Team # 35

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 DEPARTMENT OF ENVIRONMENTAL PROTECTION,

Intervenor – Appellant,

v.

JIM BOB BOWMAN,

Defendant – Appellee.

ON APPEAL FROM

THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF NEW UNION

BRIEF FOR JIM BOB BOWMAN

Defendant – Appellee

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

United States Supreme Court

United States Courts of Appeal

United States District Courts

CONSTITUTIONAL PROVISIONS

FEDERAL RULES OF CIVIL PROCEDURE

STATUTES

Regulations

Rules

STATEMENT OF JURISDICTION

I. Jurisdiction Below

The District Court of New Union had jurisdiction over NUWF's citizen suit pursuant to 28 U.S.C. § 1331 (2012) and 33 U.S.C. § 1365(a)(1) (2012). In granting summary judgment, the court found that it lacked subject matter jurisdiction over the case. The Plaintiff – Appellant, NUWF, challenges this ruling on appeal.

II. Jurisdiction on Appeal

On June 1, 2012, the district court granted summary judgment in favor of Defendant – Appellee, Jim Bob Bowman on four counts. The district court's order constitutes a final decision. Therefore, this court has jurisdiction pursuant to 28 U.S.C. § 1291 (2012).

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

The following issues are presented on appeal:

I. Whether NUWF has standing to sue Bowman for alleged violations of the Clean Water Act.

II. Whether 33 U.S.C. § 1365(b) serves as a bar to NUWF's citizen suit due to NUDEP's diligent prosecution of Bowman for the alleged violations of the Clean Water Act.

III. Whether there is a continuing violation of the Clean Water Act by Bowman as required in order to vest this court with subject matter jurisdiction.

IV. Whether Bowman violated the Clean Water Act when he undertook land clearing actions on his property. Specifically, whether Bowman's actions satisfied the "addition" element of a Clean Water Act violation.

STATEMENT OF THE CASE

A. Statement of Facts

Jim Bob Bowman owns 1,000 acres of land in the state of New Union. (District Court Judgment (hereinafter D.C.) 1). Six hundred fifty feet of Bowman's property borders the Muddy River. (D.C. 1). The property is within the 100 year flood plan of the Muddy River and all parties agree that the property is a wetland according to the U.S. Army Corps of Engineers' Wetlands Determination Manuel. (D.C. 1-2). The whole of the property is also hydrologically connected to the Muddy River. (D.C. 1).

On June 15, 2011, Bowman began land clearing operations. (D.C. 2). He used a bulldozer to level trees and other vegetation. (D.C. 2). He pushed the leveled material into windrows and burned it. (D.C. 2). Bowman dug ditches using the bulldozer and pushed the ashes of the burned material into the ditches. (D.C. 2). The bulldozer was then used to level the field. (D.C. 2). Finally, Bowman dug a swale from the back of his property to the front. (D.C. 2). Land clearing activity on the Bowman property ceased completely on July 15, 2011. (D.C. 2).

As a result of Bowman's land clearing operations, the entire property had been leveled except for a 150 foot wide strip in the front of the property. (D.C. 2). This untouched strip of land ran for the entire 650 feet of the property which bordered the Muddy River. (D.C. 2). After the remaining field, which was leveled, had sufficiently drained, Bowman planted wheat in September 2011. (D.C. 3).

Shortly after the New Union Wildlife Federation (NUWF) became aware of Bowman's land clearing activities. (D.C. 2). NUWF's stated purpose is to protect the habitats of New Union's wildlife and fish populations. (D.C. 2). Believing Bowman to be in violation of the Clean Water Act (CWA), NUWF sent Bowman, the New Union Department of Environmental

Protection (NUDEP), and the Environmental Protection Agency (EPA) notice of its intent to sue Bowman under the citizen suit provision of the CWA. (D.C. 2). This notice was sent to the respective parties on July 1, 2011. (D.C. 2).

B. Course of Proceedings

NUDEP contacted Bowman shortly after NUWF's notice was sent. (D.C. 2). NUDEP told Bowman his land clearing operations violated both state and federal law. (D.C. 2). Even though he claimed his innocence, Bowman agreed to a settlement with NUDEP. (D.C. 2). He would not clear any more wetlands in the area. (D.C. 2). Bowman would agreed to convey a conservation easement to NUDEP over the 150 foot strip which had not been leveled and an additional 75 foot wide "buffer zone" between the untouched strip and the cleared field. (D.C. 2). Additionally, Bowman was required to construct, at his own expense, a year-round wetland on the buffer zone. (D.C. 2). The public would be allowed unrestricted daytime recreational access to the area covered by the easement. (D.C. 2). The settlement between Bowman and NUDEP was formalized in an administrative order issued by NUDEP, which Bowman consented to on August 1, 2011. (D.C. 2).

NUDEP filed suit against Bowman under 33 U.S.C. § 1365 in the District Court of New Union August 10, 2011. (D.C. 3). On September 5, NUDEP filed a motion to enter a decree identical to the administrative order it had agreed to with Bowman. (D.C. 3). This motion and the entry of the decree was consented to by Bowman. (D.C. 3).

