Team 5

C.A. No. 13-1246

In the United States Court of Appeals for the Twelfth Circuit

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NEW UNION WILDLIFE FEDERATION,

Plaintiff-Appellant

v.

NEW UNION DEPARTMENT OF ENVIRONMENTAL PROTECTION,

Intervenor-Appellant,

v.

JIM BOB BOWMAN,

Defendant-Appellee.

ON APPEAL FROM
THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW UNION

BRIEF FOR NEW UNION WILDLIFE FEDERATION

Plaintiff-Appellant

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JURISDICTIONAL STATEMENT

District courts have original jurisdiction pursuant to 28 U.S.C. § 1331 (2006) over all civil actions arising under the Constitution, laws, or treaties of the United States. This civil action involves claims arising under the United States Constitution and the Clean Water Act 33 U.S.C. §§ 1311(a), 1319(d), (g), 1342, 1344, 1365 (a)-(b) (2006), thereby conferring the district court with subject matter jurisdiction. On June 1, 2012, the district court granted defendant's motion for summary judgment; the order is final. Therefore, jurisdiction is proper in this court pursuant to 28 U.S.C. § 1291 (2006).

STATEMENT OF THE ISSUES

I. Whether NUWF has organizational standing to bring a § 505 citizen suit on behalf of its members when three such members submitted affidavits demonstrating that the defendant's placement of dredged and fill material into the wetland diminished their recreational use and enjoyment of the Muddy River.

II. Whether the placement of dredged and fill material into a wetland in violation of § 404 of the CWA, constitutes a continuing violation for purposes of subject matter jurisdiction as long as the pollutants remain in the Muddy River.

III. Whether an agency enforcement action that failed to bring a violator into compliance, failed to impose administrative penalties to punish and deter the violator, and failed to remove the defendant's economic benefit realized through non-compliance, constituted "diligent prosecution," of the CWA and thus barred NUWP's citizen suit.

IV. Whether the defendant's re-depositing of dredged and fill material that increased the pollutants in the wetland was an "addition," and therefore, a "discharge of a pollutant" subject to § 404 of the CWA.

STATEMENT OF THE CASE

On August 10, 2011, New Union Department of Environmental Protection (DEP) filed suit against Bowman (defendant) under § 505 of the Clean Water Act (CWA) seeking to enter as a consent decree the terms of an administrative order previously issued against the defendant. R. at 5. On August 30, 2011, New Union Wildlife Federation (NUWF) filed suit under § 505 of the

CWA against the defendant for violations of § 301(a) and § 404 of the CWA. R. at 5. NUWF sought civil penalties and an injunction against the defendant. R. at 5. NUWF filed a motion to intervene in DEP's suit, as well as a motion opposing the entry of DEP's proposed consent decree. R. at 5. On November 1, 2011, the district court consolidated the two actions. R. at 5.

All parties filed cross-motions for summary judgment. R. at 5. On June 1, 2012, the district court granted the defendant's motion for summary judgment on all counts, holding that: (1) NUWF lacked standing to bring suit against the defendant; (2) that there is no continuing violation as required for subject matter jurisdiction; (3) the court lacked subject matter jurisdiction because New Union diligently prosecuted the defendant; and, (4) that the defendant did not violate § 404 of the CWA. R. at 5. NUWF appeals the decision of the district court.

STATEMENT OF FACTS

Bob Bowman (defendant) owns one-thousand acres of wooded or previously wooded land adjacent to the Muddy River near the town of Mudflats in the State of New Union. R. at 3. All parties agree that the Muddy is a navigable water of the United States and that the defendant's former woods constitute wetlands. R. at 9. On June 15, 2011, the defendant commenced land clearing operations. He used bulldozers to knock down trees, level other vegetation, and push the trees and vegetation into windrows. R. at 4. The defendant then burned the windrows. R. at 4. Next, the defendant used a bulldozer to dig trenches and pushed the trees and leveled vegetation remains and ashes into them. R. at 4. He leveled the resulting field, again pushing soil from high portions of the field into the trenches and low lying portions of the field. R. at 4. Finally, he formed a wide ditch or swale that ran from the back of his property to the river in order to drain the field into the Muddy. R. at 4. This dredged and fill material remains in the wetlands. R. at 7.

NUWF is a not for profit corporation organized under the laws of New Union. R. at 4. Its purpose is to protect the fish and wildlife of the state by protecting their habitats, among other things. Three NUWF members, Dottie Milford, Zeke Norton, and Effie Lawless submitted affidavits that they use and enjoy the area around the Muddy for recreational purposes, on or near the defendant's property. R. at 6. They testified they are aware that wetlands serve valuable functions in maintaining the integrity of rivers. R. at 6. Although 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. R. at 6. Milford testified that the Muddy looked more polluted to her than it did prior to the defendant's activities. R. at 6. Moreover, Norton testified that he has frogged the area for years for recreational and subsistence purposes, and that as a result of the defendant's activities his success in finding frogs has significantly diminished. R. at 6.

Shortly after learning of the defendant's activities, NUWF sent a notice of its intent to sue the defendant under § 505 of the CWA to the defendant, EPA, and the State of New Union/DEP. R. at 4. The defendant does not contest the validity of the notice. R. at 4. DEP contacted the defendant shortly thereafter and sent him a notice informing him that he had violated both state and federal law by clearing the field. R. at 4. The defendant, although denying any wrongdoing, entered into a settlement agreement with DEP, under which he agreed not to clear more wetlands in the area. R. at 4. He also agreed to convey to DEP a conservation easement plus an additional 75 foot buffer zone between the wooded area and the new field; he agreed to construct and maintain a year-round wetland on the 75 foot buffer zone; and the easement allows public entry for appropriate, day-use-only, recreational purposes, requiring the defendant to keep the

easement area in its natural state, and forbidding him from developing it in any other way. R. at 4. DEP and the defendant incorporated their agreement into an administrative order issued by DEP to the defendant, to which he consented on August 1, 2011. A state statute grants DEP authority to issue such administrative orders, and although it authorizes DEP to include an administrative penalty of up to $125,000, DEP included no penalty in the order to the defendant. R. at 4. The order further did not require the defendant to remove the dredged and fill material from the wetland.

SUMMARY OF THE ARGUMENT

The district court erred in granting defendant's motion for summary judgment and denying NUWF's motion for summary judgment.

As a threshold issue, the district court incorrectly found that NUWF's members did not suffer an injury in fact that was fairly traceable to the defendants conduct. In so holding, the district court ignored the relaxed standing requirements articulated in *Laidlaw*. There, as long as environmental plaintiffs submit affidavits demonstrating that their recreational use and enjoyment of the area is diminished as a result of the defendant's conduct, the injury in fact element is satisfied. NUWF's members submitted affidavits that far surpass this standard, and therefore NUWF has Article III standing.

Second, the district court incorrectly found that no continuing violation exists and that therefore the court lacked subject matter jurisdiction. However, the weight of authority supports NUWF's contention that the continued presence of dredged and fill material constitutes a continuing violation until it is removed. A distinction must be made between § 402 violations, which become wholly past at the moment the defendant stops polluting, and § 404 violations, which continue to pollute until remedial measures are taken. The district court failed to make this

vital distinction. Moreover, in finding no continuing violation, the district court undermined the purpose of the CWA, to restore the Nation's waters.

Third, NUWF's citizen suit is not barred because DEP's prosecution was not "diligent." The CWA requires enforcement agencies to "diligently" prosecute violators to preclude a subsequent citizen suit. DEP's prosecution of the defendant consisted only of DEP's inadequate administrative order allowing the defendant to escape liability for 425 feet of property that will continue to violate the CWA. Additionally, DEP's order assessed no civil penalty in spite of the defendant's economic benefit gained from violating the CWA. DEP's order cannot constitute diligent prosecution because the order does not require compliance with the CWA, does not achieve the CWA's goals, and allows the defendant to profit economically from his continuing violations. Because the DEP's order does not amount to diligent prosecution, NUWF's citizen suit is not barred by prior state action.

