absolutely clear* that the allegedly wrongful behavior could not reasonably be expected to recur.'" *Id*.

In the instant case, both Bowman and NUDEP clearly demonstrate that any future violation cannot "reasonably be expected to recur" by looking at the settlement agreement and subsequent actions taken by Bowman. R. at 4, 7. The settlement agreement required Bowman to cease any additional land clearing within the wetland area, surrender 250 feet of his property for a conservation easement that is open to the public, and construct and maintain an additional wetland buffer, thus preventing any future disturbance of the wetland immediately adjacent to the river. R. at 4. Bowman completely consented to the settlement with NUDEP, which was embodied into an administrative order, showing his willingness to adopt the wishes of NUDEP and diminishing the likelihood of any further violations. *Id.* Most importantly, Bowman's subsequent activities include only planting of wheat on the land not affected by the settlement agreement and lack introducing any additional fill material to the land demonstrating his willingness to comply with the agreement. R. at 7.

While the settlement agreement certainly complies with the standards set down by the Fifth Circuit in *Carr*, a separate analysis is offered in cases where compliance by a defendant is not voluntary. *Envtl. Conservation Org. v. City of Dallas*, 529 F.3d 519, 528 (5th Cir. 2008). In fact, even if the facts were such that Bowman's voluntary compliance was in question, he would have met the more stringent requirements for "voluntary mootness" as delineated by *Carr*. *Id.* at 528 (deeming that *Carr* was not applicable in situations of non compliance, instead adopting a

requirement that the plaintiff, " proves that there is a realistic prospect that the violations alleged in its complaint will continue notwithstanding the consent decree.").

The Second Circuit dealt with a similar circumstance in which a citizen suit was filed after a state agency entered into a settlement agreement with the violator. *Atl. States Legal Found., Inc. v. Eastman Kodak Co.,* 933 F.2d 124, 125 (2d Cir. 1991). The court held that a citizen suit cannot go forward if the, "settlement reasonably assures that the violations alleged in the citizen suit have ceased and will not recur." unless there are, "realistic prospect of continuing violations." *Id.* at 128.

The District Court was correct in finding that the settlement between Bowman and NUDEP, and Bowman's subsequent compliance, ended any "realistic prospect of continuing violation." R. at 4, 7-8. Bowman's agreement to cease any more land-clearing and the creation of a wetland buffer zone are indications that not only has any harm to the environment and surrounding waters has ceased and is not likely to recur, but that the area is also better off because of the settlement. R. at 4, 8.

D. The Court Should Apply a 'Continued to Introduce' Standard for Determining Continuing Violation.

Case law directly dealing with § 404 fails to plainly articulate what constitutes a continued violation in cases of continued presence of fill material under the purview of the Clean Water Act. R. at 4, 7. While not completely analogous to the legal standards and requirements of the Clean Water Act, there are several cases dealing with the continued presence of fill material under the RCRA. The facts in *June v. Town of Westfield, New York* are very similar to those in the case at hand, in that suit was brought because of the continued presence of fill material used to shore up a road adjacent to a waterway. 370 F.3d 255, 256 (2d Cir. 2004). While the Defendant in this case argued that claims were barred as wholly past violations under

both the CWA and the RCRA, the Second Circuit chose to dispose of the continued violation issue under the RCRA. *Id.* at 256, 259. Under the RCRA the court held that the violation was not continuing by focusing on the defendants conduct. *Id.* at 259. The Second Circuit explains, "June fails to allege that, at the time of the filing of this lawsuit the defendant 'continued to introduce substances that made the…exceedances worse.' His allegations were of a purely historical act." *Id.* The most applicable standard in determining if a continuing violation under the CWA consider whether the violation expands in scope because of or despite a settlement agreement with the state administrator. As previously seen, the instant facts show evidence of worsening conditions. R. at 8.

The holding in *June* is derived from *South Road Associations v. International Business Machines Corp*., which also shares similar facts to the instant case. 216 F. 3d 251 (2d Cir. 2000). In *South Road*, the defendant moved contaminated soil from one location on the property to another in response to an agreement between the Defendant and the State environmental authority. *Id.* at 253. In ultimately deciding that RCRA did not provide a right to a citizen suit, the Second Circuit focused on the fact that the presence of any material, "pursuant to a state-sponsored or state-authorized plan or program does not constitute 'introduction' for the purposes of the RCRA." *Id.* at 257. While not binding on CWA or the instant case, the rationale of the prior two cases demonstrate a practical standard for situations where material remains present as the result of a state action or mandate. As there were no realistic prospect of continuing violations because of the settlement agreement with NUDEP, the violations were wholly past, prohibiting citizen suit jurisdiction. The District Court was correct in granting summary judgment for lack of continuing or ongoing violation as required for subject matter jurisdiction by § 505(a) of the Clean Water Act.