NUWF filed a separate, individual action under § 1365 against Bowman on August 30, 2011. (D.C. 3). On September 15, NUWF filed motions to intervene in NUDEP's suit, to oppose the entry of the decree, and to consolidate the cases. (D.C. 3). All of these motions are still pending in the District Court of New Union. (D.C. 3).

NUDEP intervened in NUWF's suit on November 1, 2011. (D.C. 3). During discovery, Bowman deposed all three members of NUWF who had given affidavits to support the organization's standing. (D.C. 4). The members, Dottie Milford, Zeke Norton, and Effie Lawless, all testified that they use the Muddy for recreational boating, fishing, and occasional picnic on its banks. (D.C. 4). They further testified that they cannot discern any difference in the land's appearance from the river or its banks. (D.C. 4). In addition to these general statements, Milford testified that the Muddy seemed more polluted to her than before. (D.C. 4). Norton testified that he used the area, including Bowman's property, for frogging. (D.C. 4). He claimed that after Bowman's actions, he can no longer find good frogs on Bowman's land. (D.C. 4). On cross-examination, Norton admitted that he had been trespassing onto Bowman's land in order to frog there. (D.C. 4).

After discovery, the parties filed cross motions for summary judgment. (D.C. 3). On June 1, 2012, the district court granted summary judgment in favor of Bowman. (D.C. 3). Following the judgment, both NUWF and NUDEP appealed to this court. Order p. 1.

SUMMARY OF THE ARGUMENT

The district court correctly granted summary judgment in favor of Bowman. The district court correctly found that NUWF lacked standing to sue Bowman. Specifically, NUWF failed to demonstrate that any of its members had suffered an injury which could give NUWF Article III standing. Plaintiff's aesthetic and recreational enjoyment of the area has in no way been diminished by Bowman's actions. The specific injuries alleged by NUWF members Norton and Milford have flaws which prevent them from serving as the basis for NUWF's standing. Norton's injury is the result of his own illegal activity and Milford's alleged esthetic injury cannot be fairly traced back to Bowman's actions.

The district court also correctly found that it lacked subject matter jurisdiction. NUDEP's settlement agreement with Bowman constituted a diligent prosecution of the violation and barred NUWF's citizen suit. There also was no ongoing violation of the CWA, which is required to vest a court with subject matter jurisdiction under 33 U.S.C. § 1365(a)(1).

Finally, the district court correctly concluded that Bowman had not violated § 404 of the Clean Water Act. Bowman's actions did not satisfy the addition element of the offense as interpreted by the EPA in the Water Transfers Rule. This interpretation is due great deference by the court under the *Chevron* analysis framework. The "outside world" definition of addition promulgated by the EPA also furthers the goals of the CWA. Therefore, the court correctly deferred to the EPA definition and found no violation of the CWA.

STANDARD OF REVIEW

This appeal was taken from the district court's grant of summary judgment. Summary judgment is appropriate if 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(a). The issues presented contain questions of law; therefore a *de novo* standard of review should be applied. *Pierce v. Underwood*, 487 U.S. 552, 558 (1988). The court should independently weigh the merits of the motions for summary judgment without deferring to the reasoning given by the district court. *Hughes v. Boston Mut. Life Ins. Co.*, 26 F.3d 264, 268 (1st Cir. 1994).

ARGUMENT

This court should affirm the district court's grant of summary judgment in favor of Bowman on all four assignments of error raised by NUWF and NUDEP. First, the district court correctly found that NUWF lacked standing as it failed to state an injury in fact. Second, the district court correctly found that it lacked subject matter jurisdiction due to NUDEP's diligent

prosecution. Third, the district court correctly found that it lacked subject matter jurisdiction because Bowman's violations were wholly past. Lastly, the district court correctly found that Bowman had not violated 33 U.S.C. § 1344.

I. THE DISTRICT COURT WAS CORRECT IN FINDING THAT NUWF LACKED STANDING BECAUSE THEY CANNOT SHOW AN INJURY IN FACT BASED ON PURELY PAST RECREATIONAL USE, ILLEGAL ACTIVITY, OR AESTHETIC LOSS WITHOUT CAUSATION.

The district court correctly granted the motion for summary judgment in favor of Bowman on the issue of NUWF's standing to bring this suit. Specifically, the district court correctly found that NUWF had failed to state an injury in fact.

Article III of the Constitution confers federal courts' jurisdiction over cases and controversies. U.S. Const. art. III § 2. Several case and controversy doctrines have grown around this constitutional limitation. *Allen v. Wright*, 468 U.S. 737, 750 (1984). The standing doctrine determines whether a specific person is the proper party to bring a matter to court for adjudication. *Id.* Standing is an important check on the judiciary and serves to maintain the separation of powers amongst the three branches of government. *Id.* at 752.

The determination of standing contains three requirements that must be satisfied in order for a party to properly adjudicate a matter. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992). The plaintiff first must demonstrate that he has suffered an "injury in fact" which is the invasion of a legally protected interest. *Id.* This injury must also be both "concrete and particularized" as well as "actual or imminent." *Id.* Second, the plaintiff must prove that the injury is fairly traceable to the violation. *Id.* Finally, it must be likely that the court can redress the injury by the relief requested. *Id.* at 561.