Last, the defendant's re-deposit of dredged and fill material, which resulted in the "addition" of pollutants that were not previously in the wetland, was a violation of § 404 of the CWA. The CWA strictly prohibits "the discharge of any pollutant by any person," unless otherwise authorized by a permit. The CWA defines "discharge of a pollutant" to include "any addition of any pollutant to navigable waters from any point source," but the CWA does not expressly define "addition." When the terms "discharge" and "addition of a pollutant" are read in the context of the Act as a whole and its stated objectives, Congress unambiguously conveys that the re-deposit of dredged and fill material by the defendant was an "addition." This conclusion is bolstered by the CWA's legislative history. Therefore, because the congressional intent is clear, the court must give effect to Congress's intent by reversing the district court and holding the defendant violated § 404 of the CWA.

Even if the court finds that congressional intent is ambiguous, the EPA's interpretation of the term "addition" in the dredged and fill context is entitled to deference because it is based on a reasonable interpretation of the Act. The EPA's interpretation of "addition" in § 404 requires only that the pollutant be removed from its original location and re-deposited elsewhere in the navigable water. Here, the defendant removed trees and other vegetation from their original location in the wetland and re-deposited them elsewhere in the wetland. R. at 4. Therefore, the defendant's re-deposit was an "addition" according to the EPA's interpretation of the term, which is entitled to *Chevron* deference.

STANDARD OF REVIEW

This case involves an appeal from the district court's grant of summary judgment. Summary judgment is appropriate if "there is no genuine issue as to any material fact and . . . the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). Therefore, the issues before this Court are questions of law and should be reviewed de novo. *Pierce v. Underwood*, 487 U.S. 552, 557 (1988). Therefore, this Court should afford no deference to the opinions and conclusions of the lower court. *See id.*

ARGUMENT

I. NUWF Has Organizational Standing to Bring a Citizen Suit Under § 505 of the Clean Water Act.

The district court's decision to grant the defendant's motion for summary judgment should be reversed because NUWF had organizational standing. An organization has standing to bring suit on behalf of its members when: 1) one or more of the organization's members has Article III standing to sue in their own right; 2) the interests at stake are germane to the organization's purpose; and 3) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit. *Hunt v. Wash. State Apple Adver. Comm'n*,

432 U.S. 333, 343 (1977).

A. NUWF Satisfies the First Element of Organizational Standing Because at Least One Member of NUWF Has Article III Standing.

To prove that NUWF has organizational standing to bring a citizen suit under § 505 of the Clean Water Act (CWA), the organization must prove that at least one member of NUWF has Article III standing. *See Aransas Project v. Shaw*, 835 F. Supp. 2d 251, 265 (S.D. Tex. 2011). Standing is an essential requirement to federal litigation because Article III of the Constitution "restricts the federal courts to the adjudication of 'cases' and 'controversies'." *Friends of the Earth, Inc. v. Gaston Copper Recycling Corp.*, 204 F.3d 149, 153 (4th Cir. 2000). To demonstrate standing, a plaintiff must satisfy three elements: 1) an injury in fact; 2) that is fairly traceable to the alleged violations; and 3) that is redressable by a favorable decision. *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992). Furthermore, a plaintiff must support each element with specific facts via affidavits or other evidence." *Sierra Club v. Franklin Cnty. Power of Ill.,* 546 F.3d 918, 925 (7th Cir. 2008).

1. NUWF Meets the First Requirement of Article III Standing Because Three Members Have Suffered an Injury In Fact.

The first element of Article III Standing requires that at least one of NUWF's members has suffered an injury in fact. *See Defenders of Wildlife*, 504 U.S. at 560. NUWF members, Dottie Milford, Zeke Norton, and Effie Lawless, have suffered an injury in fact as a result of the defendant's re-deposit of dredged and fill material on the jurisdictional wetland. The purpose underlying the injury-in-fact requirement is to limit access to the courts to those "who have a direct stake in the outcome," as opposed to those who "would convert the judicial process into 'no more than a vehicle for the vindication of the value interests of concerned bystanders.'" *Valley Forge Christian Coll. v. Ams. United for Separation of Church & State, Inc.*, 454 U.S.

464, 473 (1982). In the case at bar, plaintiffs have a direct stake in the outcome because three NUWF members averred that they use the Muddy River for recreational purposes, and they are therefore affected by the defendant's continued violation of § 404 of the CWA.

a. NUWF's Affidavits Sufficiently Demonstrate NUWF's Members' Use and Enjoyment Interests of the Muddy Suffer as a Result of the Defendant's Actions, Which Proves Injury in Fact for Purposes of Article III Standing.

"Environmental plaintiffs adequately allege injury in fact when they aver that they use the affected area and are persons 'for whom the aesthetic and recreational values of the area will be lessened' by the challenged activity." *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs.*, 528 U.S. 167, 183 (2000) (quoting *Sierra Club v. Morton*, 405 U.S. 727, 735 (2011)). Courts have held that environmental plaintiffs who live and recreate in an area where environmental damage impairs their use of the affected area, have standing to challenge the polluting activity. *See Gaston*, 204 F.3d. at 149 (2000)(Plaintiff showed he had suffered injury in fact where he regularly used lake four miles downstream from the illegal discharge); *Ecological Rights Found. v. Pac. Lumber Co.*, 230 F.3d 1141 (9th Cir. 2000)(holding plaintiffs had standing where affiants claimed their concerns about pollution made them less fully enjoy their recreational use of the waters at issue); *United States v. Metro. St. Louis Sewer Dist.*, 883 F.2d 54, 56 (8th Cir. 1989)(Eighth Circuit found that a group had standing where members alleged they frequently visited, crossed, and observed the waters in question, and that at times used the water for recreational purposes); *Sierra Club, Lone Star Chapter v. Cedar Point Oil Co.*, 73 F.3d 546, 556 (5th Cir. 1996)(Fifth Circuit held that citizens' concern about water quality in Galveston Bay sufficed as injury in fact where two of the affiants lived near Galveston Bay and all of them used the bay for recreational activities).

In *Friends of the Earth v. Laidlaw*, the Supreme Court addressed the issue of whether

plaintiffs suffered an injury in fact for purposes of their citizen suit under § 505 of the CWA. 528 U.S. at 701. After commencement of the suit, the defendant moved for summary judgment, claiming that plaintiff, which was an organization, failed to allege an injury in fact, and therefore lacked Article III standing to bring suit. *Id*. In response to this motion the plaintiff-organization submitted affidavits from members demonstrating that they had been injured by defendant's pollution. *Id*. For example, one FOE member averred that he lived a half-mile from the defendant's facility; that he occasionally drove over the river, and that it looked and smelled polluted. *Id*. Also, the affidavit stated that a member would fish, camp, swim, and picnic in and near the river between three and 15 miles downstream from the facility, as he did when he was a teenager, but would not do so because he was concerned that the water was polluted by Laidlaw's discharges. *Id.* at 181-82. Another member of the plaintiff-organization averred that she picnicked, walked, bird-watched, and waded in and along the river because of the natural beauty of the area; that she no longer engaged in these activities in or near the river because she was concerned about harmful effects from discharged pollutants. *Id*. The Supreme Court found that these affidavits were sufficient to show injury in fact at the summary judgment level because the plaintiffs demonstrated that they "use the affected area and are persons for whom the aesthetic and recreational values of the area will be lessened by the challenged activity." *Id*. at 183.

Here, the affidavits by members of NUWF far surpass the threshold for establishing injury in fact at the summary judgment level established by *Laidlaw* and its progeny. In the present case, NUWF alleged and has presented uncontroverted deposition and affidavit testimony that its members use and enjoy the waters adjacent to the defendant's property. Three members averred that they use the area along the Muddy River for recreational boating and fishing, often picnicking on its banks, on or in the vicinity of the defendant's property. R. at 6.