III. THE DISTRICT COURT CORRECTLY HELD THAT THE PLAINTIFF'S CITIZEN SUIT WAS BARRED BY NUDEP'S COMMENCEMENT AND DILIGENT PROSECUTION OF AN ENFORCEMENT ACTION.

The citizen suit provision of the CWA explains that a citizen suit to enforce a violation of the Act is barred when a state agency has already taken an enforcement action against the alleged violator. 33 U.S.C. § 1365(b)(1)(B). In this case, NUDEP filed a lawsuit in the Federal District Court for the District of New Union to enforce a settlement agreement against Bowman. The settlement agreement required Bowman to cease further land-clearing operations, construct a 75 feet wide artificial wetland along the length of his property, and to create a conservation easement on the 225 feet wide section of his property adjacent to the Muddy River. R. at 4. The District Court held correctly that this settlement agreement, in conjunction with the lawsuit filed by NUDEP to enforce it, barred NUWF from filing its citizen suit under § 505 of the CWA. R. at 7-8.

A. The CWA Bars a Citizen Suit Where an Agency has Commenced and is Diligently Prosecuting an Enforcement Action Addressing the Same Violation Under a State Law That is Comparable to the CWA.

Section 505 of the Clean Water Act allows citizens to bring suit for violations of the Act. 33 U.S.C. § 1365(a). That section also limits the circumstances under which citizen suits may be brought. Subsection (b)(1)(B) provides that "[n]o action may be commenced under subsection (a)(1) of this section ... if the Administrator or State has commenced and is diligently prosecuting a civil or criminal action in a court of the United States or a State to require compliance with the standard, limitation, or order" that the plaintiff alleges was violated. 33 U.S.C. § 1365(b)(1)(B).

Section 309 of the CWA governs the enforcement of the Act. 33 U.S.C. § 1319(a). In pertinent part, it provides the state agency and the citizen-plaintiff with the ability to impose civil

penalties upon violators of the Act. 33 U.S.C. § 1319(g). The citizen-plaintiff is denied the right to impose civil penalties for any violation "with respect to which a State has commenced and is diligently prosecuting an action under a State law comparable to this subsection." 33 U.S.C. § 1319(g)(6)(A)(ii).

These two statutory provisions work together to preclude a citizen suit from seeking to punish a violator of the CWA when a state governmental agency has already taken proper action to cure the violation. The three key elements are that the state agency: (1) has "commenced," (2) and is "diligently prosecuting" an enforcement action (3) under state law that is "comparable" to the CWA. *North and South Rivers Watershed Ass 'n v. Town of Scituate,* 949 F.2d 552, 555-57 (1st Cir. 1992); *Arkansas Wildlife Fed'n v. ICI Americas, Inc.,* 29 F.3d 376, 379 (8th Cir. 2004).

The purpose of this statutory bar is to ensure that citizen suits do not play a "potentially intrusive" role in enforcement of environmental laws; it is important to preserve the "government agency's discretion to act in the public interest." *ICI Americas*, 29 F.3d at 380. Thus, citizen suits are only appropriate where federal and state authorities appear "unwilling to act," *North and South Rivers Watershed Ass 'n v. Town of Scituate,* 949 F.2d 552, 555 (1st Cir. 1992), or "when federal state and local agencies fail to exercise their enforcement responsibility." *ICI Americas,* 29 F.3d at 380.

1. NUDEP "Commenced" an Enforcement Action When it Filed a Lawsuit to Enforce the Administrative Order.

When NUDEP filed a lawsuit against Bowman in the United States District Court, it "commenced" an enforcement action. The statute does not define at what point a state agency's action has "commenced" for the purpose of the diligent prosecution bar. Courts have found that "an administrative action 'commences' at the point when notice and public participation protections become available to the public and interested parties." *Friends of*

Milwaukee's Rivers v. Milwaukee Metro. Sewerage Dist., 382 F.3d 743, 756 (7th Cir. 2004); *Public Interest Research Group, Inc. v. Elf Atochem N. Am., Inc.,* 817 F.Supp. 1164, 1173 (D.N.J.1993). The key to the "commencement" requirement is that important notice and hearing procedures become available and interested third parties are given the ability to intervene. *Arkansas Wildlife Fed'n v. ICI Americas, Inc.*, 29 F.3d 376, 380 (8th Cir.1994). A mere warning, given by a state agency to a suspected violator, does not qualify as "commencement" of an enforcement action. *Atochem*, 817 F.Supp. at 1173.

