**Team 55**

C.A. No. 13-1246

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**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.*

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**On Appeal from the Order of the United States District Court for the District of New Union,**
**Civ. 149-2012, Dated June 1, 2012.**

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# BRIEF FOR THE INTERVENOR-APPELLANT

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## JURISDICTIONAL STATEMENT

### I. Jurisdiction Below

The district court had jurisdiction pursuant to 28 U.S.C. § 1331 (1980) and under the Administrative Procedure Act. 5 U.S.C. § 702 (1976). The district court granted Bowman's motion for summary judgment on all grounds and denied the NUWF's summary judgment motion. This appeal seeks review of that decision.

### II. Jurisdiction on Appeal

On June 1, 2012, the district court granted Bowman's motion for summary judgment. Therefore, the district court's order is a final decision, and this Court has jurisdiction pursuant to 28 U.S.C. § 1291 (2006).

## STATEMENT OF THE ISSUES PRESENTED FOR APPEAL

This appeal presents the following issues:

1. Whether NUWF has standing to sue Jim Bob Bowman for violating the CWA.
2. Whether there is a continuing or ongoing violation as required by § 505(a) of the CWA for subject matter jurisdiction.
3. Whether NUWF's citizen suit has been barred by NUDEP's diligent prosecution of Bowman as set out in § 505(b) of the CWA.
4. Whether Bowman violated the CWA when he moved dredged and fill material from one part of a wetland adjacent to navigable water to another part of the same wetland.

## STATEMENT OF THE CASE

### I. Factual Background

Jim Bob Bowman (Bowman) owns one thousand acres of previously wooded land in the State of New Union (New Union), adjacent to the Muddy River, including 650 feet of shoreline.

The river is commonly used for miles both upstream and downstream of this point for recreational navigation. The property is wholly within the one-hundred year flood plain of the Muddy and is hydrologically connected to it. The parties agree that the property is a wetland, as determined by the U.S. Army Corps of Engineers' (the Corp's) Wetlands Determination Manual.

Bowman commenced land clearing operations on June 15, 2011, and completed this work on or about July 15, 2011. He used bulldozers to level vegetation including trees, pushed them into windrows and then burned the windrows. He also used a bulldozer to dig trenches and pushed the trees and leveled vegetation remains and ashes into them, and then leveled the resulting field, pushing soil from high portions of the field into the trenches and low lying portions of the field. Bowman then formed a wide ditch that ran from the back of his property to the river in order to drain the field into the Muddy. Bowman left a strip of land approximately 150 feet wide, and which runs along the 650 foot length of river frontage on his property, to clear after it had drained. In September 2011, Bowman sowed the field, all of his property except a 225 feet wide strip adjacent to the river, with winter wheat.

**II. Procedural Background**

New Union Wildlife Federation (NUWF) sent a notice of its intent to sue Bowman under § 505 of the CWA, *Id*. § 1365, the citizen suit provision, to Bowman, EPA, and New Union/ New Union Department of Environmental Protection (NUDEP). NUDEP sent Bowman a notice shortly thereafter informing him that he had violated both state and federal law by clearing the field. Subsequent to receiving this notice, Bowman entered into a settlement agreement with NUDEP, while maintaining that he had not violated state or federal law.

Under the agreement, Bowman agreed not to clear more wetlands in the area and to convey to NUDEP a conservation easement on a 225 foot wide strip of land adjacent to the river.

This included the 150 foot wide strip of still wooded property that he had not yet cleared, plus an additional 75 foot buffer zone between that wooded area and the new field. He also agreed to construct and maintain a year-round wetland on that 75 foot buffer zone. The conservation easement allows public entry for appropriate, day-use-only, recreational purposes, requires Bowman to keep the easement area in its natural state, and forbids him from developing it in any way other than constructing and maintaining the artificial wetland.

NUDEP issued an administrative order incorporating the agreement and containing no penalties, which Bowman consented to on August 1, 2011. NUDEP then brought a suit in federal district court under § 505 of the CWA on August 10, 2011,

NUWF filed a § 505 complaint against Bowman on August 30, 2011, seeking civil penalties and an order requiring him to remove the fill material and restore the wetlands. It filed a motion on September 15, 2012, to intervene in the NUDEP § 505 action, to consolidate the NUDEP and NUWF actions, and opposing the entry of the decree proposed by NUDEP in the NUDEP § 505 action.

NUDEP filed a motion to intervene in the NUWF case at about the same time, which the district court subsequently granted. It also filed a motion on September 5, 2011 to enter a decree in its own § 505 case, the terms of which are identical to the state administrative order. Bowman consented to both the motion and the decree. This motion is still pending. After discovery, the parties filed cross-motions for summary judgment.

The District Court granted Bowman's motion for summary judgment on all counts and found that NUWF lacked standing to bring the suit, the District Court lacked subject matter jurisdiction because all violations were wholly past and due to NUDEP's diligent prosecution of

Bowman, and that there is no violation of the CWA because Bowman did not discharge dredged or fill material to a water of the United States.. NUWF and NUDEP are appealing this decision.

## SUMMARY OF THE ARGUMENT

The District Court erred by denying standing to NUWF. In order to have Article III standing, the plaintiff must prove an injury-in-fact that is directly traceable to the defendant's action and the injury is likely to be redressed by a favorable decision. The Supreme Court has recognized a "reasonable fear" standard of injury-in-fact in that plaintiffs in environmental suits may satisfy injury-in-fact by proving they use the affected area and are individuals for whom the aesthetic and recreational values of the area will be lessened. In addition, a majority of circuit courts have allowed for increased risk and probabilistic harm to satisfy injury-in-fact. Three members of NUWF have submitted affidavits indicating their aesthetic and recreational interest in the Muddy River to have been injured as a result of Bowman's land clearing operations. They have sufficiently demonstrated injury-in-fact. Traceability and redressability are not in dispute.

