Team 41

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 THE NEW UNION WILDLIFE FEDERATION
Plaintiff-Appellant

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JURISDICTIONAL STATEMENT

The U.S. District Court for the District of New Union had proper subject matter jurisdiction under 28 U.S.C. § 1331 because the issues involve a question of federal law under the Clean Water Act ("CWA"). 33 U.S.C. §§ 1251 *et. seq.* The district court entered its final order granting summary judgment to the defendant on all issues on June 1, 2011. The Appellants, New Union Wildlife Federation ("NUWF") and New Union Department of Environmental Protection ("NUDEP"), timely appealed the district court's order. The U.S. Court of Appeals for the Twelfth Circuit has proper jurisdiction based on 28 U.S.C. § 1291, which permits jurisdiction of appeals from all final decisions of the district courts of the United States, including the.

STATEMENT OF THE ISSUES

I. Does NUWF have standing to sue Jim Bob Bowman (Bowman) for violating the Clean Water Act (CWA) when NUWF members identified specific recreational activities they participate in, either on or near Bowman's wetland property, and the members stated that these activities have been hampered since Bowman plowed and drained the wetland despite the fact that the members did not have legal access to Bowman's land?

II. Does Bowman continue to violate § 505 of the CWA when he failed to remediate the damage he caused by plowing over the wetland, and when he continued to plant wheat seeds, and drain the wetland?

III. Is NUWF's citizen suit barred from proceeding when NUDEP's proposed penalty is disproportionate to the economic benefit Bowman received from his violation, is less than authorized under statute, will not result in cessation of pollution or compliance with the CWA, and undermines the purpose of the Citizen Suit Provision?

IV. Did Bowman violate the CWA when he cleared wetland of vegetation, re-deposited and filled other lower parts of the wetland from higher elevation points within the same wetland, and loosened and overturned sub-strata soil by digging drainage ditches causing the wetland to lose its impermeable characteristics without a § 404 permit?

STATEMENT OF THE CASE

On July 1, 2011, after Bowman filled his wetland property without obtaining the proper permits, NUWF filed notice to sue Bowman pursuant to § 505 of the CWA, 33 U.S.C. § 1365,

for violating §§ 301(a) and 404 of the CWA. (R. at 3.) NUWF alleged that Bowman violated the CWA by dredging and filling, and then draining wetlands into the Muddy River. (R. at 4.) Upon receiving NUWF's notice of intent to sue Bowman, NUDEP entered into a settlement agreement with Bowman that was subsequently incorporated into an administrative order under the authority of a state statute that is nearly identical to the relevant parts of Section 309 (a) and (g) of the CWA. (R. at 4.)

On August 10, 2011, after the administrative order was issued, NUDEP filed suit in the United States District Court for the District of New Union alleging that Bowman violated § 505 of the CWA. (R. at 5.) On August 30, 2011, NUWF also filed a § 505 action against Bowman in the United States District Court for the District of New Union seeking civil penalties, and requiring Bowman to remove the fill material and restore the wetland. (R. at 5.) On September 5, 2011, NUDEP, with Bowman's consent, moved to enter a decree containing terms identical to the administrative order. (R. at 5.) This motion is pending. (R. at 5.) On September 15, 2011, NUWF moved to intervene and consolidate the NUDEP and NUWF actions, while simultaneously opposing NUDEP's motion to enter a decree. (R. at 5.) NUDEP filed a similar motion to intervene in the NUWF case, which was granted on November 1, 2011. (R. at 5.) The district court stated that the decision to consolidate the cases did not prejudice NUDEP's right to enforce violations of its proposed decree or NUWF's rights to continue with this action. (R. at 5.)

Following discovery, the court granted Bowman's motion for summary judgment on four issues presented. First, the district court found that NUWF lacked standing because its members did not suffer injuries fairly traceable to Bowman's alleged violations. (R at 5.) Second, the court ruled that it lacked subject matter jurisdiction because all violations were wholly past, and, therefore, there was no continuing violation of the CWA. (R. at 5.) Third, the court held that

NUWF lacked subject matter jurisdiction because NUDEP's diligent prosecution of the claim barred NUWF from seeking relief under the CWA's § 505 Citizen Suit Provision. (R. at 5.) Fourth, the court determined that NUWF failed to prove that there had been an "addition" under the CWA and therefore did not satisfy a key element necessary to prove Bowman violated the law. (R. at 5.) The district court denied NUWF's cross-motion for summary judgment, which alleged Bowman violated the CWA when he added fill material to his wetland without a § 404 permit. (R. at 5.)

STATEMENT OF THE FACTS

On June 15, 2011, Bowman began bulldozing and leveling trees and other vegetation on his waterfront wetland on the Muddy River. (R. at 3-4.) Intending to farm the property, Bowman dug trenches that led directly into the Muddy River, and drained the wetland. (R. at 4.) Over the next 15 days Bowman leveled almost the entire 1,000 acre wetland. (R. at 4.) To accomplish this task, Bowman pushed the leveled brush and tree materials into windrows and burned them. (R. at 4.) He then dug trenches, pushed the remaining ash and vegetation waste into the trenches, and covered them with dirt. (R. at 4.) Bowman could not immediately access a 150 foot wide swath of saturated wetland along his 650 feet of Muddy River frontage with heavy machinery. (R. at 4.) Bowman left that portion of the wetland intact, intending to clear it later. (R. at 3-4.)

Bowman owns the entire 1,000 acre tract of what was a wooded wetland, prior to June 15, 2011, and is now almost entirely a leveled field. (R. at 3.) The Muddy River is a large river, more than 500 feet wide and more than six feet deep where it borders Bowman's land. (R. at 3.) Bowman's property is entirely within the 100-year floodplain of the Muddy River, and portions of the property are inundated with water during normal high flows. (R. at 3.) All parties agree that Bowman's property is properly classified as a wetland by the U.S. Army Corps of

Engineers' ("COE") Wetlands Determination Manual. (R. at 4.) To level the wetland, Bowman moved soil from the elevated portions of the wetland into the low-lying portions. (R. at 3.) After the lawsuits were filed, Bowman cultivated the land, planting a winter wheat crop on September, 2011. (R. at 5.)

NUWF members Dottie Milford, Zeke Norton, and Effie Lawless have used the Muddy River in the past and will continue to use the river in the vicinity of Bowman's property for fishing, recreational boating, and picnicking on the banks. (R. at 6.) All three individuals are aware that Bowman mostly destroyed his wetland. (R. at 6.) All are concerned that the loss of the ecologically sensitive, spongy wetland habitat will cause increased pollution in the Muddy. (R. at 6.) The members feel a loss from Bowman's destruction of the wetland. (R. at 6.) Milford testified that the Muddy River appears more polluted now than it did prior to the destruction of the wetland. (R. at 6.) Norton testified that he was especially fond of the Bowman property and general area because of its "exceptionally good . . . frogging." (R. at 6.) Norton, who uses the area for recreational and subsistence purposes, could normally find a dozen or so good sized frogs when he went frogging in that area and now no longer observes any frogs in the drained field. (R. at 6.) He stated that he is lucky to find two or three good sized frogs in the remaining 150-foot swath of wetland, now publically accessible under the conservation easement. (R. at 4, 6.) Bowman's land was properly posted with no trespassing signs. (R. at 6.)