The members further testified that they are aware the valuable function wetlands serve in maintaining the integrity of rivers. R. at 6. Although they cannot yet see a difference in the land from the river or its banks, they are cognizant of the differences and feel a loss from the destruction of the wetlands. R. at 6. Moreover, one member testified that the Muddy looks more polluted to her than it did prior to the defendant's activities. R. at 6.

The district court, in finding that the plaintiffs had not suffered injury, placed sufficient weight on the fact that Norton's alleged injury was that he could no longer go "frogging" on the defendant's property. R. at 6. The district court explained that this activity constituted trespass, and that "the inability to continue illegal activities cannot give rise to an injury to support standing." R. at 6. Although the district court correctly stated the law, Norton still suffered an injury in fact because his ability to frog in public areas along the Muddy has also been diminished by the defendant's activities. *See Cantrell v. City of Long Beach*, 241 F.3d 674, 680-81 (9th Cir. 2001)(holding that although birdwatchers had no legal right to enter the Naval Station, their desire to view the birds at the Naval Station from publicly accessible locations outside the station is an interest sufficient to confer standing). Therefore, although Norton did not have a legal right to "frog" on the defendant's property, his interest in frogging the surrounding public area is sufficient to support standing.

NUWF members live in the vicinity of the defendant's property, recreate near the Muddy River, and have suffered in their ability to use and recreate along the Muddy as a result of the defendant's activities. These injuries constitute more than the mere "general averments" and "conclusory allegations" found insufficient in *National Wildlife Fed'n*, 497 U.S. 871, 888 (1990). Moreover, NUWF's affidavits demonstrate that the defendant's pollution has caused injury to the plaintiffs that cannot be equated with the speculative "'some day' intentions" the

Supreme Court found insufficient to show injury in fact in *Defenders of Wildlife,* 504 U.S. at 564. Therefore, because NUWF has demonstrated that its members have a "direct stake" in the outcome of this case because of their actual use and enjoyment of the area near the Muddy River, the first element of standing is met.

b. Lack of Injury to the Environment Does Not Eliminate NUWF's Standing To Bring a Citizen Suit Under the CWA.

Lack of environmental injury does not eliminate NUWF's standing. In granting the defendant's motion for summary judgment, the district court improperly concluded that because the defendant's activities do not have a substantial negative impact on the environment, the plaintiffs have not suffered any injury for purposes of standing. However, this is a mischaracterization of current case law, and this court should reverse the district court's decision to grant defendant's motion for lack of environmental injury.

In *Laidlaw*, the Supreme Court addressed whether lack of environmental injury could give rise to standing. *Laidlaw*, 528 U.S. at 181. There, defendants moved for summary judgment arguing that plaintiff, an organization, did not have standing to sue because there was no evidence of environmental injury. *Id*. In support of this argument, Laidlaw relied on the district court's finding that there had been "no demonstrated proof of harm to the environment" from Laidlaw's mercury discharge violations. *Id*. However, the Supreme Court reversed the district court and held that the relevant showing for Article III standing "is not injury to the environment but injury to the plaintiff." *Id*. To insist that there be environmental injury as part of the standing inquiry "is to raise the standing hurdle higher than the necessary showing for success on the merits in an action alleging noncompliance with an NPDES permit." *Id*.

The current case is similar to *Laidlaw* in this regard. Although, as the DEP biologist testified, the wetland might be benefitted from the defendant's pollution, the relevant question is

not whether the environment has suffered injury. Rather, the pertinent inquiry is whether the members of NUWF have suffered injury and allege sufficient facts to render Article III standing. Here, the NUWF members averred facts showing that the defendant's polluting activities harmed their use and enjoyment of the Muddy. To impose a requirement that the environment suffer injury would erroneously heighten the injury in fact required by Article III. Therefore, this court should reverse the district court's decision because, although the environment possibly remains unharmed, the *plaintiffs* suffered an injury in fact.

2. NUWF Meets the Second Requirement of Article III Standing Because NUWF's Members' Injuries Are Traceable to the Defendant's § 404 Violation of the CWA.

The second element of Article III Standing requires that NUWF's members' injuries are fairly traceable to the actions of the defendant. *See Defenders of Wildlife*, 504 U.S. 555. NUWF's injuries are fairly traceable to the defendant's violation of the CWA because the defendant is the direct cause of NUWF's injuries. The fairly traceable requirement ensures that there is a genuine nexus between the plaintiff's injury and the defendant's conduct. *Defenders of Wildlife,* 504 U.S. at 560. In other words, the defendant's conduct must have some causal connection to the plaintiff's injury. "To establish standing to redress an environmental injury, plaintiffs need not show that a particular defendant is the only cause of their injury." *Natural Res. Def. Council, Inc. v. Watkins*, 954 F.2d 974, 980 (4th Cir. 1992). Instead, to meet the "fairly traceable" requirement*,* plaintiffs must merely show that a defendant discharges a pollutant that "causes or contributes to the kinds of injuries alleged by the plaintiffs." *Id*. Here, the record gives no indication that there are any other polluters in the vicinity of the defendant's property. Thus, viewing all facts in the light most favorable to the plaintiff when reviewing the district courts grant of summary judgment, it is reasonable to conclude that the defendant is the "but for" cause of NUWF's injuries. However, even if there are other polluters, traceability is satisfied because

the defendant's placement of fill material into the wetland contributed to NUWF's alleged injuries. It is the defendant's wetland destruction and placement of fill material that has caused NUWF's members to curtail their use and enjoyment of the river, and not the wrongful conduct of others who are not joined in this action. Therefore, NUWF's members' injuries are traceable to the defendant's actions.

3. NUWF's Meets the Third Requirement of Article III Standing Because NUWF's Members' Injuries Are Redressable by a Favorable Ruling.

The third element of Article III standing requires that member's injuries be redressable by a favorable ruling from the court. *See Defenders of Wildlife*, 504 U.S. 555 (1992). NUWF has been harmed by the defendant's illegal placement of fill and dredge material into the wetland without a permit. To remedy these injuries, NUWF sought civil penalties and an order requiring the defendant to remove the fill material and to restore the wetlands. R. at 5. Such penalties would redress NUWF's injuries discussed above. *See Laidlaw*, 528 U.S. at 155-86 (finding that even where plaintiffs failed to appeal denial of injunctive relief, which would have redressed their injuries, payment of civil penalties to Treasury are sufficient to meet redressability prong of standing analysis). Here, the payment of civil penalties have a deterrent effect; the penalties would redress NUWF's injuries by abating current violations and preventing future ones. Therefore, an injunction or the imposition of civil penalties will redress NUWF's injury.

B. NUWF Satisfies the Second Element of Organizational Standing Because Protection of the Wetland Is Germane to NUWF's Purpose.

The second element of organizational standing requires the interests at stake are germane to the organization's purpose. *See Aransas*, 835 F. Supp. 2d. at 265. NUWF is a not-for-profit corporation organized under the laws of New Union. R. at 4. NUWF's purpose is to protect the fish and wildlife of the state by protecting their habitats. The defendant's § 404 violation of the

CWA will have a negative impact on the fish and wildlife of the Muddy River and the hydrologic function of the wetland adjacent to the Muddy. Therefore, protection of such jurisdiction waters of the United States is germane to the NUWF's purpose.

C. NUWF Satisfies the Third Element of Organizational Standing Because Neither the Claim Asserted Nor the Relief Requested Requires the Participation of Individual Members in the Lawsuit.