NUWF has associational standing to sue on behalf of its members. NUWF's members have individual standing to bring suit on their own. In addition, NUWF is an organization dedicated to the purpose of protecting the fish in the Muddy River and the interests it seeks to protect are germane to that purpose. Lastly, NUWF is not seeking damages for its individual members. Instead, NUWF is seeking civil penalties for deterrence purposes as well as seeking injunctive relief for Bowman to restore the wetlands.

NUDEP is further arguing that Bowman's violations of the CWA is wholly past because Bowman has, prior to the filing of the citizen's suit by NUWF, received an administrative order pursuant to a settlement in which Bowman agreed to cease all present and future activities on his property. NUWF's argument that a filled wetland constitutes a never-ending CWA violation

until the wetland is restored is unpersuasive. Ultimately, the effect of the prior compliance by Bowman moots both the injunctive relief and civil penalties sought by NUWF. Thus, the District Court was correct in holding that the violations are wholly past.

Section 505 (b) of the CWA bars citizen suits, "if the Administrator or State has commenced and is diligently prosecuting" an alleged violation in a federal or state court. It also contains a notice provision that requires citizens to give 60 days' notice of their intent to sue to the alleged violator as well as to the Administrator and the State, and bars citizen suits if the Administrator or the State commences enforcement action within that 60-day period. Supreme Court has confirmed the rights of alleged violators to avoid citizen suits by coming into compliance within this notice period. It has also recognized governmental action as the primary enforcement mechanism against alleged violations. NUWF's suit is barred as NUDEP commenced its enforcement action within the 60-day notice period and as its prosecution of Bowman satisfies the requirements for diligent prosecution under this section.

Courts have interpreted the State's diligent prosecution to bar citizen suits when three requirements are satisfied - the state must have "commenced" an enforcement procedure, the state must be "diligently prosecuting" the enforcement proceedings and the state's statutory enforcement scheme must be "comparable" to the federal scheme. NUDEP had "commenced" its enforcement procedure against Bowman, before NUWF brought its suit. The prosecution was diligent as shown by its timeliness and persistence in reaching a fair and equitable agreement, requiring Bowman to incur expenses in maintaining the wetland while relinquishing considerable value of the property, through a transparent process that provided adequate avenues for public participation. The parties also agree that the enforcement schemes are comparable. Thus NUDEP's diligent prosecution of Bowman bars the citizen suit brought by NUWF.

The CWA makes it unlawful for the addition of any pollutant to navigable waters from any point source. Bowman's actions satisfy all four of the elements, indicating that he was in violation of the Clean Water Act because he did not obtain a permit. The Bowman property is classified as a wetland and therefore is a "navigable water" within the meaning of the statute. Bowman used a bulldozer to clear his land and a bulldozer is a "point source" within the meaning of the statute. The material that Bowman pushed into the ground met the definition of a "pollutant" and these pollutants met the definition of "fill material" resulting in these actions requiring a permit from the US Army Corps of Engineers.

Bowman's activities satisfy the criteria of "addition." Bowman "redeposited" the "pollutants" into the ground and "redeposited" has been held to be an addition. Bowman's actions are factually distinct from the line of cases that interpret addition as "coming from the outside world" and this line of cases should not be followed in the present case. The District Court incorrectly determined that the Water Transfer Rule applies to the present case and entitled the situation *Chevron* deference. Because of factual differences and inconsistencies with the final rule and the preamble, the Twelfth Circuit should apply *Mead*'s interpretation and find that the Water Transfer Rule is inapplicable to the present case and not persuasive. Finally, Bowman's actions constituted an industrial or commercial use and he introduced a pollutant to the water, resulting in the NPDES permit exclusion of a water transfer inapplicable to the present situation.

## STANDARD OF REVIEW

The questions of law to be evaluated by this Court should be reviewed de novo. *Theriot, Inc. v. United States*, 245 F.3d 388, 395 (5th Cir. 1998). Review of federal agency action is governed by the Administrative Procedure Act, 5 U.S.C. § 551 (2006), and should only be overturned if it "relied on factors which Congress has not intended it to consider, entirely failed

to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that is could not be ascribed to a difference in view or to the product of agency expertise." *Motor Vehicle Mfrs. Ass'n of the U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983).

## ARGUMENT

### I. THE DISTRICT COURT ERRED IN HOLDING THAT NUWF LACKED STANDING TO BRING A CITIZEN SUIT AGAINST BOWMAN FOR VIOLATING THE CWA.

NUWF has Article III standing to bring a citizen suit against Bowman pursuant to § 505 of the CWA. Specifically, four individual members of the NUWF have claimed actual and imminent injuries as a direct result of the Bowman's land clearing operations that could potentially be redressed by this court through a favorable decision.

Article III, § 2 of the United States Constitution requires the existence of a case or controversy before an issue can be presented to and ruled upon by the judicial system. U.S. Const. art. III, § 2. The doctrine of standing under Article III case or controversy requirements serves the important function of identifying appropriate matters for judicial resolution. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992). An organization has standing to bring a citizen suit on behalf of its member if: (a) its members would otherwise have standing to sue in their own right; (b) the interest it seeks to protect are germane to the organization's purpose; and (c) 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). Supreme Court has laid out the three elements to determine the standing for individual plaintiffs: (1) an injury-in-fact; (2) that is fairly traceable to the challenged action of the defendant; and (3) likely to be redressed by a favorable decision. *Lujan*, 504 U.S. 555 at 560-61.

### A. Members of the NUWF satisfy the individual Article III standing requirements.

Members of NUWF satisfy all the three elements of standing established in *Lujan* in that they have an injury-in-fact that is fairly traceable to the challenged action of Bowman, which is likely to be redressed by a favorable decision of the court. *Id.*

In the present case the only disputed element is "injury in fact." It is also not disputed that a favorable outcome for the member's NUWF will provide redress for Bowman's activities. It is also not disputed that the injuries to NUWF members are also fairly traceable to Bowman's actions. There are no other actions alleged to have caused NUWF's member's injuries other than Bowman's land clearing activities under the evidences credited by the District Court. (*R*. at 4).