In the settlement agreement entered into between Bowman and NUDEP, Bowman agreed to convey a conservation easement to NUDEP. (R. at 4.) The conservation easement includes the 650-foot long, 150-foot wide uncleared section of wooded wetland adjacent to the Muddy River. (R. at 4.) This represents 2.2 acres of land, or 0.22% of the original wetland. Bowman also agreed to construct and maintain a permanently inundated wetland on a 75-foot buffer zone

between the wetland and the new field. This represents 1.1 acres of land, or 0.11% of the original wetland. The easement states that the land must remain in a natural state, and open to the public for day-use-only, recreational purposes. (R. at 4.) Bowman also agreed not to clear any more of the wetland area. (R. at 4.) The agreement does not mention the drainage ditch.

STANDARD OF REVIEW

This Court's standard of review on appeal from a grant of summary judgment is *de novo*. *Regan v. Faurecia Automotive Seating, Inc.*, 679 F.3d 475, 479 (6th Cir. 2012). A court ruling on a motion for summary judgment must "view the factual evidence and draw all reasonable inferences in favor of the nonmoving party." *Id.* Summary judgment is proper when there are no genuine issues of material fact. Fed. R. Civ. P. 56(c). This Court should apply the same criteria the district court applied, pursuant to Federal Rule of Civil Procedure 56(c).

SUMMARY OF THE ARGUMENT

NUWF has standing to pursue its claim against Bowman because its members have satisfied the Article III standing requirements outlined in *Laidlaw*. NUWF is a non-profit organization incorporated under the laws of New Union, suing on behalf of its members. NUWF's mission is to protect fish and wildlife habitat throughout the state, and its members support the mission through membership fees. NUWF took interest in this suit when Dottie Milford and Zeke Norton, affiants and members of NUWF, suffered immediate and concrete, aesthetic and economic injuries when Bowman filled the wetland. Milford testified that the Muddy River looks more polluted, and Norton is unable to harvest as many frogs in the area. This Court has the ability to redress these injuries with a favorable ruling for NUWF. The district court erred in holding that NUWF did not have standing, and this Court should reverse the lower court on this issue.

The dredging and filling of 99.67% of the wetland constitutes an ongoing and continuous violation of the CWA. Bowman filled the wetland without the necessary § 404 permit, and in refusing to restore the wetland to its original state, he continues to violate the CWA. The lower court erred by relying on the Supreme Court's decision in *Gwaltney* to hold that Bowman's actions do not constitute a continuing violation. NUWF presented evidence showing that converting the wetland to dry farm land constitutes a § 404 violation, and the continued draining of his wetland after the complaint was filed is a continuing and ongoing violation of the CWA. Also, the harm caused by Bowman's destruction of the wetland will continue until the wetland is restored. Finally, barring the NUWF suit merely because Bowman completed filling the wetland before a suit was filed would lead to individuals concealing their otherwise illegal activities, and would erode CWA protections. Thus, this Court should reverse the district court on this issue because Bowman's actions were not wholly past.

NUDEP's action does not rise to the level of diligent prosecution sufficient to bar NUWF's citizen suit. NUDEP's proposed consent decree imposes penalties that are less than the economic benefit Bowman will enjoy as a result of his violation. The punishment is too small to act as an effective deterrent against future violators. Furthermore, the consent decree will not result in a cessation of violations or compliance with the CWA. The decree does not order the removal of fill material from the wetland, nor does it order the removal of the drainage ditch. Congress' reason for including the Citizen Suit Provision in the CWA was to encourage citizen participation of enforcement, and to provide another layer of accountability when state or federal agencies fail in their statutory duties. Here, NUDEP failed in its statutory duty to preserve and restore the integrity of waters of the United States. Therefore, this Court should reverse the lower court and allow NUWF to proceed with its suit.

Bowman violated the CWA when he dredged, leveled, and filled, a 1,000 acre wetland to create a farm field without a § 404 permit, in contravention of the goal of the CWA to "restore and maintain" sensitive water ecosystems in the U.S. The lower court erred when it relied on the EPA's Water Transfer Rule, to hold that an "addition" for the purposes of the CWA must come from the "outside world." The EPA's Water Transfer Rule is explicitly limited only to the NPDES program under § 402 of the CWA, but has no bearing on additions of fill material regulated by § 404 of the Act. Fill is any material which has the effect of replacing any water of the United States with dry land. Unlike a pollutant, fill is defined by its effect on the receiving water, not by the nature of the material. When making a determination of whether a certain discharge is a pollutant or fill the reviewing court must first look to whether the material has the effect of fill. If it has the effect of fill, than a § 404 permit is required the NPDES program does not apply. Furthermore, in contrast to the outside world theory, case law in four federal circuits has held that an addition for the purposes of § 404 can include leveling a wetland to create a farm field, "deep ripping" a wetland to cause drainage, and digging a ditch all while using the extracted material to fill in adjacent parts of the same wetland. Here, Bowman leveled 99.67% of the original wetland to create a farm field. The district court erred by not requiring Bowman to obtain a § 404 permit, and the court's decision undermines the intent of the CWA by allowing such activities to persist in violation of the CWA.

ARGUMENT

I. NUWF has standing to sue Bowman for violating the CWA because NUWF members suffered specific injuries to their recreational interests that are traceable to Bowman's actions, regardless of their legal right to enter Bowman's land.

NUWF properly demonstrates Article III standing to sue on behalf of its members through testimony and affidavits showing specific injuries to its members that are fairly traceable to Bowman's destruction of the wetland. U.S. Const. art. III, § 2. Additionally, NUWF is not

precluded from pursuing this case because its members did not have a legal right to be on Bowman's property.

A. NUWF established Article III standing requirements for an organization suing on behalf of its members because it has suffered an injury in fact that is concrete, traceable to Bowman's destruction of the wetland, and the injury can be redressed by a favorable court decision.

NUWF meets the Supreme Court's Article III standing requirements under *Friends of the Earth, Inc. v. Laidlaw Environmental Services,* because it has shown that its members' injuries are concrete, actual, traceable to Bowman's actions, and that a favorable court decision could redress those injuries. 528 U.S. 167 (2000). An organization has standing to sue on behalf of its members when: its members would, in their individual capacities, have standing to sue; the interests are in line with the organization's purpose; and when the claims asserted do not require the participation of individual members. *Id*. at 167. In order to have standing, an organization suing on behalf of its members must show that: "(1) it has suffered an 'injury in fact' that is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical; (2) the injury is fairly traceable to the challenged action of the defendant; and (3) the injury is not merely speculative and the injury can be redressed by a favorable [court] decision." *Id.* at 180-81. "If a plaintiff asserting an interest under the [CWA] meets the constitutional standing requirements to satisfy Article III, then that plaintiff satisfies the statutory threshold as well." *Friends of the Earth, Inc. v. Gaston Copper Recycling Corp.*, 629 F.3d 387, 396 (4th Cir. 2011).

NUWF has standing to bring a citizen suit under the CWA because NUWF has properly alleged Bowman violated the CWA when he filled his wetlands. A citizen has standing to sue any individual who is in violation or alleged to be in violation of the CWA. 33 U.S.C § 1365(a)(1) (2012). "Citizen," for the purposes of this section, includes multiple persons having an interest, which is or may be adversely affected. § 1365(g). NUWF has satisfied all three

Laidlaw requirements to support Article III standing. Therefore NUWF can, under the Citizen Suit Provision, file a claim on behalf of its members.

