C. A. No. 13-1246

UNITED STATES COURT OF APPEALS

FOR THE TWELFTH CIRCUIT

NEW UNION WILDLIFE FEDERATION,

Plaintiff-Appellant,

v.

NEW UNION DEPARTMENT OF ENVIRONMENTAL CONSERVATION,

Intervenor-Appellant,

v.

JIM BOB BOWMAN,

Defendant-Appellee.

ON APPEAL FROM THE DISTRICT COURT
FOR THE STATE OF NEW UNION

Brief of Plaintiff-Appellant NEW UNION WILDLIFE FEDERATION

Team 45

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JURISDICTIONAL STATEMENT

The district court had jurisdiction over this action pursuant to 28 U.S.C. § 1331 and 33 U.S.C. § 1365(a). The district court entered an order setting forth findings of fact and conclusions of law on June 1, 2012. NUWF and NUDEP filed a timely notice of appeal. This appeal is from a final judgment that disposes of all parties' claims. This court has jurisdiction under 28 U.S.C. § 1291.

STATEMENT OF THE ISSUES

1. Did the court below err in concluding that New Union Wildlife Federation lacked standing to sue Jim Bob Bowman for violating the Clean Water Act?
2. Did the court below err in concluding that it lacked subject matter jurisdiction based on its conclusion that Bowman's violations are not ongoing and continuing?
3. Did the court below err in concluding that it lacked subject matter jurisdiction based on its conclusion that the New Union Department of Environmental Protection diligently prosecuted Bowman?
4. Did the court below err in concluding that Bowman's land clearing and filling activities did not constitute a violation of the Clean Water Act?

STATEMENT OF THE CASE

Plaintiff New Union Wildlife Federation ("NUWF") brought action against Jim Bob Bowman ("Bowman") in United States District Court for the District of New Union for filling wetlands without a permit in violation of §§ 301(a) and 404 of the Clean Water Act ("CWA"). The New Union Department of Environmental Protection ("NUDEP") intervened in the action, and after discovery, NUWF and Bowman filed cross motions for summary judgment. This appeal arises after the district court granted Bowman summary judgment on all counts.

Initially, the district court held that NUWF failed to demonstrate the jurisdictional requirement of standing. The court reasoned that NUWF's members' affidavits did not allege an injury in fact fairly traceable to the clearing of Bowman's field when they testified that they could not see a difference, but were aware of differences and felt a loss from the destruction of wetlands. (R. 6.) The court concluded that these injuries were "only speculative," and were possibly addressed by a conservation easement promised by Bowman.

Second, the district court held that it lacked subject matter jurisdiction because it found that Bowman's land clearing activities ceased on July 15, 2011, and were therefore not ongoing and continuing. The court reasoned that when Bowman subsequently drained the property and planted wheat, such activities did not require a § 404 permit. (R. 7.) The court dismissed NUWF's argument that a § 404 violation continues unless and until the fill material is removed, arguing that under this standard all violations would be continuing, which would obviate the jurisdictional requirement for a continuing violation. (R. 7.)

Third, the district court held that NUWF's citizen suit was precluded under § 505(b)(1)(B) of the CWA. The court reasoned that NUDEP diligently prosecuted Bowman by sending a notice letter and negotiating a settlement with Bowman after receiving NUWF's notice of violation letter, and by seeking to have that settlement entered as a decree in federal court. (R. 7.) The court also relied on the settlement terms in finding diligent prosecution, including Bowman's deeding a conservation easement to NUDEP and Bowman's construction of a buffer-wetland area. (R. 7-8.)

Finally, the district court found that Bowman's activities did not constitute a violation of the CWA, because the clearing and filling of the wetlands was not a "discharge" as required by the statute, because nothing had been added to the wetlands. The court therefore granted

summary judgment to Bowman on the issue. The CWA defines "discharge" as the "addition of any pollutant to navigable waters from any point source," which requires a permit under § 404 of the CWA. 33 U.S.C. § 1362(12) (2006). Although the litigants and the court did not contest that the fill material was a "pollutant," that the bulldozers used were "point sources," and that the property filled was a "navigable water," the court agreed with Bowman that his activity did not constitute an "addition" under the CWA. (R. 8-9.) Relying on an EPA definition of "addition" as "from the outside world," the court determined that since the dredged and fill material came from the same wetland being filled, it could not constitute an addition. (R. 9.) Citing the EPA's "unitary navigable waters" theory, the court also concluded that when Bowman moved pollutants from one navigable water to a second navigable water, there was no "addition." (R. 9-10.) NUWF and NUDEP, citing cases which held that returning dredged material to a wetland constituted § 404 activities, argued that Bowman's activities required a § 404 permit. (R. 10.) The district court was not persuaded because the cases had not been decided in light of the EPA's "outside world" and "unitary navigable waters" theories. (R. 10.)

NUWF challenges the district court's determination that it lacks subject matter jurisdiction because there is no continuing violation. NUWF also challenges the determination that NUDEP's prosecution bars its citizen suit against Bowman. NUWF and NUDEP challenge the district court's determination that NUWF lacks standing to bring its CWA claim against Bowman, and the determination that Bowman's activities did not constitute a violation of the CWA. Bowman supports the district court's ruling on all grounds.

STATEMENT OF THE FACTS

Bowman owns property consisting of 1000 acres of wetland, which runs adjacent to the Muddy River for 650 feet, near the town of Mudflats in the State of New Union. (R. 3-4.)

Bowman's property is hydrologically connected to the Muddy River, which annually floods portions of the property. (Id.) The property serves as a wetland habitat for a variety of species, including trees, other wetland vegetation, and frogs. (R. 3, 6.) Where Bowman's property abuts it, the Muddy River is large, nearly 500 feet wide and more than six feet deep. (R. 3.). The Muddy is frequently used for recreational navigation. (R. 3.) On or in the vicinity of Bowman's property, locals often picnic on the banks of the Muddy River, and engage in recreational boating, fishing, and frogging. (R. 6.)

On June 15, 2011, Bowman undertook the conversion of his 1000 acres of wetland into a field suitable for growing wheat. (R. 4-5.) Bowman first cleared the property of trees and vegetation using a bulldozer. (R. 4.) Bowman pushed the trees and vegetation into windrows, which he burned and used to fill trenches which he had dug with a bulldozer. (Id.) Next, Bowman leveled the field he had created by pushing soil from higher parts of land into the trenches and low lying portions of land. (Id.) To complete his transformation of the wetland into an agricultural field, Bowman dug a swale to drain the field into the Muddy River. Because Bowman could not reach the saturated land closest to the Muddy, he was forced to leave a strip of land approximately 150 feet wide unchanged. (Id.)

NUWF, a non-profit corporation under the laws of New Union, is a membership organization whose purpose is to protect the fish and wildlife of New Union. NUWF seeks to accomplish its purpose by protecting fish and wildlife habitats, such as the wetland that Bowman chose to convert to a field. (R. 4.) On July 1, 2011, when NUWF became aware of Bowman's activities, it sent notice to Bowman, the EPA, and the State of New Union/NUDEP of its intent to sue Bowman under § 505 of the CWA, which authorizes citizen suits. Members of NUWF averred in affidavits that they suffered injury from Bowman's land clearing activities, including

being aware of the differences on Bowman's property, feeling a loss from the destruction of the wetlands, and fearing that the Muddy would become much more polluted. (R. 6.) Additionally, Zeke Norton, a member of NUWF, testified that when he had previously frogged the area, he caught up to a dozen frogs in the correct season, and now he only finds two to three frogs in the area. (Id.)

After receiving NUWF's notice of intent to sue, NUDEP contacted Bowman and informed him with a notice of violation that his land clearing activities violated federal and state law. (Id.) Bowman thereafter entered into a settlement agreement with NUDEP. (Id). As part of the settlement, Bowman agreed to convey to NUDEP a conservation easement on the as-yet uncleared 150 foot strip adjacent to the Muddy River. (Id.) The settlement also required Bowman to construct a 75 foot buffer zone between his new field and the remaining wetlands, which he would maintain as a year-round wetland. (Id.) NUDEP entered the settlement as an administrative order under a state statute virtually identical to the CWA, to which Bowman consented. (Id.) Although the statute authorized NUDEP to include an administrative penalty of up to $125,000, NUDEP chose not to assess any monetary penalty against Bowman. (Id.) On August 10, 2011, NUDEP brought suit against Bowman in the United States District Court for the District of New Union, seeking to enter a decree, the terms of which were identical to the state order, and again, Bowman consented to this decree. (R. 5.) The district court has yet to rule on this motion. (Id.)