An injury-in-fact asserted by a plaintiff must be particularized to the plaintiff and be concrete, actual or imminent and not speculative. *Lujan*, 504 U.S. at 563-64. The Supreme Court has also recognized that injuries to aesthetic interests are worthy of legal protection. *Sierra Club v. Morton,* 405 U.S. 727, 734 (1972). A "reasonable fear" is sufficient injury-in-fact to support standing. *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs.*, 528 U.S. 167 (2000). Also, "[t]he 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.

The particularized injury could be demonstrated by a "concrete plan" proven by "specific facts" that "would be directly affected by actions of the appellant." *Lujan*, 504 U.S. 555 at 564. Here, Dottie Milford, Zeke Norton, and Effie Lawless, three member of NUWF, have offered affidavits and depositions giving specific facts about their injuries. (*R*. at 6). The three also show that they have previously used Muddy for recreational purposes such as fishing, boating, thus showing a concrete plan or purpose. Bowman's actions in clearing the wetlands clearly affect

their plan to continue this use. Thus the injuries to the members of NUWF satisfy all of the requirements for the particularization required by *Lujan*.

Plaintiffs in environmental suits may also satisfy injury-in-fact by proving they use the affected area and are individuals "for whom the aesthetic and recreational values of the area will be lessened." *Sierra Club v. Morton,* 405 U.S. 727, 734 (1972). The plaintiffs should show that the activity connections are not attenuated and they use the wetland in a "way that would be significantly affected by the proposed actions." *Id.* at 735.

The injury-in-fact for plaintiffs could be satisfied by a "reasonable fear" of an increased risk or probabilistic harm to satisfy injury-in-fact for plaintiffs. *See Me. People's Alliance And Natural Res. Def. Council v. Mallinckrodt, Inc.*, 471 F. 3d 277, 284 (1st Cir. 2006) (Injury-in-fact established for probabilistic risk and reasonable fear because witnesses testified that they have modified their recreational activities near the river in fear of pollution); *Baur v. Veneman*, 352 F.3d 625, 634 (2d Cir. 2003) (Injury-in-fact established for enhanced risks of disease transmission due to exposure); *Friends of the Earth, Inc. v. Gaston Copper Recycling Corp.*, 204 F.3d 149, 156 (4th Cir. 2000) (Injury-in-fact established by testimony that recreational activity such as swimming and finishing has decreased in reaction to fear of river pollution after establishing a direct nexus); *Bensman v. U.S. Forest Serv.*, 408 F.3d 945, 963 (7th Cir. 2005) (Injury-in-fact established for aesthetic interests due to frequent visits to affected location); *Ecological Rights Found. v. Pac. Lumber Co.*, 230 F.3d 1141, 1150-51 (9th Cir. 2000) (Injury-in-fact established due to testimony of lowered aesthetic and recreational interest).

In the present case, the members of NUWF have continually and frequently used the Muddy River for recreational purposes. With a more polluted river, the members of NUWF will imminently suffer an aesthetic injury when they conduct their activities on the river near

Bowman's property. In fact, as Milford testified, the aesthetic injuries have already occurred as the river appeared far more polluted to her after Bowman's land clearing activities. (*R*. at 6).

The District Court considered the aesthetics of the river unaffected because the conservation easement effectively shields the field from the river and claimed that the injuries claimed by the NUWF's members were speculative. *Id.* In reaching this conclusion, the District Court was primarily concerned with how the surrounding of the river would appear to one navigating the river. But similar to the plaintiff in *Laidlaw*, the members of NUWF have expressed their opinion that the river is now more polluted with the destruction of the wetlands on Bowman's property and the reasonable fear that it may become even more polluted if Bowman's activities continue.

The members of the NUWF have often used the Muddy River adjacent to Bowman's property for recreational purposes which have been affected by Bowman's activities. Milford testified that the actual appearance of the river water has changed after Bowman's activities and thus affected her aesthetic enjoyment of the river. The aesthetics of the river water itself must be given weight in addition to the aesthetics of the surrounding wetlands. NUWF"s members are not asserting potential environmental harms; rather they are focusing on their personal injuries due to the aesthetics changes in the river near area affected by land clearing. The elements of the NUWF members' testimonies are sufficient for standing under *Laidlaw*.

Also the probabilistic harm and increased risk are sufficient to overcome the speculation argument to established injury-in-fact. NUWF's members have testified about actual aesthetic harms to the river. Their longstanding ties with river show a direct nexus between NUWF's members and the "area of environmental impairment." *Gaston*, 629 F.3d at 395. They have also

testified about the river acting as a deterrent to pollution and that the river has changed noticeably after Bowman's activities.

The injuries here are actual and imminent and are sharply different from the Eighth Circuit's rejection of a plaintiff's argument about flooding of the 100-year flood plain because it is "too remote in the abstract." *Shane v. Veneman*, 376 F.3d 815, 818 (8th Cir. 2004). NUWF"s members now have less enjoyment in their recreational activities due to Bowman's actions and will lose even more enjoyment if the aesthetics of Muddy is harmed further. Thus it is undeniable that the injuries claimed by NUWF's members are not speculative as indicated by the District Court. (*R*. at 6).

### B. NUWF has standing as an organization to bring suit on behalf of its members

As stated previously, an organization has standing to bring a citizen suit on behalf of its member if: (a) its members would otherwise have standing to sue in their own right; (b) the interest it seeks to protect are germane to the organization's purpose; and (c) 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).

As discussed in the previous section, the members of NUWF have individual standing to bring this citizen suit in their own right. Three members of NUWF, Dottie Milford, Zeke Norton, and Effie Lawless have provided affidavits and deposition establishing the aesthetic and recreational injury-in-fact they have sustained on the Muddy River. The sole cause of the aesthetic and recreational injuries is Bowman's land clearing operations. Finally, the injuries can be redressed through Bowman's cessation of land clearing activities, restoration of wetlands, and civil penalties for future deterrence.