1. NUWF has demonstrated injury in fact because it has demonstrated that the destruction of the wetland caused aesthetic, recreational, and economic injuries to its members.

The district court erred in holding that NUWF members only allege speculative injuries because Bowman caused specific harm to NUWF's members when he filled his wetlands. To show an "injury in fact" the plaintiff must adequately document, through affidavits and testimony, a reasonable concern that the defendant's action will directly affect the plaintiff's recreational, aesthetic, or economic interest. *Laidlaw*, 528 U.S. at 169. A plaintiff must also demonstrate that the injury is to oneself, not just to the environment. *Id*. at 181. There are two prongs to the "injury in fact" test that a plaintiff must satisfy. *Id*. In the first prong, a plaintiff must allege a specific harm that is concrete and particularized, and that was caused by the defendant's actions. *Summers v. Earth Island Inst.*, 555 U.S. 488, 496 (2009). In the second prong, the plaintiff must show that the injury is actual or imminent, not conjectural or hypothetical, by asserting a specific intention to use or return to the area affected by the defendant's harm. *Pacific Rivers Council v. U.S. Forest Service*, 689 F.3d 1012 (9th Cir. 2012).

Laidlaw, the preeminent standing case, involved an environmental group challenging a private party's violation of the CWA by releasing toxic effluent in excess of permitted levels. 528 U.S. at 167. In *Laidlaw*, an environmental group was found to have standing when toxic mercury wastewater discharges harmed its members' recreational, aesthetic, and economic interests. *Id*. at 169. The environmental organization in *Laidlaw* argued that it's members could no longer walk, swim, bird watch, or picnic in specific areas in, or around, the river and one member who occasionally drove by testified that the river "looked and smelled polluted."

Laidlaw, 528 U.S. at 181-82. The Court held that the affidavits and testimony "dispositively" presented more than "general averments" and "conclusory allegations" or the "someday" intentions to participate in some remote act in the future. *Laidlaw*, 528 U.S. at 167 (citations omitted); *see also Nat. Resources Def. Council v. S.W. Marine, Inc.*, 236 F.3d 985 (9th Cir. 2000) (organization members demonstrated injury in fact by testifying that "they had derived recreational and aesthetic benefit" from using a bay, "but that their use had been curtailed because of concerns about pollution"); *c.f. Summers*, 555 U.S. at 495-496 (environmental organization failed to establish injury because it did not show a concrete intention to visit a location affected by a proposed timber sale, only that member "'wanted to' go there").

Multiple NUWF members asserted that Bowman's dredging and plowing of his wetland directly affected their aesthetics and economic interests. As in *Laidlaw*, where discharges caused the river to look polluted and prevented the plaintiffs from using the river as they had in the past, here, NUWF member Dottie Milford testified that she has suffered aesthetic injury because the Muddy River is now visibly "more polluted." (R. at 6.)

NUWF members have also suffered economic injury. NUWF member Zeke Norton testified that his success frogging the area has decreased dramatically. Where he could usually harvest a dozen "good sized frogs" for subsistence and recreation, he is now lucky to find two or three. (R. at 6.) Nothing about these claims are "general averments" or "conclusory allegations." They are specific and ongoing harms. They show that NUWF members continue to use the land and river but are harmed by Bowman's failure to restore the wetland to its original state. Unlike *Summers*, where the plaintiff demonstrated only a vague intention to visit the affected location, here, NUWF members have documented their continued use of the area prior to and since Bowman filled his wetland. Like in *Laidlaw*, NUWF members' testimony demonstrates injury in

fact by establishing that the members have used and continue to use the Bowman property and that their recreational, aesthetic, and economic interests have been harmed.

In finding that NUWF did not have standing, the lower court cited testimony from NUDEP biologist who stated that the future 1.1 acre 'buffer zone' wetland (encompassing 0.11% of the original wetland) will provide "richer wetland habitat" for frogs "once fully established." (R. at 6.) The district court opined that the overall environment could be "benefitted rather than injured by the change." (R. at 6.) Thus, the court dismissed the concrete and immediate injuries suffered by NUWF as purely speculative. However, NUWF need only to demonstrate concrete and imminent injuries to satisfy this standing requirement. It does not have to overcome speculation that its injuries might someday be mitigated by action taken at an unspecified future date. Additionally, this objection addresses only NUWF's alleged economic injury. The lower court did not address the aesthetic injury attested to by Milford.

2. NUWF's injury is fairly traceable to the Bowman's actions because changes to the river's appearance and to frog numbers occurred immediately after Bowman filled the wetland.

NUWF members documented in their affidavits changes to the river and frog populations following Bowman's destruction of the wetland. To establish the second prong of standing, a plaintiff must show that it suffered an injury that is "fairly traceable" through an essential nexus to Bowman's actions. *Laidlaw*, 528 U.S. at 180-81. An injury is "fairly traceable" if there is a "substantial likelihood" that the defendant's conduct caused plaintiffs harm. *Pub. Interest Research Group of New Jersey, Inc. v. Powell Duffryn Terminals Inc.*, 913 F.2d 64, 72 (3d Cir. 1990) ("*Duffryn*"). This does not mean that the plaintiffs "must show to a scientific certainty that defendant's [actions] . . . caused the precise harm suffered by the plaintiffs." *Natural Resources*

Defense Council, Inc. v. Watkins, 954 F.2d 974, 980 n. 7 (4th Cir. 1992) (quoting *Duffryn*, 913 F.2d at 72).

In cases involving a CWA violation, a plaintiff must show that the defendant discharged "some pollutant in concentrations greater than allowed by its permit, into a waterway in which the [plaintiff has] an interest that is or may be adversely affected by the pollutant," and that "the pollutant causes or contributes to the kinds of injuries alleged by the [plaintiff]." *Duffryn*, 913 F.2d at 72. In *Duffryn*, the defendants discharged an oil and grease solution in excess of permitted levels. *Id*. The plaintiff's affiants stated that after the discharge the water they used for recreation contained an oily sheen. *Id.* The court found the aesthetic injury was fairly traceable to the defendant's discharges. *Id*.

Here, the facts are similar to those in *Duffryn*. After Bowman's actions, NUWF members recognized specific effects of those changes. NUWF member Dottie Milford testified that the river looks more polluted to her than it did before Bowman's activities. (R. at 6.) Similarly, Zeke Norton testified that there are fewer frogs than before Bowman cleared the wetland. *(Id.* at 6.) These observations of changes before and after Bowman's activities indicate a substantial likelihood that Bowman's destruction of the wetland caused the injuries at issue. As outlined in *Watkins*, it is not NUWF's burden to show with scientific certainty that Bowman's destruction of the wetland "caused the precise harm suffered by the plaintiffs." Here, NUWF has shown that its members' injuries are fairly traceable to Bowman's destruction of the wetland, thereby satisfying the second prong of the standing test.

3. NUWF's injury is redressable because a favorable decision of this Court could result in restoration of the destroyed wetland and civil penalties.