On August 30, 2011, NUWF filed a citizen suit under § 505 of the CWA, seeking civil penalties as well as an order to compel Bowman to remove the dredged fill materials and restore the entire 1000 acres to its previous wetland state. NUDEP filed a motion to intervene in NUWF's action, which the district court granted. (Id.)

SUMMARY OF THE ARGUMENT

This Court should reverse the district court's granting of summary judgment on all counts. The district court erred in concluding that NUWF failed to establish standing, that Bowman's violation was not ongoing and continuing, that NUDEP's prosecution of Bowman barred NUWF's suit, and that Bowman's activities did not constitute a violation of the CWA.

NUWF established standing to sue Bowman when several NUWF members testified that they actually used affected area for recreational boating, picnicking, and frogging, and now feared that the Muddy River would become more polluted. Under established precedent, a NUWF member must show (1) injury in fact, which is concrete and particularized, and actual; (2) that the injury is traceable to Bowman's activity; and (3) that the harm is likely redressed by a favorable decision. Injury for standing purposes can include allegations of aesthetic and economic harms, as well as decreased recreational use of an area. Friends of the Earth, Inc. v. Laidlaw Envtl. Servs., Inc., 520 U.S. 167 (2000); Sierra Club v. Morton, 405 U.S. 727 (1972). NUWF members clearly established standing when they testified to several concrete and particularized injuries: the loss of frog population in and around Bowman's property; the perceived pollution present in the Muddy River; and the fear that the loss of wetlands will adversely affect the Muddy River. (R. 6.)

Bowman's violation of § 404 of the CWA is ongoing unless and until the illegally dumped fill material is removed from his property, and therefore there is subject matter jurisdiction to hear the instant action. Relying primarily on Gwaltney of Smithfield, Inc. v. Chesapeake Bay Found., Inc., the district court erroneously held that there was no continuing violation. This reliance was in error. Gwaltney is better limited to its facts, which involved discharges into waterways, subject to the § 402 permitting system. Bowman's violations

implicate the § 404 permitting system. The difference between the violations and potential for remediation is significant: violations under § 402 flow away from the point of the violation and are not readily susceptible to remediation. Violations under § 404, such as Bowman's dumping of dredged and fill material into his wetland, remain in the same area and are susceptible to remediation. For this reason, Gwaltney is not applicable to § 404 violations. Finally, the statutory language in the CWA indicates that a violation is ongoing and continuing until a defendant takes remedial measures that ameliorate the environmental damage.

NUWF's citizen suit is not precluded by NUDEP's prosecution of Bowman. Although § 505(b)(1)(B) of the CWA bars citizen suits where a governmental enforcement agency "is diligently prosecuting" the same alleged violations, NUDEP's administrative order and subsequent lawsuit against Bowman seeking a decree identical to the administrative order do not constitute diligent prosecution. 33 U.S.C. § 1365(b)(1)(B) (2006). In examining the diligence of agency prosecution, courts consider monetary penalties assessed against defendants, the ability of the public to meaningfully participate in the proceedings, and whether the government action provides relief towards ending the violation. NUDEP's action against Bowman does not address any of these concerns. NUDEP failed to assess any penalties against Bowman, thereby allowing him to gain an economic benefit from violating the CWA. NUDEP's settlement agreement and subsequent consent decree was not open to public comment. Most importantly, the administrative order and potential decree allow Bowman to keep his field in a state of non-compliance with the CWA, thereby failing to even seek to enforce the CWA. In contrast, NUWF seeks to enforce the CWA and force Bowman to comply with § 404. The diligent prosecution bar is designed to prevent citizen suits that are duplicative of the government action. That is not the case here, and therefore, NUWF's lawsuit should not be barred.

For the foregoing reasons, NUWF has standing and should not be barred from bringing its claim against Bowman for violations of §§ 301(a) and 404 of the CWA. Bowman's land clearing and filling activities constitute the discharge of a pollutant into a navigable water, which, absent a § 404 permit, is a clear violation of the CWA. The CWA defines "discharge of a pollutant" to mean "any addition of any pollutant to navigable waters from any point source." Id. § 1362(12). No party to this case challenges the fact that Bowman's wetland is a navigable water, that the bulldozers Bowman used are point sources, and that the burned vegetation and soil Bowman used to fill his wetland are a pollutant under the CWA. Despite this, the district court held that Bowman's activity did not violate the CWA, because his activities did not constitute an "addition." The district court's construction of addition is unpersuasive. First, both the "outside worlds" and "unitary navigable waters" theories arose in the context of the § 402 permitting system. Second, the "unitary navigable waters" theory is not controlling, because it does not withstand Chevron scrutiny. Congress explicitly provided for the regulation of dredged fill in the CWA. The EPA's proposed construction would frustrate Congressional intent to regulate the transfer of pollutants from point sources to navigable waters. Finally, the district court's analysis all but ignores relevant precedent finding that activities similar, and in some cases nearly identical, to Bowman's are subject to § 404 permitting requirements.

STANDARD OF REVIEW

Decisions granting summary judgment are reviewed de novo to determine whether there are any genuine issues of material fact and whether the district court properly applied the relevant substantive law. Waste Action Project v. Dawn Min. Corp., 137 F.3d 1426, 1428 (9th Cir. 1994). Questions of subject matter jurisdiction are reviewed de novo. United States v.

Parrett, 530 F.3d 422, 429 (6th Cir. 2008). Matters of statutory interpretation are also reviewed de novo. See id.; United States v. Eaton, 31 F.3d 1426, 1428 (9th Cir. 1994).

ARGUMENT

I. NUWF HAS STANDING TO SUE BOWMAN.

To satisfy standing requirements in a CWA citizen enforcement action, a "plaintiff must show (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) it is likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision." Friends of the Earth, Inc. v. Laidlaw Envl. Servs., Inc., 528 U.S. 167, 181 (2000) (citing Lujan v. Defenders of Wildlife, 504 U.S. 555, 560 (1992)). With respect to NUWF's standing, "[a]n association has standing to sue on behalf of its members when its members would have standing to sue in their own right, the interests at stake are relevant to the association's purpose, and neither the claim nor relief requested requires that the individual members participate in the lawsuit." Laidlaw, 528 U.S. at 181. Only one plaintiff need demonstrate standing to standing to satisfy the standing requirement. Bowen v. Kendrick, 487 U.S. 589, 620 n.15 (1988); Watt v. Energy Action Educ. Found., 454 U.S. 151, 160 (1981). Thus, if one of the plaintiffs has standing, it is irrelevant if the others meet the requirements. In the subject action, all of the plaintiffs, members of NUWF, have shown standing.

A. NUWF Members Have Suffered Injury in Fact Because Bowman's Land Clearing Activities Have Affected Their Health, Aesthetic, Environmental, and Recreational Interests.

To satisfy the "injury in fact" requirement, allegations of injury to health or aesthetic, environmental or recreational interests are sufficient. Laidlaw, 528 U.S. at 183; see also Sierra Club v. Morton, 405 U.S. 727, 735 (1972). At a minimum, "the desire to use or observe an

animal species, even for purely esthetic purposes, is undeniably a cognizable interest for purposes of standing." Lujan v. Defenders of Wildlife, 504 U.S. at 562; see also, Sierra Club v. Morton, 405 U.S. at 734 ("Aesthetic and environmental well-being, like economic well-being, are important ingredients of the quality of life in our society."). In the context of environmental litigation, the standing requirements are "not onerous." See e.g., Am. Canoe Ass'n v. Murphy Farms, Inc., 326 F.3d 505, 517-18 (4th Cir. 2003). Rather, the requirement is designed so that an individual needs to show "a connection to the area of concern sufficient to make credible the contention that the person's future life will be less enjoyable–that he or she has or will suffer in his or her degree of aesthetic or recreational satisfaction–if the area in question remains or becomes environmentally degraded." Ecological Rights Found. v. Pac. Lumber Co., 230 F.3d 1141, 1149 (9th Cir. 2000). And indeed, the injuries alleged need not be large; an "identifiable trifle" will suffice. United States v. Students Challenging Regulatory Agency Procedures (SCRAP), 412 U.S. 669, 689 n.14 (1973).