NUDEP and Bowman incorporated their agreement into an administrative order issued by NUDEP to Bowman, which Bowman consented to on August 1, 2012. R. at 4. On August 10, 2012, after issuing the administrative order to Bowman, NUDEP chose to bring suit in federal court and filed a complaint against Bowman in the District Court under § 505 of the CWA. R. at 5. On August 30, 2012, before NUDEP had filed a motion to enter the administrative order, NUWF filed its own § 505 complaint with the District Court seeking civil penalties and an injunction requiring Bowman to remove the fill material and restore the wetlands. R. at 5.

When NUDEP filed a lawsuit against Bowman on August 10, 2012, the state agency commenced an enforcement action. R. at 5. At this point, state had done more than merely warn Bowman that he was in violation. The State initiated a formal lawsuit, complete with personal service of the charges against Bowman and the right to a hearing. Additionally, the public was given notice that Bowman was an alleged violator of the CWA. R. at 5. At this point, interested parties had the right to intervene in the action and public hearings could be held on the matter. R. at 5. Therefore, NUDEP timely commenced an enforcement action against Bowman when it filed this lawsuit, even though it did not file its motion to enter the administrative order until

after NUWF had filed its own suit.

2. NUDEP "Diligently Prosecuted" an Enforcement Action Against Bowman.

NUDEP was "diligently prosecuting" an enforcement action because it had issued an administrative order to Bowman that was capable of requiring Bowman's compliance with the CWA. R. at 4. Enforcement actions are considered "diligent" if they are "capable of requiring compliance with the Act and [are] in good faith calculated to do so." *The Piney Run Pres. Ass'n v. The County Com'rs Of Carroll County, MD*, 523 F.3d 453, 459 (4th Cir. 2008). Section 505 (b)(1)(B) of the CWA does not require government prosecution to be far-reaching or zealous; it requires only diligence. *Karr v. Hefner,* 475 F.3d 1192, 1197 (10th Cir.2007). "The plaintiff in a citizens suit has the burden of proving the state agency's prosecution was not diligent." *Karr*, 475 F.3d at 1198 (quoting *Williams Pipe Line Co. v. Bayer Corp.,* 964 F. Supp. 1300, 1324 (S.D. Iowa 1997)). "This burden is heavy, because the enforcement agency's diligence is presumed." *Karr*, 475 F.3d at 1198 (quoting *Williams*, 964 F. Supp. at 1324). In addition, when the government and the alleged violator enter into a consent decree designed to cure the violations, courts "must be particularly deferential to the agency's expertise." *Piney Run*, 523 F.3d at 459.

a. The Administrative Order Agreed Upon by NUDEP and Bowman is Capable of Requiring Compliance with the CWA.

The enforcement action that NUDEP took against Bowman is capable of requiring compliance with the CWA. Shortly after NUWF gave notice of Bowman's violations, NUDEP and Bowman entered into a settlement agreement whereby Bowman agreed not to clear more wetlands in the area. R. at 4. He also agreed to convey to NUDEP a conservation easement on the uncleared 150 foot-wide portion of his property adjacent to the Muddy, plus an additional 75-foot buffer zone between that wooded area and the new field. *Id.* He agreed to construct and

maintain a year-round wetland on that 75 foot buffer zone. *Id.* The conservation easement allows public entry for appropriate, day- use-only, recreational purposes, requires Bowman to keep the easement area in its natural state, and forbids him from developing it in any way other than constructing and maintaining the artificial wetland. *Id.* NUDEP and Bowman incorporated their agreement into an administrative order issued by NUDEP to Bowman, which Bowman consented to on August 1, 2012. *Id.*

This administrative order prevents any further land-clearing operations by Bowman. R. at 4. In addition, the 75-foot buffer zone, upon which Bowman has agreed to build and artificial wetland, will likely provide a better habitat for frogs than previously existed on the property. R. at 6. Also the conservation easement will allow for legal frogging on the property, as well as other recreational uses. R. at 4. There will be no aesthetic loss for the recreational users of the river, as the 225 feet wide wooded area makes the cleared portion of Bowman's property invisible from the river. R. at 6. According to NUDEP's scientific expert, the artificial wetland is likely to provide a richer wetland habitat than previously existed. *Id.*

