Team #47

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 OF NEW UNION WILDLIFE FEDERATION

ORAL ARGUMENT REQUESTED

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STATEMENT OF JURISDICTION

The United States District Court for the District of New Union had subject matter jurisdiction over this civil enforcement action pursuant to § 309(b) of the Clean Water Act, 33 U.S.C. § 1319(b) and 28 U.S.C. §§ 1331, 1345 and 1355 (2010). On June 1, 2012, the District Court entered final judgment in favor of the Defendant, Jim Bob Bowman. The New Union Wildlife Federation and the New Union Department of Environmental Protection filed a timely notice of appeal. *See* 28 U.S.C. 2107(b) (2010). The United States Court of Appeals for the Twelfth Circuit has jurisdiction pursuant to 28 U.S.C. § 1291 (2010).

STATEMENT OF THE FACTS

Jim Bob Bowman (the "Defendant") owns 1,000 acres of wooded land adjacent to the Muddy River, which borders 650 acres of the Defendant's property. T.R. 3[1]. The Defendant's property is within the 100-year floodplain of the Muddy River. *Id.* The Muddy River and the Defendant's property are hydrologically connected, resulting in the growth of trees and other vegetation characteristic of wetlands. *Id.* at 3-4.

On June 15, 2011, the Defendant began bulldozing and clearing a wetland habitat on his property. T.R. 4. He knocked down trees and other vegetation, denuding the resulting field. *Id.* He pushed this organic matter into windrows and burned it. *Id.* The Defendant then dug trenches and filled them with the remaining organic matter and ash. *Id.* The Defendant undertook a second stage of bulldozing sediment from higher areas of the field to lower. *Id.* Then, the Defendant drained the field into the Muddy River. *Id.* By the time the Defendant completed land clearing operations of the wetland habitat on July 15, 2011, only a little over two

[1] Citations to the Technical Record are indicated by T.R. followed by the page number.

acres, out of the initial one thousand, remained intact. *T.R. 4.* The Defendant left a strip of land 150 feet wide adjacent to 650 feet of the Muddy River. *Id.*

On August 1, 2011, the Defendant consented to an administrative order by New Union Department of Environmental Protection ("NUDEP"), where he agreed not to clear more wetlands in the area. T.R. 4. In addition, the Defendant agreed to convey a conservation easement on the 150 foot wide strip of property adjacent to the Muddy that he had not cleared plus an additional 75 foot buffer zone. *Id.* In addition, Defendant agreed to maintain a year round wetland on the 75 foot buffer zone. *Id.* NUDEP declined to issue an administrative penalty of $125,000, despite the penalty being authorized by statute. *Id.*

STATEMENT OF THE CASE

On July 1, 2011, the New Union Wildlife Federation ("NUWF") sent the Defendant a notice of intent to sue the Defendant under § 505 of the Clean Water Act ("CWA"). T.R. 4. Shortly after NUWF sent notice to the Defendant, NUDEP notified the Defendant that he was in violation of state and federal law for clearing wetlands. *Id.* The Defendant entered into an agreement with NUDEP, which was incorporated into an administrative order, that the Defendant would (a) clear no more wetlands; (b) grant a conservation easement on part of his property adjacent to the Muddy River, including a seventy-five foot buffer zone and allowing public entry for appropriate recreational purposes; and (c) construct and maintain a wetland on the buffer zone. Under the agreement, NUDEP did not require the Defendant to pay an administrative penalty, authorized by statute, of $125,000. *Id.*

NUDEP filed suit against the Defendant in the United States District Court for the District of New Union on August 10, 2011. T.R. 4. NUDEP moved for the District Court to enter an order with terms identical to its administrative agreement with the Defendant. *Id.* NUWF filed its own § 505 suit against the Defendant on August 30, 2011. *Id.* NUDEP moved to

intervene in NUWF's suit. *Id.* at 5. On November 1, 2011, the District Court held a status conference on both cases and granted NUDEP's motion. *Id.*

On June 1, 2012, the District Court granted the Defendant's motion for summary judgment and ruled that (a) NUWF lacks standing to file a citizen enforcement suit against the Defendant, (b) the District Court lacks subject matter jurisdiction because all violations are wholly past, (c) the District Court lacks subject matter jurisdiction due to prior state action, and (d) the Defendant did not violate the CWA. T.R. 11.

On September 14, 2012, the United States Court of Appeals for the Twelfth Circuit granted NUWF and NUDEP's notices of appeal, designating NUWF as the appellant, NUDEP as the Intervenor-Appellant, and Bowman as the Appellee. T.R. 1-2.

STANDARD OF REVIEW

The standard of review for summary judgement is *de novo*. Fed. R. Civ. P. 56; *Louisiana Envtl. Action Network v. City of Baton Rouge*, 677 F.3d 737, 744 (5th Cir. 2012); *Ctr. for Biological Diversity v. Marina Point Dev. Co.*, 560 F.3d 903, 909 (9th Cir. 2008); *Becerra v. Dalton,* 94 F.3d 145, 148 (4th Cir. 1996); *Sylvia Dev. Corp. v. Calvert Cnty.,* 48 F.3rd 810, 817 (4th Cir. 1995).

ISSUES PRESENTED FOR REVIEW

I. Whether NUWF has standing to sue the Defendant for violating the CWA.

II. Whether there is a continuing or ongoing violation as required by § 505(a) of the CWA for subject matter jurisdiction.

III. Whether the state failed to diligently prosecute the Defendant for violating the CWA.

IV. Whether there is a violation of the CWA.

SUMMARY OF ARGUMENT

Four issues are presented upon appeal, each discussed in the applicable section below.

The first issue before the Court of Appeals for the Twelfth Circuit is whether NUWF has standing to sue the Defendant pursuant to § 505 of the CWA. 33 U.S.C. § 1365 (2010). NUWF has standing to sue because the plaintiff suffered an injury in fact that is fairly traceable to the defendant's violation, and the injury would be redressed by the court applying remedies available at law.