In Laidlaw, the Supreme Court held that affidavits stating a decreased use and enjoyment of waters due to fears of pollution satisfied the injury in fact requirement, because the affidavits more than demonstrated a connection between the land at issue and the individuals who were suing, which made credible the contention that their future aesthetic or recreational interests had and would continue to suffer. Laidlaw, 528 U.S. at 180-85. In Laidlaw, the Court highlighted the affidavit and deposition testimony of one member as particularly persuasive. Id. at 181-82. For that member, the river "looked and smelled polluted," and because "[the affiant] was concerned that the water was polluted" he "would not [fish, camp, swim, and picnic]" near the river. Id. Similarly, another member averred that she engaged in fewer recreational outings because she was "concerned about harmful effects from discharged pollutants." Id. at 182.

Sworn statement after sworn statement made similar allegations. See id. The affidavits each expressed concern regarding the effect of discharged pollutants. That concern, the Supreme Court found, more than "adequately documented injury in fact" for purposes of Article III standing. Id. at 183.

Following Laidlaw, courts have routinely found that "environmental plaintiffs who live, work, and recreate in the area at issue satisfy the injury in fact requirement by demonstrating that their use and enjoyment of the area has been diminished by environmental damage or concerns about environmental damage." N.C. Shellfish Growers Ass'n v. Holly Ridge Assocs., LLC., 278 F. Supp. 2d 654, 663 (E.D.N.C. 2003); See e.g., Am. Canoe Ass'n, 326 F.3d at 518-20 (finding injury in fact where plaintiffs expressed concern that water quality had decreased and stated that those concerns affected their recreational, aesthetic, and economic interests); Friends of the Earth, Inc. v. Gaston Copper Recycling Corp., 204 F.3d 149, 156-57 (4th Cir. 2000) (finding injury in fact where plaintiff living four miles downstream of unpermitted discharges claimed that concerns about the discharges affected use and enjoyment of waterway); Pub. Interest Research Grp. of N.J., Inc. v. Powell Duffryn Terminals Inc., 913 F.2d 64, 71 (3d Cir. 1990) (finding sufficient injury in fact where affiants alleged that they were "offended by the brown color and bad odor of the water" adjacent to park where affiant went bird watching), cert denied, 498 U.S. 1109 (1991); Friends of the Earth v. Consol. Rail Corp., 768 F.2d 57, 61 (2d Cir. 1985) (finding injury in fact where affiant had passed the polluted river and found its pollution "offensive to his aesthetic values").

Understood in this context, NUWF members more than meet the requirements for standing. NUWF submitted affidavits from three of its members, Dottie Milford, Zeke Norton, and Effie Lawless. (R. 6.) The three averred "that they use the Muddy for recreational boating

and fishing, picnicking on its banks, on or in the vicinity of Bowman's property." (Id.) They further testified that they are aware of the valuable function wetlands serve in maintaining rivers. (Id.) Importantly, the three testified "they are *aware of the differences* and *feel a loss* from the destruction of the wetlands." (Id.) (emphasis added). Indeed, they "fear[] the Muddy is more polluted . . . and will be far more polluted" as a result of the unpermitted clearing of the wetland. (Id.) Such fears, and the changes in behavior that it engenders, are clearly injury in fact. See Idaho Conservation League v. Atlanta Gold Corp., 844 F. Supp. 2d 1116, 1129 (D. Idaho 2012) (finding statements attesting to "fear[] of stepping into [the river] for health reasons" as showing "specific and actual injury in fact). At base, the injury in fact requirement is designed to ensure that the alleged injury "affect[s] the plaintiff in a personal and individual way," that it is not a generalized grievance shared by the general public. See Lujan, 504 U.S. at 561. NUWF more than meets this burden.

Standing alone, NUWF members have plainly demonstrated a credible connection "sufficient to make credible the contention that [their] future life will be less enjoyable . . . if the area in question remains or becomes environmentally degraded." Ecological Rights Found., 230 F.3d at 1149. Plaintiffs have testified to repeated trips to and around the Muddy for recreational purposes. (R. 6.) Plaintiffs have testified to a very real and very imminent concern that discharged pollutants will affect their aesthetic and recreational interests. (Id.) One of NUWF's members, Dottie Milford, even stated that "the Muddy looks more polluted to her than it did prior to" the unpermitted clearing. (Id.) In environmental citizen suits, nothing more is required for purposes of the standing inquiry. See Sierra Club, Lone Star Chapter v. Cedar Point Oil Co. Inc., 73 F.3d 546, 556 (5th Cir. 1996) (finding affiants "concern" clearly meets "[t]he requirement that a party demonstrate injury in fact," which "is designed to limit access to the

courts to those 'who have a direct stake in the outcome'" of the litigation) (quoting Valley Forge Christian College v. Am. United for Separation of Church and State, Inc., 454 U.S. 464, 473 (1982)).

B. Plaintiff Norton Has Suffered Injury in Fact Because Bowman's Land Clearing Activities Has Led to Direct Harm to His Economic and Subsistence Interests.

In addition to the allegations of injury to aesthetic and recreational interests, another NUWF member, Zeke Norton, has averred to the fact that Defendant's actions have affected his recreational and economic interests. Plaintiff Norton testified that he "frogged the [area around or on Defendant's property] for years for recreational and subsistence purposes." (R. 6.) Before the unpermitted land clearing, Norton "could always count on getting a dozen good sized frogs" in certain seasons. (Id.) After the unpermitted land clearing, Norton "is lucky to find two or three . . . frogs in the remaining woods and buffer area." (Id.) Despite the fact that these allegations constitute a very clear and very direct injury to Norton, the court below dismissed the allegations as insufficient to support standing. (Id.) The court below credited the possibility, raised in his deposition, that Norton "supposed he might have been trespassing" when he had previously frogged on the property. (Id.)

With respect to Norton and without much analysis, the court below reasoned "[t]he inability to continue illegal activities cannot give support to standing." (Id.) The court's analysis here is unpersuasive for several reasons. First, it ignores the fact that an absolute right of access is not a prerequisite to standing in environmental enforcement actions. See e.g., Save Our Sonoran, Inc. v. Flowers, 408 F.3d 1113, 1120 (9th Cir. 2005) (finding sufficient standing despite fact that development in question was on private land); Cantrell v. City of Long Beach, 241 F.3d 674, 681 (9th Cir. 2001) ("[W]e have never required a plaintiff to show that he has an

right of access to the site on which the challenged activity is occurring, or that he has an absolute right to enjoy the aesthetic or recreational activities that form the basis of his concrete interest."). Second, by considering the issue of Plaintiff Norton's right of access, the court below went beyond the pleadings, and essentially determined an issue that is factually dubious. Norton admits "he might have been trespassing." (R. 6.) However, he might not have been trespassing. Given that Norton testified that he has "frogged the area for years" despite the alleged presence of a no trespassing sign, he may have obtained a right to frog the land through adverse possession. However, this is ultimately a disputed question of fact, not to be decided at summary judgment. Finally, and most significantly, Norton's injury is ongoing. Norton will still be permitted to legally frog the wetland conservation easement, which is open to the public. If no further action is taken, Norton will be lucky to find "two or three . . . frogs in the remaining woods and buffer area." (R. 4, 6.) The only redress to Norton's recreational and subsistence injury is remediation of the cleared land.

C. The District Court's Focus on Speculative Changes to the Environment Around Bowman's Property is Misplaced, Since the Only Relevant Inquiry for Standing is Injury to the Plaintiff.