NUWF may argue that the administrative order cannot require compliance because it imposes no concrete financial penalties upon Bowman. However, "a citizen-plaintiff cannot overcome the presumption of diligence by showing that the agency's prosecution strategy is less aggressive than he would like or that it did not produce a completely satisfactory result." *Piney Run*, 523 F.3d at 459. The fact that a state agency decides not to punish by way of administrative penalties does not prove that the action cannot require compliance. *Gwaltney*, 484 U.S. at 60; *Envtl. Conservation Org. v. City of Dallas*, 529 F.3d 519, 530 (5th Cir. 2008). Therefore, NUDEP's administrative order is capable of requiring compliance with the CWA even though the Agency chose not to administer financial penalties. NUDEP may have felt that the expense

of creating and maintaining the artificial wetland on his property was a sufficient financial penalty to be imposed upon Bowman under the circumstances. The Agency's determination is to be given great deference. *Piney Run*, 523 F.3d at 459.

NUWF may also argue that the administrative order cannot require compliance with the CWA because it does not force Bowman to return the wetlands to the condition they were in prior to his land-clearing activities. "But the harm sought to be addressed by the citizen suit lies in the present or the future, not in the past." *Gwaltney*, 484 U.S. at 59. The purpose of § 505's notice provision, which requires that a citizen give the violator 60 days' notice of the intention to bring a citizen suit, is to give the violator the chance to comply with the law, thereby rendering the citizen suit unnecessary. 33 U.S.C. § 1365(b)(1)(A); *Id.* at 59-60. The Supreme Court held that this notice provision demonstrates that citizen suits can only be brought in order to cure present or future violations of the CWA, not wholly past violations. *Id.* at 60. Therefore, NUWF has no legal interest in curing Bowman's past violations and can only bring a citizen suit if NUDEP's enforcement actions have no chance of requiring Bowman's future compliance with the CWA.

Finally, the fact that Bowman did not plant wheat on the 75-foot buffer zone indicates that he has taken the first step to comply with the administrative order. R. at 5. There is nothing to suggest that the administrative order is incapable of requiring Bowman's compliance with the CWA, nor is there any evidence that Bowman has not already begun the comply with the Act.

b. The Administrative Order is a Good Faith Effort by NUDEP to Require Bowman's Compliance with the CWA.

The record contains absolutely no evidence that NUDEP's enforcement of Bowman's violations was done in bad faith. "[T]he court must presume the diligence of the state's prosecution of a defendant absent persuasive evidence that the state has engaged in a pattern of

conduct that could be considered dilatory, collusive, or otherwise in bad faith." *Friends of Milwaukee's Rivers v. Milwaukee Metro. Sewerage Dist.*, 382 F.3d 743, 760 (7th Cir. 2004). A finding of bad faith is usually associated with some kind of delay by the state agency in the enforcement of its action. *Jones v. City of Lakeland,* 224 F.3d 518, 522 (6th Cir.2000) (a 10–year enforcement action that waived the deadlines contained in four prior Consent Decrees was found not to be diligent); *Ohio Valley Envtl. Coal., Inc. v. Hobet Mining, LLC*, CIV.A. 3:08-0088, 2008 WL 5377799 (S.D.W. Va. Dec. 18, 2008) (delay was found where the state agency's action in state court had been dormant for over a year at the time of the citizen suit, and the only action the state had taken was to file amendments to its complaint.) Collusion, another type of bad faith, has been found where the violator of the CWA is the party that initiates a settlement with the state agency in order to prevent a citizen suit. *Ohio Valley Envtl. Coal., Inc. v. Hobet Min., LLC*, 723 F. Supp. 2d 886, 907 (S.D.W. Va. 2010) (state agency took no action to address the defendant's violations until the defendant itself moved to modify the pre-existing Consent Decree).

There is no evidence of delay or collusion this case. The issue did not languish for a long period of time without action. NUDEP notified Bowman that he was in violation of the CWA shortly after NUWF gave the agency notice of its intention to sue him. R. at 4. NUDEP immediately began negotiating with Bowman the terms of the settlement agreement, and the Administrative Orders was signed on August 1, 2012, a mere month after NUWF notified the agency. *Id.* Furthermore, NUDEP filed suit in Federal Court to enforce the administrative order on August 10, 2012. R. at 5. Therefore, NUDEP acted swiftly to cure Bowman's violation of the CWA. Also, there is nothing in the record to suggest that Bowman and NUDEP have acted collusively to avoid NUWF's citizens suit. NUDEP contacted Bowman to alert him that he was

in violation of the CWA, and then issued the administrative order and Bowman consented to it. R. at 4. The administrative order requires Bowman to construct and maintain an artificial wetland on a 75 feet wide portion of his land extending the entire length of his property, which the District Court found that this project would be of "considerable initial expense and an indeterminable future expense" to Bowman. R. at 4, 8. Therefore, there is no collusion because NUDEP took the initial action and the agreement was not a mere slap on the wrist.