The second issue is whether the District Court lacks subject matter jurisdiction for mootness because all violations are wholly past. The Defendant's violation of the CWA was ongoing under the *Laidlaw* standard. The Defendant cannot meet the heavy burden of sustaining his motion for summary judgment by proving that the wrongful behavior could not be reasonably expected to recur because he continued clearing the wetland habitat after he was put on notice by both NUWF and NUDEP that he was in violation of the law.

The third issue is whether the District Court lacks subject matter jurisdiction due to prior state action. The Defendant cannot sustain his motion for summary judgement because NUDEP did not diligently prosecute the Defendant by failing to impose an administrative penalty.

The final issue on appeal is whether there is a violation of the CWA. The Defendant violated the CWA by discharging dredge and fill material, an addition, from a point source into the waters of the United States without a permit.

For the foregoing reasons, the District Court's granting of summary judgment should be reversed on all four issues.

ARGUMENT

I. The District Court erred in granting Defendant's motion for summary judgment that NUWF lacks standing to file a citizen suit against Defendant.

The Court of Appeals for the Twelfth Circuit should reverse the District Court's ruling, pursuant to the Defendant's motion for summary judgment, that NUWF lacks standing to sue the Defendant under 33 U.S.C. § 1365 (2010), the citizen suit provision of **§** 505 of the CWA. T.R. 11. The standard of review for summary judgment is *de novo*. Fed. R. Civ. P. 56; *infra* at 3.

Congress created an explicit private right of action against violators of the CWA. 33 U.S.C. § 1365 (2010). Any suit brought in federal court must meet the "case or controversy" requirements of Article III of the U.S. Constitution. U.S. CONST. art. III. The District Court applies an outdated standard to Defendant's challenge of NUWF's standing, citing only *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992), and *Sierra Club v. Morton*, 405 U.S. 727 (1972). T.R. 6. Scrutiny of standing in environmental suits increased after *Lujan*, with most challenges to standing citing *Lujan* in "talismanic fashion." Charles Caldart & Josh Kratka, Trends in Citizen Enforcement Suits Under the CWA, SN033 ALI-ABA 139, 143 (Oct. 25-26, 2007). "[M]ore recently, defendants' prospects for mounting successful standing challenges were dealt a

significant blow by the Supreme Court's rejection of several spirited Article III challenges to a CWA citizen suit in [*Laidlaw*].” *Id.*

In *Lujan*, the Court accepted Scalia’s narrow reading of Article III to trump legislation specifically granting standing in environmental citizen suits. *Lujan*, 504 U.S. at 555. Moreover, in *Lujan*, the expansive citizen suit provision of the Endangered Species Act (“ESA”) was held unconstitutional because it granted a broader basis of standing than Article III. *Lujan*, 504 U.S. at 572; *see also* 16 U.S.C. § 1540(g)(1)(A) (1994) (“[A]ny person may commence a civil suit on his own behalf (A) to enjoin any person, including the United States and any other governmental instrumentality or agency . . . who is alleged to be in violation of any provision of this chapter.”). *Laidlaw* explicitly repudiated Scalia’s view on Article III standing in environmental citizen suits, effectively overruling the *Lujan*’s standing.. *Laidlaw*, 528 U.S. at 181. “Congress has found that civil penalties . . . deter future violations, [which] warrants judicial attention and respect.” *Laidlaw*, 528 U.S. at 185.

There are three requirements for bringing a citizen suit under the CWA: (1) the plaintiff suffered an “injury in fact—an invasion of a legally protected interest which is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical”; (2) that the injury is “fairly . . . trace[able] to the challenged action”; and (3) that it is “likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision.” *Lujan*, 504 U.S. at 560-61. These elements were defined by *Sierra Club v. Morton*, 405 U.S. 727 (1972). *See, e.g.,* U.S. CONST. art. 3, § 2; *United States v. Students Challenging Regulatory Agency Procedures (SCRAP)*, 412 U.S. 669 (1973); *Granite State Outdoor Adver., Inc. v. City of Clearwater*, 351 F.3d 1112 (11th Cir. 2003); *Defenders of Wildlife v. Ballard*, 73 F. Supp. 2d 1094 (D. Ariz. 1999).

Organizations have standing on behalf of an individual member if that member has standing, the interest pursued is consistent with the group’s purpose, and the person’s membership is not necessary to the action. *Hunt v. Wash. Apple Adver. Comm'n*, 432 U.S. 333, 343 (1977); *Envtl. Prot. Info. Ctr, Inc. v. Pac. Lumber Co.*, 67 F. Supp. 2d 1090 (N.D. Cal.

1999). *But c.f. Solid Waste Agency v. United States Army Corps of Eng'rs*, 163 F.R.D. 268 (N.D. Ill. 1995). If one plaintiff has standing, it is unnecessary to consider whether other parties have standing. *Watt v. Energy Action Educ. Found.*, 454 U.S. 151 (1981).

Scalia's dissent in *Laidlaw* succinctly states the scope of current standing in environmental suits. "If there are permit violations, and a member of the plaintiff environmental organization lives near the offending plant, it would be difficult not to satisfy today's lenient standard." *Laidlaw*, 528 U.S. at 201 (Scalia, J., dissenting). Until *Laidlaw* and under Scalia's inexorable pen, environmental litigants lost every major case on standing, and in the process the Court significantly "ratcheted up" the standing requirements for environmental advocates. John D. Echeverria, *Critiquing Laidlaw: Congressional Power to Confer Standing and the Irrelevance of Mootness Doctrine to Civil Penalties*, 11 DUKE ENVTL. L. & POL'Y F. 287, 293 (2001) (*citing Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83 (1998) (denying citizen suit standing to environmental organization), *Lujan*, 504 U.S. 555 (1992) (denying standing to environmental organization, effectively declaring ESA citizen-suit provision unconstitutional), *Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871 (1990) (similar)). At the same time, the Court liberalized standing requirements for regulated entities complaining about excessive environmental regulation. Echeverria, at 293 (*citing Bennett v. Spear*, 520 U.S. 154 (1997) (upholding standing of ranchers to challenge proposed modifications of a water project to comply with the ESA)).