NUWF, as an organization, has standing when its members would otherwise have standing to sue in their own right, the interests at stake are germane to the organization's

purpose, and neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit. *Friends of the Earth, Inc. v. Laidlaw Environmental Svs., Inc.*, 528 U.S. 167, 181 (2000). The party invoking federal jurisdiction bears the burden of establishing the elements of standing. *Lujan*, 504 U.S. at 561. NUWF has failed to meet this burden as it has not demonstrated that any of its members suffered an "injury in fact" sufficient to grant them standing.

A. NUWF's members have failed to show an injury in fact because the alleged "injuries" fail to show diminished recreational use of the Muddy River.

The three NUWF members who gave depositions testified that they use the Muddy River for recreational purposes. (D.C. 4). They use the river for boating, fishing, and picnic on the river's banks. (D.C. 4). The three members, however, have failed to state an injury in fact because their use of the Muddy River has not been infringed upon in anyway. The Supreme Court has stated that an environmental plaintiff adequately alleges an injury when "the aesthetic and recreational value of the area will be *lessened*". *Sierra Club v. Morton*, 405 U.S. 727, 735 (1972) (emphasis added). NUWF's members can still continue their recreational activities in the same manner as they had prior to Bowman clearing his field. Also, all of the NUWF's members testified that they cannot see any difference in the appearance of Bowman's land. (D.C. 4). NUWF has failed to allege any diminished use of the Muddy River. Therefore, they have failed to carry their burden of demonstrating an injury in fact. This failure becomes even more apparent when compared to prior cases. *See Allen*, 468 U.S. at 751-52 ("In many cases, the standing question can be answered chiefly by comparing the allegations of the particular complaint to those made in prior standing cases").

A complaint comparable to ours can be found in *Friends of the Earth, Inc. v Laidlaw Environmental Svs., Inc.*, 528 U.S. 167 (2000). In that case, Laidlaw bought a hazardous waste incinerator facility. *Id.* at 175. The facility began dumping hazardous materials into the North Tyger River shortly after becoming operational. *Id.* at 176. The most dangerous of these materials was mercury *Id.*

Friends of the Earth (FOE) filed a citizen suit against Laidlaw to prevent the further discharge of mercury into the river. *Id.* at 177. To support its standing to sue, FOE and the other plaintiffs submitted several affidavits detailing their injuries caused by the discharges. The affidavits sated that the plaintiffs were no longer able to use the area for fishing, camping, and swimming due to the mercury discharges. *Id.* at 181-82. The discharges prevented their enjoyment of the river because it cased the river to look and smell polluted. *Id.* One of the plaintiffs also alleged an injury because the mercury discharge decreased the value of her home. *Id.* at 182.

The Supreme Court found the allegations of the FOE members to be sufficient to constitute injury in fact. *Id.* Quoting *Sierra Club v. Morton*, the court stated "Environmental plaintiffs adequately allege injury in fact when they aver that they used the challenged area and are persons whom the aesthetic and recreational value of the area will be lessened by the challenged activity". *Id.* at 183 (internal quotation marks omitted).

Unlike the plaintiffs in *Friends of the Earth*, NUWF's members have not averred any diminished aesthetic or recreational value of the Muddy River. All of NUWF's members testified that they could see no difference in the appearance of the land after Bowman's activities. (D.C. 4). They also fail to include anything in their affidavits or testimony that shows diminished recreational use of the Muddy. Whereas the FOE plaintiffs were prevented from using the river

they had once been able to enjoy, the NUWF plaintiffs allege no such deprivation of use. The burden is on NUWF to allege such an injury. *See Lujan,* 504 U.S. at 561. Therefore, unlike the plaintiffs in *Friends of the Earth,* the NUWF members have failed to show an injury in fact.

Two of the plaintiffs, Zeke Norton and Dottie Milford, gave testimony regarding two more specific injuries. Norton claimed that Bowman's activities have caused him injury because he can no longer frog that area as he had before. Milford claimed that the Muddy seemed to be more polluted than it had prior to Bowman's actions. Neither of these alleged "injuries" can serve as the basis of NUWF's standing. We will discuss each injury in turn.

B. Zeke Norton's alleged loss of frogging territory cannot serve as a basis for NUWF's standing because the inability to continue an illegal activity cannot give rise to standing.

Norton claims that he suffered an injury in fact because he can no longer use Bowman's land for frogging. (D.C. 4). On cross examination, Norton admitted that he was only able to frog the area by trespassing onto Bowman's land. (D.C. 4). The district court correctly noted that the inability to continue illegal activities cannot give rise to an injury to support standing. *See generally Armstrong v. Davis,* 275 F.3d 849, 865 (9th Cir. 2001) (abrogated on other grounds) ("Nonetheless, standing is inappropriate where the future injury could be inflicted only in the event of future illegal conduct"). Since the only way Norton's frogging activities could be lessened is if he continued to trespass onto Bowman's land, which is illegal conduct, this cannot be an injury sufficient to give standing to NUWF.