3. The State Enforcement Statutes Are "Comparable" to the CWA.

The comparability requirement is generally applied to the state enforcement scheme as a whole, not to the particular enforcement provision being applied in the current state proceedings. *Scituate*, 949 F.2d at 558; *ICI Americas*, 29 F.3d at 381. Where the state statute contains comparable penalty provisions and the same overall enforcement goals as the CWA, the statute is presumed comparable unless interested citizens have been denied a meaningful opportunity to participate at important stages of the decision-making process. *ICI Americas*, 29 F.3d at 381.

Here, all parties have stipulated that the enforcement schemes of the New Union statutes are virtually identical to the enforcement schemes laid out in the CWA. Therefore, the state law includes all of the necessary provisions to make the law "comparable" to the CWA.

B. The State's Enforcement of the Administrative Order Forecloses the Citizen's Suit for Civil Penalties.

The First Circuit, interpreting the Supreme Court's holding in *Gwaltney*, has found that § 309(g)(6)(A)(ii), bars citizen suits seeking both civil penalties or injunctive relief where a state agency is diligently prosecuting an action under § 505 of the CWA. *Scituate*, 949 F.2d at 558. The key is that the state agency must have the same enforcement options available to punish the offender under state law as the CWA provides. *Id.* The state agency does not have to

actually *seek* civil penalties in order to foreclose a citizen suit for civil penalties, as long as the state has the *ability* to seek penalties, a citizen suit based on the polluter's conduct is barred, even if the state agency has exercised its discretion not to do so. *Connecticut Coastal Fishermen's Ass'n v. Remington Arms Co., Inc.*, 777 F. Supp. 173, 181 (D. Conn. 1991) *aff'd in part, rev'd in part*, 989 F.2d 1305 (2d Cir. 1993) ("33 U.S.C. § 1319(g)(6) bars citizen suits where a state agency conducting enforcement proceedings against the defendant has authority to assess civil penalties, regardless of whether the agency has actually assessed such penalties."); *Sierra Club v. Colorado Ref. Co.*, 852 F. Supp. 1476, 1485 (D. Colo. 1994).

NUDEP has comparable statutes for both §§ 309 (a) and (g) of the CWA. As noted above, it is stipulated that the statutes are essentially identical. R. at 4. Therefore, NUDEP had all of the enforcement options made available by the CWA at its disposal when the agency made the decision to punish Bowman's violations with the administrative order. Even though NUDEP chose not to seek civil penalties, NUWF's citizen suit is foreclosed pursuant to §1319(g)(6)(A)(ii). As noted earlier, NUDEP's discretion to choose the proper mode of enforcement under state law comparable to the CWA is to be given great deference. *Piney Run*, 523 F.3d at 459.

IV. THE DISTRICT COURT ERRED WHEN IT FOUND THAT BOWMAN DID NOT VIOLATE THE CWA BECAUSE HIS ACTIONS DID NOT CONSTITUTE AN "ADDITION" OF POLLUTANTS TO THE WETLAND.

The meaning of the word "addition" for the purpose of the CWA is not defined by Congress or by the Army Corps of Engineers. The District Court found that EPA's definition of the word "addition" as "from the outside world" has been accepted by the courts in the context of § 402 of the CWA. R. at 9. The District Court then found that EPA's definition of "addition" should be applied to Bowman's § 404 violation, unless Congress specifically has provided

otherwise, because the same word should be understood to have the same meaning in two different sections of the same statute. R. at 9; *Sorenson v. Sec'y of Treasury of U.S.*, 475 U.S. 851, 860 (1986).

This decision was incorrect for two reasons. First, § 402 and § 404 of the CWA are completely different in subject matter and enforcement, and therefore the meaning of "addition" as applied to § 402 does not fit § 404. Second, to construe the word addition to mean "from the outside world" would completely write the "dredge-and-fill" program out of § 404, contradicting Congressional intent.

A. The EPA's Definition of "Addition" to Mean "From the Outside World" Should Not be Applied to § 404 of the CWA because the EPA is Not the Agency in Charge of Administering § 404 Permits.