The third element of organizational standing requires neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit. *See Hunt*, 432 U.S. at 343. In *Bano v. Union Carbide Corp.,* the Second Circuit held that "where the organization seeks a purely legal ruling without requesting that the federal court award individualized relief to its members," the third prong of organizational standing is satisfied. 361 F.3d 696, 714 (2d Cir. 2004); *See also Hunt*, 432 U.S. at 344 (the request for declaratory and injunctive relief does not require individualized proof and is thus properly resolved in a group context). Here, because NUWF seeks civil penalties and injunctive relief only, not money damages, its claims do not require "individualized proof." Therefore, the third prong of the organizational standing doctrine is satisfied.

II. The District Court Has Subject Matter Jurisdiction Because a Continuing Violation Exists Under 33 U.S.C. § 1365 (a)(1).

The district court erred in holding that the court lacked subject matter jurisdiction over NUWF's § 505 citizen suit due to the absence of a continuing violation since a continuing violation does exist. Section 505 of the CWA provides that "any citizen may commence a civil action on his own behalf … against any person who is alleged to be in violation" of the Act. 33 U.S.C. § 1365(a)(1) (2006). In *Gwaltney of Smithfield v. Chesapeake Bay Foundation*, the Supreme Court interpreted § 505 to preclude jurisdiction over citizen suits for "wholly past violations." 484 U.S. 49 (1987). However, the Court also held that subject matter jurisdiction

exists when a plaintiff alleges in good faith "a state of either continuous or intermittent violation." *Id*. at 57.

Here, NUWF alleged in good faith that the defendant's activities constitute a continuing violation, thereby the district court had subject matter jurisdiction. In concluding otherwise, the district court misconstrued the holding in *Gwaltney* and ignored the weight of authority, which holds that the placement of fill material in a wetland without a permit constitutes a continuing violation of the Act until remedial measures are taken. The district court erroneously surmised that the above interpretation obviates *Gwaltney* and renders the statute of limitations meaningless. However, the district court, in reaching this decision failed to distinguish between §404 and §402 violations. Moreover, the district court's statute of limitations argument is merely dicta because NUWF brought suit within one year of the defendant placing the dredge and fill material into the wetlands, well within the statute of limitations period. Last, public policy and the purpose of the CWA compel an interpretation that continued presences of dredged and fill material constitutes a continuing violation.

A. The Placement of Dredged and Fill Material Constitutes a Continuing Violation As Long As the Unpermitted Fill Material Remains in and Continues to Add Pollution into the Muddy River.

The district court incorrectly held that the continued presence of dredged and fill material, which violates § 404 of the CWA, does not constitute a continuing violation. In the aftermath of *Gwaltney*, many courts have reached the conclusion that a polluter who fills a wetland with dredged or fill material without a permit is in violation of § 404 of the CWA until the fill is removed. *See Sasser v. Adm'r, U.S. EPA*, 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."); *United States v. Reaves*, 923 F. Supp. 1530, 1534 (M.D. Fla. 1996)("unpermitted

discharge of dredged or fill materials into wetlands on the site is a continuing violation for as long as the fill remains."); *Informed Citizens United, Inc. v. USX Corp.*, 36 F. Supp. 2d 375 (S.D. Tex. 1999). Furthermore, the weight of authority supports NUWF's argument that un-removed fill material constitutes a continuing violation. *See Stepniak v United Materials, LLC*, 03-CV-569A, 2009 WL 3077888 (W.D.N.Y. Sept. 24, 2009)("The weight of authority supports plaintiffs' position that the continued presence of fill material constitutes a continuing violation."). Therefore, the court has subject matter jurisdiction over NUWF's citizen suit because the defendant's failure to remove the fill material from the wetland constitutes a continuing violation.

1. Although the Defendant Is No Longer Adding Pollutants to the Wetland, He Is Still in Violation of the CWA Because the Dredged and Fill Material in the Wetlands Continues to Pollute the Muddy.

While the holding in *Gwaltney* confirms that courts do not have subject matter jurisdiction in a § 505 citizen suit for "wholly past" violations, the type of injury determines whether a violation is "wholly past" or "continuing." It is a reasonable interpretation of the CWA to treat the failure to take remedial action as a continuing violation. *North Carolina Wildlife Fed'n v. Woodbury*, No. 87-584, 1989 WL 106517 (E.D.N.C. Apr. 25, 1989). The physical act of discharging dredge waste is not the injury that gives citizens standing; it is the "*consequences* of the discharge in terms of lasting environmental degradation." *Id*.

Justice Scalia's concurring opinion in *Gwaltney* gives credence to the conclusion that the failure to take remedial measures constitutes a continuing violation. According to Justice Scalia, the phrase in U.S.C. § 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. Moreover, when a polluter "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*. Therefore, it is the dredged and fill material's continued presence, not the initial act of discharge, which constitutes the violation of the CWA.

Here, although the defendant's initial discharge of the dredged and fill material into the wetland is "wholly past," the environmental injury continues because the pollutant continues to drain into the Muddy. R. at 7 ("[The defendant's] only subsequent activities have included planting wheat seeds and draining the property through the drainage ditch or swale he constructed earlier."). Therefore, this court should hold that although the defendant's initial discharge into the wetlands has ceased, the continued presence of the fill material in the wetlands constitutes a continuing violation for purposes of §505 of the CWA because the fill material will continue to pollute the Muddy River until it is removed.

2. The Interpretation that Non-Remedial Measures Constitutes a Continuing Violation Does Not Obviate the Continuing Violation Jurisdictional Requirement Articulated in § 505 of the CWA.

The district court erred when it suggested that giving merit to NUWF's argument that a continuing violation exists as long as dredged and fill material remains in the wetland would obviate *Gwaltney*. The district court apparently believes that on the day placement of dredged and fill material into the wetland ceases, the violations become "wholly past" under the *Gwaltney*. This argument fails, however, because "it loses sight of the focus of the Act: the water." *Molokai Chamber of Commerce v. Kukui, Inc.*, 891 F. Supp. 1389, 1400 (D. Haw. 1995). Moreover, *Gwaltney* is distinguishable because the defendant in *Gwaltney* discharged wastewater in violation of § 402, not fill material in violation of § 404. *Stillwater of Crown Point Homeowner's Ass'n v. Kovich*, 820 F. Supp. 2d 859, 895 (N.D. Ind. 2011).

There are typically two types of injuries that occur from pollutants: 1) those that once occurred cannot be remedied, thus making the violation "wholly past," i.e. § 402 violations; and 2) injuries that continue to cause environmental degradation until remediation occurs, such as § 404 violations. *Molokai*, clearly differentiates between these types of injuries:

> A clear example of this distinction exists when one contrasts earthwork construction activity with the operation of a hypothetical chemical plant near a river. Assume that when the plant stops operations, the pollutant ceases to flow into the river. The violations before the plant closed are clearly past violations. No future violation is possible unless the plant restarts its operations and resumes its discharge into the river. In contrast, the digging of the ditch creates circumstances where the pollutant, i.e., runoff continues to discharge into waters of the state each time it rains and therefore continues to pollute until the violative earthwork construction is corrected. *Molokai*, 891 F. Supp. at 1401.

Woodbury further aids in this distinction by holding that "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 under *Gwaltney.*" *Woodbury* at 3. Only those violations "having persistent effects that are amenable to correction, would constitute continuing violations, until remedied, under *Gwaltney." Id*. The majority of cases "dealing with fill materials appear to adopt the approach taken in *Woodbury* of deeming the pollution 'ongoing' as long as the polluting fill material remains in the water." *City of Mountain Park, GA v. Lakeside at Ansley, LLC*, 560 F. Supp. 2d. 1288, 1296 (N.D. Ga. 2008). Because fill materials when discharged into a system stay intact over time and thus continue to have roughly the same net polluting effect years or even decades after the time of their deposit. *Id*. Courts that have taken the stricter interpretation of what constitutes a "wholly past" violation have not been in the dredged and fill context. *See, e.g.*, *Brewer v. Ravan,* 680 F. Supp. 1176, 1182 (M.D. Tenn. 1988); *Friends of Santa Fe Cnty. v. LAC Minerals*, 892 F. Supp. 1333, 1354 (D.N.M. 1995). In the present case, although the defendant's actions are "wholly past," the pollutants he deposited remain in the

wetland. Because the harmful effect of the pollutants is amenable to correction, this is a remedial injury. Therefore, the above distinction demonstrates that the presence of dredged and fill material constituting a continuing violation for purposes of subject matter jurisdiction does not obviate the holding in *Gwaltney*.