In *Federal Election Commission v. Akins*, 524 U.S. 11 (1998), the Court upheld the standing of a non-profit organization to sue the FEC pursuant to a citizen-suit provision for improperly failing to categorize a group as a "political" organization, rejecting the proposition "that Congress lacks the constitutional power to authorize federal courts to adjudicate the lawsuit." *Akins*, 524 U.S. at 20. *Akins* supports recognition of Congress's power to confer standing beyond Article III. *Id*.

A. Injury in Fact

Proof of use or enjoyment of a particular resource that is damaged or threatened by a particular activity is sufficient to establish injury in fact. Injury in fact suffered by individuals may be brought on their behalf by organizations representing them. *Sierra Club*, 405 U.S. at 757; *Warth v. Seldin*, 422 U.S. 490, 498 (1975). Injuries are not limited to economic or physical damages, but encompass aesthetic, recreational, and other non-traditionally protected interests.

In *Laidlaw*, the Supreme Court rejected the argument that a citizen suit plaintiff could not establish injury from the defendant's unlawful discharges of mercury to a river, when the district court had found that there had been "no demonstrated proof of harm to the environment" from those discharges because the "relevant showing for purposes of Article III standing . . . is not injury to the environment but injury to the plaintiff." *Laidlaw*, 528 U.S. at 181.

> "[W]e see nothing 'improbable about the proposition that a company's continuous and pervasive illegal discharges of pollutants into a river would cause nearby residents to curtail their recreational use of that waterway and would subject them to other economic and aesthetic harms. The proposition is entirely reasonable, the district court found it was true in this case, and that is enough for injury in fact."

Id. at 184-85.

Injury in fact is established when an action by the defendant "has interfered with [plaintiff's] enjoyment of [a] natural resource." *Pub. Interest Research Grp. of N.J. v. Powell Duffryn Terminals, Inc.*, 913 F.2d 64, 71 (3d Cir. 1990), *cert. denied*, 498 U.S. 1109 (1991). *See also, Sierra Club v. Simkins Indus., Inc.*, 847 F.2d 1109, 1113 (4th Cir. 1989) (injury in fact established when plaintiff's members recreate on river and have an "interest in protecting the environmental integrity of the [waterway] and curtailing any ongoing unlawful discharges into its waters.").

A plaintiff would need to demonstrate that he either: (1) makes some use of the body in question in an area near or otherwise affected by the activity sought to be restrained, or (2) *would* use the body of water but for the restraint. The causal chain may be lengthy and tenuous. *See, e.g., PIRGIM Pub. Interest Lobby v. Dow Chemical Co*., 44 E.R.C. 1300, 1302 (E.D. Mich. 1996) ("excess phosphorus in Saginaw Bay causes the accumulation of organic debris along the shoreline").

The Supreme Court ruled, contrary to *Lujan*, that the plaintiff was not required to demonstrate that the defendant's illegal pollution produced a demonstrable harm to the environment and that this harm in turn adversely affected the plaintiff. *Laidlaw*, 528 U.S. at 169. *Lujan* would "raise the standing hurdle higher than the necessary showing for success on the merits in an action alleging noncompliance with [a CWA] permit." *Id*.

While the Court did not overturn its previous rulings on actual injury, it essentially explained them away as narrow cases involving rare and extreme circumstances. The *Laidlaw* Court described *Lujan* as containing "general averments" and "conclusory allegations" stating only that "one of [the organization's] members uses unspecified portions of an immense tract of territory, on some portions of which mining activity has occurred or probably will occur by virtue of the governmental action." *Laidlaw*, 528 U.S. at 183 (*quoting Lujan v. National Wildlife Federation*, 497 U.S. 871, 888-89 (1990)).

> "In contrast, the affidavits and testimony presented by FOE in this case assert that Laidlaw's discharge, and the affiant members' reasonable concerns about the effects of these discharges, directly affected those affiants' recreational, aesthetic, and economic interests. . . . Nor could the plaintiffs' allegations "be equated with the speculative 'some day' intentions to visit endangered species halfway around the world that we held insufficient to show injury in fact in Defenders of Wildlife."

Laidlaw, 528 U.S. at 184 (*quoting Lujan*, 504 U.S. at 564).

B. Fairly Traceable and Redressable

Injury in fact must be fairly traceable to the action challenged and redressable by the relief sought. *Lujan*, 504 U.S. at 560-61; *Sierra Club*, 405 U.S. at 727; *see also Arlington Heights v. Metropolitan Hous. Dev. Corp.*, 429 U.S. 252, 261 (1977); *Simon v. E. Ky. Welfare Rights Org*., 426 U.S. 26, 41-46 (1976).

> "In Clean Water Act enforcement suits, defendants may argue that the plaintiff's injury is not "fairly traceable" to the defendant's pollution because its violations contribute only a small portion of the overall pollutant loading to the body of water in question, and therefore cannot be said to have caused the plaintiff's injury. A corollary argument is that the plaintiff's injury cannot possibly be "redressed" by the lawsuit because the waterway will remain polluted regardless of the extent of the relief afforded against the defendant. Arguments of this nature have been uniformly rejected by the courts."

Caldart & Kratka, at 145.

To meet the fairly traceable requirement, plaintiffs need show only that the defendant's violations contributed to their injury. *E.g., Powell Duffryn*, 913 F.2d at 72 (plaintiffs need not show "that defendant's effluent . . . caused the precise harm suffered by the plaintiffs"); *Sierra Club v. Cedar Point Oil*, 73 F.3d 546, 558 (5th Cir. 1996) (similar); *Natural Resources Def. Council, Inc. v. Watkins*, 954 F.2d 974, 980 (4th Cir. 1992) ("plaintiffs need not show that . . . the plaintiff would enjoy undisturbed use of a resource").

Under the Third Circuit's widely adopted *Powell Duffryn* standard, an injury is fairly traceable to a defendant's discharge when the defendant has (a) violated the CWA, (b) affecting a waterway in which the plaintiffs have an interest that is or may be adversely affected, and (c) this causes or contributes to the kinds of injuries alleged by the plaintiffs. *Powell Duffryn*, 913 F.2d at 72. Enforcement need not eliminate pollution to redress plaintiff's injury. *Id.* at 73; *Sierra Club v. Cedar Point*, 73 F.3d at 556; *Sierra Club v. Simkins*, 847 F.2d at 1113.