In assessing the injury to the NUWF members, the court below credited the assertion that "the environment may be benefitted rather than injured by the changes" and that "the conservation easement effectively shields the field from the river." That focus is misplaced. The relevant inquiry for purposes of standing is harm to the plaintiff, not harm to the environment. To require the plaintiff to demonstrate actual environmental harm would "raise the standing hurdle higher than the necessary showing for success on the merits" in many CWA actions. Laidlaw, 528 U.S. at 181 (2000); see also Ecological Rights Found., 230 F.3d at 1151 ("Requiring the plaintiff to show actual environmental harm as a condition for standing confuses

the jurisdiction inquiry (does the court have power under Article III to hear the case?) with the merits inquiry (did the defendant violate the law?).”). Put simply, the speculative focus on environmental harms or benefits, at the standing inquiry stage, is premature. It ignores the fact that for purposes the Article III standing inquiry, *injury to the plaintiff* is the standard.

Given that injury to the plaintiff is the relevant inquiry, it is enough that NUWF members profess concern that the environmental damage will impair future enjoyment of the affected wetlands and riverway. See Sierra Club, Lone Star Chapter, 73 F.3d at 556 (finding sufficient injury in fact where “[t]wo of the affiants live near Galveston Bay and all of them use the bay for recreational activities” and where “the affiants expressed fear that the discharge . . . will impair their enjoyment of these activities” in the future); United States v. Metro. St. Louis Sewer Dist., 883 F.2d 54, 56 (8th Cir. 1989) (finding affiants had “quite adequately satisfied the standing threshold” when alleging that they “visit, cross, and frequently observe” the affected river and “from time to time . . . use these waters for recreational purposes”); Consol. Rail Corp., 768 F.2d at 61 (finding sufficient injury in fact where affiant alleged passing the affected river and finding the pollution “offensive to [his] aesthetic values”) (internal quotation marks omitted).

II. THE COURT BELOW ERRED IN DENYING JURISDICTION OVER NUWF’S CLIAMS BECAUSE DEFENDANT’S VIOLATION IS ONGOING AND CONTINUING.

The court below determined it lacked subject matter jurisdiction over NUWF’s claims because all the violations are wholly past and not ongoing. The court’s reasoning is unpersuasive. In fact, Bowman’s violation is ongoing and continuing, and not wholly past. Bowman’s unpermitted land clearing led to the discharge of dredge fill material into a “water of the United States.” Bowman did so without a § 404 permit. Because the fill material remains

unremoved and the environmental damage remains unremedied, the violation is ongoing and continuing.

Bowman's discharge of dredge fill material, without the requisite § 404 permit, represents a continuing violation, such that there is subject matter jurisdiction to adjudicate NUWF's complaint. Section 404 of the CWA regulates "the discharge of dredge and fill materials into navigable waters." 33 U.S.C. § 1344 (2006). The CWA permits affected citizens to bring suit to enforce violations of certain provisions. The CWA citizen suit provision provides, in relevant part: "[A]ny citizen may commence a civil action . . . against any person . . . who is alleged to be in violation of (A) an effluent standard or limitation under this chapter or (B) an order issued by the Administrator or a State with respect to such a standard or limitation . . . ." Id. § 1365(a).

The court below looked to the decision in Gwaltney of Smithfield, Inc. v. Chesapeake Bay Found. Inc, where the Supreme Court held that 33 U.S.C. § 1365(a) precluded private actions based on "wholly past [CWA] violations." Gwaltney of Smithfield, Inc. v. Chesapeake Bay Found., Inc., 484 U.S. 49, 61 (1987). The Court determined that § 1365 confers jurisdiction over citizen suits only when a plaintiff makes an allegation of continuous or intermittent violations. Id. at 57. The lower court relied on Gwaltney to determine that because "Bowman's land clearing activities ceased . . . and there is no reason to believe he will resume them," then the violations are, for purposes of § 505(a), no longer ongoing or continuing. (R. 7.) However, the lower court's reliance on Gwaltney is misplaced. There are important factual dissimilarities between the subject action and Gwaltney, which make strict application of Gwaltney unreasonable in light of the CWA's statutory purpose and language.

A. The Unpermitted Discharge of Dredged Fill Materials into the Wetlands is a Continuing Violation as Long as the Fill Remains.

Contrary to the opinion of the trial court, Gwaltney is more appropriately limited to cases involving discharges into waterways, and should not be applied to cases involves discharges into wetlands. This is because discharges of soluble materials into waterways are not susceptible to remedial measures. Discharges of non-soluble solids into wetlands are susceptible to remedial measures. See N.C. Wildlife Fed'n v. Woodbury, 87-584-CIV-5, 1989 WL 106517, at *3 (E.D.N.C. Apr. 25, 1989) ("[T]he characterization of the presence of dredge and fill material . . . as a continuing violation recognizes that the violation is still capable of correction."). Because the injury that supports citizen suit jurisdiction arises not only from the *act* of discharging waste into navigable waters, but also from the *consequences* of the presence of unlawful waste material, jurisdiction is appropriate. Id.; see also City of Mountain Park, GA v. Lakeside at Ansley, LLC., 560 F. Supp. 2d 1288, 1293-94 (N.D. Ga. 2008). On this point, the court below warned that such an interpretation would "render without meaning the jurisdictional requirement for a continuing violation, since all violations would be continuing." (R. 7.) Such fears are unwarranted. Indeed, "[o]nly violations having persistent effects that are amenable to correction, would constitute continuing violations, until remedied, under Gwaltney." Woodbury, 1989 WL 106517, at *3 (recognizing "citizen-suits for past discharges which are not susceptible to remedial efforts, due to effective natural dissipation or dispersion, would clearly continue to be barred un Gwaltney"). Bowman's violation of the CWA is still amenable to correction, and therefore jurisdiction is appropriate.

In a number of persuasive opinions issued by courts assessing Gwaltney's impact on violations involving filled wetlands, the courts have concluded "a violation is 'continuing' for purposes of the statute until illegally dumped fill material has been removed." Informed Citizens United v. USX Corp., 36 F. Supp. 2d 375, 377 (S.D. Tex. 1999) (noting that several courts have

found Gwaltney inapplicable in context of § 404); see also Sasser v. Administrator, U.S. E.P.A., 990 F.2d 127, 129 (4th Cir. 1993) ("Each day the pollutant remains in the wetlands without a permit constitutes an additional day of violation."); Stillwater of Crown Point Homeowner's Ass'n, Inc. v. Kovich, 820 F. Supp. 2d 859, 895-96 (N.D. Ind. 2011) ("This Court finds the weight of authority, notwithstanding the Supreme Court's ruling in Gwaltney, to be persuasive that the continued precense of fill material in the waterway constitutes a continuing violation."); Swinomish Indian Tribal Cmty. v. Skagit Cnty. Dike Dist. No. 22, 618 F. Supp 2d 1262, 1267 (W.D. Wash. 2008) (concluding same); Lakeside at Ansley, F. Supp. 2d at 1296; Atl. States Legal Found., Inc. v. Hamelin, 182 F. Supp. 2d 235, 248 n.20 (N.D.N.Y. 2001) (citing cases and concluding same); United States v. Reaves, 923 F. Supp. 1530, 1534 (M.D. Fla. 1996); United States v. Tull, 615 F. Supp. 610, 622-23 (E.D. Va. 1983), aff'd 769 F.2d 182 (4th Cir. 1985), rev'd on other grounds, 481 U.S. 412 (1987); Stepniak v. United Materials, LLC, 03-CV-569A, 2009 WL 3077888, at *4 (W.D.N.Y. Sept. 24, 2009) (concluding same); Greenfield Mills, Inc. v. Goss, 1:00 CV 0219, 2005 WL 1563433, at *3 (N.D. Ind. 2005) (concluding same after extensively discussing Gwaltney). That a violation like the one in Gwaltney cannot be easily remedied should not preclude this Court from recognizing that violations capable of remediation must be remedied, consistent with the purpose, language, and structure of the CWA. See United States v. Ciampitti, 669 F. Supp. 684 (D.N.J. 1987).