B. Public Policy and the Purpose of the CWA Compel an Interpretation that Continued Presence of Dredged and Fill Material Constitutes a Continuing Violation.

Public policy supports an interpretation of the CWA that the presence of dredged and fill material constitutes a continuing violation. The purpose of the CWA is to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251 (2006). "If subject matter jurisdiction was denied completely because a violation was regarded as "wholly past" the day after an illegal ditching, a citizen-plaintiff would never be entitled to a day in court." *United States v. Telluride Co.*, 884 F. Supp. 404, 407 (D. Colo. 1995), *rev'd*, 146 F.3d 1241 (10th Cir. 1998). Moreover, this interpretation would give violators "a powerful incentive to conceal their activities from public and private scrutiny, which would lead to serious problems in public and private enforcement of the Clean Water Act." *Woodbury* at 3. To hold that the presence of dredged and fill material is wholly past "would have the effect of incentivizing polluters to simply conceal their misdeeds, knowing that they will not face CWA liability unless they are essentially caught in the act of polluting." *Ansley*, 560 F. Supp. 2d. at 1296. Therefore, due to the remedial purpose and public policy considerations of the CWA, the continuing presence of dredged and fill material in the wetlands constitutes a continuing violation.

C. The Interpretation that the Continued Presence of Dredge and Fill Material Constitutes a Continuing Violation Does Not Obviate the Applicable Statute of Limitations.

The interpretation that the presence of dredged and fill material constitutes a continuing violation does not obviate the statute of limitations. The CWA does not contain a statute of

limitations, but most courts have held that the five-year statute of limitations under 28 U.S.C. § 2462 applies to citizen suits under the CWA. *See, e.g., Sierra Club v. Chevron U.S.A., Inc.*, 834 F.2d 1517, 1521 (9th Cir. 1987). For purposes of the CWA, the polluter remains "in violation" until the fill is removed or remediation is performed, tolling the statute of limitations. *Cont'l Ins. Co. v. Kovich*, 820 F. Supp. 890, 896 (E.D. Pa. 1993), *aff'd*, 19 F.3d 642 (3d Cir. 1994); *Reaves*, 923 F. Supp. at 1534 (holding that the five-year statute of limitations had not yet begun to run because the continued presence of fill material constituted a continuing violation). Some courts have held that the statute of limitations begins to run at the time of the initial discharge. *See Telluride*, 884 F. Supp. at 408. However, this holding would undermine the very purposes of the CWA, and the policy considerations that were considered above. Therefore, because the statute of limitations is tolled until the dredged and fill material is removed, the Court must hold that the defendant remains in a current state of violation. However, when the district court addressed the statute of limitations, it was merely dicta because NUWF brought this § 505 citizen suit well within the five-year limitations period.

III. The Court Has Subject Matter Jurisdiction over NUWF's Citizen Suit Despite Prior State Action Because the State Is Failing to Diligently Prosecute the Defendant Under § 1365(b)(1)(B).

The district court erred in granting summary judgment on the ground of prior state action because the substance of DEP's administrative order does not constitute diligent prosecution of the defendant. A citizen suit under the CWA is barred if the "[s]tate has commenced and is diligently prosecuting a civil or criminal action in a court of the United States…to require compliance with such standard, limitation, or order." 33 U.S.C. § 1365 (b)(1)(B) (2006). However, the statute does not define "diligently prosecuting." Courts consider the totality of the circumstances and may evaluate assorted indicia of diligence to determine whether a citizen suit

is precluded. *Citizens Legal Envtl. Action Network v Premium Standard Farms*, No. 97–6073–CV–SJ–6, 2000 WL 220464 at *7 (W.D. Miss. Feb. 23, 2000).

Here, the district court erroneously held that DEP's settlement with the defendant was diligent simply because DEP required the defendant to maintain at his own expense a publicly-accessible artificial wetland on a fraction of his property, giving up personal economic benefit for only that small portion's agricultural value. R. at 7. The court misplaced emphasis on the defendant's potential future expense in maintaining the 225 feet of property covered by the order and failed to sufficiently consider DEP's failure to address almost two-thirds of the river frontage property that continues to be in violation of the Act. Congress purposefully chose to bar citizen suits only upon a finding that an enforcement agency's prosecution adequately addressed a violation. DEP's order was not designed to bring the defendant into compliance with the CWA; it allows the defendant to escape liability for 425 feet of property that will continue to violate the CWA and fails to impose any administrative penalty to remove the defendant's economic benefit from breaking the law. The court erred in barring NUWF's citizen suit because DEP's order does not satisfy the plain meaning of diligence or many of the recognized indicia of diligence.

A. DEP's Actions Do Not Meet the Plain Meaning of Diligence.

The fundamental objective of the citizen suit provision is to allow private citizens to bring suit to enforce the CWA when the state has failed to sufficiently do so. S. Rep. No. 92-414, at 80 (1971), *reprinted in* 1972 U.S.C.C.A.N. 3668, 3746. Congress included the "diligent prosecution bar" intending for citizen suits to supplement rather than supplant governmental action. *Gwaltney*, 484 U.S. at 60. However, by qualifying prosecution with the word "diligent," Congress empowers citizens and courts to question the energy and effort of the enforcement agency's action. Jeffery G. Miller, *Theme and Variations in Statutory Preclusions Against*

Successive Environmental Enforcement Actions by EPA and Citizens: Part One: Statutory Bars in Citizen Suit Provisions, 28 Harv. Envtl. L. Rev. 401, 465 (2004).

The statute does not define diligence. When a word is not defined in the statute, courts enforce the plain, unambiguous meaning of the word chosen by Congress. *Caminetti v. U.S.*, 37 S.Ct. 192, 194 (1917). Webster's dictionary defines "diligent" as "characterized by steady, earnest, and energetic effort; painstakingly." Merriam-Webster's Collegiate Dictionary 325 (Frederick C. Mish et al. eds., 10th ed. 1998). The plain meaning of the word diligent, which was deliberately chosen by Congress, requires more than an attempt at achieving partial compliance; it requires that the governmental enforcement action should be aggressive in seeking compliance with the CWA.

Here, the compliance order requires the defendant to construct and maintain an artificial wetland in a 225-foot conservation easement granted to the DEP and he cannot develop the easement property in any other way. R. at 4. The order fails to address the violations on 425 feet of property for which no corrective action was taken and no penalty was assessed. R. at 4. Courts recognize that settlements are important tools in an enforcement agency's arsenal. *See Karr v. Hefner*, 475 F.3d 1192, 1198 (10th Cir. 2007). However, a settlement that does not require compliance with the CWA and does not assess civil penalty can hardly be characterized as "earnest, energetic effort" designed to bring about compliance with the CWA.

B. DEP's Prosecution Does Not Meet Recognized Indicia of Diligence.

Courts have identified three indicia of diligence to determine whether a citizen suit is barred by diligent prosecution, including: 1) whether the government required compliance with the specific standard, limitation, or order invoked by the citizen suit; 2) the possibility that the citizen-alleged violations will continue notwithstanding the polluter's settlement with the

government; and, 3) the severity of any penalties compared to the polluter's economic benefits in not complying with the law,or the penalties imposed for similar violations in the state. *Citizens Legal Envtl. Action Network v Premium Standard Farms*, No. 97–6073–CV–SJ–6, 2000 WL 220464 at *7 (W.D. Miss. Feb. 23, 2000).