Availability of civil penalties payable to the federal treasury are a form of redressability. *Laidlaw*, 528 U.S. at 192-93. *Laidlaw* held that civil penalties provide redress because, at a

minimum, in the context of a suit alleging ongoing or threatened pollution, the imposition of civil penalties deters illegal conduct and therefore helps redress the injury about which the plaintiff is complaining. *Laidlaw*, at 169. The holding in *Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83 (1998), the Court explained in *Laidlaw*, only limits standing when the plaintiff is complaining about "wholly past" violations. *Laidlaw*, 528 U.S. at 169.

C. Analysis

NUWF has standing to sue the Defendant because several of its individual members have standing, and the interest pursued is in line with NUWF's purpose. NUWF is a non-profit organization whose purpose is to protect the habitats of fish and other wildlife within the state. T.R. 4. The Defendant cleared vegetation from and filled in, effectively destroying, a wetland portion of the property he owns. *Id.* The Defendant owns 1,000 acres of wetlands along a 650 foot stretch of the Muddy River. T.R. 3. The Defendant destroyed wetlands for farming activities, leaving only a 150 foot wide swathe. *Id.* at 4. Because wetlands serve valuable functions of maintaining the integrity of rivers and are important, threatened habitats for wildlife, the current action is in line with NUWF's purpose. *Id.* at 6. Between *Lujan* and *Laidlaw*, a narrow application of Article III standing inhibited citizen suits, contrary to Congressional intent; however, *Laidlaw* explicitly recognized that Congress could create a private right of action that is broader than Article III standing. Congress explicitly created such a private right of action in § 505 of the CWA. 33 U.S.C. § 1365 (2010).

NUWF's members have standing to sue because they can show the Defendant's actions in destroying the wetland in violation of the CWA have caused an injury in fact, which is fairly traceable to the Defendant's actions, and that the injury is redressable by remedies available to them at law. NUWF submitted three affidavits of current members: Dottie Milford, Zeke Norton, and Effie Lawless. T.R. at 6.

Injuries in fact include economic, physical, recreational, and other traditionally non-protected injuries. The District Court recognized that an injury may be aesthetic rather than economic. *Id.* However, proof of the use or enjoyment of a particular resource, or that the plaintiff's *would* use the particular resource, that is damaged or threatened by the defendant's action is enough to establish injury in fact. All three affiants express that they use the Muddy River and its banks for recreational boating, fishing, and picknicking. T.R. at 6. Because wetlands serve a valuable function in maintaining the integrity of river systems by absorbing sediments and pollutants, and serving as a buffer to flooding, the affiants' use and enjoyment of the river is sufficiently threatened to support an injury in fact under *Laidlaw*. The loss of the wetlands may physically threaten the river by loss of the flood buffer and an increase of the flow of sediments and pollutants flowing into the riffer, affecting the integrity of the entire ecosystem. Aesthetically, the Muddy River "looks" more polluted than before the Defendant destroyed the wetland habitat. *Id.* Affiants fear that NUDEP's deal will allow other farmers within the community to clear and drain adjacent wetlands with impunity. *Id.* Only the deterrence of civil penalties available under the CWA will sufficiently protect the plaintiff's use and enjoyment of a natural resource from actual harm. Under NUDEP's agreement, the Defendant would not be able to clear more wetlands and would grant a conservation easement for the 150 foot swathe left unmolested, plus an additional 75 foot buffer zone; however, NUDEP did not include the $ 125,000 penalty. *Id.*

The District Court argues that the "only direct injury is that one of NUWF's members can no longer illegally use the cleared area for frogging." *Id.* However, injury in fact is not limited to direct injury, but may encompass any threatened injury to the use and enjoyment of a resource, aesthetically, physically, economically, or others. The District Court finds that the "remaining injuries are speculative." *Id.* As the affiants note, they cannot see a difference in the land from the river or its banks, they are aware of the differences and feel a loss from the destruction of the wetlands, fearing the Muddy is more polluted as a result and will be far more polluted if other

adjacent wetlands are cleared and drained for agricultural uses." *Id.* This is enough to escape summary judgment under *Laidlaw*.

The injury in fact to the Plaintiff is fairly traceable to the Defendant's destruction of the wetlands along the Muddy River, because it contributes to the loss of integrity of the river. It also meets the *Powell Duffryn* standard because the Defendant violated the CWA by clearing the wetland, which threatens to affect the plaintiff's use and enjoyment of the Muddy River and its banks, and contributes to the kinds of injuries in fact alleged by the plaintiff organization's members. The injury in fact is redressable because, as the Supreme Court held in *Laidlaw*, "Congress has found that civil penalties . . . deter future violations, [which] warrants judicial attention and respect." *Laidlaw*, 528 U.S. at 185.

In conclusion, the District Court erred in granting the defendant's motion for summary judgment, that NUWF lacks standing to sue the Defendant under the citizen suit provision of the CWA. NUWF has standing to file a citizen suit against the Defendant for destroying wetlands in violation of the CWA, and to seek the legal remedy of applicable civil penalties authorized by statute.

II. The District Court erred in granting the Defendant's motion for summary judgment, holding that there is no continuing or ongoing violation as required by § 505(a) of the CWA.

The Court of Appeals for the Twelfth Circuit should reverse the District Court's ruling, pursuant to the Defendant's motion for summary judgment, that there is no continuing or ongoing violation as required by § 505 of the CWA. The CWA authorizes suits "against any person . . . who is alleged to be in violation." 33 U.S.C. § 1365(a)(1). The standard of review for summary judgment is *de novo*. Fed. R. Civ. P. 56; *infra* at 3.

The Fourth Circuit held that citizen plaintiffs may establish an ongoing violation by either proving violations that occurred on or after the date the complaint was filed, or by adducing evidence from which a reasonable trier of fact could find a continued 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). The *Gwaltney* Test "for determining ongoing violation has been adopted by all of the federal courts that have addressed the issue, including the Third, Fifth, Sixth, Ninth, and Eleventh Circuits. Caldart & Kratka, at 147 (*citing Gwaltney,* 890 F.2d at 698); *see also Natural Res. Def. Council, Inc. v. Texaco Ref. and Mktg., Inc.,* 2 F.3d 493, 499 (3d Cir. 1993).