A favorable decision by this Court and a subsequent trial verdict in favor of NUWF could require Bowman to restore the wetland to its former condition and to pay civil penalties that

would deter future violations, thus redressing the injuries suffered by NUWF. In the final prong of the standing test a plaintiff must show that her injury is redressable by a favorable court decision. *Laidlaw*, 528 U.S. at 181. Congress intended civil penalties to defer future violations in CWA cases. *Id*. at 169. An organization requesting civil penalties is enough to show redress since "all civil penalties have some deterrent effect." *Id*. Civil penalties are not available to private plaintiffs for wholly past violations. *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 106-07 (1998). However, plaintiffs may "seek penalties for violations ongoing at the time of the complaint that could continue into the future if undeterred." *Id*. at 108.

The record establishes that NUWF properly alleged a violation of the CWA and Bowman continues to violate the CWA by not restoring his wetlands. NUWF seeks an order to remove the fill material and restore the wetland, and civil penalties to prevent Bowman from continuing to violate the CWA. A favorable decision at the trial court could require Bowman to restore the wetland and pay deterrent civil penalties.

With all evidence taken in light of NUWF, NUWF has demonstrated that it has suffered aesthetic and economic injury in fact which is immediate and concrete, that the injury is fairly traceable to Bowman's destruction of the wetland, and that the injury is redressable by a favorable court decision. Therefore, NUWF satisfies *Laidlaw's* elements for standing.

B. The fact that a NUWF member trespassed on Bowman's land while frogging does not preclude showing an injury in fact.

An organization can establish sufficient standing for environmental harm to land despite its members' lack of legal right to the land in question. The issue of trespassing and standing was discussed in *Animal Lovers Volunteer Association, Inc. v. Weinberger* (*ALVA*), when ALVA challenged the Navy's goat eradication plan on San Clemente Island. 765 F.2d 937 (9th Cir.1985). The court in *ALVA* found that since the island was composed entirely of military

property, that there was no public access to the island, and, therefore, ALVA could not establish a "direct sensory impact" to "ALVA's own environment or on any environment to which ALVA members have access." *ALVA*, 765 F.2d at 939. However, the court noted that if ALVA could show that the "Navy's program would affect its members' aesthetic or ecological surroundings" they might have standing to sue. *ALVA*, 765 F.2d at 939.

The proposition that a plaintiff need not show a tangible legal right to access a defendant's property at issue in the case was upheld in *Cantrell v. City of Long Beach*. 241 F.3d 674, 681 (9th Cir. 2001). In *Cantrell*, the court held that the plaintiffs—who watched birds from nearby publicly-owned lands adjacent to 20 acres of tidal flats owned by the U.S. military—alleged sufficient harm, and thus had standing when they established that the destruction of the tidal flats would result in "aesthetic harm to the birdwatchers by interfering with their ability to enjoy viewing the birds in their habitats." *Cantrell*, 241 F.3d at 681.

The district court wrongly concluded that, because NUWF members can "no longer illegally use the cleared land for frogging," they do not have standing. (R. at 6.) Although it was illegal for Norton to harvest frogs on Bowman's land, Norton also testified that he frogged "the area." (R. at 6.) Norton testified to a drastic decline in frog population on Bowman's land. Even without legal access to the land, as in *Cantrell*, Norton has an interest in his ecological surroundings, which includes the area around Bowman's land. Indeed frogs are known to migrate many miles to find suitable habitat for summer foraging or overwintering habitat.[1] Mr. Norton's observation that less "good sized" frogs were found in the area of Bowman's now demolished wetland is an indicator that his wetland provided suitable frogging habitat and that

[1] David S Pilliod, Charles R Peterson, & Peter I Ritson, *Seasonal migration of Columbia spotted frogs (Rana luteiventris) among complementary resources in a high mountain basin*, Can. J. of Zoology, vol. 80 (2002).

that habitat is now diminished. Therefore, NUWF members properly established that Bowman's activities in fact injured their aesthetic and ecological interests despite having no legal access to his property.

II. Bowman's dredging and filling of his wetland constitutes an ongoing and continuous violation of the CWA because he has failed to remove the fill and restore the wetland to its original state.

The CWA grants an express right for an organization to file a citizen suit against any person who is alleged to be in violation of an effluent standard when the violation is not wholly past but is ongoing or continuous. § 1365(a); *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Found.*, 484 U.S. 49, 56–63 (1987). A private organization can show an ongoing violation with a good-faith showing: (1) violations will continue on or after the date the complaint is filed; or (2) by adducing evidence from which a reasonable trier of fact could find a continuing likelihood of a recurrence in intermittent or sporadic violations." *Chesapeake Bay Found., Inc. v. Gwaltney of Smithfield, Ltd.*, 844 F.2d 170, 171-72 (4th Cir.1988). "Intermittent or sporadic violations do not cease to be ongoing until the date when there is no real likelihood of repetition." *Id.* 844 F.2d 172.

In *Gwaltney*, the Supreme Court held that a private action will not be permitted if the violation is wholly past. 484 U.S. at 58-59. However, the Court agreed with the lower court and held that evidence of past violations strongly supports, and may alone establish, a claim alleging continuous or future violations. *Id*.

Without the necessary permit, an individual who has discharged pollutants into a water of the U.S. violates the CWA and continues to violate the Act each day that the pollutant remains in the wetland without a permit. *Sasser v. Adminstr., U.S. E.P.A.*, 990 F.2d 127, 129 (4th Cir. 1993); 33 U.S.C. § 1362(14). In *U.S. v. Akers*, an injunction was imposed against a developer

who dredged, filled and drained a portion his wetland without the requisite § 404 permit. 785 F.2d 814, 817 (9th Cir. 1986). The court concluded that the dredging and filling of wetlands constituted a "major conversion from wetlands to dry lands" and was an ongoing violation of the CWA. *Id.* at 823.

Other evidence of past violations sufficient to prove a continuous violation has included erosion-generated discharges. *See Ctr. for Biological Diversity v. Marina Point Dev. Associates,* (*Marina point*) 434 F. Supp. 2d 789, 797 (C.D. Cal. 2006) (a continuing violation occurred when "[d]efendants' inadequate system for managing erosion helped create gullies that deepened over time despite subsequent efforts at mitigation"); *Molokai Chamber of Commerce v. Kukui, Inc.,* 891 F.Supp. 1389, 1401 (D.Haw. 2007) (". . . the digging of [a] ditch creates circumstances where the pollutant, i.e., runoff continues to discharge into waters of the state each time it rains and therefore continues to pollute . . ."). *North Carolina Shellfish Growers Association v. Holly Ridge Associates, LLC.,* 278 F. Supp. 2d 654 (E.D.N.C. 2003) (runoff discharged through dredged ditches continuously entered tidal marsh and established an ongoing violation).

Even though Bowman entered into a settlement agreement with NUDEP, post-*Gwaltney* case law interprets his filling of the wetland as an ongoing and continuous violation of § 404 of the CWA. Bowman drained his wetlands after NUWF filed its complaint. (R. at 5) This alone satisfies the *Gwaltney* test and shows that Bowman continues to violate the CWA.

Also, as in *Akers* where the court held that a § 404 permit was needed for a "major conversion from wetlands to dry lands," Bowman converted 996.7 acres of the original 1,000 acre wetland to dry farmland. Each day that the pollutant remains in the wetland without a § 404 permit is another violation of the CWA. *Sasser,* 990 F.2d at 129.