C. Dottie Milford's allegation that the river looks more polluted to her now cannot give NUWF standing because the alleged "injury" is not fairly traceable to Bowman's activities.

Dottie Milford testified at her deposition that the river "looked more polluted to her than it had before Bowman's activities." (D.C. 4). Generally, aesthetic injuries are sufficient to give rise to an injury in fact. *See Sierra Club*, 405 U.S. at 734. The flaw with Milford's allegation, however, is that NUWF has failed to allege facts sufficient to establish the second element of standing, causation. *Lujan*, 504 U.S. at 555.

Causation, as defined in *Lujan*, means that the injury alleged by the plaintiff is fairly traceable to the activities of the defendant. *Id.* This element is similar to the causation element in tort claims. The plaintiff must show that "but for" the defendant's acts, the injury would not have occurred. NUWF has failed to make this showing.

The Muddy River is a very large body of water, over five hundred feet wide at Bowman's property. (D.C. 1). The river forms the border between New Union and Progress for at least forty miles both upstream and downstream of the property. This forty miles of river presumably is bordered by many separate pieces of land owned by people other than Bowman. NUWF has failed to put forth any facts to show Bowman's activities are the cause of Milford's perception that the river appears more polluted. The change in appearance, if there has been any change at all, could have been caused by some other property owner along the river besides Bowman.

NUWF has failed to carry its burden to allege specific facts to show Bowman's activities caused the aesthetic deficiency alleged by Milford. The Supreme Court has stated "The litigant *must clearly and specifically set forth facts* sufficient to satisfy these Art. III standing requirements. A federal court is powerless to create its own jurisdiction by embellishing otherwise deficient allegations of standing". *Whitmore v. Arkansas*, 495 U.S. 149, 155-56 (1990) (emphasis added). As NUWF has failed to clearly and specifically set forth facts sufficient to

establish a causal link between Milford's alleged injury and Bowman's activity, this allegation cannot serve as the basis for NUWF's Art. III standing.

Neither NUWF nor its members have demonstrated an injury in fact sufficient to give rise to standing. For these reasons, this court should affirm the district court's grant of the motion for summary judgment on the standing issue.

II. THE DISTRICT COURT CORRECTLY DETERMINED IT LACKED SUBJECT MATTER JURISDICTION DUE TO NUDEP'S DILIGENT PROSECUTION OF BOWMAN AND THE ALLEGED VIOLATIONS BEING WHOLLY PAST.

The district court correctly found that it lacked subject matter jurisdiction over the matter because Bowman's violations were wholly past.

Any citizen may commence a civil action against any person alleged to be in violation of either an effluent standard or limitation or an order issued by the Administrator or a State. 33 U.S.C. § 1365(a)(1) (2012). This subject matter jurisdiction is limited in two ways. First, the Supreme Court has held that the language of § 1365(a)(1) only encompasses continuing violations. *Gwaltney of Smithfield Ltd. v. Chesapeake Bay Foundation*, 484 U.S. 49, 59 (1987). Second, § 1365(b) states "no action may be commenced if the Administrator or State has commenced and is diligently prosecuting a civil or criminal action in a court of the United States." 33 U.S.C. 1365(b)(1)(B) (2012).

The district court correctly found that it lacked subject matter jurisdiction over NUWF's citizen suit. It reached this determination due to NUDEP's diligent prosecution of Bowman's alleged violation of the CWA and the alleged violations being wholly past events.

A. NUDEP's prosecution of Bowman was timely commenced and diligent and thus deprived the district court of subject matter jurisdiction.

The citizen suit provision of the CWA has been described as "critical" to its enforcement as it provides both a check on the state and a second level of enforcement. *Sierra Club v.*

Hamilton Cty. Bd. of Cty. Comm'rs, 504 F.3d 634, 637 (6th Cir. 2007). However, citizen suits are meant to supplement rather than supplant government action. *Gwaltney,* 484 U.S. at 62. The state and federal governments have and will always be the primary enforcers of the CWA. *See Piney Run Preservation Ass'n v. County Comm'rs of Carroll County, Maryland*, 523 F.3d 453, 456 (4th Cir. 2008). Therefore, § 1365 bars citizen suits if the government has already commenced and is "diligently prosecuting" the offender.

As a threshold matter, the state must have already commenced its action to bar a citizen suit. 33 U.S.C.A. 1365(b)(1)(B) (2012). Courts look to which lawsuit was filed first to determine if the action was timely commenced. *See Friends of Milwaukee's Rivers v. Milwaukee Metropolitan Sewerage Dist.*, 382 F.3d 743, 754 (7th Cir. 2004). NUDEP filed its lawsuit in federal court August 10, 2011. (D.C. 3). NUWF filed its lawsuit August 30, 2011. (D.C. 3). The NUDEP action was commenced prior to the filing of NUWF's lawsuit. Therefore it was timely commenced and can serve as a bar to NUWF's action.

The second requirement to bar NUWF's citizen suit under § 1365(b)(1)(B) is that the action must be diligently prosecuted. The court's evaluation of the diligence of state action is "quite deferential." *Karr v. Hefner*, 475 F.3d 1192, 1198 (10th Cir. 2007). "Citizen-plaintiffs must meet a high standard to demonstrate that it has failed to prosecute a violation diligently." *Id.* NUWF has not met this high standard demanded of them by the law.