The Supreme Court also noted in Gwaltney that the citizen plaintiff's case will become moot only when the defendant is able to meet the "heavy burden" of "demonstrat[ing] that it is 'absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur."' *Gwaltney*, 484 U.S. at 66 (citation omitted). Therefore, when the sufficiency of the defendant's post-complaint remedial efforts remain an issue for trial, mootness will not be a concern.

In *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC)*, 149 F.3d 303 (4th Cir. 1998), the Fourth Circuit held that a CWA citizen suit had become moot after the trial court declined to issue injunctive relief, even though the court also imposed a civil penalty. The Fourth Circuit held that, as a matter of law, civil penalties payable to the federal treasury do not "redress" a citizen plaintiff's injuries for purposes of an Article III mootness inquiry. *Laidlaw*, 149 F.3d 303, at 306 (*citing Steel Co.,* 523 U.S. at 106-07). The Supreme Court reversed the Fourth Circuit in a seven-to-two decision. *Laidlaw*, at 167. The Court affirmed the continuing validity of the mootness discussion set forth in Gwaltney, noting that "[t]he 'heavy burden of persuading' the court that the challenged conduct cannot reasonably be expected to start up again lies with the party asserting mootness." *Laidlaw*, 528 U.S. at 189.

While *Gwaltney* suggests that any citizen suit would become moot once it is clear that illegal conduct will not recur, "every appellate court that addressed the issue following Gwaltney

concluded either that the Court's language could not properly be read as addressing civil penalty claims . . . or that it was simply dictum." Echeverria, at 305. As the Supreme Court said in *Laidlaw*, "We granted certiorari, to resolve the inconsistency between the Fourth Circuit's decision in this case and the decisions of several other Courts of Appeals, which have held that a defendant's compliance with its permit after the commencement of litigation does not moot claims for civil penalties under the Act." *Laidlaw*, 528 U.S. at 179-80 (citations omitted).

In conclusion, the Defendant's violation of the CWA was ongoing on or after the date the complaint was filed. The Defendant is not able to meet the heavy burden of sustaining his motion for summary judgment by proving that the wrongful behavior could not be reasonably expected to recur because he continued his clearing activity after he was informed by both NUWF and NUDEP that he was in violation of the law. On June 15, 2012, the Defendant began clearing the wetland habitat in violation of the CWA. T.R. 4. The Defendant did not complete his clearing activity until July 15, 2012; however, on July 1, 2012 NUWF sent the Defendant a notice of intent to file suit against him under the CWA and a short time later, NUDEP informed the Defendant he was in violation of federal law. T.R. 4. It would defeat the intent of *Laidlaw* to hold that once a defendant in violation of the CWA is informed by an environmental organization that they intend to file a citizen's suit against him, and that he is in violation of federal law by a state agency, he is allowed to render their complaints moot because he hurries up and finishes his illegal conduct. The actual harm was ongoing when NUWF's complaint was filed on August 30, 2012, because the Defendant noted that the wetland was not sufficiently drained for him to plant winter wheat until September 2012.

III. This court has subject matter jurisdiction because the state did not diligently prosecute the Defendant due to the state's failure to exercise its authorized power to its full extent.

The purpose of citizen enforcement suits under the CWA is to "both goad the responsible agencies to more vigorous enforcement of the anti-pollution standards and if the agencies remained inert, to provide an alternative enforcement mechanism." *Gwaltney of Smithfield v. Chesapeake Bay Found*, 484 U.S. 49, 60 (1987); *see also Student Pub. Interest Research Grp. of N.J., Inc. v. Fritzcsche, Dodge & Olcott, Inc.*, 759 F.2d 1131, 1136 (3d Cir. 1985) (citing *Baughman v. Bradford Coal Co.*, 592 F.2d 215, 218 (3d Cir. 1979)). Citizen suits enable "private parties to assist in enforcement efforts where federal and state authorities appear unwilling to act." *Water Quality Prot. Coal. v. Municipality of Arecibo*, 858 F. Supp. 2d 203, 211 (D.P.R. 2012). The standard of review for summary judgment is *de novo*. Fed. R. Civ. P. 56., *infra* at 3.

Any citizen may initiate an enforcement suit if the State has not commenced, or is not diligently prosecuting, a civil or criminal action. 33 U.S.C. § 1365 (b)(1)(B) (2010); *Friends of Milwaukee's Rivers and Lake Mich. Fed'n v. Milwaukee Metro. Sewerage District*, 382 F.3d 743, 751-52 (7th Cir. 2004); *Student Pub. Interest Research Grp. of N.J., Inc. v. Georgia-Pacific Corp.*, 615 F. Supp. 1419, 1427 (D.N.J. 1985). A plaintiff may demonstrate that there is a lack of diligent prosecution when an agency cannot demonstrate that it has the "power to accord relief which is the substantial equivalent to that available to the [Environmental Protection Agency] ("EPA") in federal courts." *Id.* at 219. Evidence that an agency has a poor enforcement record may be dispositive and indicate a lack of diligent effort. *Gardeski v. Colonial Sand & Stone Co.*, 501 F. Supp. 1159, 1164 (S.D.N.Y. 1980). In addition, "the pendency of an action in the state court is no bar to proceedings concerning the same matter in the Federal court having jurisdiction." *Ohio Valley Envtl. Coal., Inc. v. Coal-Mac, Inc.*, 775 F. Supp. 2d 900, 916 (S. D. W.Va. 2011). In *Georgia-Pacific Corp.*, the lower court entered a consent judgment which was

deemed not to be an actual prosecution of an action in a court against a defendant by a federal agency. 615 F. Supp. at 1427. The court held that the agency had not taken administrative action with respect to defendant, indicating of a lack of due diligence. *Id.* In *Municipality of Aercibo*, the EPA demonstrated a lack of diligence when the municipality had not come forward with any evidence regarding its compliance with a court order. *Municiplaity of Aercibo*, 858 F. Supp. 2d at 212.