Finally, by destroying vegetation and creating a drainage ditch, Bowman has created circumstances highly likely to result in erosion related discharge, which can be a continuing violation of the CWA. In nearly the same way that the developers in *North Carolina Shellfish Growers Association* continued to violate the CWA by creating drainage ditches to drain the marsh, here, Bowman created ditches that drain the marsh so that charred forest, wetland vegetation, and other biological material, undisputed pollutants, flow directly into the Muddy River. (R. at 8.)

Under *Gwaltney*, Bowman is in continuing violation of the CWA because his violations continued after the complaint was filed and his violations are likely to continue because he has no plan to remove the fill material from the wetland. It is undisputed that Bowman bulldozed about 99.67% of his wetland to create an agricultural field. It is further undisputed that Bowman had no § 404 permit when he dredged and filled his wetland. Furthermore, Bowman continued to drain his land after both NUDEP and NUWF had filed complaints. Bowman remains in violation of the CWA every day that fill materially remains in the wetland illegally.

By affirming the district court, this Court would be endorsing an unjust rule that there would be no continuing violation of the CWA, and thus no possibility for a citizen suit, *as long as the person bulldozes and drains the wetland quickly and before anyone notices*. In such a case there would very rarely be a continuing violation of the CWA. This reasoning is contradictory to the purpose of the Act. In fact, in *North Carolina Wildlife Federation v. Woodbury*, the district court comes to nearly the same conclusion:

> "[i]f citizen-suits were barred merely because any illegal ditching and drainage of a wetland tract was completed before it might reasonably be discovered, violators would have a powerful incentive to conceal their activities from public and private scrutiny—which would lead to serious problems in public and private enforcement of the Clean Water Act." WL 106517 (E.D.N.C. 1989).

Here, NUWF presented enough evidence show that Bowman is in continuous violation of the CWA, and therefore this Court retains jurisdiction over this case. Bowman should not be rewarded for his clear and unapologetic destruction of waters of the United States. Rather this Court should hold that the district court erred in inconsistently applying the CWA and should reverse the lower court on this issue.

III. Diligent prosecution by NUDEP does not bar NUWF from bringing suit against Bowman when the consent decree offered by NUDEP, and accepted by Bowman, seeks preservation or recovery of less than 4 acres of wetland in response to Bowman's destruction of over 996 acres of wetland.

NUDEP's proposed consent decree for Bowman does not rise to the level of "diligent prosecution" so as to bar NUWF's citizen suit. The decree requires Bowman to preserve or restore only 0.33% of the wetland after destroying 99.67% of the wetland. This remedy is grossly disproportionate to the economic benefit Bowman will reap, represents a failure of the state agency to enforce the CWA, is not likely to prevent continuing violation, and thus is not diligent prosecution. § 1365(b). Furthermore, barring NUWF's suit would undermine Congress' express intent in including a citizen suit provision in the CWA. Congress intended the Citizen Suit Provision to create an additional enforcement mechanism against CWA violations. Where NUWF seeks a remedy that is appropriate, and NUDEP seeks an insufficient remedy, this Court should allow NUWF's suit to continue.

The Citizen Suit Provision of the CWA grants citizens the right to commence suit against any person alleged to be in violation of an effluent standard or limitation. § 1365(a)(1). However, a citizen may not commence suit under subsection (a)(1) if a State is diligently prosecuting a civil action in a federal court to enforce compliance with that standard or limitation. § 1365(b). Agency actions are not *ipso facto* diligent, though they bear a heavy presumption of diligence. *Citizens Leg. Envtl. Action Network, Inc. v. Premium Stand. Farms, Inc.*, 97-6073-CV-SJ-6,

2000 WL 220464 (W.D. Mo. 2000). However, citizen suits "can serve as a check to ensure the state and federal governments are diligent in prosecuting Clean Water Act violations." *The Piney Run Preservation Ass'n v. The County Com'rs Of Carroll County, MD*, 523 F.3d 453, 456 (4th Cir. 2008).

A. NUDEP's action is not diligent because the proposed remedy is too financially insignificant to punish Bowman for his violation or deter future violation by others.

The comparative severity of the agency penalty and the polluter's economic benefit derived from the breach is an important judicial measurement of diligence. *Friends of the Earth, Inc. v. Laidlaw Envtl. Services (TOC), Inc*., 890 F. Supp. 470, 491 (D.S.C. 1995). There, the court noted that if the environmental agency assessed a penalty that was less than the polluter's economic benefit, the agency, in effect, would not have punished the polluter at all. *Id*. at 481. "To further the objective of the Act, the amount of the civil penalty must be high enough such that the penalty does not merely become a cost of doing business." *A. States Leg. Found. Inc. v. Universal Tool & Stamping Co., Inc*., 786 F. Supp. 743, 753 (N.D. Ind. 1992).

Similarly, a penalty that is far less than the maximum penalty may be considered non-diligent prosecution. *Id*.; *Atlantic States Legal Found. v. Universal Tool & Stamping Co*. (*Universal Tool*), 735 F.Supp. 1404, 1416 (N.D. Ind. 1990). In *Universal Tool*, a state agency, in addition to requiring compliance, assessed the polluter a total fine of $10,000 for hundreds violations despite having the statutory authority to fine $25,000 per violation. The court found that the agency's action was not diligent. *Id*.

The penalty imposed by NUDEP is grossly disproportionate to the economic gains Bowman may reap as a result of his violation of the CWA. Though there was no direct testimony as to Bowman's expected economic benefit, the economic benefits of gaining more than 996

acres of productive farmland vastly outweigh the penalty of having to restore just over one acre and grant an easement on a total of just over three acres of land. Giving up less than one half of one percent of one's land in exchange for not having to apply for the necessary CWA permit for the remaining 996 acres is a highly beneficial economic arrangement for a would-be developer, and would undermine the CWA permit process by creating a cost-effective way to develop or discharge into wetlands without seeking a permit.

Furthermore, NUDEP's penalty was orders of magnitude less than the maximum possible penalty, and thus NUDEP's action should not be considered diligent prosecution. NUDEP could have ordered the entire 996 acre field restored to its former wetland state pursuant to § 1319(a)(3). NUDEP could also have ordered administrative penalties up to $125,000. Instead, NUDEP required restoration on approximately 1.1 acres, and a conservation easement on approximately 3.3 acres (including the restored land). NUDEP required Bowman to pay $0 in administrative penalties.

It is true that "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*. at 459. However, in this case, NUDEP's prosecution strategy amounts to an abdication of its responsibility to protect navigable waters under the CWA. In a similar factual situation to this, a Wisconsin landowner constructed a drainage ditch and drained 1,000 acres of farmland into a navigable water. *U.S. v. Alshabkhoun*, 277 F.3d 930 (7th Cir. 2002). The EPA entered an order compelling civil penalties of $225,000 together with a plan to restore several acres of wetlands destroyed by the construction. *Id*. Here, in addition to constructing a ditch and draining almost 1,000 acres of land into the Muddy River, Bowman dredged and filled almost 1,000 acres of wetland.(R. at 4.) Yet

Bowman's penalties amounted to a fraction of the penalties in *Alshabkhoun*. Compared to *Alshabkhoun*, the agency action in this case is effectively a failure to prosecute.