1. DEP's Prosecution Is Not Diligent Because the Prosecution Does Not Aim to Bring the Defendant into Compliance with the Act.

Diligent prosecution requires that the settlement order bring the defendant into compliance with the CWA. The court in *Sierra Club v. ICG Eastern* held that when an enforcement action is capable of requiring compliance with the CWA and is in good faith calculated to do so, then the enforcement action is considered diligent. 833 F. Supp. 2d 571, 578 (N.D.W. Va. 2011). Courts do not require an actual end to violations, but determine whether the agency's actions were *designed* to bring about compliance. *Friends of Milwaukee's Rivers v. Milwaukee Metro. Sewerage Dist.*, 382 F.3d 743, 764 (7th Cir. 2004). To comply with the CWA, a person must obtain a permit to discharge a pollutant from a point source into a navigable water of the United States. 33 U.S.C. § 1344 (2006). When a person fails to correct a § 404 violation, then he is in a continuous state of violation, even though the initial unlawful activity has ceased. *See Woodbury*, No. 87-584-CIV-5, 1989 U.S. Dist. LEXIS 13915, at *7. When remedial action can cure or prevent further violation, the enforcement agency shall require remedial action to bring the violator into compliance with the CWA. *Id.*

Here, the defendant's construction of the drainage ditch and redeposit of the fill material was completed several months ago. R. at 4. However, every time it floods, another discharge of the still present dredged and fill material will flow into the Muddy. Furthermore, the defendant has deposited dredged and fill material into the wetland, altering its elevation and drainage function. To cure the existing violation and prevent continuing violations, the CWA's purpose

mandates removing the pollutants, eliminating the drainage ditch, and restoring the wetland. DEP's order cannot possibly constitute diligent prosecution because it allows these post-settlement continuing violations to go unpunished. Additionally, even if DEP chose not to require remedial action to cure the continuing violations of the CWA, the settlement agreement still does not require the defendant to obtain a permit for the continued presence of the pollutants. Therefore, DEP's prosecution was not diligent because the order was not designed to bring the defendant into compliance with the Act.

2. DEP Is Not Diligently Prosecuting the Defendant Because the Order Does Not Assess Civil Penalties, and the Defendant May Economically Benefit from Noncompliance with the CWA.

New Union's state statute is the equivalent of the CWA's § 1319, including the ability to impose up to $125,000 in administrative penalties for violation of the statute. R. at 4. Section 1319 states "[a]ny person who violates ... any permit condition or limitation ... shall be subject to a civil penalty...." 33 U.S.C. § 1319(d) (2006). Section 1319 also lists mitigating factors instructing the enforcement agency to "…take into account the nature, circumstances, extent and gravity of the violation, or violations, and, with respect to the violator, ability to pay, any prior history of such violations, the degree of culpability, economic benefit or savings (if any) resulting from the violation, and such other matters as justice may require." 33 U.S.C. § 1319(g)(3) (2006). Although authority exists holding that a penalty need not be as harsh as a citizen would prefer to constitute diligent prosecution, *see Gwaltney*, 484 U.S. at 60, other courts have noted that lack of significant relief is properly considered by a court in determining diligence of prosecution and a penalty far less than the maximum allowable penalty may be an indication of non-diligent prosecution. *See Atl. States Legal Found. v. Universal Tool & Stamping*, 735 F. Supp. 1404, 1416-17 (N.D. Ind., 1990).

a. The Defendant's Low Culpability and Lack of Prior Violations Does Not Negate the Necessity for Civil Penalties Due to the Severity of the Violation.

The CWA is a strict liability statute that does not require fault to assess a monetary penalty. *See, e.g., United States v. Ohio Edison,* 725 F.Supp. 928, 934 (N.D. Ohio 1989) (stating that issues of fault are relevant only in determining the amount of a penalty); *Stoddard v. Western Carolina Reg'l Sewer Auth.,* 784 F.2d 1200, 1208 (4th Cir. 1986); *Atl. States Legal Found. v. Tyson Foods,* 897 F.2d 1128, 1142 (11th Cir. 1990). In *Buxton v. U.S. E.P.A.*, the defendant unknowingly violated the CWA by filling a wetland with dredged and fill material without a permit. *See* 961 F. Supp. 6, 8 (D.D.C. 1997), *aff'd* 132 F.3d 1480 (D.C. Cir. 1998). The EPA imposed a $5,000 administrative penalty even though the defendant had no prior history of CWA violations. *Id.* Although the defendant's culpability was low, the commonality and severity of the violation prompted the court to uphold the penalty. *Id.* at 10. It did not matter that the defendant was in the process of restoring the wetlands and received no economic benefit; the deterrent function of the CWA required a civil penalty. *Id.* at 9.

Likewise, here the defendant has no history of violating the CWA, and he was unaware of his current violation. However, dredged and fill material placed into the wetland without a permit contributed to the pervasive problem of illegal polluting. Therefore, the defendant's low level of culpability neither negates the seriousness of the violation nor the state's responsibility to enforce the deterrent effects of the CWA.

b. A Civil Penalty Must Disgorge the Defendant of Any Economic Benefit Resulting from Non-Compliance with the CWA.

Through penalty imposition the CWA strives to deter not only the violator, but the general public as well. *See U.S. v. Mun. Auth. of Union Twp.* 929 F. Supp. 800, 806 (M.D. Penn. 1996). Courts utilize various methods in assessing appropriate penalties, but the "bottom up"

method is most consistent with the CWA's goals. The "bottom up" method begins by determining the violator's realized economic gain. *See U.S. v. Smithfield Foods,* 191 F.3d 516 (4th Cir. 1999). Next, the "bottom up" method takes into account an amount based on § 1319(d) factors. *Id*. If further punishment and deterrence is deemed necessary the "bottom up" analysis adds a sum to the penalty. *Id*. This achieves the CWA's goals by removing, at a minimum, the violator's advantage over law-abiding competitors as well as the reasonable amount of economic gain realized through noncompliance. Moreover, an additional punitive component is included to achieve specific and general deterrence. *Mun. Auth. of Union Twp.,* 929 F. Supp. at 806.

Here, the defendant was able to plant winter wheat on the cleared portions of the former wetland. R. at 5. The defendant benefits from his noncompliance because he can use 425 feet of land he otherwise would not be able to had he complied with the CWA. R. at 5. To constitute diligent prosecution, DEP should have imposed a penalty that recompensed the defendant's economic benefit, as well as punished and deterred the defendant and future violators.

Therefore, because DEP's order fails to remediate the continuing violation, and fails to impose a civil penalty, DEP's actions cannot be deemed diligent under any interpretation of the law. Thus, the district court erred in holding as a matter of law that NUWF's suit is precluded.

IV. The Defendant Violated § 404 of the CWA Because His Re-deposit of Dredged and Fill Material into the Jurisdictional Wetland Without a Permit Was a "Discharge of a Pollutant."

A violation of the CWA exists when a person: 1) discharges; 2) a pollutant; 3) from a point source; 4) into navigable waters; 5) without a permit. Federal Water Pollution Control Act Amendments of 1972, §§ 301(a), 402, 33 U.S.C. §§ 1311(a), 1342 (2006). The defendant concedes that he used a "point source" to dispose of "pollutants" in a jurisdictional wetland considered to be a "water of the United States." R. at 8-9. Thus, the issue here is whether the

defendant's redeposit of dredged and fill materials that added pollutants to the wetland, which were not previously present, was an "addition." If so, then a CWA § 404 permit is required, and the district court erred in granting defendant's motion for summary judgment.

A. Section 404 of the CWA Unambiguously Expresses Congressional Intent to Prohibit the Re-deposit of Dredged and Fill Material into a Wetland Without a Permit.