"Section 505 (b)(1)(B) does not require government prosecution to be far-reaching or zealous." *Karr v. Hefner*, 475 F.3d 1192, 1197 (10th Cir. 2007). Deferential treatment should be given to the agency's expertise, and § 505 (b)(1)(B) should be interpreted so as not to undermine the government's ability to reach voluntary settlements with defendants. *Id.* at 1198. In *Weinberger v. Romero-Barcelo*, the Supreme Court held that EPA negotiation into a consent decree under the Federal Water Control Pollution Act that provided the violator with prospective schedule compliance does not preclude establishing a lack of diligent prosecution. *Romero-Barcelo*, 456 U.S. at 318. Likewise, in *Connecticut Fund for Env't v. L & W Indus., Inc.*, the district court held that a citizen suit was barred because the consent judgment at the administrative agency level was sufficient to constitute "diligent prosecution." *L & W Indus.*, 631 F. Supp. at 1291 (D. Conn. 1986).

NUWF has established that it has a right to pursue its citizen suit under § 1365 (b)(1)(B). NUDEP issued a consent decree on August 1, 2011, which provided for several actions that would cease against the wetlands by the Defendant, but the state failed to issue an administrative penalty of up to $125,000, as allowed by state statutes. T.R. 4. Similarly, in *Georgia-Pacific Corp.*, the court determined that the entry of a consent decree and ultimately a failure of a penalty, did not classify as administrative action, and was not supportive of "diligent prosecution." *Georgia-Pacific Corp.*, 615 F. Supp. at 1427. In *Bradford Coal Co., Inc.*, an agency's failure to exercise power to provide relief, which is substantially equivalent to that available to the EPA in federal courts exhibited a lack of due diligence. *Bradford Coal Co.,* 592

F.2d at 218. The state's failure to impose an administrative penalty of up to $125,000 against the Defendant indicates that NUDEP has not demonstrated a diligent prosecutorial effort. T.R. 4.

The Defendant's failure to take action to abide by the consent decree demonstrates that there was a lack of due diligence by the state agency to utilize its enforcement authority. The Defendant has not demonstrated that he complied with the consent decree or take any steps to remove the dredge and fill. In *Municipality of Arecibo*, the municipality did not produce any evidence to indicate that there was a compliance with the decree despite an explicit decree by the EPA. *Municipality of Arecibo*, 858 F. Supp. 2d at 212.

In sum, this court has subject matter jurisdiction despite prior state action because there was a lack of diligent prosecution by NUDEP. Furthermore, the state did not utilize the full expression of its administrative power. In addition, the Defendant has not produced evidence to indicate that he was in compliance with the order decree, which is indicative of a lack of due diligence by NUDEP.

IV. The lower court erred in granting defendant's motion for summary judgment because defendant's land clearing operations clearly violated the CWA.

The CWA forbids the discharge of pollutants except in accordance with a permit issued under §§ 402 or 404 of the CWA. *See* 33 U.S.C. § 1311(a) (2010). Section 402 authorizes the United States EPA to regulate the discharge of pollutants. 33 U.S.C. § 1342(a) (2010). The CWA defines "discharge of a pollutant" to mean "any addition of any pollutant to navigable waters from a point source." 33 U.S.C. § 1362(a) (2010). Section 404 of the CWA, devises a separate regulatory system under which the United States Army Corps of Engineers (the "Corps") is authorized to regulate "the discharge of dredged or fill material into the navigable waters . . . " 33 U.S.C. § 1344 (2010). The interpretation of a statute presents a legal question,

courts therefore subject that interpretation to *de novo* review. *See United States v. Gifford,* 17 F.3d 462, 472 (1st Cir.1994); Fed. R. Civ. P. 56; *infra* at 3..

The lower court should have denied Defendant's motion for summary judgment because the Defendant's land clearing operations clearly constituted a discharge (addition) of a pollutant from a point source into the waters of the United States without a permit. Both the Defendant and NUDEP concede that the material moved about the property included pollutants, the bulldozers were point sources, and the Defendant's former woods were wetlands and, therefore, are waters of the United States for purposes of the CWA. T.R. at 8-9. The final element, addition, is also clearly satisfied because: (1) Both EPA's "outside world" definition of "addition" and its interpretation of addition in the preamble to the Water Transfer Rule do not merit deference in § 404 cases; (2) Defendant's land clearing operations constituted an addition of dredged materials; and (3) Defendant's land clearing operations constituted an addition of fill material.

A. The lower court erred in refusing to grant the motion to dismiss because both EPA's "outside world" interpretation of "addition" and its interpretation of addition in the preamble to the water transfer rule do not merit deference in § 404 cases.

Although EPA has never defined the term "addition" either in the CWA or through regulation, it has argued that "in order for addition of a pollutant from a point source to occur, the point source must *introduce* the pollutant into navigable water from the outside world." *Nat'l Wildlife Fed'n v. Gorsuch*, 693 F.2d 156, 165. *See also, Nat'l Wildlife Fed'n v. Consumers Power Co.*, 862 F.2d 580, 586 (6th Cir. 1988). EPA has construed the term "addition" not to include transfers of water from one body of water to another in accordance with its "unitary navigable waters" theory. National Pollutant Discharge Elimination System ("NPDES") Water Transfer Rule, 73 Fed. Reg. 33,697 (Jul. 29, 2008) (codified at 40 C.F.R. pt. 122 (2012)). In

reference to the amount of deference the courts should show a regulatory agency, the Supreme Court stated:

> "If Congress has explicitly left a gap for the agency to fill, there is an express delegation of authority to the agency to elucidate a specific provision of the statute by regulation. Such legislative regulations are given controlling weight unless they are arbitrary**,** capricious, or manifestly contrary to the statute."

Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 844 (1984).

EPA's "outside world" construction of the term "addition" does not merit deference for two reasons. First, Congress did not explicitly leave a gap for EPA to fill in context of § 404 permits. Second, even if it were concluded that the outside world definition merited deference in the context of § 402 permits, it does not follow that it merits deference in the context of § 404 permits because, it is a well settled principle of statutory construction that the same words can have different meanings in different contexts. EPA's Water Transfer Rule has no bearing on "addition" in the context of § 404 for two reasons. The EPA intended that the Water Transfer Rule be limited solely to water transfers. Also, the Water Transfer Rule neither includes nor defines the term "addition."