"A CWA enforcement prosecution will ordinarily be considered diligent if the judicial action is capable of requiring compliance with the act and is in good faith calculated to do so". *Piney Run Preservation Ass'n*, 523 F.3d at 459. The government prosecution does not have to be far-reaching or zealous, it must only be diligent. *Id.*; *Karr*, 475 F.3d at 1197. The fact that an agency has entered into a consent decree does not establish lack of diligence. *Id.* In fact, when

presented with a consent decree the court "must be particularly deferential to the agency's expertise." *Karr*, 475 F.3d at 1198.

NUWF has not alleged any facts that would point to a lack of diligence on behalf of NUDEP. The consent decree requires Bowman not only to cease any land clearing operations, but also requires him to grant a conservation easement to NUDEP and construct a year-round wetland on his property. NUWF cannot in good faith argue that these actions are not "calculated in good faith" to bring Bowman into compliance with the CWA.

The main contention NUWF seems to have with the consent decree is NUDEP did not seek any civil penalties against Bowman, although they are authorized to do so under the law. However, citizen plaintiffs cannot overcome the presumption of diligence merely by showing that the agency's prosecution strategy is less aggressive than the plaintiff would like or that it did not produce a result to the plaintiff's satisfaction. *Karr*, 475 F.3d at 1197. The Supreme Court recognized in *Gwaltney* that if citizen-plaintiffs could seek civil penalties the government chose to forgo, then the government's discretion to act in the public's best interest would be considerably curtailed. *Gwaltney*, 484 U.S. at 61. This is exactly what NUWF is seeking to do in this case, and this court cannot permit that to occur.

NUWF has failed to meet its "high burden" to overcome the assumption that NUDEP's prosecution of Bowman was diligent. Since NUDEP's prosecution was, in fact, diligent and timely commenced, this court should affirm the district court's grant of the motion for summary judgment.

B. Bowman's alleged violations of the CWA are "wholly past" events depriving the district court of subject matter jurisdiction.

The Supreme Court has determined that the grant of subject matter jurisdiction over citizen suits found in § 1365(a) only concerns violations of the CWA that are ongoing. *Gwaltney*,

484 U.S. at 59. This axiomatic statement of the law is undisputed by NUWF. (D.C. 5). The district court concluded that all of Bowman's land clearing activities ceased July 15, 2011 and are unlikely to continue as he has promised not to conduct any more land clearing and granted an easement to NUDEP over the remaining uncut portion of his property. Thus the district court correctly determined that the violations were not ongoing and therefore, it had no subject matter jurisdiction over the proceeding.

NUWF has made three assignments of error as to what constitutes an ongoing violation. First, NUWF contends that a violation is ongoing until the violation is remediated. Second, NUWF argues that the standard set forth in *Gwaltney* does not apply to the Bowman's violation of the CWA. Lastly, the NUWF contends that planting wheat constituted an ongoing violation. For the following reasons discussed below, NUWF has failed to prove an ongoing violation.

First, NUWF relied heavily on *Sasser v. Administrator*, 990 F.2d 127, 129 (4th Cir. 1993), as support for its contention that a violation is ongoing until the violation is remediated. In *Sasser*, the petitioner discharged dredged and fill material into a wetland when he restored an old embankment on his property without a discharge permit. *Id.* at 128. On appeal, Sasser raised a challenge based on subject matter jurisdiction. *Id.* at 129. The Fourth Circuit denied his challenge, holding "Each day the pollutant remains in the wetlands without a permit constitutes an additional day of violation". *Id.* The only authorities the Fourth Circuit cited for this proposition were *U.S. v. Ciampitti*, 669 F. Supp. 684, 700 (D.N.J. 1987), and *U.S. v. Cumberland Farms*, 647 F. Supp. 1166, 1183-84 (D.Mass. 1986), *aff'd* 826 F.2d 1151 (1st Cir.1987). The Fourth Circuit's reliance on these cases is misplaced, as both of them stand for the proposition that failure to remediate is a factor to consider when assessing civil penalties against a violator. They do not serve as authority for the proposition the Fourth Circuit made in *Sasser*. Following

Sasser would require this Court to disregard the language of § 1365 and the Supreme Court's holding in *Gwaltney*.

The logical fallacy of *Sasser* and NUWF's assertion is succinctly explained in *U.S. v. Rutherford Oil Corp.*, 756 F. Supp. 2d 782, 791 (S.D.T.X. 2010). The *Rutherford* court correctly noted that the violation of the CWA is not the presence of pollutants in a navigable water of the United States, but the addition of pollutants. *Id.* As long as addition is continuing, the violation is continuing. *Id.* However, once the addition of pollutants stops, the violation is no longer ongoing. *Id.*

NUWF alleges that Bowman violated the CWA by discharging dredge and fill material into a wetland without a permit. *See* 33 U.S.C. § 1344 (2012). The violation occurs when dredge or fill material is added to the wetland. *See* 33 U.S.C. § 1362(12) (2012). Once the addition of the dredge or fill material stops, the violation ceases. The pollutant remains, but the presence of the pollutant is not the violation at issue. The addition of the pollutant is the violation alleged.