The CWA unambiguously states that re-depositing dredged and fill material without a permit violates § 404. Statutory interpretation begins with the language and structure of the statute itself. *See Robinson v. Shell Oil Co*., 519 U.S. 337, 340 (1997). The statutory terms in question must not be read in isolation; they must be read in light of "the specific context in which that language is used, and the broader context of the statute as a whole." *Robinson*, 519 U.S. at 341. Thus, to determine how congress meant to define "discharge of a pollutant" in § 404, the Court must first look to the actual language of the statute while remaining cognizant of the CWA's fundamental objectives.To achieve the CWA's enumerated goals, Congress imposed a strict prohibition on "the discharge of any pollutant by any person," making any such discharge "unlawful" unless otherwise authorized by a permit under §§ 402 or 404. *See* 33 U.S.C. § 1311(a) (2006). Congress chose not to specify activities considered a "discharge." *See* 33 U.S.C. § 1362(12), (16) (2006). Based on the actual language of the statute and Congress's objectives, the defendant's land clearing activities and re-deposit of the excavated dredged and fill material was a "discharge" of a pollutant into waters of the United States without a permit. Therefore, the defendant violated the CWA.

1. According to Language and Purpose of the CWA, the Defendant's Re-deposit of Excavated Dredged and Fill Material into the Wetland Was an "Addition."

The CWA defines "discharge of a pollutant" to include "any addition of any pollutant to navigable waters from any point source." 33 U.S.C. § 1362(12) (2006). The CWA further

defines "pollutant," "navigable waters," and "point source," but does not define "addition." 33 U.S.C. § 1362(6), (7), (14) (2006). The language of the CWA prove that the defendant's land clearing activity and re-deposit of excavated dredged and fill material clearly results in the "addition" of a pollutant to a water of the United States. When a statute does not define a term, the word shall be interpreted as taking its ordinary, contemporary, and common meaning. *See United States v. Wilson*, 133 F.3d 251, 269 (4th Cir. 1997). Webster's Dictionary defines "add" as "to join or unite so as to bring about an increase or improvement." Merriam-Webster's Collegiate Dictionary 13 (Frederick C. Mish et al. eds., 10th ed. 1998). Here, under the ordinary meaning of the word "add," pollutants have been "added" to jurisdictional wetland. The defendant removed trees and other vegetation material, but deposited dredged and fill material into the wetland. R. at 4. Thus, as a result of the defendant's actions, pollutants are now present in the wetland, which were not present before. R. at 4. Because the defendant's actions "[brought] about an increase" in pollutants in a water of the United States, the defendant actions were an "addition" under the CWA.

The pollutant's origin is irrelevant in § 404 violations. First, if Congress intended the definition of "discharge" to be limited to only the addition of new or non-native material, Congress would have included language to effectuate that intent. The statutory language, however, does not reflect any such limitation. *See* 33 U.S.C. § 1362(12) (2006). It is not permissible to construe a statute on the basis of a mere surmise as to what the legislature intended and to assume that it was only by inadvertence that it failed to state something other than what is plainly stated. *See United States v. Deluxe Cleaners & Laundry, Inc*., 511 F.2d 926, 929 (4th Cir. 1975). Instead, the definition of "discharge" refers broadly to "any addition of any pollutant," indicating that Congress intended the term to be all-inclusive. 33 U.S.C. § 1362(12)

(2006). If the Court were to find that the deposited pollutant must not have originated from the wetland in which it is deposited, the Court would improperly add a requirement to the definition of "discharge" that Congress provided; in effect, the Court would change Congress's definition of "discharge" to "any addition of any pollutant [that did not originate in the wetland it is thereafter deposited in]." Second, a restrictive reading of "addition" cannot be reconciled with Congress's use of the term "dredged spoil" in the definition of "pollutant." *See* 33 U.S.C. § 1362(6) (2006). Dredged spoil is by definition "material that is excavated or dredged from waters of the United States." *See Avoyelles Sportsmen's League, Inc. v. Marsh,* 715 F.2d 897, 924 (5th Cir. 1983). There is no evidence that Congress intended to narrowly limit the regulation of discharges of dredged spoil to those few and unusual cases where spoil is dredged in one body of water and transported to another. Therefore, the CWA's language, purposefully chosen by Congress, unambiguously reveals that Congress intended "addition" to include the defendant's re-deposit of dredged and fill material into the jurisdictional wetland, regardless of the material's origin.

2. Section 404's Purpose Confirms that the Defendant's Re-deposit of Excavated Dredged and Fill Material into the Wetland Was an "Addition."

The lower court erred by finding that the defendant did not add to the wetland. The purpose of § 404 of the CWA is to protect the nation's wetlands and the important functions they serve. *See Avoyelles*, 715 F.2d at 923. Courts recognize that re-depositing activities significantly alter the character of wetlands and limit the vital ecological functions served by the tract. *Id.* The far-reaching effects of the defendant's actions are particularly significant. The defendant's deposit of dredged and fill material into the wetland destroyed the natural state of the aquatic environment despite the fact that defendant placed the pollutant only a few feet from where the material was excavated. *See* R. at 4. As a result, the wetland no longer has the same filtration

effect. *See* Office of Technology Assessment, U.S. Congress, *Wetlands: Their Use and Regulation* 48-50 (1984). Furthermore, the sediment and contaminants released into the wetland will likely also pollute the river because the defendant altered the wetland to drain into the Muddy. *Id*. From the perspective of the now destroyed wetland, the pollutant's origin does not diminish the harmful hydrological and environmental effects on the wetland. *See United States v. Deaton*, 209 F.3d 331, 336 (4th Cir. 2000). It is only relevant that dredged and fill material has been "added" to that site. *Id.* Because the defendant caused the destruction of the wetland and the important functions it served, his actions were contrary to § 404's purpose. Therefore, the defendant's redeposit of dredged and fill material violated of the CWA.

3. Legislative History Confirms that the Defendant's Re-deposit of Excavated Dredged and Fill Material into the Wetland was an "Addition."

The harmful effects of the defendant's actions were exactly the actions that Congress sought to prohibit through the CWA § 404 permitting scheme. *See e.g., United States v. Riverside Bayview Homes, Inc.,* 474 U.S. 121, 134-39 (1984); *Avoyelles*, 715 F.2d at 915. The bedrock objective of the CWA is "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a) (2006). The word "integrity" was deliberately chosen by congress. H.R. Rep. No. 92-911, at 76-77 (1972). The following excerpt from a report that accompanied the House bill for the CWA, demonstrates the significance of Congress's word choice:

> The word "integrity" as used is intended to convey a concept that refers to a condition in which the natural structure and function of ecosystems is maintained…. "Natural" is generally defined as that condition in existence before the activities of man invoked perturbations which prevented the system from returning to its original state of equilibrium…. Any change induced by man which overtaxes the ability of nature to restore conditions to "natural" or "original" is an unacceptable perturbation. *Id*.

The defendant's actions, which changed the elevation of and drained the wetland, are exactly the type of "perturbation" of the natural order that the legislative history declared unacceptable. Thus, Congress intended that the defendant's actions require a § 404 permit because the placement of dredged and fill materials into the wetland negatively affected the "chemical and biological integrity of the Nation's waters" Therefore, although the plain language of the CWA, when read in context and in light of the Act's purpose, appears to clearly evidence Congressional intent regarding the interpretation of "addition," the CWA's legislative history confirms the perception that Congress expresses its intent through its chosen language.

B. Even if Congressional Intent Is Not Unambiguously Indicated by the Language and Purpose of the CWA, the Agency's Interpretation of "Addition" in § 404 Is Entitled to Judicial Deference.

In reviewing an agency's interpretation of a statute, the first step of the *Chevron* framework asks whether Congress clearly addressed the term at issue. *See Chevron U.S.A., Inc. v. Nat'l Res. Def. Council, Inc.*, 467 U.S. 837, 842-43 (1984). If the congressional intent is clear, the courts must give effect to that intent, and the agency interpretation that conflicts with the congressional intent cannot be upheld. *Id.* As demonstrated in above in Section A, Congress has spoken directly to the issue presented in this appeal. When the terms "discharge" and "addition of a pollutant" are read in the context of the Act as a whole and its stated objectives, Congress conveys that the defendant's actions were an "addition."