In addition to the foregoing authority, the statutory language of the CWA suggests that a violation is ongoing and continuing until Bowman takes measures that remediate the environmental damage. There is support for this proposition in Gwaltney. Justice Scalia's concurrence in Gwaltney, in which he was joined by Justices O'Connor and Stevens, considered the relevant statutory language and found that "[t]he phrase in § 505(a), 'to be in violation,'

unlike the phrase 'to be violating' or 'to have committed a violation,' suggests a state rather than an act–the opposite of a state of compliance." Gwaltney, 484 U.S. at 69 (Scalia, J., concurring). The concurring Justices concluded, based on the clear language of the CWA, that "[w]hen a company has violated an effluent standard or limitation, it remains, for purposes of § 505(a), 'in violation' of that standard or limitation so long as it has not put in place remedial measures that clearly eliminate the cause of the violation." Id. The remedy reflects the violation. Because NUWF alleges "the continued presence of dredged and fill material in the former wetlands" constitutes a continuing violation, nothing short of the removal of the dredged and fill material constitutes sufficient remediation. (R. 7.)

B. Sound Policy Supports Finding Jurisdiction over Bowman's Unlawful Discharge of Dredged and Fill Material Because a Contrary Interpretation Would Immunize the Dumping from CWA Oversight.

Sound policy also supports the interpretation that a violation of § 404 is continuing unless and until the unlawfully dumped dredged fill material is removed. The contrary conclusion would be lead to an unworkable system of statutory enforcement, where "citizen-suits [would be] barred merely because any illegal ditching and drainage . . . was completed before it might reasonably be discovered." Woodbury, 1989 WL 106517 at *3. Therefore, "violators would have a powerful incentive to conceal their activities from public and private scrutiny." Id. As a practical matter, it would so limit jurisdiction over "past" violations that it would completely immunize even the most egregious violations of the CWA. Id.; see also USX Corp., 36 F. Supp. 2d at 378 (concluding the same).

The continued presence of dredged fill material in the former wetlands on Bowman's property constitutes a continuing violation under § 404 of the CWA. The court below reasoned that this interpretation of the CWA would "render without meaning the jurisdiction requirement

for a continuing violation, since all violations would be continuing." (R. 7.) However, by interpreting the statute to preclude jurisdiction for cases like Bowman's, the court went too far. It so circumscribed the reach of § 404 so as to render meaningless the prohibition on discharging pollutants into wetlands. That cannot have been Congress' intention. The declaration of goals and policy to the CWA begins: "The objective of this chapter is to *restore* and *maintain* the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. §1251 (2006) (emphasis added). In light of the CWA's express purpose, "interpretations of a statute which would produce absurd results are to be avoided if alternative interpretations consistent with the legislative purpose are available." Griffin v. Oceanic Contractors, Inc., 458 U.S. 564, 575 (1982); see also Perry v. Commerce Loan Co., 383 U.S. 392, 400 (1966) (observing that when an interpretation of a statutory text produces "absurd or futile results," a court may look "beyond those words to the purpose of the act" (quoting United States v. Am. Trucking Ass'ns, 310 U.S. 534, 543 (1940)). It would be perverse to say that this court no longer has jurisdiction because Bowman stopped discharging pollutants before NUWF had an opportunity to file suit.

III. NUWF'S CITIZEN SUIT IS NOT BARRED BY NUDEP'S ACTIONS.

The CWA provides for private citizen suits to bring civil actions to enforce any effluent standard or limitation under the Act, as well as EPA or state agency orders, allowing citizens to act as "private attorneys general" to enforce the CWA. 33 U.S.C. § 1365(a)(1) (2006); Ellis v. Gallatin Steel Co., 390 F.3d 461, 477 (6th Cir. 2004) (noting that "[c]itizens acting as 'private attorneys general' . . . seek relief not on their own behalf but on behalf of society as a whole"); See also Hudson River Fishermen's Ass'n v. Westchester Cnty., 686 F. Supp. 1044, 1050 (S.D.N.Y. 1988). This provision recognizes Congress' intention that the public "have a genuine opportunity to speak on the issue of protection of its waters" and have the ability to ensure "expeditious implementation of the authority and a high level of performance by all levels of

government and discharge sources." S. Rep. No. 414, 92d Cong., 1st sess. 72 (1971), reprinted in 1972 U.S.C.C.A.N. 3668, 3738; see also Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc., 890 F. Supp. 470, 487 (D.S.C. 1995). However, where a governmental enforcement agency "is diligently prosecuting or has diligently prosecuted a judicial action to enforce the same alleged violations of a particular permit, standard, or limitation," citizen suits are barred by § 505(b)(1)(B) of the CWA. Laidlaw, 890 F. Supp. at 486; 33 U.S.C. § 1365(b)(1)(B). "Citizen-plaintiffs bear the burden of proving that the [agency's] prosecution was not diligent." Laidlaw, 890 F. Supp. at 486-87. However, diligent prosecution requires more than token efforts by the EPA or a state agency to mitigate the damage done by a violator. It "requires evidence about specific measures taken to redress a violation and a substantial and ongoing response by the enforcement agency." Water Quality Prot. Coal. v. Municipality of Arecibo, 858 F. Supp. 2d 203, 211-12 (D.P.R. 2012) (citing N. and S. Rivers Watershed Ass'n, Inc. v. Town of Scituate, 949 F.2d 552, 557 (1st Cir. 1991)). Therefore, diligent prosecution is a fact-specific and contextual inquiry.

A. Measured Against the Standard Routinely Used by Courts, NUDEP'S Prosecution of Bowman Is Not Diligent.

While courts have recognized that state agencies and the EPA are entitled to some deference in their approach to pursuing violations of the CWA, prosecutions by these agencies are not presumed to be *ipso facto* "diligent" by reviewing courts. *See, e.g.,* Ark. Wildlife Fed'n v. ICI Ams., Inc., 29 F.3d 376, 380-81 (8th Cir. 1994); Laidlaw, 890 F. Supp. at 489. The court should "analyze the Plaintiffs' allegation of lack of diligence 'against the background of the agency action.'" Id. (citing S. Rep. No. 414, 92d Cong., 1st sess. 80, reprinted in 1972 U.S.C.C.A.N. 3668, 3746 ("[I]f the court viewed the agency action as inadequate, it would have jurisdiction to consider the citizen action notwithstanding any pending agency action.")). In

order to analyze the diligence of an agency's prosecution of a CWA violation, courts have looked to various indicia of diligence. These factors include the degree to which any agency imposed fines addressed the economic benefit gained by the violator (Laidlaw, 890 F. Supp. at 491; Arecibo, 858 F. Supp. 2d at 203); whether the administrative process provided for public participation and comment (Laidlaw, 890 F. Supp. at 490); and whether the agency action provides substantial relief towards ending the violation (Atl. States Legal v. Eastman Kodak Co., 933 F.2d 124, 127 (2d Cir. 1991); Arkansas, 29 F.3d at 380 (1994); Friends of Milwaukee's River and Alliance for Great Lakes v. Milwaukee Metro. Sewerage Dist., 556 F.3d 603, 606 (7th Cir. 2009)). NUDEP's prosecution of Bowman cannot be said to be diligent based on any of these factors.

i. NUDEP Failed to Include Any Penalty in its Administrative Order, even Though Bowman Has Gained and Continues to Reap an Economic Benefit from Illegally Filling the Wetland on his Property.