In order for the EPA's "outside world" interpretation of "addition" to warrant *Chevron* Deference, there must be an express delegation of authority to the EPA. Section 402 of the CWA expressly delegates authority to the Administrator of the EPA to issue permits for the discharge of any pollutant. 33 U.S.C. § 1342(a)(1). Section 404, however, expressly delegates authority to the Secretary of the Army, acting through the Chief of Engineers, to issue permits for the discharge of dredged or fill material. 33 U.S.C. § 1344(a) (2010). Here, the Corps, not the EPA, clearly has authority over permits for the discharge of dredged or fill material. Therefore, because Congress left a gap in § 404 for the Corps and not the EPA to fill, EPA's outside world definition adopted as a litigation position in § 402 cases does not merit deference.

Even if Congress has granted the EPA authority to define terms found in § 404, it has yet to define "addition" outside the context of § 402. Although it is a general principle that the same term used in different sections of the same statute is presumed to mean the same thing, courts

have found identical words to have different meaning in different contexts within the same statute. The Supreme Court stated that:

> "since most words admit of different shades of meaning, susceptible of being expanded or abridged to conform to the sense in which they are used, the presumption readily yields to the controlling force of the circumstance that the words, though in the same act, are found in such dissimilar connections as to warrant the conclusion that they were employed in the different parts of the act with different intent."

Helvering v. Stockholms Enskilda Bank, 293 U.S. 84, 87(1934) (citing *Atl. Cleaners & Dyers v. United States*, 286 U.S. 427, 433 (1932). Under the *Helvering* analysis, the word "addition" is found in "such dissimilar connections" (within two different regulatory schemes) that it is reasonable to presume they were used with different intent.

EPA's definition of "addition" should be given no weight as defined in relation to the "unitary navigable waters theory." The unitary navigable waters theory relies on the dictionary definition of "addition." "The dictionary definition of "addition" is 'to join annex, or unite' so as to increase the overall number or amount of something." *Friends of Everglades v. S. Florida Water Mgmt. Dist.*, 570 F.3d 1210, 1217 (11th Cir. 2009) (citing Webster's Third New International Dictionary 24 (1993). The EPA relied on this theory when crafting its Water Transfer Rule. *See generally* National Pollutant Discharge Elimination System (NPDES) Water Transfers Rule, 73 Fed. Reg. 33,697. The EPA explicitly limits its definition of "addition" to water transfers. "This rule focuses exclusively on water transfers." National Pollutant Discharge Elimination System (NPDES) Water Transfers Rule, 73 Fed. Reg. 33,697. Here, EPA's narrow definition of the term "addition" must be limited to the context of water transfers.

The Supreme Court has held "administrative implementation of a particular statutory provision qualifies for *Chevron* deference when it appears that Congress delegated authority to the agency generally to make rules carrying the force of law, and that the agency interpretation claiming deference was promulgated in the exercise of that authority." *United States v. Mead Corp.*, 533 U.S. 218, 227 (2001). EPA's definition of "addition" vis–à–vis NPDES Water

Transfer rule does not merit deference because the word "addition" is neither defined nor appears in the final rule, rather it is discussed in the preamble. The final rule merely states that "The following discharges do not require NPDES permits: (i) Discharges from a water transfer. 40 C.F.R. § 122.3(i) (2012). Here, the discussion of the term "addition" in a preamble to a final rule does not rise to the level of an exercise of authority delegated by Congress.

In sum, the lower court erred in refusing to grant the motion to dismiss based on an improper interpretation of the term "addition." The Court is not required to defer to the EPA's interpretation because: (1) Congress did not explicitly delegate it authority under § 404; (2) the term "addition" as it is used in § 402 is susceptible to a different meaning than "addition" as it is used in § 404; (3) EPA's interpretation of "addition" in relation to the the Water Transfer Rule has limited applicability to water transfers; and (4) EPA's neither defined "addition" or used it in the actual Water Transfer Rule.

B. The lower court erred in refusing to grant the motion to dismiss because defendant's land clearing operations constituted an addition of dredged material.

Neither Congress nor the EPA has clearly defined "addition," however, the Corps has provided through regulation that it "includes redeposit of dredged material." 33 C.F.R. § 323.2(d)(1) (2012). The term includes "redeposit other than incidental fallback, of dredged material, including excavated material, into waters of the United States which is incidental to any activity, including mechanized landclearing, ditching, channelization, or other excavation." 33 C.F.R. § 323.2(d)(1)(iii) (2012). The D.C. Circuit stated that "redeposit occurs when material removed from the water is returned to it." *Nat'l Min. Ass'n v. U.S. Army Corps of Eng'rs.*, 145 F.3d 1399, 1401 (D.C. Cir. 1998). The Defendant's land clearing operations clearly amounted to a redeposit of dredged material and, therefore, an addition.

There is an "emerging consensus" among the Circuit Courts that the "redeposit of indigenous materials" qualifies as an "addition" where the redeposit is made into the waters of the United States. *United States v. Sinclair Oil Co.*, 767 F. Supp. 200, 204 (D. Mont. 1990). Indeed, nearly every circuit to consider the issue has concluded that the redeposit of dredged material constitutes an addition. *See Borden Ranch P'ship v. U.S. Army Corps of Eng'rs.*, 261 F.3d 810 (9th Cir. 2001) *aff'd,* 537 U.S. 99 (2002); *United States v. Deaton*, 209 F.3d 331, 335-36 (4th Cir. 2000); *Rybachek v. EPA*, 904 F.2d 1276, 1285 (9th Cir. 1990); *United States v. M.C.C. of Florida, Inc.*, 772 F.2d 1501, 1506 (11th Cir. 1985). In *Deaton*, the defendant dug a ditch through a wetland using a bulldozer. The excavated dirt was piled on either side of the ditch, a practice known as sidecasting. *Deaton*, 209 F.3d at 333. The Fourth Circuit concluded that sidecasting "constitutes the discharge of a pollutant under the CWA. *Id.* at 335. The Court rejected the defendant's argument that "no pollutant is discharged unless there is an 'introduction of new material into the area, or an increase in the amount of a type of material which is already present.'" *Id.* (citing *United States v. Wilson*, 133 F.3d 251 (4th Cir. 1997)). In rejecting this argument, the court distinguished between the addition of "material" and the addition of a "pollutant." The court reasoned that once earth and vegetation was removed from the wetland it became dredged spoil, a pollutant that to that point had not existed on defendant's property. *Deaton*, 209 F.3d at 335.