Even if the court finds that congressional intent is ambiguous, the EPA's interpretation of the term "addition" in the dredged and fill context is entitled to deference because it is based on a reasonable interpretation of the Act. *Id*. The EPA's interpretation of "addition" in § 404 requires only that the pollutant be removed from its original location and re-deposited elsewhere in the navigable water. Alison M, Dornsife, *From A Nonpollutant into A Pollutant: Revising EPA's*

Interpretation of the Phrase "Discharge of Any Pollutant" in the Context of NPDES Permits, 35 Envtl. L. 175, 189-92 (2005). It is not the role of the judiciary to substitute its preferred reading of the statute for the agency's, so long as the agency's reading is "rational and consistent with the statute." *See Akindemowo v. U.S. Immigration and Naturalization Serv*., 61 F.3d 282, 285 (4th Cir. 1995). Deference to the agency's interpretation is especially warranted here. Congress charged both the EPA and the Corp. with administering the CWA and exercising their "ecological judgment" and "technical expertise" in achieving Congress's objectives. *Riverside Bayview*, 474 U.S. at 465. Here, the defendant removed trees and other vegetation from their original location in the wetland and re-deposited them elsewhere in the navigable water. R. at 4. Therefore, the defendant's re-deposit was an "addition" according to the EPA's interpretation of the term, which is entitled to *Chevron* deference.

C. Analogous Precedent Holds that Similar Actions Constituted an "Addition" in the Dredged and Fill Context.

Case law has accepted that the re-deposit of dredged and fill material are "additions" of pollutants, and hence, discharges that can be regulated. *See, e.g., Rybachek v. EPA*, 904 F.2d 1276, 1285-86 (9th Cir. 1990) (holding that the resuspension of dredged spoil, rock, sand, and cellar dirt could be the addition of pollutants).

Avoyelles Sportsmen's League, Inc. v. Marsh, 715 F.2d 897 (5th Cir. 1983) is particularly enlightening to the present case. In *Avoyelles*, the court found that burying of burned vegetation and soil from a wetland in that same wetland was an addition of pollutants to the wetland and hence a discharge. *Id*. at 923-24. The court found that because the re-deposit would alter the character of the wetlands and limit their ecological functioning, it must qualify as a discharge in order to satisfy the broad purpose of the CWA. *Id. Avoyelles* speaks directly to the issue in the present case. First, the court's decision was after *Gorsuch's* "outside world" definition of

"addition," but the court chose not to apply such interpretation of "addition" to resolve the dispute. *See Nat'l Wildlife Fed'n v. Gorsuch*, 693 F.2d 156 (D.C. Cir. 1982). Secondly, even cases that interpreted the agency's regulatory authority conservatively cited to *Avoyelles* with approval. *See Nat'l Mining Ass'n v. U.S. Army Corp. of Eng'rs*, 145 F.3d 1399, 1405-06 (D.C. Cir. 1998). Furthermore, the facts of the present case are closely analogous to *Avoyelles*. Like the defendant in *Avoyelles,* the defendant in the present case deposited pollutants collected from a wetland into the same wetland, which altered the character of the wetland and changed its ecological functioning. R. at 4. Thus, *Avoyelles* demonstrates that such actions constitute an "addition" in the dredged and fill material context and is a violation of the CWA.

In the district court below, the defendant mistakenly relied on *Nat'l Wildlife Fed'n v. Gorsuch*, 693 F.2d 156 (D.C. Cir. 1982). In *Gorsuch*, the court upheld as reasonable, EPA's view that for purposes of § 402 NPDES permit requirement, water released from a dam will not be considered a discharge of a pollutant from a point source unless the dam itself adds pollutants "from the outside world." *Id.* at 165. Not only are the facts of *Gorsuch* distinguishable from the present case, *Gorsuch* also did not consider what constitutes a discharge of "dredged spoil," or "dredged material" into waters of the United States. *Id.* Furthermore, the analysis in *Gorsuch* actually supports NUWF's position in this case; the court in *Gorsuch* stated the "language of the statute permits either construction" and held that the agency's interpretation of the terms "discharge" and "addition" deserves great deference from the courts. *Id.* at 174-75. Thus, the very case the defendant used in the lower court proves the "outside world" theory does not apply to the dredged and fill context because it plainly states that the EPA's interpretation of "addition" is entitled to deference.

D. The "Unitary Navigable Waters" Theory Does Not Apply to § 404 of the CWA.

The EPA's "unitary navigable waters" theory is not applicable to the present case. The defendant argued in the lower court that the "unitary navigable waters" theory is applicable and would therefore, determine that the defendant's actions were not an "addition." R. at 10.

1. The Supreme Court Has Not Endorsed the "Unitary Navigable Waters" Theory.

In *S. Florida Water Mgmt. Dist. v. Miccosukee Tribe of Indians*, the Supreme Court addressed the "unitary navigable waters" theory, which suggests that all navigable waters are one. 541 U.S. 95 (2004). However, the Supreme Court declined to rule on the theory's validity. *Id*. In fact, the Court noted that several "provisions might be read to suggest a view contrary to the unitary waters approach." *Miccosukee*, 541 U.S. at 107-09. Based on the Court's unfavorable reception of the theory in *Miccosukee*, it is highly unlikely that the Supreme Court will ever favorably rule on the theory and its application to § 404. *See* Chris Reagen, *The Water Transfers Rule: How an EPA Rule Threatens to Undermine the Clean Water Act*, 83 U. Colo. L. Rev. 307, 326 (2011). Therefore, because the Supreme Court has not endorsed the "unitary navigable waters" theory and has never applied the theory to § 404 cases, the "unitary navigable waters" theory is inapplicable to the present case.

2. The Water Transfer Rule, Which Mirrors the "Unitary Navigable Waters" Theory, Does Not Apply to § 404.

The Water Transfer Rule codified by the EPA in 2008 clarifies that a water transfer, which is the movement of water from an area where water is available to another area where water is scarce, does not constitute an "addition" of a pollutant under the CWA that triggers the NPDES requirement. *Id.* at 307. Some commentators argue that the EPA's Water Transfers Rule adopted the highly controversial "unitary navigable waters" theory. *Id.*

Although the lower court mentions the Water Transfer Rule as support of the "unitary navigable waters" theory, the text of the Rule itself explains that the Water Transfer Rule does not affect § 404 dredged and fill material permits. In response to commentators who argued that the proposed Rule was inconsistent with § 404 of the CWA, the Rule explicitly states: "[b]ecause Congress explicitly forbade discharges of dredged material except as in compliance with the provisions cited in CWA section 301, today's rule has no effect on the 404 permit program, under which discharges of dredged or fill material may be authorized by a permit. 33 U.S.C. § 1344 (2006). National Pollutant Discharge Elimination System (NPDES) Water Transfers Rule, 73 Fed. Reg. 33697 (June 13, 2008). Because the Rule's explicit language makes this clarification and repeatedly addresses the Water Transfer Rule's effect on § 402, it is evident that the Water Transfer Rule does not apply to § 404. Therefore, the Water Transfer Rule does not affect the interpretation of "addition" in the present case.

CONCLUSION

The defendant's discharge of pollutants into the wetland without a permit was a violation of § 404 of the CWA. Because NUWF's members' averred facts sufficient to demonstrate the injury in fact they suffered as a result of the defendant's actions, NUWF has organizational standing to bring a § 505 citizen suit. The district court has subject matter jurisdiction because the remaining dredged and fill material in the wetland continues to violate § 404 of the CWA. Furthermore, NUWF's citizen suit is not barred by DEP's inadequate prosecution. Therefore, this court should reverse the district court's decision to grant the defendant's motion for summary judgment.