In another factually related case, the COE discovered that a landowner had filled 0.771 acres more wetland than his one-acre fill permit allowed. *U.S. v. Donovan*, 466 F. Supp. 2d 595, 597 (D. Del. 2006). The COE ordered him to restore the wetland and he refused. After years of legal fighting, the district court ordered him to restore the 0.771 acres and pay a civil penalty of $256,000. Here, NUDEP ordered Bowman to restore just 150% the amount restored in *Donovan* and pay 0% of the fine assessed to *Donovan* despite the fact that Bowman filled more than 100,000% more wetland than Donovan. (R. at 4.) Thus, NUDEP's prosecution in this case is not diligent.

B. NUDEP's action is not diligent because it will not result a cessation of violations and compliance with the CWA.

NUDEP's action should not be considered diligent because the consent decree fails to address the presence of the drainage ditch and the continuing drainage into the Muddy River that will result from the ditch. The consent decree also fails to address the continuing reduction of water quality that will result from the destruction of almost 1,000 acres of wetland. Agency action should be considered diligent only if it is capable of requiring compliance with the CWA. *Piney Run*, 523 F.3d at 459. Agency action should not be considered diligent if pollution is likely to continue or resume despite agency action. *Atlantic States Legal Foundation v. Eastman Kodak Co.*, 933 F.2d 124, 127 (2nd Cir. 1991).

The proposed consent decree between NUDEP and Bowman prohibits Bowman from clearing additional wetlands, requires him to construct and maintain a 75 foot by 650 foot year-round wetland, and requires him to grant a recreation and conservation easement on the 225 foot wide strip of land adjacent to the Muddy River. (R. at 4.) The consent decree, however, does not

address the drainage ditch constructed by Bowman. This ditch, or swale, will continue to drain pollutants into the Muddy River as long as it remains in place. Because the consent decree will not prevent pollution from entering the Muddy and does not require Bowman to restore the wetland in violation on the CWA, NUDEP's action cannot be considered diligent.

The proposed consent decree between NUDEP and Bowman also does not address the continuing violation of the CWA as a result of the fill material that remains in the wetland, harming the water quality of the Muddy River. In *Donovan*, the court held that the defendant harmed the environment by "altering a natural water purification and flow attenuation system." 466 F. Supp. 2d at 600. The court also noted that the harm continued as long as the wetland remained un-restored. *Id*. Under NUDEP's proposed consent decree, Bowman's destruction of nearly 1,000 acres of wetland will continue to alter the quality and quantity of water entering the Muddy River in perpetuity because there is no requirement to restore more than 1.1 acres of wetland. The consent decree will continue to allow harm to the flow attenuation system of the wetland. The agency action should not be considered diligent.

C. Public policy and the legislative intent underlying Citizen Suit Provisions compel this Court to allow NUWF to continue its suit.

Citizen suit provisions were created to encourage active citizen participation in enforcing compliance with environmental requirements. The Citizen Suit Provision of the CWA was modeled after the Citizen Suit Provision in the Clean Air Act. *Nat. Resources Def. Council, Inc. v. Train*, 510 F.2d 692, 699 (D.C. Cir. 1974). Both Citizen Suit Provisions were designed to aid government agencies by creating a mechanism whereby citizens could take part in reporting and enforcing environmental violations. *Id*. at 699-700. Congress intended for citizen groups to be involved as "welcomed participants in the vindication of environmental interest." *Friends of the Earth v. Carey*, 535 F.2d 165, 172 (2d Cir. 1976).

NUDEP and Bowman seek to exclude NUWF from taking part in this action. They argue, correctly, that deference should be given to state agencies in the enforcement of their statutory duties. *Karr v. Hefner*, 475 F.3d 1192, 1198 (10th Cir. 2007). However, "a diligent prosecution analysis requires more than mere acceptance at face value of the potentially self-serving statements of a state agency and the violator with whom it settled." *Friends of Milwaukee's Rivers v. Milwaukee Metro. Sewerage Dist*., 382 F.3d 743, 760 (7th Cir. 2004). Here, compared to other cases of similar violations, NUDEP has agreed to settle without imposing civil penalties and, more importantly, without requiring a statistically significant percent of restoration. Though NUDEP has some discretion in addressing CWA violations, that discretion is governed by its statutory duty to *maintain and restore* "the chemical, physical, and biological integrity of the Nation's waters." § 1251. NUDEP's action will not prevent Bowman from discharging pollutants into the Muddy River through his intact drainage ditch. Though NUWF applauds NUDEP's requirement that Bowman restore and preserve the waterfront property on his land, four acres of preserved wetlands will not restore the water filtration and flow mitigation effects of 996 acres of wetland. NUDEP has not diligently prosecuted this serious violation of the CWA. NUDEP's failure demonstrates why the Citizen Suit Provision of the CWA exists.

Taking an overly broad view of what comprises diligent prosecution, or granting too much deference to state agencies, will create an incentive for polluters to actively seek government intervention in order to shield them from citizen attorneys general.

IV. Bowman's dredging, clearing, and leveling of the wetland constitutes an addition of a pollutant and therefore requires a § 404 permit under the CWA.

Bowman violated the CWA when he dredged, filled, leveled, and cleared a 1,000 acre wetland to create a farm field without a § 404. The lower court erred when it relied on EPA's Water Transfer Rule to reach its decision because COE, rather than EPA, regulations govern

discharges of fill to waters of the U.S. Bowman misidentifies the governing agency by claiming that this Court must give deference to EPA's Water Transfer Rule. The Supreme Court, in *Southeast Alaska Conservation Council v. Coeur Alaska,* held that § 404 supersedes implementation of § 402 of the CWA when "fill" material is discharged into a water of the U.S. 557 U.S. 261 (2009). Fill is defined by regulation as any material discharged into a water of the U.S. which has the effect of replacing the water with dry land. 33 C.F.R. § 323.2(5)(e)(1). Here, § 404 is implicated because the wetland on Bowman's property is a water of the U.S. and the effect of his bulldozing and leveling operations was to replace a water of the U.S. with dry land. When Bowman filled his wetland it constituted an "addition" of soil and vegetation from one stratum to another under the CWA. Any other interpretation would lead to an absurd result that would undermine the very purpose of the CWA. Thus EPA's § 402 Water Transfer Rule is inapplicable and Bowman violated the CWA.

A. EPA's Water Transfer Rule does not govern the discharge of soil and vegetation into a water of the U.S. when the soil has the effect of replacing a body of water with dry land.

The district court erred when it held that the Water Transfer Rule applied to the dredging and filling of Bowman's wetland because the rule has no bearing on the discharge of fill under the CWA. Section 301 of the CWA prohibits the discharge of a pollutant from a point source into a jurisdictional water of the U.S. except in compliance with § 402 and § 404 of the CWA. Fill is defined by EPA and COE regulations as an effect-based test and *Coeur Alaska* held that compliance with § 404 hinges on whether the discharge at issue is fill, before the same discharge can be analyzed as a pollutant. *Id*. Thus, if the effect of a discharge is to replace water of the U.S. with dry land, that discharge must be considered fill regulated by § 404. Here, Bowman replaced

99.67% of the wetland with dry land to create a farm field. Bowman's filling of the wetland is governed by § 404 of the CWA and the Water Transfer Rule under § 402 is inapplicable.

1. Bowman violated § 404 by filling the wetland because fill is any material which has the effect of replacing a water of the U.S. with dry land, even if the material at issue may also qualify as a pollutant.