NUWF is seeking to protect interests that are germane to the organization's purpose. NUWF's members elect its Board of Directors, who in turn elects the organization's President. (*R*. at 4). NUWF's purpose is to protect the fish and wildlife of the state by protecting their habitats, among other things. Therefore, the protection of the Muddy River is directly relevant to the purpose of the organization. *Id.*

NUWF is also not pursuing damages based on its individual members' injuries but rather seeking civil penalties and an order requiring Bowman to remove the fill material and restore the wetlands. (*R*. at 5). Therefore, NUWF has satisfied all the required elements to bring this suit on behalf of its members, who otherwise still have standing to sue on their own.

## II. THE DISTRICT COURT WAS CORRECT IN HOLDING THAT ALL VIOLATIONS ARE WHOLLY PAST

CWA prohibits any discharge of pollutants from any point source into navigable water of the United States without the appropriate pollution discharge permits and subsequent compliance. 33 U.S.C. §§ 1311 (a), 1342. The Supreme Court has held that Citizen suits under § 505 of the CWA are barred for wholly past violations. *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Found*., 484 U.S. 49, 57 (1987). CWA § 505 (a) (1) permits a citizen-plaintiff to bring suit alleging "a state of either continuous or intermittent violation, that is, a reasonable likelihood that a past polluter will continue to pollute in the future." *Id.* Furthermore, the allegations of continuing violations must be made in "good faith." *Id*. at 64.

In *Gwaltney*, the Supreme Court noted that allowing citizen suits for wholly past violations will render the sixty day notice requirement superfluous if the alleged violator is not given "an opportunity to bring itself into complete compliance with the Act." *Gwaltney*, 484 U.S. at 59-60. Subsequent cases have allowed two ways to prove ongoing violations: "(1) by

proving violations that continue on or after the date the complaint is filed, or (2) by adducing evidence from which a reasonable trier of fact could find a continuing likelihood of a recurrence in intermittent or sporadic violation." *Chesapeake Bay Found., Inc. v. Gwaltney of Smithfield, Ltd.,* 890 F.2d 690, 693 (4th Cir. 1989).

Courts have held that the violation of the CWA does not include mere decomposition of pollutants. *Conn. Coastal Fishermen's Ass'n v. Remington Arms Co., Inc.*, 989 F.2d 1305, 1313 (2d Cir. 1993). Also, a single past violation "with continuing effects, [is] not a continuing discharge." *Hamker v. Diamond Shamrock Chem. Co.*, 756 F.2d 392, 397 (5th Cir. 1985). "In determining whether to characterize a violation as "continuing," it is important to distinguish between the "present consequences of a one-time violation," which do not extend the limitations period, and "a continuation of a violation into the present," which does." *Nat'l Parks & Conservation Ass'n, Inc. v. Tennessee Valley Auth.*, 502 F.3d 1316, 1322 (11th Cir. 2007). A discharge in violation of the obligation at issue under § 1311 (a) is not a continuing violation on the basis that the discharger fails to remedy its effects. *United States v. Rutherford Oil Corp.*, 756 F. Supp. 2d 782, 791 (S.D. Tex. 2010)

In the present case, as the District Court correctly stated, Bowman's land clearing activities ceased on July 15, 2012 and there is no reason to believe that he will resume them. Also, in accordance with the administrative order, he has placed the remaining wooded land he owns in the area in a conservation easement with NUDEP. Thus, there is no evidence from which a reasonable trier of fact could find a continuing likelihood of a recurrence in intermittent or sporadic violation.

NUWF alleges that the continued presence of dredged and fill material in the former wetland is an ongoing violation. It cites *Sasser v. Adm'r, U.S. E.P.A.,* 990 F.2d 127, 129 (4th

Cir.1993), in support of its position. In *Sasser,* the court concluded that violations in terms of adding dredged or fill materials to wetlands are considered ongoing until the illegally dumped fill material to have been removed. *Sasser*, 990 F.2d at 129. As noted earlier, other courts have declined to follow this reasoning. It also directly contradicts with the jurisdiction requirement of the ongoing violations and it conflicts with application of the statute of limitation principle involving the CWA. The jurisdictional requirement of § 505 is an inquiry into the status of a violation, i.e., whether it is continuing or not. A simple conclusion that filling a wetland creates a never ending violation until removal, renders the jurisdictional requirements superfluous and is illogical, since such a reasoning effectively renders all violations continuing and is improper.

It may be argued that Bowman continued his violation due to having sowed winter wheat on September 2011. However, the act of seeding is a non-prohibited discharge of dredged or fill material under § 404. 33 U.S.C § 1344 (f)(1)(A). In addition, a single, isolated event is insufficient as a matter of law to raise a genuine issue of material fact as to whether there is a continuing violation. *See Allen Cnty. Citizens for the Env't, Inc. v. BP Oil Co.*, 762 F. Supp. 733, 744 (N.D. Ohio 1991) (one single instance of exceedance without relevant evidence of past exceedance does not support continuation). Here, Bowman had sowed the winter wheat outside of the area designated as wetland buffer zone and the easement area. He has not violated the terms of the settlement with NUDEP. In addition, aside from this one instance of planting winter wheat, Bowman has not conducted any other activity on his property following the termination of land clearing on July 15, 2012 and after the settlement agreement with NUDEP. Thus, the one instance of § 404 exempt seeding should not render his violation to have continued following compliance.

In summary, the decision by the court below in the instant case in correct given the fact that there is no continuing violation and there is no additional evidence to demonstrate a continuing likelihood of any recurrence.

## III. NUDEP'S PROSECUTION OF AND CONSENT DECREE WITH BOWMAN SATISFY THE REQUIREMENTS FOR DILIGENT PROSECUTION AS SET OUT IN § 505 (b) OF THE CWA AND THE COURT BELOW WAS CORRECT IN GRANTING SUMMARY JUDGMENT ON THIS ISSUE.