In Friends of the Earth, Inc. v. Laidlaw Envtl. Servs., the court stated that "[a] lenient penalty that is far less than the maximum penalty may provide evidence of non-diligent prosecution." Laidlaw, 890 F. Supp. at 491. In Laidlaw, in addition to requiring that the defendant make every effort to come into compliance with effluent limitations and perform a fish tissue study, the state agency assessed a penalty against the defendant of $100,000, which was "far less than the maximum possible penalty" of $2,270,000. Id. at 479-80, 491. The court determined that the defendant's economic benefit from failing to comply with pollution control requirements of the CWA was "substantially in excess of the $100,000 penalty . . . ." Id. at 482. The court stressed the importance of monetary penalties, stating that "civil penalties seek to deter pollution by discouraging future violations." Id. at 491. To this end, "[a] penalty serves as a successful deterrent only if potential violators believe that they will be worse off by not complying" with the requirements of the CWA. Id. Therefore, the court concluded "the amount

of the civil penalty must be high enough to insure that polluters cannot simply absorb the penalty as a cost of doing business." Id. at 491-92. Based on these findings, the court determined that the plaintiff's had presented "strong evidence that the agency's prosecution of [defendant] was not diligent" under § 505(b)(1)(B) of the CWA. Id. at 497; see also Knee Deep Cattle Co., Inc. v. Bindana Inv. Co., Ltd. 94 F.3d 514, 516 (9th Cir. 1996) (stating that "a penalty must actually have been assessed under the [comparable] state law" in order for diligent prosecution by state agency to be met).

NUDEP's failure to include any administrative penalty when it was authorized to include a penalty of up to $125,000 serves as strong evidence that its prosecution of Bowman was not diligent under § 505(b)(1)(B) of the CWA. (R. 4.) In Laidlaw, the enforcing agency assessed a penalty that was approximately 4.5% of the total possible amount. Here, NUDEP has assessed a penalty that is 0% of the total possible amount. By failing to assess any administrative penalty, NUDEP has not prevented Bowman from "simply absorb[ing] the penalty" of maintaining the easement and buffer. Laidlaw, 890 F. Supp. at 491. Not only does this fail to eliminate economic incentives for noncompliance, but it fails to adequately punish Bowman for his illegal activities.

Moreover, the argument that Bowman's costs are an adequate penalty fails in light of Laidlaw, where a monetary penalty was assessed in addition to other efforts which required the defendant spend money in order to come into compliance with the CWA. In its analysis, the lower court seems to imply that the deeding of the conservation easement and the construction of the buffer-wetland which come "at considerable initial expense and an indeterminable future expense" serve as the equivalent of a civil penalty. (R. 7, 8.) However, this surface-level analysis fails to take into account the purpose of civil penalties in deterring future violations, as

described in Laidlaw. In calculating the true "expense" to Bowman, the lower court failed to even consider the economic benefit to Bowman of the filling and draining of the wetland. (R. 7-8.) While Bowman previously gained no economic benefit from the wetland, his dredging and filling activity allowed him to plant winter wheat, which presumably he will sell for profit. (R. 5.) By failing to consider this economic benefit, the lower court could not have analyzed whether the conservation deed and wetland construction were successful deterrents to Bowman and future violators, nor whether Bowman simply absorbed the conservation easement "as a cost of doing business." Laidlaw, 890 F. Supp. at 492. NUDEP's failure to assess any monetary penalty is thus evidence that its prosecution of Bowman was not diligent.

ii. NUDEP's Private Settlement with Bowman Failed to Allow for Meaningful Public Participation and Opportunity for Comment, and Therefore Cannot be Considered to be Diligent Prosecution.

In Laidlaw, the state agency and defendant reached a settlement agreement which a judge entered as a consent order on the following day. Id. at 479. This consent order was signed on the last day before citizen plaintiffs could file their own lawsuit. Id. The state agency admitted that this timeline was "exceedingly fast" by its own standards. Id. The court in Laidlaw stressed the "importance of public participation in the enforcement of the CWA . . . ." Id. at 488. The court found that "the absence of a meaningful opportunity for the citizen plaintiffs to intervene in this case" triggered a heightened scrutiny of the settlement between the defendant and state agency. Id. at 490; see also Hamelin, 182 F. Supp. 2d. 235, 247 (N.D.N.Y. 2001) (stating that a court reviewing an agency action should consider "whether there are provisions to ensure adequate public participation").

As in Laidlaw, the administrative order and lawsuit against Bowman do not provide for the public participation that the CWA envisions. Because the citizen suit provision of the CWA is designed to encourage public participation in the protection of the waters of the United States,

NUDEP's prosecution and the outcome of its lawsuit should provide for "notice and hearing procedures designed to protect and give access to the public and interested parties." Friends of Milwaukee's Rivers, 382 F.3d at 756 (finding that "[l]etters and conferences where no public notice was given and that did not result in hearings have been found not to bar a citizens' suit"). Here, there is no indication that there was any public participation in the settlement process. (R. 4.) Nor does the federal suit allow for any meaningful public participation, since the goal of NUDEP's suit in federal court is to enter a decree "the terms of which are identical to the state administrative order," which Bowman consented to when NUDEP moved to enter the decree,. Based on these considerations, NUDEP's prosecution should be examined with heightened scrutiny and this procedural deficiency should weigh, as it did for plaintiffs in Laidlaw, in favor of allowing NUWF's lawsuit. Laidlaw, 890 F. Supp. at 490.

iii. Because NUDEP's Private Settlement Allows Bowman to Avoid Substantial Compliance With the CWA and Permits the Violations to Continue, NUDEP's Actions Cannot be Considered Diligent.

Numerous courts agree that a citizen suit is barred "unless there is a realistic prospect that the violations alleged in [plaintiff's] complaint will continue notwithstanding the settlement." Eastman Kodak Co., 933 F.2d at 127; see also Friends of Milwaukee's Rivers, 556 F.3d at 606; Jones v. City of Lakeland, Tenn., 224 F.3d 518, 522-23 (6th Cir. 2000) (stating that where an administrative action extended or waived compliance deadlines, prosecution was not diligent); Laidlaw, 890 F. Supp. at 490 ("[T]he lack of substantial relief in a settlement is properly considered by the court in determining whether the state action was diligently prosecuted."). In the present case, the settlement agreement, the subsequent administrative order, and the potential consent decree that NUDEP is seeking in federal court do nothing to address Bowman's continuing violation, functionally extending Bowman's compliance deadline indefinitely. By continuing to have fill or dredged material in his wetland, Bowman fails to comply with the §

404 permit requirement for releasing dredged or fill material into a wetland. While NUDEP's administrative order may restore a small part of the original wetland, it allows Bowman to maintain a much larger area as dredged and filled land suitable for farming. (R. 4.) This is a continuing violation of the CWA. See supra Section II. Therefore, because NUDEP's prosecution allows permit compliance to be delayed or perhaps forever avoided, NUDEP's prosecution should not bar NUWF's citizen suit. See Piney Run Pres. Ass'n v. Cnty. Com'rs of Carroll Cnty., Md., 523 F.3d 453, 456 (4th Cir. 2008) (recognizing that the "citizen suit provision is 'critical' to the enforcement of the CWA . . . as it allows citizens 'to abate pollution when the government cannot or will not command compliance.'" (citing Gwaltney, 484 U.S. at 62)); Laidlaw, 890 F. Supp. at 490; N.Y. Coastal Fishermen's Ass'n v. Dep't of Sanitation, 772 F. Supp. 162, 168 (S.D.N.Y. 1991).

B. Unlike NUDEP's Lackluster Prosecution, NUWF Seeks to Actually Enforce the Provisions of the CWA, and Therefore NUWF's Enforcement Action Should Not be Barred by the Policy Against Duplicative Citizen Suits.

Bowman and NUDEP may attempt to rely on cases that state that government agencies have primary responsibility for the enforcement of the CWA; that "citizen suits are intended to supplement rather than supplant this primary responsibility;" and that "citizen suits are only proper if the government fails to exercise its enforcement responsibility." Town of Scituate, 949 F.2d at 558. However, these cases rely on certain policy considerations, such as "due deference to the state's plan of attack;" "protection of litigants interest in the finality of their cases, [and] preservation of the incentives that polluters might have to settle charges with state or federal authorities . . . ." Hamelin, 182 F. Supp. 2d at 246; Citizens Legal Envtl. Action Network, Inc. v. Premium Standard Farms, Inc., 97-6073-CV-SJ-6, 2000 WL 220464, at *12 (W.D. Mo. Feb. 23,

2000). These policy considerations are simply not applicable in the subject action, where the agency prosecution does not address the concerns raised in NUWF's lawsuit.