Here, the addition stopped on July 15, 2011. Therefore, the violation ceased on July 15, 2011. Thus, the violation of the CWA was wholly past at the time NUWF filed its case on August 30, 2011. Attempting to argue anything else is illogical and contrary to the law.

Second, NUWF contends that *Gwaltney* only applies to violations of 33 U.S.C. § 1342 and not to 33 U.S.C. § 1344, the section Bowman allegedly violated.. NUWF offers no support as to why these two sections should be treated differently. Even if they could, such a distinction would be irrelevant because *Gwaltney* was interpreting §1365, the citizen suit provision. The holding that the violation must be ongoing to vest a court with subject matter jurisdiction applies whether it is a violation of § 1344 or § 1342.

Third, the planting of wheat in September 2011 was not a continuing violation of § 1344. NUWF conceded that this activity was not the addition of dredge or fill material. (D.C. 5).

The planting of wheat may, however, be a separate violation of § 1344. If this is the case, it still cannot serve as the basis for subject matter jurisdiction because NUWF did not provide Bowman with notice sufficient to vest the court with jurisdiction. 33 U.S.C. § 1365 (b)(1)(A). In order to give a court subject matter jurisdiction, the notice must contain:

> sufficient information to permit the recipient to identify the specific standard, limitation, or order alleged to have been violated, the activity alleged to constitute a violation, the person or persons responsible for the alleged violation, the location of the alleged violation, the date or dates of such violation, and the full name, address, and telephone number of the person giving notice.

40 C.F.R. § 135.3 (2012). The notice's identification of the alleged violations must be clear. *Karr*, 475 F.3d at 1200. NUWF could not have possibly notified Bowman of any alleged violation resulting from the planting of wheat because the planting occurred over a month after NUWF sent out its notice. Without this proper notice, no citizen action can be commenced. 33 U.S.C. § 1365 (b)(1)(a) (2012).

NUWF has failed to allege an ongoing violation of the CWA. Therefore, this court should affirm the district court's grant of summary judgment on this count and find that no subject matter jurisdiction exists in this case.

III. THE DISTRICT COURT'S CORRECTLY FOUND THAT BOWMAN DID NOT VIOLATE § 404 OF THE CWA BECAUSE HE DID NOT "ADD" ANYTHING TO THE WETLAND UNDER THE EPA'S INTERPRETATION OF ADDITION.

Both NUWF and NUDEP charge that Bowman violated § 404 of the CWA for discharging pollutants without a permit. (D.C. 6-8). Discharging of pollutants is defined as the "addition of any pollutant to navigable waters from any point source." 33 U.S.C. § 1362(12) (2012). Pollutant are "dredged spoil, solid waste, incinerator residue, sewage sludge, garbage,

munitions, chemical wastes, biological materials, radioactive materials, heat, wrecked or discarded equipment, rock, sand, cellar dirt and industrial, municipal, and agricultural waste discharged into water." 33 U.S.C. § 1362(6) (2012). A point source is any "discernible, confined, and discrete conveyance" such as a pipe, ditch, or channel from which pollutants are discharged. 33 U.S.C. § 1362(14) (2012). Addition, however, is not defined in the CWA. What constitutes "addition" is the issue in this case.

The district court found that Bowman's bulldozer, the dredged spoil, and the wetland on his property satisfied the elements of a point source, pollutant, and navigable water respectively. The district court did not find a violation of the CWA in this case however because there was no "addition." The district court gave *Chevron* deference to the EPA's definition of "addition" found in the Water Transfers Rule, and found that under this definition, Bowman did not "add" pollutants. Alternatively, the district court applied the "from the outside world" definition of addition and concluded that it was also unsatisfied. The appellants challenge this ruling.

A. The Water Transfers Rule defines "addition" as bringing a pollutant in "from the outside world".

The Water Transfers Rule (WTR), codified at 40 C.F.R. § 122.3, excludes water transfers from NPDES permitting requirements. It says:

> The following discharges do not require NPDES permits . . . (i) Discharges from a water transfer. Water transfer means an activity that conveys or connects waters of the United States without subjecting the transferred water to intervening industrial, municipal, or commercial use. This exclusion does not apply to pollutants introduced by the water transfer activity itself to the water being transferred.

40 C.F.R. § 122.3(i) (2012). The EPA adopted the WTR in order to clarify its position on what constitutes addition within the meaning of 33 U.S.C. § 1362(12). National Pollutant Discharge Elimination System Water Transfers Rule, 73 Fed. Reg. 33697-01 (2008) ("The legal question

addressed by today's rule is whether a water transfer as defined in the new regulation constitutes an "addition" within the meaning of section 502(12).").