Here, there has clearly been a redeposit of dredged material. Just as in Deaton, Defendant used a bulldozer to dig a ditch to drain his field, a wetland, into the Muddy River. T.R. at 4. Soil, trees and other vegetation was displaced and deposited throughout the field. T.R. at 4. The bulldozer, a point source, converted soil and vegetation previously existing in Defendant's field from a beneficial filtering system into dredged spoil, a pollutant.

The Ninth Circuit reached a similar conclusion based on a similar set of facts in *Borden Ranch,* 261 F.3d 810. In *Borden Ranch* the defendant engaged in a practice known as "deep ripping" where metal prongs are dragged through the soil behind a tractor or bulldozer, tearing up soil behind it. *Borden Ranch*, 261 F.3d at 813. The Court rejected the defendant's argument

that "deep ripping cannot constitute the "addition" of a "pollutant" into wetlands, because it simply churns up soil that is already there, placing it back basically where it came from." *Borden Ranch,* 261 F.3d at 814. It reiterated "activities that destroy the ecology of a wetland are not immune from the CWA merely because they do not involve the introduction of material brought in from somewhere else. *Borden Ranch*, 261 F.3d at 814-15. The Ninth Circuit determined that despite the fact that no new material had been added, a "pollutant" had been added because "soil was wrenched up, moved around, and redeposited somewhere else." *Borden Ranch,* 261 F.3d at 815. Additionally, the Ninth Circuit cited a regulatory guidance letter issued by the Corps and the EPA that indicated that deep ripping required a permit under the CWA because it "destroy[s] the hydrological integrity of . . . wetlands." *Borden Ranch*, 261 F.3d at 813.

Just as in *Borden Ranch*, soil was moved from one location in the field to another. T.R. at 4. Additionally, Like in *Borden Ranch,* where the defendant destroyed the hydrological integrity of the wetlands, Defendant altered the hydrological characteristics of his field. T.R. at 4. Prior to Defendant's land clearing operations a protective layer of soil and vegetation existed which filtered out pollutants. Defendant's land clearing operations caused the destruction of the hydrological integrity of the wetland.

The D.C. Circuit interprets "addition" differently. In *Nat'l Min. Ass'n* the court stated "Regardless of any legal metamorphosis that may occur at the moment of dredging, we fail to see how there can be an addition of dredged material when there is no addition of material. *Nat'l Min. Ass'n*, 145 F.3d at 1404. In *Nat'l Min. Ass'n* plaintiffs challenged the *Tulloch* Rule, a regulation which prohibited dredging operations resulting in incidental fallback. *See Nat'l Min. Ass'n*, 145 F.3d 1399. The Court did, however, recognize that sidecasting has always been regulated under § 404. *See* 58 Fed. Reg. 45,008, 45,013 (Aug. 25, 1993) (codified at 33 C.F.R. Pts. 323 and 328). Furthermore the case before the Court is distinguishable from *Nat'l Min. Ass'n* because, here, the Defendant's land clearing operations result in much more than

"incidental fallback." Defendant's extensive land clearing operations resulted in the destruction of over ninety-nine percent of the wetland located on his property[2]. T.R. 3-4.

In sum, nearly every circuit to consider whether land alteration techniques similar to ones employed in the present case have found that the redeposit of dredged material constitutes an addition.

C. The lower court erred in refusing to grant the motion to dismiss because Defendant's land clearing operations constituted an addition of fill material.

The Army Corps of Engineers has defined the term "discharge of fill material" as "the addition of fill material into waters of the United States." 33 C.F.R. § 323.2(f) (2012). Where "fill material" is defined as "material placed in waters of the United States where the material has the effect of: (i) Replacing any portion of water of the United States." 33 C.F.R. § 323.2(e)(1) (2012). Courts have routinely found that where soil and vegetation are moved and redeposited within a wetland resulting in the leveling, that an addition has occurred. *See Avoyelles Sportsmen's League, Inc. v. Marsh*, 715 F.2d 897 (5th Cir. 1983). In Avoyelles, the defendant used bulldozers to cut timber and vegetation. The defendant then raked the trees into windrows, burned them and spread the ashes across the tract resulting in some leveling. *See Avoyelles*, 715 F.2d at 901. The court held that the landowners were discharging "fill material" into the wetlands because "the activities were designed to 'replace the aquatic area with dry land.'" *Avoyelles*, 715 F.2d at 924-25.

Here the facts are nearly analogous to the *Avoyelles* case. The Defendant used a bulldozer to knock down trees and level other vegetation and pushed the material into windrows and burned it, thus converting it to a "pollutant." T.R. at 4. The Defendant then pushed the ashes

[2] 150 ft x 650 ft = approximately 2.24 acres which is less than 1% of the initial wetland located on Defendant's property.

into trenches. T.R. 4. In addition, he went back and leveled the resulting field pushing soil from high ground to low. T.R. 4. The resulting area was dry land suitable for agriculture.

The Defendant clearly discharged fill material into a wetland. The act of pushing soil from the high ground to the low, resulting in a displacement of water is clearly an addition.

CONCLUSION

New Union Wildlife Federation respectfully prays the Court of Appeals for the Twelfth Circuit to reverse the lower court's decision to grant summary judgment on all counts. Under the CWA, the plaintiff has standing; the court has subject matter jurisdiction because violations are ongoing and the state did not diligently prosecute the Defendant; and the Defendant's land clearing operation clearly amounts to an addition.

Respectfully submitted,

_____
Team #47
Attorneys for the Appellant

CERTIFICATE OF SERVICE

I hereby certify that a true and exact copy of the foregoing has been forwarded by first class mail, postage paid, to _____, Attorney for the Appellee, and _____, Attorney for the Intervenor, on this the 9th day of April, 2012.

_____
NAME
Firm
B.P.R. No.