The Clean Waters Act does not define the word "addition" in the statute. R. at 9. In many § 402 cases, courts have accepted the EPA's suggested definition of "addition" as meaning "from the outside world." *Nat'l Wildlife Fed'n v. Gorsuch*, 693 F.2d 156, 175 (D.C. Cir. 1982); *Nat'l Wildlife Fed'n v. Consumers Power Co.*, 862 F.2d 580, 584 (6th Cir. 1988). This means that, in order for there to be "addition" of a pollutant to a statutorily protected water or wetland, the pollutant must be brought into the wetland from some other source. *Gorsuch*, 693 F.2d at 165. Because this definition has been accepted by Courts in § 402 cases, Bowman argued, and the District Court found, that the same definition should be applied to Bowman's alleged § 404 violation, because the Supreme Court has held that the same term in different sections of the same statute should keep the same meaning unless Congress has clearly provided otherwise, which Congress had not done in the CWA. *Sorenson*, 475 U.S. at 860; R. at 9.

The District Court erred, however, because § 402 and § 404 of the CWA are two very distinct permitting programs. It is a general rule of statutory construction that "identical words

used in different parts of the same act are intended to have the same meaning." *Sorenson*, at 860. However, "the presumption readily yields to the controlling force of the circumstance that the words, though in the same act, are found in such dissimilar connections as to warrant the conclusion that they were employed in the different parts of the act with different intent." *Helvering v. Stockholms Enskilda Bank*, 293 U.S. 84, 87 (1934). Here, § 402 and § 404 of the CWA are so different in subject matter and enforcement that the definition of "addition," as applied to § 402, simply is not workable when applied to § 404.

The § 404 program involves issuing permits for the discharge of "dredge material" and "fill material," specifically. 33 U.S.C. § 1344(a). Meanwhile, § 402 involves permits for the discharge of all other pollutants. 33 U.S.C. § 1342(a). Significantly, the EPA is the government agency that is in charge of issuing permits for § 402 violations. 33 U.S.C. § 1342(a); *Gwaltney*, 484 U.S. at 52. When Congress is silent on an issue in a statute, the federal agency that is entrusted with administering the statutory scheme is expected to construe the statute, and great deference is given to that construction by the courts. *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 844 (1984). Therefore, it is flows naturally that courts in cases pertaining to § 402 violations have accepted the EPA's definition of "addition." Because the EPA is entrusted with administering permits under § 402 of the CWA, the EPA's construction of "addition" as requiring that the pollutant originate "from the outside world" has been given great deference.

However, § 404 of the CWA is not enforced by the EPA. Rather, permits pertaining to dredge and fill material are issued by the Army Corps of Engineers. 33 U.S.C. § 1344(d). The Supreme Court has clearly delineated the two permit programs, stating, "[t]he [CWA] is best understood to provide that if the Corps has authority to issue a permit for a discharge under §

404, then the EPA lacks authority to do so under § 402." *Coeur Alaska, Inc. v. Se. Alaska Conservation Council*, 557 U.S. 261, 274 (2009). The Court noted that the EPA's own regulations forbid the EPA from exercising the permitting authority that is given to the Corps in § 404 of the CWA. *Id.* at 277; 40 C.F.R. § 122.3(b). Because the EPA is *not* entrusted with the administration of § 404, the deference that courts have given to the EPA's interpretation of "addition" in § 402 cases need not be shown in § 404 cases. *Chevron*, 467 U.S. at 844.

Thus, Congress intended § 404 of the CWA to be treated very differently than § 402, and for the EPA to have a limited role in the former. Therefore, it is illogical to apply the EPA's definition of addition to § 404 cases. In addition, to apply the EPA's definition of addition to § 404 cases would effectively write § 404's "dredge-and-fill" program completely out of the statute, contradicting Congressional intent.

B. Applying the EPA's Definition of "Addition" to § 404 of the CWA Would Be Contrary to Congressional Intent.

The purpose of the CWA is to "restore and maintain the chemical, physical and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a). Section 404, specifically, requires permits for the discharge of dredge or fill material into the nation's navigable waters, most notably wetlands. 33 U.S.C. § 1344(a). The term "discharge of fill material" is defined as "the addition of fill material into waters of the United States." 33 C.F.R. § 323.2(f). Again, the term "addition" is not defined in the CWA. R. at 9. Taken as a whole, Congress intended the statute to prevent the disruption of the landscape of our nation's waters and wetlands by excavation, dredging, leveling, or other such physical processes without a permit. 33 U.S.C. § 1344.

1. To Apply the EPA's Definition of "Addition" to § 404 Cases Would Render the "Dredge-And-Fill" Program Nearly Useless Because it Would Only Require a Permit When the Pollutant is Introduced "From the Outside World."