This clarification came as a result of a circuit split regarding the meaning of addition. Some courts limit the meaning of addition to situations where the point source had introduced the pollutant into the water "from the outside world." *See National Wildlife Federation v. Gorsuch*, 693 F.2d 156, 175 (D.C. Cir. 1982); *National Wildlife Federation v. Consumers Power Co.*, 862 F.2d 580, 584 (6th Cir. 1988). Others have disregarded the "outside world" definition, instead focusing on factors such as hydrological connectivity and changing the natural flow of water. *See generally Dubois v. Dept. of Agriculture*, 102 F.3d 1273, 1298 (1st Cir. 1996); *Catskill Mountains Chapter of Trout Unlimited, Inc. v. City of New York*, 273 F.3d 481, 491 (2d Cir. 2001).

The Supreme Court weighed in on the question of addition in *South Florida Water Mang. Dist. v. Miccosukee Tribe of Indians*, 541 U.S. 95 (2004). Although the court did not reach an ultimate conclusion, it appeared to adopt the *Catskill* hydrological connectivity test. *Id.* at 109 ("The Tribe does not dispute that if C-11 and WCA-3 are simply two parts of the same water body, pumping water from one into the other cannot constitute an "addition" of pollutants."). The Supreme Court even adopted the Second Circuit's analogy to explain the logic of the test. *Id.* at 110, *citing Catskill*, 273 F.3d at 492 (As the Second Circuit put it in Trout Unlimited, "[i]f one takes a ladle of soup from a pot, lifts it above the pot, and pours it back into the pot, one has not 'added' soup or anything else to the pot."). The Supreme Court did not reach a conclusive answer on the issue, choosing instead to vacate the decision and remand for further fact finding on the hydrological connectivity of the water bodies at issue. *Id.* at 112.

In response to these developments, the EPA promulgated the Water Transfers Rule to clarify its position that addition only occurs when something is added from the "outside world". National Pollutant Discharge Elimination System Water Transfers Rule, 73 FR 33697-01 (2008) ("EPA's long standing position is that an NPDES pollutant is "added" when it is introduced into a water from the "outside world" by a point source".). Under this "outside world" definition, "addition" only occurs when the point source introduces something to navigable water that was not present before. *Gorsuch,* 693 F.2d at 165. This is the definition of addition due great deference by this court under a *Chevron* analysis

B. The "outside world" definition of "addition" is due deference from this court under the *Chevron* analysis because it was promulgated pursuant to the EPA's rule making authority and is a reasonable interpretation of the statute.

The Supreme Court developed a two-part method of analyzing the legality of an agency interpretation of a statute. *Chevron U.S.A., Inc. v. NRDC,* 467 U.S. 837, 842-45 (1984).. The first question is whether Congress has directly spoken on the issue. *Id.* If Congress has unambiguously declared its intent, then the Court must follow that directive. *Id.* at 842-43. If, however, there is some ambiguity then the court reaches the second part of the analysis. *Id.* at 843. In this part, the court must determine if the agency's interpretation of the statute is a permissible one. *Id.* If the agency's interpretation is reasonable, the court should not disturb it. *Id.* at 845 (*quoting U.S. v. Shimer*, 367 U.S. 374, 382-83 (1961)).

Since *Chevron,* the Supreme Court has added a preliminary question to the analysis. *U.S. v. Mead Corp.*, 533 U.S. 218, 226 (2001). The Supreme Court held that in order for *Chevron* deference to apply, Congress must have delegated authority to the agency to make rules that carry the force of law and the agency interpretation was carried out under that authority. *Id.* Thus, in order for an agency's statutory interpretation to receive *Chevron* deference the agency

must show: 1) Congress delegated the agency authority to make rules and the agency was exercising that authority; 2) the statute at issue is ambiguous; and 3) the agency's interpretation is a permissible one. The EPA's definition of addition satisfies all three elements.

The EPA has been expressly delegated rule making authority with regard to the Clean Water Act. 33 U.S.C. § 1361(a) (2012) ("The Administrator is authorized to prescribe such regulations as are necessary to carry out his functions under this chapter".). The rule making power of the Administrator has been described as its "most important function". *American Frozen Food Institute v. Train*, 539 F.2d 107, 129 (D.C. Cir. 1976). The definition of addition in the Water Transfers Rule was promulgated in an exercise of the EPA's grant of rulemaking authority. Therefore, the second question set forth in *Mead* has also been satisfied.

There is certainly an ambiguity in the statute regarding the meaning of addition. *Friends of the Everglades v. South Florida Water Management Dist.*, 570 F.3d 1210, 1227 (11th Cir. 2009). The very existence of two competing interpretations of addition is the very definition of ambiguity. *Id. (citing U.S. v. Acosta*, 363 F.3d 1141, 1155 (11th Cir. 2004)). The EPA's interpretation of addition is also a permissible one. *Id.* at 1228 ("Because the EPA's construction is one of the two readings we have found is reasonable, we cannot say that it is "arbitrary, capricious, or manifestly contrary to the statute.").

Having determined the EPA's definition of addition is due *Chevron* deference, this court must give that interpretation effect. A court may not substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator of an agency. *Chevron*, 467 U.S. at 844. Therefore, the "outside world" definition of addition applies to the case at hand.

C. Under the "outside world" definition of "addition", Bowman did not add pollutants to the wetland and thus did not violate the Clean Water Act.