NUWF's suit is barred as NUDEP's prosecution of and consent decree with Bowman satisfy the requirements for diligent prosecution under §505 (b) of the CWA. NUDEP had "commenced" its enforcement procedure against Bowman, before NUWF brought its suit. (R. at 7). Also, NUDEP's prosecution of Bowman was diligent as shown by its timeliness and persistence in reaching a fair and equitable agreement, through a transparent process that provided adequate avenues for public participation by involving the federal district court.

Section 505 (a) of the CWA states that any citizen "may commence a civil action on his own behalf" against any person (including the United States and any other government agency) to the extent permitted by the Eleventh Amendment to the Constitution "who is alleged to be in violation of an effluent standard or limitation under this chapter." 33 U.S.C. § 1365. But §505 (b) (1) (B) states a limitation to this right in that "no action may be commenced . . . if the Administrator or State has commenced and is diligently prosecuting a civil or criminal action in a court of the United States, or a State to require compliance with the standard, limitation, or order." *Id.* It also provides that "in any such action in a court of the United States any citizen may intervene as a matter of right." *Id.*

The Supreme Court has held that §505 do not permit citizen suits for wholly past violations. *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Found., Inc.*, 484 U.S. 49, 64

(1987). The Court stated that "the most natural reading of 'to be in violation' is a requirement that citizen-plaintiffs allege a state of either continuous or intermittent violation - that is, a reasonable likelihood that a past polluter will continue to pollute in the future." *Id*. at 57. The Court invoked the canon of "in pari materia" and noted that "Congress used identical language in the citizen suit provisions of several other environmental statutes that authorize only prospective relief." *Id*. It also used the canon of "noscitur a sociis" and recognized "the pervasive use of the present tense throughout § 505" to arrive at its conclusion. *Id*. at 59.

The Court also confirmed the rights of alleged violators to avoid citizen suits by coming into compliance within the notice period. The notice provision requires citizens to give 60 days' notice of their intent to sue to the alleged violator as well as to the Administrator and the State. 33 U.S.C. § 1365(b)(1)(A). If the Administrator or the State commences enforcement action within that 60-day period, the citizen suit is barred. 33 U.S.C. § 1365(b)(1)(B). "It follows logically that the purpose of notice to the alleged violator is to give it an opportunity to bring itself into complete compliance with the Act and thus likewise render unnecessary a citizen suit." *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Found., Inc.*, 484 U.S. 49, 59-60 (1987).

Governmental action has been recognized as the primary enforcement mechanism against alleged violations. The Court has stated that the limitation provided for citizen suits in §505 (b), "suggests that the citizen suit is meant to supplement rather than to supplant governmental action." *Id*. at 60. The "Congressional declaration of goals and policy" for the CWA reiterates "the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution" and "to plan the development and use (including restoration, preservation, and enhancement) of land and water resources." 33 U.S.C. § 1251(b). "Because of the obvious danger that unlimited public actions might disrupt the implementation of the Act and overburden the courts, Congress

restricted citizen suits to actions seeking to enforce specific requirements of the Act." *Natural Res. Def. Council, Inc. v. Train*, 510 F.2d 692, 700 (D.C. Cir. 1974).

Black's law dictionary defines the term "diligent" as "Careful; attentive; persistent in doing something." Thus, for the prosecution to be diligent, it has to be not only timely and persistent, but also careful and attentive. This aspect is recognized in §505 (b) (1) (B) through its requirement for the "diligent prosecution" to "require compliance with the standard, limitation, or order." 33 U.S.C. § 1365.

In deciding whether the government, exercising its primary enforcement authority, is "diligently prosecuting" the alleged violation, courts normally provide great deference to government enforcement, "particularly when the EPA chooses to enforce the CWA through a consent decree, failure to defer to its judgment can undermine agency strategy." *Karr v. Hefner, 475 F.3d 1192, 1197 (10th Cir. 2007)*. The governmental action need not be "far-reaching or zealous," or coincide with the "prosecutorial strategy . . . of the citizen-plaintiff." *Id*. It would be "unreasonable and inappropriate to find failure to diligently prosecute" because the alleged polluter "prevailed in some fashion or because a compromise was reached." *Ark. Wildlife Fed'n v. ICI Americas, Inc.*, 29 F.3d 376, 380 (8th Cir. 1994). Also, "[w]here an agency has specifically addressed the concerns of an analogous citizen's suit, deference to the agency's plan of attack should be particularly favored." *N. & S. Rivers Watershed Ass'n, Inc. v. Town of Scituate*, 949 F.2d 552, 557 (1st Cir. 1991).

Some courts "presume" diligent prosecution, "absent persuasive evidence that the state has engaged in a pattern of conduct in its prosecution of the defendant that could be considered dilatory, collusive or otherwise in bad faith." *Conn. Fund For Env't v. Contract Plating Co., Inc.*, 631 F. Supp. 1291, 1293 (D. Conn. 1986). This presumption results in the citizen-plaintiffs

bearing "the heavy burden of proving that the state agency's prosecution was not diligent." *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs., Inc.*, 890 F. Supp. 470, 486-87 (D.S.C. 1995).