Bowman violated the CWA when he replaced 996.7 acres of his original 1,000 acre wetland with dry land because Bowman's filling activities are governed by § 404 of the CWA and not the Water Transfer Rule under § 402. Section 301(a) of the CWA prohibits the discharge of a pollutant "except in compliance with" § 402 and § 404. § 1311(a). Under § 301(a), the court must determine which of the two permitting systems, § 402 or § 404, has been violated. *Avoyelles Sportsmen's League, Inc. v. Marsh*, 715 F.2d 897, 922 (5th Cir. 1983). Section 402 regulates "point source" discharges of pollutants and § 402 regulates the discharge of fill material. §§ 1342, 1344.

Fill is not defined in the text of the CWA. The "Secretary [of the Army] may issue permits . . . for the discharge of dredged or fill material." § 1344. The EPA and COE jointly defined fill in 2002 as any material which "has the effect of replacing a water of the U.S. with dry land or raising the bottom elevation of a water of the U.S." 33 C.F.R. § 323.2(5)(e)(1). *Coeur Alaska* interpreted the 2002 rule and held that "fill" is defined by the effect on the receiving water, not by the type of material or pollutant involved. 557 U.S. 261. In *Coeur Alaska*, the plaintiff environmental group alleged that EPA and COE violated the CWA when COE issued a § 404 permit, rather than EPA issuing a § 402 permit, to a mining company who planned to discharge mining waste slurry into a navigable lake. *Id*. at 271. The plaintiff alleged that the permit violated a regulation which prohibited the issuance of NPDES permits, under § 402, to certain kinds of mining waste disposal. *Id.* Relying on the joint EPA-COE fill rule, the Court

held that a reviewing court must first determine whether the definition of fill has been met before looking to whether there was a discharge of a pollutant, under § 402, when alleging a violation of the CWA. *Id.* at 289. The Court held that § 402 may apply so long as the material at issue is not fill, but that § 404 applies if the material is fill. *Id.*

Here, Bowman's land clearing activities have the effect of replacing a water of the U.S. with dry land and, therefore, fall within § 404. It is undisputed that the wetland at issue is a water of the U.S. under the CWA. (R. at 9.) Bowman began land clearing operations in the wetland by using "bulldozers to knock down trees, level other vegetation," and push them into windrows. (R. at 4.) Next he used a bulldozer to dig trenches and a drainage ditch. (R. at 4.) Finally, he "leveled the resulting field, again pushing soil from high portions of the field into the trenches and low lying portions of the field," in effect filling a water of the U.S. to create a dry farm field. (R. at 4.) Here, there is no question that Bowman's land clearing had the effect of "replacing a water of the U.S. with dry land." 33 C.F.R.§ 323.2(5)(e)(1). Therefore, the material at issue is fill and Bowman's land clearing is governed by § 404.

2. The Water Transfer Rule does not apply because it is limited to the NPDES program under § 402, rather than § 404.

The Water Transfer Rule applies to only § 402 of the CWA, and it does not serve to exempt draining and filling a wetland under § 404. Bowman mistakenly relies on the Water Transfer Rule to claim that the filling of the wetland was not an "addition" under § 404 because the Water Transfer Rule governs only discharges regulated under the NPDES program of § 402. Bowman relies on *Friends of the Everglades v. South Florida Water Management District* to support his proposition that the Water Transfer Rule applies here, however, because that case was decided prior to *Coeur Alaska*, the *Friends of the Everglades* court could not consider the implications of that holding. 570 F.3d 1210 (11th Cir. 2009). In *Friends of the Everglades*, the

court held that the EPA's Water Transfer Rule, exempting from the NPDES permitting system inter-basin water transfers which included pollutants, was a reasonable interpretation of the CWA. *Id*. at 1228. The court granted deference to the EPA's interpretation based upon the definition provided in the Water Transfer Rule which states that a water transfer is any "activity that conveys or connects waters of the United States without subjecting the transferred water to intervening industrial, municipal, or commercial use." The court in *Friends of the Everglades* did address whether the water transfer rule applies to § 404 because the text of the rule itself limits it to the NPDES permitting system. To reach this holding, the court would have had to make up a regulation where none had existed. In light of the *Coeur Alaska* decision the Water Transfer rule is inapplicable to pollutants that have the effect of replacing wetland with dry land.

Here, Bowman's clearing and draining of the wetland do not fall under the permitting scheme of § 402. Just as in *Coeur Alaska*, if the material is fill then § 402 NPDES permits do not apply. Just as in *Coeur Alaska*, where the Court held that a regulation pertaining to § 402's NPDES program could not apply where the regulated pollutant at issue had the effect of fill, here, the regulated pollutant has the effect of fill, and no part of the NPDES program is applicable. Since the Water Transfer Rule only applies to the NPDES program under § 402 it does not apply here.

B. Since "addition" for the purposes of § 404 has not been defined by the CWA or COE regulations, case law properly interprets dredging and depositing of fill material from within the same wetland as an addition.

This Court should interpret the bulldozing and leveling of the wetland as an "addition" and a violation of § 404 because Bowman laterally and vertically moved soil from within the wetland without meeting CWA requirements. If this Court were to condone Bowman's unpermitted activity under the "outside world" analysis it would undermine the purpose of the

CWA, and cause unnecessary destruction of the wetland merely because he filled the wetland from within the wetland, rather than with fill from far away.

1. Bowman's leveling of the wetland constitutes and addition of fill material because filling a wetland can occur with material dredged and re-deposited within the same wetland, and need not come from the "outside world."

Relevant authority supports NUWF's allegation that filling the wetland constitutes an addition because Bowman dredged and re-deposited fill material within the same wetland. At least four federal circuits and a federal district court have held that addition may be reasonably construed to include the re-deposit of fill material from the same fill disposal site.[2]

An addition of fill may include excavating and moving soil so that it is re-deposited nearby. *Deaton*, 209 F.3d at 333. In *Deaton*, the Fourth Circuit held that a developer violated the CWA when he used a backhoe to dig a large drainage ditch through a wetland and used the soil excavated to fill the wetland along the sides of the ditch, in a process known as "sidecasting." *Id*. The court held that, even though the addition of fill material came from within the same wetland, the activity met the definition of fill. *Id.* at 336. The court held that soil and vegetation, once moved and used to fill a wetland, becomes fill for the purpose of § 404. *Id*. at 335.