In order to add a pollutant under the EPA's definition of the test, the point source must introduce something to navigable water that was not previously present. *Gorsuch,* 693 F.2d at 165. Simply moving material around the wetland will not qualify as addition. As the Supreme Court illustrated "if one takes a ladle of soup from a pot, lifts it above the pot, and pours it back into the pot, one has not 'added' soup or anything else to the pot." *Miccosukee,* 541 U.S. at 110. The fact that the point source changes the nature of the material is also irrelevant. *Consumers Power,* 862 F.2d at 585.

The *Consumers Power* decision is particularly enlightening in the present case. In *Consumers,* the power company pumped water from Lake Michigan into a reservoir. *Id.* at 581. The water from the reservoir would then pass through turbines back into Lake Michigan, creating electrical power. *Id.* at 581-82. During this process, fish would frequently get swept up by the pumping operation and be "pureed" by the turbines before being returned to Lake Michigan. *Id.* at 582.

The National Wildlife Federation argued that the pumping stations required § 402 permits because they "added" a pollutant, biological material, to Lake Michigan. *Id.* at 580. The Sixth Circuit disagreed, reasoning that the fish originated in the lake, and thus could not have been added from the outside world. *Id.* at 585. The court also rejected the argument that the turbines "created" a pollutant when they changed the nature of the fish from living organism to dead biological material. *Id.* It reasoned that the transformation did not satisfy the "outside world" requirement because the fish never left the water. *Id.* It further reasoned that to hold that such a transformation constituted addition would be contrary to *Chevron* as it would alter what constituted the "outside world". *Id.*

Similarly here, the alleged pollutant originated and at all times was located within the wetlands on Bowman's property. The pollutant could not have been introduced by Bowman "from the outside world" into the wetland. Bowman did not add anything to the wetland. Therefore, no violation of the Clean Water Act occurred.

At the district court level, NUWF contended that Bowman removed harmless soil from the wetland and what he returned to the wetland was a pollutant. *See U.S. v. Deaton*, 209 F.3d 331 (4th Cir. 2000). Specifically, they assert that Bowman had indeed added pollutants from the "outside world.". Accepting this argument would violate the deference due to the EPA under *Chevron* because it would render the "outside world" interpretation of addition irrelevant.

This argument is also illogical. It contradicts the reasoning given by the Supreme Court's in *Miccosukee*. To hold that soil somehow undergoes a magical transubstantiation from harmless dirt to dangerous pollutant merely by shoveling it up and replacing it would render § 1362(12) meaningless. Such a definition would conflate the elements of addition and point source into one single element. Congress clearly did not intend for this to be the case as it provided for both elements in its definition of discharge.

The last argument NUWF made before the district court was that the EPA's definition of addition as "from the outside world" only applies to § 1342 and not § 1344 violations. NUWF's argument is that the Water Transfers Rule was contemplated to avoid issuing NPDES permits, which are issued pursuant to § 1342. This argument is superficially appealing, but lacks substance.

The definition of addition promulgated was not an interpretation of section § 1342, but was instead an interpretation of 33 U.S.C. § 1362(12). *See* National Pollutant Discharge Elimination System Water Transfers Rule, 73 Fed. Reg. 33697-01 (2008) ("The legal question

addressed by today's rule is whether a water transfer as defined in the new regulation constitutes an "addition" within the meaning of section 502(12)."). 33 U.S.C. § 1362(12) applies equally to both § 1342 and § 1344. Moreover, the same words used in different areas of the same statute are presumed to mean the same thing. *Sorenson v. Sec. of Treasury*, 475 U.S. 851, 860 (1986). The statutory construction of the CWA evinces no Congressional intent that addition should be defined differently when applied to § 1342 versus § 1344. Therefore, NUWF's argument that the EPA's interpretation of addition only applies to § 1342 must fail.

D. The "outside world" definition of "addition" is consistent with the CWA's goal of protecting the integrity of the nation's waters.

The objective 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) (2012). The EPA's interpretation of addition as requiring something to be introduced from the "outside world" is consistent with this goal. This interpretation maintains the integrity of the Nation's waters by preserving them in the condition they are now. The definition of addition advanced by the Appellants would essentially require the EPA to protect the waters from themselves, by forcing them to police not only pollutants from the "outside world" but also those which may already be present in the water. Some of these materials defined as pollutants, such as biological material, naturally occur in certain water bodies. To require the EPA to enforce the CWA based on Appellants' definition of addition would set them up for failure, as it would be impossible to protect the Nation's waters from themselves.

CONCLUSION

This court should hold that NUWF lacks standing to bring this suit because it has failed to demonstrate that it and any of its members have suffered a cognizable injury in fact. This court

should also hold that it lacks subject matter jurisdiction over this matter as both NUDEP's diligent prosecution and the lack of an ongoing violation serve as an insurmountable bar to NUWF's citizen suit. Finally, this court should hold that the EPA's "outside world" interpretation of addition is due *Chevron* deference and therefore Bowman did not "add" any pollutants while undertaking his land clearing operation. To use any other definition of addition would be contrary to both Supreme Court precedent and the policy underlying the CWA. For the foregoing reasons, this court should affirm the district court's grant of Bowman's motion for summary judgment.

Respectfully Submitted,

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Counsel for Jim Bob Bowman