Courts have interpreted the State's diligent prosecution to bar citizen suits when three requirements are satisfied. *Friends of Milwaukee's Rivers v. Milwaukee Metro. Sewerage Dist., 382 F.3d 743, 755 (7th Cir. 2004) [citing McAbee v. City of Fort Payne, 318 F.3d 1248, 1251 (11th Cir. 2003)].* First, the state must have "commenced" an enforcement procedure against the polluter. *Id*. Second, the state must be "diligently prosecuting" the enforcement proceedings. *Id*. Finally, the state's statutory enforcement scheme must be "comparable" to the federal scheme promulgated in 33 U.S.C. § 1319(g). *Id.* As the court in Friends of Milwaukee stated, "[t]he verb tenses used in subsection (b)(1)(B) and the scheme of the statute demonstrate that the bar was not intended to apply unless the government files suit first (and is diligently prosecuting such suit)." *Id.* at 754 (internal citations omitted). Under § 1319(g), "an administrative action 'commences' at the point when notice and public participation protections become available to the public and interested parties." *Id.* at 756. When an agency files a complaint with the court the action commences because "from this formal moment enforcement becomes public." *Id. at 757.*

Regarding the first requirement, the enforcement action by NUDEP against Bowman "commenced" on August 10, 2011, when NUDEP filed a complaint against Bowman in federal court (R. at 5). This was 41 days after NUWF had sent the notice of its intent to sue Bowman on July 1, 2011, but before NUWF brought its own suit against Bowman on August 30, 2011. *Id*. Thus, as of August 10, 2011, the enforcement action became public and "public participation protections became available to the public and interested parties." *Friends of Milwaukee's Rivers v. Milwaukee Metro. Sewerage Dist.,* 382 F.3d 743, 756 (7th Cir. 2004). NUWF utilized this public participation protection and actually intervened in this action on September 15, 2012 (R.

at 5). Thus, NUDEP had "commenced" its enforcement procedure against Bowman, before NUWF brought its suit.

The second requirement is whether NUDEP has been "diligently prosecuting" the enforcement action against Bowman. As discussed earlier, courts normally provide great deference to government enforcement and recognize that compromises may be reached in enforcement actions. NUDEP contacted Bowman, entered into a settlement agreement with him through discussions, issued it as an administrative order and procured Bowman's consent to it, all within a month after receiving the notice from NUWF. Further, NUDEP provided for public participation by filing a suit in federal court, just ten (10) days after reaching that compromise (R. at 5). Less than a month later, on September 5, 2011, NUDEP filed a motion to enter a decree with identical terms as that of the previously agreed administrative order. Thus, the timeline confirms that NUDEP was timely and persistent in its prosecution.

The third requirement is also satisfied as the parties agree that the state's statutory enforcement scheme is "comparable" to the federal scheme (R. at 4). But in addition to these requirements, the prosecution also needs to be careful and attentive. This is especially true when the regulatory agency reaches an agreement with the alleged violator, to confirm that the agreement was not collusive. In the present case, NUDEP has filed a motion with the federal court to enter a decree, the terms of which are identical to the administrative order. A court will enter such a proposed consent judgment only "if the court decides that it is fair, reasonable and equitable and does not violate the law or public policy." *Sierra Club, Inc. v. Elec. Controls Design, Inc.*, 909 F.2d 1350, 1355 (9th Cir. 1990). Thus, the transparent enforcement process followed by NUDEP, which allowed for public participation, ensures that its prosecution was

careful and attentive, by requiring a neutral federal court to confirm that the agreement is "fair, reasonable and equitable and does not violate the law or public policy." *Id*.

As the District Court noted, the settlement "required Bowman to immediately cease further violations of §404 and in lieu of a penalty, to deed a conservation easement over a large portion of his property, relinquishing its agricultural and development value, preserving it in a natural state, and opening it to appropriate public use." (R. at 7). The settlement also "required Bowman to construct and maintain a year-round, partially-inundated wetland at considerable initial expense and an indeterminable future expense." (R. at 8). Thus, the settlement agreement was fair and equitable by requiring Bowman to incur expenses in maintaining the wetland while relinquishing considerable value of the property, in return for NUDEP not seeking a civil penalty and removal of fill materials. It follows that NUDEP's prosecution of Bowman and the resulting agreement satisfy the "diligent prosecution" requirement as defined in §505 (b) (1) (B) of CWA.

It may be argued that the NUWF suit is not barred by the NUDEP prosecution, since it is seeking civil penalties and an order requiring Bowman to remove the fill material and restore the wetlands, both of which were not part of the agreement between NUDEP and Bowman. But the Supreme Court has held that if citizens are allowed to seek "civil penalties that the Administrator chose to forgo, then the Administrator's discretion to enforce the Act in the public interest would be curtailed considerably." *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Found., Inc*., 484 U.S. 49, 61 (1987). Allowing such suits "would change the nature of the citizens' role from interstitial to potentially intrusive." and as the Court stated "[w]e cannot agree that Congress intended such a result." *Id*. Thus, "a citizen suit under the Act may neither be addressed wholly to past violations nor seek to recover fines and penalties that the government has elected to forego." *Atl. States Legal Found., Inc. v. Eastman Kodak Co.*, 933 F.2d 124, 127 (2d Cir. 1991).

"Second-guessing of the EPA's assessment of an appropriate remedy . . . fails to respect the statute's careful distribution of enforcement authority among the federal EPA, the States and private citizens, all of which permit citizens to act where the EPA has 'failed' to do so, not where the EPA has acted but has not acted aggressively enough in the citizens' view." *Ellis v. Gallatin Steel Co.,* 390 F.3d 461, 477 (6th Cir. 2004).

It may also be argued that the use of the phrase "is diligently prosecuting" (present tense) in §505 (b) (1) (B) requires a current prosecution to bar a citizen suit, and that the NUWF suit is not barred as NUDEP has already reached an agreement with Bowman and hence is not currently prosecuting him. But such an interpretation "would allow citizens to bring a private enforcement action against any alleged violator, as long as the citizen waited until the conclusion of the governmental action before bringing the citizen suit." *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs, Inc.*, 890 F. Supp. 470, 485 (D.S.C. 1995). Such a result would be contrary to the Supreme Court's holding in *Gwaltney* that "citizen suits are proper only if the Federal, State, and local agencies fail to exercise their enforcement responsibility." *Id*. at 486. This will also cause potential violators to be "disinclined to resolve disputes by such relatively informal agreements if additional civil penalties may then be imposed in pending citizen suits," which will deprive the agencies "of this resource-conserving enforcement tool." *Comfort Lake Ass'n, Inc. v. Dresel Contracting, Inc.*, 138 F.3d 351, 357 (8th Cir. 1998).