Similarly, an addition of soil may include moving soil only inches or feet by "deep ripping" and churning up lower strata of soil for the purpose of poking holes in the semi-impermeable under-soil of the wetland to drain it. *Borden*, 261 F.3d 810. *Borden* held that a real-estate developer who performed a type of in-place tillage using 4-foot prongs pulled by a

[2] *See Avoyelles Sportsmen's League, Inc. v. Marsh*, 715 F.2d 897, 923 (5th Cir. 1983); *Borden Ranch P'ship v. U.S. Army Corps of Eng'rs*, 261 F.3d 810, 814 (9th Cir.2001); *Rybachek v. U.S. Envtl. Prot. Agency*, 904 F.2d 1276, 1285 (9th Cir.1990); *United States v. M.C.C. of Florida*, 772 F.2d 1501 (11th Cir.1985); *United States v. Huebner*, 752 F.2d 1235, 1243 (7th Cir. 1985); *U.S. v. Deaton*, 209 F.3d 331 (4th Cir. 2000); *U.S. v. Bay-Houston Towing Co., Inc.*, 33 F. Supp.2d 596 (E.D. Mich. 1999).

bulldozer with the intent to replace a wetland with dry land violated § 404 of the CWA when he failed to obtain a permit for such fill activities. *Id*. at 814. Although the defendant claimed that his activities fell within the farming exception to § 404 because he was tilling the soil in preparation for planting vineyards, the court distinguished the use of heavy equipment and 4-foot long metal prongs used by defendant to deeply pierce the soil, and thus drain the wetland, from normal farming activities. *Id.* The court reasoned that, where a person overturns the soil, in-place, within the wetland so as to cause irreparable environmental damage to a water of the U.S., there was an addition of fill requiring a § 404 permit. *Id.*

Bulldozing and clearing a wetland for use as a farm field may constitute an addition of a pollutant or fill. *Avoyelles Sportsmen's League, Inc. v. Marsh*, 715 F.2d 897. The court in *Avoyelles*, held that the defendants violated § 404 of the CWA when they cleared a wetland of all vegetation with the use of heavy equipment and re-deposited the vegitation in another portion of the same wetland. *Id*. at 923. The defendants cleared several thousand acres of wetlands with the intent of farming the land, after it had been drained. *Id*. at 922. The court held that, clearing and moving the soil, a pollutant, from one part of the wetland to another part of the same wetland, constitutes an addition of fill. *Id.*

Here, much like in *Avoyelles*, it is undisputed that Bowman laterally and vertically pushed and dredged nearly 1000 acres of wetland soil to create his farm field. (R. at 4.) Additionally, like in *Deaton* where the developer also violated the CWA when he excavated ditches within the wetland, here Bowman did the same when he excavated ditches throughout the wetland to drain and create a farm field. (R. at 4.) Finally, as in *Borden* where the developer violated § 404 of the CWA by tilling and piercing the semi-impermeable soils of the wetland,

here, Bowman destroyed the wetland by "pushing soils from high portions of the field into the trenches and low lying portions of the field." (R. at 4.)

Additionally, the district court mistakenly relied on *National Wildlife Federation v. Gorsuch* and *National Wildlife Federation v. Consumer's Power* for the proposition that the outside world theory applies to all CWA cases, not just § 404 cases. 693 F.2d 156 (D.C. Cir. 1982); 862 F.2d 580 (6th Cir. 1988). In *Gorsuch*, the plaintiff sued the EPA arguing that hydroelectric dams introduced pollutants downstream of the dam. The court held that elements such as such colder water or lower levels of oxygen may be pollutants, but they could not be pollutants if they came from within the same body of water. 693 F.2d at 183. However, *Gorsuch* also emphasized that its narrow holding was not a sweeping statement about the nature of the CWA. *Id*. Likewise in *Consumer's Power*, fish were pumped from Lake Michigan into a reservoir, through turbines (which killed the fish), and then down a stream that fed back into Lake Michigan. 862 F.2d at 580. When the fish remains, as pollutants, re-entered Lake Michigan, the court held that because the pollutants originated within the same water system there was no violation of the CWA. *Id*. at 585. The court stated that it did not matter whether the pollutants were living or dead because they came from the same source. *Id*.

Bowman's situation is vastly different from the situation *Gorsuch* and *Consumer's Power*, where a body of water was passing through its normal route and pollutants were simply being re-circulated through the same body of water. By contrast, here, Bowman destroyed 99.67% of the wetland when he bulldozed the natural sub-strata layers, and leveled an ecosystem to create a dry farm field. Moreover, bulldozing a wetland is significantly different than a dam discharging water from an upstream to a downstream section. The tilling and draining of fragile, wetland soils goes beyond re-introduction of dead-fish remains into a waterway where live fish

had been before. *See U.S. v. Donovan*, 466 F. Supp. 2d 595 (D. Del. 2006) (Wetlands are fragile living ecosystems that act "as natural water purification and flow attenuation system.")

2. An interpretation of an "addition" must always come from the "outside world" is arbitrary, and effectively guts the CWA and leads to an absurd misapplication of the law.

Bowman's discharge of fill into the wetland is the same as an addition for the purposes of § 404 of the CWA because any other interpretation would strip the CWA of its authority over wetland dredging and filling activities and lead to an absurd result. The intent of the CWA is to "maintain and restore the chemical, physical, and biological integrity of the Nation's waters," this definition encompasses the addition of soil with the effect of replacing a wetland with dry land. § 1251. Thus, the intent of the CWA is to prevent the conversion of wetlands to dry lands. *Borden ,* 261 F.3d at 815-816. A court reviewing an agency decision must avoid interpretations which would lead to an absurd result. *Holy Trinity Church v. United States*, 143 U.S. 457, 460 (1892).

Deaton and *Borden* held that "sidecasting" and "deep ripping" are incompatible with the broad goal of the CWA and are logical activities to regulate as fill under the Act given the sensitive ecological nature of wetlands. 209 F.3d at 335; 261 F.3d at 816. Furthermore, because so many dredge and fill operations involve moving fill material from one part of a water of the U.S. to another, a narrow interpretation, like the one suggested by Bowman, would effectively read the fill provision out of the statute. *See Greenfield Mills, Inc. v. Macklin*, 361 F.3d 934, 948-949 (7th Cir. 2004). As the court in *Greenfield Mills* held, excluding dredged materials from the concept of addition "would effectively remove the dredge-and-fill provision from the statute." 361 F.3d at 948-49.

Here, Bowman is destroying wetland, a critical, and fast disappearing, national treasure. Bowman has "radically altered the hydrological regime of the protected wetlands," because it

now functions as a dry farm field, rather than a wetland. *Borden,* 261 F.3d at 815-816. A holding that Bowman did not violate the CWA would frustrate Congress' intent to protect wetlands from "significant degradation." Not counting dredge and fill material from within the same site as an addition would fail to give effect to every part of § 404 and lead to an absurd result that would undermine the very purpose of the CWA.

This Court should overturn the lower court's holding because the reliance on both the EPA's Water Transfer Rule and outside world theory is misplaced and would effectively gut the § 404 permit scheme. Bowman violated § 404 when he added pollutants by leveling the wetland, as well as by digging a drainage ditch to drain the wetlands, and sidecasting the soil. "[A]ctivities that destroy the ecology of a wetland are not immune merely because they do not involve the introduction of material brought in from somewhere else." *Id* at 815. Therefore, the Plaintiffs respectfully requests that this Court reverse the district court on this issue.

CONCLUSION

This Court should reverse the district court's ruling on counts I through IV. First, the district court erred by granting summary judgment to Bowman on the issue of standing because NUWF's member's affidavits demonstrated all the requisite elements of *Laidlaw's* Article III standing test. Second, NUWF presented sufficient evidence to show Bowman's actions constituted an ongoing and continuous violation of the CWA, therefore the district court erred in holding that the violation was wholly past. Third, NUDEP's action does not constitute diligent prosecution under § 1365, therefore the district court erred in holding that NUWF was barred from proceeding in its civil action. Fourth, the district court erred in holding that Bowman did not violate the CWA because Bowman added dredge and fill material to navigable waters from a point source without the necessary § 404 permit. This Court should reverse the lower court's

grant of summary judgment on issues I through III and grant summary judgment in favor of NUWF on issue IV.

Respectfully submitted this 29th day of November, 2012.

Team 41
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By: _____
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