It is both illogical and contrary to Congressional intent to construe the statute as requiring an "addition" in fill or dredge material to come "from the outside world." R. at 9. If this definition were accepted, a permit would only be required for adding fill material to a wetland if that material came from another area outside of the wetland. Because the purpose of the CWA is to maintain the integrity of the Nation's waters and wetlands, this reading would mean that Congress believed that no damage could be done to a wetland by moving dredge material or fill material from one area of the wetland to another area of the same wetland. *See* 33 U.S.C. § 1251(a). This construction of the statute would essentially allow the owner of the wetland to excavate, dredge, and fill at will as long as he did so within the same wetland. The District Court found that moving material from one area of a wetland to another area of the same wetland does not constitute an "addition," because no new material is actually added from the outside world. R. at 10. This "nothing added" analysis implies that for their to be an "addition" there must be a physical increase of material in the wetland. *Id.*

However, the U.S. Circuit Courts have consistently held that harm is done to a wetland by moving dredge and fill material around within the same wetland and that addition takes place when the movement of material within a wetland affects the biological integrity of the environment, even if no new material is added. *Greenfield Mills, Inc. v. Macklin*, 361 F.3d 934, 948-49 (7th Cir. 2004); *United States v. Deaton*, 209 F.3d 331, 336 (4th Cir. 2000); *Avoyelles Sportsmen's League, Inc. v. Marsh*, 715 F.2d 897, 924 n. 43 (5th Cir. 1983). Holding that the discharge of dredged material into a contiguous body of water or wetland constitutes an

"addition" of dredged spoil under the CWA, the Seventh Circuit noted, "it is logical to believe that soil and vegetation removed from one part of a wetland or waterway and deposited in another could disturb the ecological balance of the affected areas — both the area from which the material was removed and the area on which the material was deposited." *Greenfield*, 61 F.3d at 948-49. Also finding an addition to have taken place, the Fourth Circuit has held that the negative effects of the addition of dredged material is "no less harmful when the dredged spoil is re-deposited in the same wetland from which it was excavated. *Deaton*, 209 F.3d at 336. In addition, the Fifth Circuit has stated that, "'dredged' material is by definition material that comes from the water itself. A requirement that all pollutants must come from outside sources would effectively remove the dredge-and-fill provision from the statute." *Avoyelles*, 715 F.2d at 924 n.43.

Here, Bowman cut down trees and other vegetation on his wetlands, burned the vegetative material, re-deposited the burnt and leftover material into the wetlands, and then leveled his property to make it suitable for farming. R. at 4. The alteration and destruction of the wetlands on Bowman's property has affected the biological integrity of the environment. This is evident through the disappearance of the frog population and the reduced ability for the wetland to absorb pollutants and sediment. R. at 6. The physical integrity of the environmental was also disturbed as attested to by Milford in citing that the Muddy River, "looks more polluted." *Id.*

Furthermore, there exists a line of cases in which courts held that the practice of "sidecasting," which involves the depositing of dredged wetland material within the same wetland, requires a § 404 permit. *United States v. Wilson*, 133 F.3d 251, 269 (4th Cir. 1997); *Deaton*, 209 F.3d at 336; *United States v. Cundiff*, 555 F.3d 200, 213 (6th Cir. 2009). The

Fourth Circuit has held that the action of excavating a hole on a wetland and allowing the "dredged material" from the hole to accumulate alongside the excavation site is an "addition" of dredged spoil to the wetland, requiring a permit under § 404. *Wilson*, 133 F.3d at 269. The "sidecasting" cases demonstrate that the EPA's definition of "addition," which includes the "from the outside world" requirement, has not been accepted by the Courts in construing the § 404 permitting program.

In particular, *Deaton* is factually analogous and legally correlative to this case by clearly addressing the legal impact of transforming a terrain within a wetland. 209 F.3d at 335. The Fourth Circuit explained that "[t]he narrow issue before us today is whether sidecasting constitutes the discharge of a pollutant under the Clean Water Act. We hold that it does." *Id.* The District Court takes issue with the fact that, despite the Fourth Circuit's analysis, no material is physically added to the wetland. R. at 10. The *Deaton* court explains that the prohibited act is not simply the addition of material, but rather the addition of a pollutant from even pre-existing materials, if, "…activity transforms some material from a non-pollutant into a pollutant…" 209 F.3d at 335. The court illustrates that the action of excavating changes the once benign material into a pollutant. *Id.* at 335-36.

Bowman's land-clearing operations moved trees and vegetation from one part of his wetland to another part, fulfilling what the *Deaton* analysis deems a transformation. R. at 4. In fact, Bowman's actions make transformation even more pronounced because Bowman *burned* the trees and vegetation. R. at 4. He changed not merely the location of the material, but also its physical composition. R. at 4.