Therefore, the NUWF suit is barred due to two reasons. First, NUDEP had "commenced" its enforcement procedure against Bowman, before NUWF brought its suit. Second, NUDEP's prosecution of Bowman was diligent as shown by its timeliness and persistence in reaching a fair and equitable agreement, through a transparent process that provided adequate avenues for public participation by involving the federal District Court.

## IV. BOWMAN'S ACTIONS SATISFIED THE ELEMENTS OF §§ 301(a) & 404 AND THIS RESULTS IN A VIOLATION OF THE CLEAN WATER ACT.

The controlling statute is the Federal Water Pollution Control Act, or known as the Clean Water Act (CWA), 33 U.S.C. § 1251 (2012). The CWA mandates in § 301(a) that "the discharge of any pollutant by any person shall be unlawful," unless the discharger obtains a permit issued under §§ 402 or 404 of the CWA. 33 U.S.C. § 1311(a) (2012). The Army Corps of Engineers is authorized to issue permits "for the discharge of dredged or fill materials into the navigable waters." *Id. § 1344*. According to the CWA, "the term 'discharge of a pollutant' and the term 'discharge of pollutants' each means any *addition* of any *pollutant* to *navigable waters* from any *point source* . . . ." (emphasis added). *Id*. § 1362 (6). If the actions of a discharger satisfy these elements without a permit, it is unlawful under the CWA. *Id*. In the present case, Bowman is in violation of the CWA as he did not obtain a permit for actions that met all of the elements under § 301(a) and § 404 that require him to obtain a permit.

### A. Navigable Waters

Bowman's property was correctly determined to be a wetland and falls within the meaning of the term "navigable waters" within the CWA. The CWA § 502(7) states that "the term 'navigable waters' means 'the waters of the United States' . . . ." 33 U.S.C. § 1362 (7) (2012). The Supreme Court has indicated that "wetlands" may be regulated under CWA § 404 as a navigable waters. *See U.S. v. Riverside Bayview Homes, Inc*. 474 U.S. 121, 16 (1985) (where the Court determined that wetlands adjacent to a navigable water were navigable). Bowman's property is adjacent to the Muddy River and "hydrologically connected to the Muddy." (R. at 3). The Muddy River is used for recreational navigation, therefore, a "navigable water" within the CWA. *Id*. at 3. The District Court indicated, "parties agree that the [Bowman] property is a

wetland" and correctly determined it a "navigable waters" because it is adjacent and hydrologically connected to the Muddy River. *Id*. at 3.

### B. Point Source

The "point source" element is also satisfied in this case. A "point source" is defined in § 502 (14) of the CWA as "any discernible, confined and discrete conveyance . . . from which pollutants are or may be discharged." 33 U.S.C. § 1362 (14) (2012). The term "point source" should be broadly interpreted. *See Parker v. Scrap Metal Processors, Inc.*, 386 F.3d 993, 1009 (11th Cir. 2004). Bulldozers have previously been classified as "point sources". *See Avoyelles Sportsmen's League, Inc. v. Marsh*, 715 F.2d 897, 922 (5th Cir. 1983) ("we agree with the district court that the bulldozers and backhoes [are] 'point sources,' since they collected into windrows and piles material that may ultimately have found its way back into the waters."). Bowman used bulldozers to conduct his activities subject to this appeal. (R. at 4). The court below indicated, "[n]o party contests that the bulldozers were point sources." *Id*. at 8. Therefore, this court should find that the point source element is satisfied.

### C. Pollutant

The court below correctly determined that the element of pollutant is satisfied. According to § 502 (6) of the CWA, "[t]he term 'pollutant' means dredged spoil . . . biological materials . . . ." 33 U.S.C. § 1362 (6) (2012). The Corps is authorized to issue permits for the "discharge of . . . fill material." *Id.* §1344. The Corps defined fill material as "material placed in waters of the United States where the material has the effect of [r]eplacing any portion of a water of the United States with dry land." 33 C.F.R. § 323.2 (2012). *See also Avoyelles Sportsmen's League, Inc. v. Marsh*, 715 F.2d 897, 924 (5th Cir. 1983) (where the court held that dirt and vegetation that was bulldozed and buried was "fill material."). Bowman "used a bulldozer to knock down trees, level

other vegetation, and push the trees and vegetation into windrows" and created ditches to further dry the land to plant winter wheat. (R. at 4-5). These actions indicate that Bowman intended to replace the water area with dry land, confirming that the bulldozed material constituted "fill material," which contained vegetation, a biological material, therefore a "pollutant." The court below correctly held that the element of pollutant is satisfied. *Id*. at 8.

**D. Addition**

The court below incorrectly reasoned that this situation involves a determination of addition as "from the outside world" and that the EPA Water Transfer Rule should be controlling. The term "addition" is not defined in the CWA. *See* 33 U.S.C. § 1362 (2012). Because the term is not defined, applying an ordinary or plain meaning interpretation is a valid first approach. *See S.D. Warren Co. v. Me. Bd. of Envtl. Prot.*, 547 U.S. 370, 376 (2006) ("since it is neither defined in the statute nor a term of art, we are left to construe it in accordance with its ordinary or natural meaning.") (internal citations omitted).

According to *Webster's Third New International Dictionary*, 24 (Philip Babcock Grove, 2002) "addition" is "the joining or uniting of one thing to another." Further, viewing the Congressional declaration of goals and policy, the key term is to "restore" the Nation's waters. 33 U.S.C. § 1251 (a) (2012). Additionally, the goal is to have "discharge[s] of pollutants . . . eliminated . . . ." *Id*. The goals of the CWA and the definition of addition indicates that Congress desired to have items not originally present within a water way, e.g. fill material, refrain from being placed into the water by man. Further, the parallel legislation to the CWA, The Rivers and Harbors Appropriation Act of 1899, 33 U.S.C. § 407 (Refuse Act) provides insight into legislative intent of the term addition in the CWA. The Refuse Act states that "it shall not be lawful to throw, discharge, or deposit . . . any refuse matter of any kind of description . . . ." *Id*.