While deference to an agency's expertise in addressing CWA violations is warranted in some situations, such deference is unwarranted here. Such deference is appropriate only when the agency's actions are truly "comparable . . . not whenever an agency sees fit to approve the actions of private parties subject to its jurisdiction." Student Pub. Interest Research Grp. of N.J. v. Ga. Pac. Corp., 615 F. Supp. 1419, 1427 (D.N.J. 1985). In this instance, NUDEP's administrative order and attempt to enter the order as a consent decree in federal court do nothing more than rubber stamp Bowman's illegal filling of the wetland on his property. While NUDEP has settled for recovering a small area of wetland and has gained an easement to river land, it has done nothing to seek enforcement of § 404 of the CWA, which would require Bowman either remove fill and dredged material from the wetland or obtain a permit for his activity. This is the action that NUWF's suit seeks, which is *not* duplicative of NUDEP's previous administrative order and NUDEP's proposed consent decree. Because it is not duplicative of NUDEP's action, NUWF's citizen suit does not "impede[] and/or obstruct[] the environmental remedy" that might otherwise be imposed. SURRCO v. PRASA, 157 F. Supp. 2d 160, 170 (D.P.R. 2001). Instead, NUWF's action should rightfully be viewed as supplementing NUDEP's dealings with Bowman. More importantly, NUWF's action better serves the CWA's primary purpose: "the vindication of environmental interests." Laidlaw, 890 F. Supp. at 487.

IV. THE LOWER COURT INCORRECTLY DETERMINED THAT SECTION 404 OF THE CWA WAS NOT VIOLATED WHEN BOWMAN PUT DREDGED AND FILL MATERIAL INTO HIS WETLAND.

Under § 301(a) of the CWA, "the discharge of any pollutant by any person shall be unlawful," except in compliance with certain permitting sections, including §§ 402 and 404 of the CWA. 33 U.S.C. § 1311(a) (2006). Section 402 of the CWA permits "the discharge of any

pollutant" into the waters of the United States provided the discharge meets all necessary requirements. Id. § 1342. Section 404 of the CWA permits "the discharge of dredged or fill material" into navigable waters. Id. § 1344. The CWA defines the term "discharge of a pollutant" to mean "any addition of any pollutant to navigable waters from any point source." Id. § 1362(12). "Pollutant" is defined within the CWA to include "dredged spoil . . . biological materials . . . rock, sand, cellar dirt . . . agricultural waste." Id. § 1362(6). The lower court found that "the material Bowman moved about the property included pollutants," that "[n]o party contests that the bulldozers were point sources," and that the area that Bowman cleared is a navigable water as defined by the statute. (R. 8, 9.) Therefore, the only issue on appeal is the lower court's error in holding that Bowman's land clearing and filling activity did not constitute an "addition."

A. The Lower Court's Reliance on the EPA's Definition of Addition as "from the outside world" Is Misguided, as it Was a Litigation Position Taken by the EPA, and Was Given Deference Only in the Context of Whether Dams Were Subject to Section 402 Permitting.

In determining whether to give deference to an EPA interpretation of language in the CWA, a court must determine if the interpretation "is inconsistent with the language of the Clean Water Act, as interpreted in light of the legislative history, or if it 'frustrate[s] the policy that Congress sought to implement' . . . ." Nat'l Wildlife Fed'n v. Gorsuch, 693 F.2d 156, 171 (D.C. Cir. 1982) (citing FEC v. Democratic Senatorial Campaign Comm., 454 U.S. 27, 32 (1981)). If that is the case, "no amount of deference can save it." Gorsuch, 693 F.2d at 171.

The lower court relied on National Wildlife Federation v. Gorsuch for the proposition that "addition" means that "the point source must *introduce* the pollutant into navigable water from the outside world." Id. at 165; (R. 9.) This reliance was in error. The EPA adopted this litigation position in Gorsuch to exclude a dam from § 402's permitting requirement, arguing

that dam-caused pollution that passes from upriver, through a reservoir, and then moves downriver is not an addition as envisioned by the CWA. Gorsuch, 693 F.2d at 165. The court in Gorsuch determined that the language of the Clean Water Act permitted the EPA's construction of "addition," and therefore examined whether the construction advanced by the EPA frustrated the policy of Congress. Id. at 175-82. The court focused on the "specific substantive provisions of the Act relating to dams" and the "general legislative purposes underlying the Act." Id. at 171. The court reasoned that if Congress had wanted to regulate all point sources under § 402 permitting, it could have "chosen suitable language, *e.g.*, 'all pollution released through a point source.'" Id. at 176. Moreover, the court found that § 304(f)(2)(F) of the CWA evinced an intent by Congress "that some water quality changes caused by dams be regulated as nonpoint pollution." Id. at 177. The Court finally determined that the lack of express control over dams in the CWA left open the possibility that "dam-caused pollution was a problem best addressed through state programs." Id. at 178. This conclusion was underscored by the unique challenges that regulators would have applying "nationally uniform standards" to dams, which would keep the agency from taking "full account of the interrelationship between dam-caused pollution and other pollution sources." Id. at 182. *In this context*, the court in Gorsuch concluded that the EPA's "outside world" definition was a reasonable interpretation of "addition."

In the present case, the lower court incorrectly deferred to the EPA's "outside world" interpretation of "addition." When the "outside world" interpretation of "addition" is applied to § 404 permitting of the filling of wetlands, as opposed to § 402 permitting of dams, this definition clearly frustrates Congressional intent. With respect to dams, Congress evidently intended for some water quality changes be regulated as non-point sources. But, unlike with pollution from dams, § 404 of the CWA clearly and explicitly provides for the regulation of

pollution placed in wetlands. See 33 U.S.C. § 1344. The district court should not have relied on the EPA's interpretation of "addition" in the context of § 402 dam permitting, where the § 404 permits at issue here serve a very different purpose. See S.D. Warren Co. v. Me. Bd. of Envtl. Prot., 547 U.S. 370, 371 (2006) (holding that discharge for the purpose of §§ 401 and 402 "are not interchangeable, as they serve different purposes"). If the EPA's "outside world" interpretation were given controlling weight in the context of § 404 discharges, a large swathe of activity that is currently regulated under § 404, including sidecasting, would no longer come under the CWA's protection. U.S. v. Bay Houston Towing Co., Inc., 33 F. Supp. 2d 596, 602 (E.D. Mi. 1999). In the wetland context, which Congress expressly provided regulation for in the form of § 404 permits, allowing such a definition of "addition" to control would frustrate Congressional intent, and therefore, no deference should be given to the EPA's "outside world" interpretation.

B. Transfer of Pollutants from One Navigable Body of Water to Another Navigable Body of Water Constitutes "Addition" Under Section 404.

It is undisputed that NUWF has satisfied the elements of a § 404 violation, with respect to § 505's definition of "pollutant," "navigable waters," and "point source." (R. 8-9.) However, the court below held that NUWF failed to satisfy the "addition" requirement to prove a § 404 permit violation. The district court, relying primarily on the EPA's construction of "unitary navigable waters," interpreted "navigable waters" to refer collectively to all waters governed by the CWA. (R. 10.) Therefore, a point source that transmits pollutants from one particular body to another is, for purposes of § 404, not "adding" pollutants to "navigable waters." (Id.)

The EPA's "unitary navigable waters" theory, as it relates to the interpretation of "addition," is not entitled to Chevron deference, because the "unitary navigable waters" construction is inconsistent with the very provisions and language of the Clean Water Act.

Chevron deference is not appropriate where its application leads to a patently unreasonable interpretation. Courts "need 'accept only those agency interpretations that are reasonable in light of the principles of construction courts normally employ." Morrison v. Nat'l Austl. Bank, Ltd., 130 S. Ct. 2869, 2887 (2010) (citation omitted). Because the EPA's construction is inherently untenable and would lead to absurd results in the context of § 404, it is not entitled to Chevron deference and should be rejected.

i. Provisions of the CWA, Including the Definition of "Pollutant," Refute the EPA's "Unitary Waters" Theory.