In its rejection of *Deaton*, the District Court puts forth *National Wildlife Federation v. Consumers Power Co.*, 862 F.2d 580, 556-58 (6th Cir. 1988), in which the Sixth Circuit held

that changing of the nature of material from living to dead does not constitute an "addition" when created or discharged by a dam. R. at 10. However, in both *Consumers* and its foundational case, *National Wildlife Federation v. Gorsuch*, 693 F.2d 156, 183 (D.C. Cir. 1982), the courts make it clear that the holdings are to be narrowly applied to cases involving dams. 862 F.2d at 587.

As the Fourth, Fifth, Sixth, and Seventh Circuits have all held, Congress intended for the § 404 program to require a permit when dredge or fill material is moved from one area of a wetland to another area within the same wetland. *Greenfield*, 361 F.3d at 948-49; *Deaton*, 209 F.3d at 336; *Wilson*, 133 F.3d at 269; *Avoyelles*, 715 F.2d at 924 n.43. To hold otherwise would severely limit the application of the § 404 permitting program to only circumstances in which dredge or fill material is introduced to a wetland from some outside source. Recognizing this type of limitation would be contrary to the purpose of § 404 of the CWA, The Circuit Courts above have abandoned the EPA's interpretation that the dredged or fill material must come "from the outside world" in order to require a permit. Therefore, Bowman was required to have a § 404 permit before undertaking his land-clearing operations, even though the dredge-and-fill material originated within the same wetland.

2. The Application of the Water Transfer Rule and the Unitary Navigable Waters Theory to the CWA is Contrary to Congressional Intent.

The EPA interpreted "addition" in its Water Transfer Rule to incorporate the "unitary navigable waters" theory. 40 C.F.R. § 122.1; R. at 9. The effect of this would be to treat the removal of water and its components from one body of water introducing it to another navigable water as insignificant and not an "addition." The effect of this is that EPA would impose self-inflicted limitations on what waters of the United States it chooses to oversee. As mentioned

above, the core focus of the CWA is to "restore and maintain the Nation's waters." *Rapanos v. U.S.,* 547 U.S. 715, 718 (2006). However, the EPA's incorporation of "unitary navigable waters theory" into its definition of "addition," via the Water Transfer Rule, is a direct contravention from the explicit as well as the implicit intentions of the CWA. 40 C.F.R. § 122.1. The EPA's use of the Water Transfer Rule would eviscerate any semblance of the EPA's role of protecting and rehabilitating the waters of the United States.

Bowman's assertions are akin to the facts in *Food and Drug Admin. v. Brown & Williamson Tobacco Corp.,* where the FDA attempted to regulate tobacco cigarettes based on a statute directing the FDA's focus towards medical drugs and devices. 529 U.S. 120, 123 (2000). The Supreme Court held that to call a cigarette a "device" and tobacco a medical "drug" was not only illogical, but flew in the face of what Congress actually wanted the FDA to do—regulate pharmaceutical drugs and devices. *Id.* at 125-126. Similarly, in the case at hand, the EPA is deliberately contravening Congressional intent, as embodied within the CWA, by inappropriately applying the Water Transfer Rule. By limiting the instances in which it oversees the discharge into the "waters of the United States,' the EPA's use of the this rule flies in the face of congress' wishes. *See generally Rapanos*, 547 U.S. at 715. As such, while agency actions are by and large given deference by the courts, as in *Brown & Williamson Tobacco Corp.*, if the agency does something that Congress did not wish for it to do, that action is no longer afforded *Chevron* deference. *Chevron*, 467 U.S. at 844.

CONCLUSION

This Court should hold that NUWF has standing to bring its claims, as it has satisfied all the elements required to allege an Article III "case and controversy." This Court should further hold that NUWF's citizen suit is barred, pursuant to § 505 of the CWA, because there is no

continuing violation and NUDEP has commenced and is diligently prosecuting an enforcement action. Finally, this Court should hold that Bowman's actions constituted an "addition" of a pollutant as applied to § 404 of the CWA. For the foregoing reasons, NUDEP respectfully requests that this Court reverse the decision of the district court to grant Bowman summary judgment on the issues of whether NUWF has standing and whether Bowman's actions violated § 404 of the CWA. This Court then should affirm the district court's decision to grant Bowman summary judgment on the grounds that there was no continuing violation and that NUWF's suit was barred by NUDEP's enforcement action.

Respectfully submitted,

Team 33
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OF ENVIRONMENTAL PROTECTION