The EPA's construction of "unitary navigable waters," and the district court's reliance on that interpretation, is unreasonable in light of the fact that the statutory definition of "pollutant" includes "dredged spoil." 33 U.S.C. 1362(6) (2006). Dredged spoil is defined as "material that is excavated or dredged from waters of the United States." 40 C.F.R. § 232.2 (2010). In other words, it *comes from* navigable water bodies. Thus, the very definition of "pollutant" adopted by Congress is plainly inconsistent with the "unitary waters" theory. The CWA expressly prohibits the discharge of a "pollutant" – here dredged fill – into navigable waters. See 33 U.S.C. 1311(a) (prohibiting unpermitted discharges). Likewise, the definition of "discharge of a pollutant" in § 1362(12), which specifically defines a "discharge" as "any addition of any pollutant to navigable waters," clearly contemplates that Congress intended the CWA to govern the discharge of pollutants. Id. § 1362(12). Under the EPA's proposed construction of "unitary navigable waters" and the district court's adoption of that construction, the result would be to make irrelevant the very definition of "dredged fill" as a pollutant. More significantly, it would make irrelevant the entire permit program under § 404. Id. § 1344. Simply put, that cannot have been Congress' intention.

The preamble to the EPA's Water Transfer Rule expressly recognized that the Rule "will not have an effect on the 404 program," precisely because "Congress explicitly forbade discharges of dredged material without a permit. National Pollutant Discharge Elimination System (NPDES) Water Transfers Rule, 73 Fed. Reg. 33698-01, 33703 (June 13, 2008) (to be codified at 40 C.F.R. pt. 122). Any interpretation that excludes pollutants from navigable waters is inherently incompatible with the statute, because the statute clearly contemplates the regulation and exclusion of pollutants from navigable waters. See 33 U.S.C. 1362(12). Moreover, the CWA clearly contemplates regulation of pollutants under a dual-scheme: under § 404, the discharge of dredged material *and*, under § 402, the discharge of other pollutants. The district court cannot simply ignore the fact that Congress included "dredged fill" in the CWA permit system. And contrary to the district court's assertion, it is simply incorrect to "give[] the same [statutory] word, *in the same statutory provision*, different meanings *in different factual contexts*." United States v. Santos, 553 U.S. 507, 522-23 (2008) (noting that "we [have] never engaged in such interpretative contortion"); see also, Clark v. Martinez, 543 U.S. 371, 378, 282, 386 (2005) (concluding that to "give the same statutory text different meanings in different cases" is a "dangerous principle" that would "render every statute a chameleon."). Rather, this Court should recognize the fact that where different sections of the CWA clearly contemplate different factual circumstances, it is inappropriate to use a definition designed in the specific context of § 402.

ii. Sound Policy Supports Rejecting the EPA's Construction, Because Adoption of the "Unitary Waters" Theory Would Lead to the Absurd Result of Allowing the Unpermitted Transfer of Pollutants Between Navigable Waters.

The EPA's interpretation is inconsistent with and contrary to the explicit statements of statutory purpose that motivate the CWA, because it treats distinct navigable waters, no matter

the level of pollution, as "unitary bodies." The EPA's construction therefore permits the unpermitted transfer of pollutants from one navigable body of water to another navigable body of water. See Catskill Mountains Chapter of Trout Unlimited, Inc. v. City of N.Y., 451 F.3d 77, 81 (2d Cir. 2006) (asserting unitary waters theory "would lead to the absurd result that the transfer or water from a heavily polluted, even toxic, water body to one that was pristine via a point source would not constitute an 'addition' of pollutants and would not be subject to the CWA's NPDES permit requirement"); Dubois v. U.S. Dept. of Agric., 102 F.3d 1273, 1297 (1st Cir. 1996). Even the Supreme Court has previously expressed strong skepticism that the EPA's theory of "unitary waters" is valid. S. Fla. Water Mgmt. Dist. v. Miccosukee Tribe of Indians, 541 U.S. 95, 107 (2004) (noting "several NPDES provisions might be read to suggest a view contrary to the unitary waters approach").

C. Courts Have Routinely Found Activities Similar to Bowman's as Subject to Section 404 of the CWA, Which Requires a Permit.

In U.S. v. Bay Houston Towing Co., Inc., defendant engaged in land clearing activities in the process of harvesting peat moss. Bay Houston Towing, 33 F. Supp. 2d at 599-600. Defendant disced the bog area on its land, and moved the loosened peat into a temporary harvest windrow. Id. at 599-600. Defendant also created haul roads on the bog using materials found within the bog, and smoothed with sand, gravel, and clay. Id. at 599. Finally, defendant created drainage ditches to drain its land. Id. The EPA issued a compliance order stating that defendant "was discharging pollutants in [the bog] without a permit." Id. Defendants argued that it could not be regulated under § 404 for "the redeposit of dredged materials that incidentally 'fall back' in the course of dredging operations." Id. at 602. The court disagreed. Id. Instead, the court held that if the material being dredged "is disposed of in a water of the United States, by sidecasting or by other means, this disposal will be considered to be a 'discharge of dredged

material' and will be subject to regulation under section 404." Id.; see also United States v. Deaton, 209 F.3d 331, 335 (4th Cir. 2000) ("[S]idecasting (that is, the deposit of dredged or excavated material from a wetland back into that same wetland) constitutes the discharge of a pollutant under the Clean Water Act.").

As in Bay Houston Towing, Bowman used sidecasting techniques to level and drain his field without a permit. He purposefully pushed trees and vegetation into windrows, dug trenches and filled them with leveled vegetation. (R. 4.) Bowman then leveled the resulting field, again pushing soil from higher portions of the field into lower portions. (Id.) The technique used by Bowman is nearly identical to that used by defendant in Bay Houston Towing, and it similarly cannot be described as incidental fall back. Therefore, it should be subject to § 404 permitting requirement, as was the activity in Bay Houston Towing.

In Avoyelles Sportsmen's League, Inc. v. Marsh, defendant engaged in land-clearing operations to put wetland to agricultural use. Avoyelles Sportsmen's League, Inc. v. Marsh, 715 F.2d 897, 901 (5th Cir. 1983). Defendant cut down trees and vegetation on the property and raked this vegetation into windrows. These were burned and disced into the ground. Defendant then leveled the area and dug a drainage ditch. Id. In its analysis, the court addressed how Gorsuch's "outside waters" theory related to the definition of "addition." Id. at 923. The court determined that the problem of whether removing vegetation from a wetland constitutes an addition "is a false issue." Id. Indeed, the court noted in prior litigation, the EPA had agreed that "if vegetation or other materials are redeposited in the wetland, that activity is a discharge." Id. The court found that "[t]he word 'addition,' as used in the definition of the term 'discharge,' may reasonably be understood to include 'redeposit.'" Id. Therefore, the court found that the

redeposit of materials into the wetland from materials taken from the wetlands "constituted a discharge within the meaning of the Act" and was therefore subject to § 404. Id. at 924.

In the instant case, Bowman engaged in almost identical activity as the defendant in Avoyelles. He similarly moved trees and vegetation from his wetland into windrows, which he burned and pushed into lower areas to level his field. (R. 4.) He also dug a drainage ditch. (Id.) This activity is exactly what the court in Avoyelles deemed "redeposit," and which the EPA acknowledged was a discharge subject to § 404 of the CWA. This court should give deference to the EPA's litigation position in Avoyelles, which shows that in the context of wetlands, the EPA has interpreted discharge to include the redeposit of vegetation into a wetland. This is consistent with the language of the CWA, and unlike the EPA's position in Gorsuch, it is consistent with Congress's intent that wetlands be protected. This court should recognize that Bowman's land clearing activity undoubtedly constituted a "discharge," and therefore an "addition." Because Bowman added pollutants from a point source into navigable waters without the requisite § 404 permit, Bowman is clearly subject to the CWA.

CONCLUSION

For the reasons stated in this Brief, NUWF respectfully requests that this Court reverse the District Court's grant of summary judgment in favor of Appellees Jim Bob Bowman and New Union Department of Environmental Protection and remand this case for further proceedings on the merits.

Respectfully Submitted,

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