These terms indicate the placement of items or material not originally within water into a navigable water. Further, mindful of the language of the Refuse Act, the Committee for the CWA believed that the "no-discharge declaration in Section 13 of the 1899 Refuse Act is useful as an enforcement tool" and "this section declares the discharge of pollutants unlawful." *Legislative History: Federal Water Pollution Control Act of 1972* Legis. History 36-E, 30 (A&P), FWPCA72-LH 36-E, 30 (Westlaw).

i. The court below confused two different lines of cases defining addition

Case law interpreting the term "addition" has evolved into two different lines of cases. The first line of cases involves situations where water, containing pollutants, is transported into a different water body. In *National Wildlife Federation v. Gorsuch*, 693 F.2d 156 (D.C. Cir. 1982), the National Wildlife Federation sought to declare that the EPA had a nondiscretionary duty to require NPDES permits for dams because of the inherent water quality problems that dams cause. For litigating purposes, the EPA determined that the definition of "added" was "physically introduce[ing] a pollutant into water from the outside world." *Id*. at 175. The court adopted the EPA's interpretation because Congress had given the EPA discretion to define the term and EPA's definition was not "manifestly unreasonable." *Id*. at 174-5.

Subsequent to *Gorsuch*, in *National Wildlife Federation v. Consumers Power Compa*ny, 862 F.2d 580, 581 (6th Cir. 1988), a group brought action to require a NPDES permit for a power generator that pumped water from Lake Michigan uphill to a reservoir and then released the water through turbines to generate electricity. Fish were being caught and pureed in the turbines and the power station would release water with fish puree as a result. *Id*. at 582. Applying the reasoning of *Gorsuch* to defer to the EPA's policy of "addition" as coming from the "outside world", the court in *Consumers Power* determined that the water passing through the

facility "never loses its status as a water of the United States" and the fish remains are not added from the "outside world," but are "transformed." *Id*. at 587-90.

The second line of applicable cases involves when material is "redeposited" into the ground. In *Avoyelles Sportsmen's League, Inc. v. Marsh*, 715 F.2d 897 (5th Cir. 1983), a landowner used bulldozers outfitted with shearing blades to cut timber and vegetation and "redeposited" this material into the ground when there was leveling of the ground. The court determined that the term "discharge" in the CWA covers redepositing and therefore requires a permit, finding that "the word addition as used in the definition of the term discharge may reasonably be understood to include redeposit." *Id*. at 923. *See also U.S. v. Pozsgai*, 999 F.2d 719 (3rd Cir. 1993), *cert. denied* 510 U.S. 1110 (1994); *but see National Mining Ass'n v. U.S. Army Corps of Eng'rs,* 145 F.3d 1399 (D.C. Cir. 1998) (where the court held that incidental fallback and sidecasting do not constitute an addition).

For the present situation, the District Court, determined that the EPA's litigating interpretation of addition in *Gorsuch* and *Consumers Power* as coming from the "outside world" was the correct analysis. However, it has been indicated that in interpreting a statute, context is incredibly important to the analysis. *See United States v. Santos*, 553 U.S. 507 (2008). In viewing the context of the facts of the case to analyze the statute, the present situation should be considered under an *Avoyelles* interpretation. Bowman "used a bulldozer to knock down trees, level other vegetation, and push the trees and vegetation into windrows [. . .] pushed the trees and leveled vegetation remains and ashes into [trenches]." (R at 4). The present situation is almost identical to the facts involved in *Avoyelles*. 715 F.2d at 902. These actions go considerably farther than merely "push[ing] pollutants from one part of his former wetlands to another part of his former wetlands" as the court below indicated. (R. at 9).

In analyzing and distinguishing from *Gorsuch* and *Consumers Power*, the Second Circuit coined the popular phrase, "[i]f one takes a ladle of soup from a pot, lifts it above the pot, and pours it back into the pot, one has not "added" soup or anything else to the pot." *Catskill Mountains Chapter of Trout Unlimited, Inc. v. N.Y.C.*, 273 F.3d 481, 492 (2d Cir. 2001) *adhered to on reconsideration,* 451 F.3d 77 (2d Cir. 2006). *See also S. Fla. Water Mgmt. Dist. v. Miccosukee Tribe of Indians*, 541 U.S. 95, 109-10 (2004) (applied the *Catskill* phrase to the Court's analysis). The present situation involving Bowman does not resemble the situation discussed in *Catskill* and a more appropriate metaphor involving soup would be taking crackers floating on top of a bowl of soup and grinding up the crackers and forcibly submerging them into the broth of the soup. Based upon the purpose of the CWA to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters," Congress could not have intended for the present situation to be permitted to occur without a NPDES permit. 33 U.S.C. § 1251.

ii. The District Court incorrectly interpreted the Water Transfer Rule

1. *Water Transfer Rule Background*

The court below incorrectly interpreted the Water Transfer Rule to apply to the present situation. In *South Florida Water Management District v. Miccosukee Tribe of Indians*, 541 U.S. 95, (2004), the Court held that a NPDES permit was required for water transfers from one navigable water into another. In response to this decision, the EPA drafted an interpretive memorandum of the CWA, indicating that Congress wished non-NPDES programs to have oversight of water transfers. *National Pollutant Discharge Elimination System (NPDES) Water Transfers Rule*, 73 Fed. Reg. 33697-01 (June 13, 2008) (to be codified at 40 C.F.R. pt. 122.3). Based on this memorandum, the EPA issued a final rule, the Water Transfer Rule, identifying several types of discharges that "do not require NPDES permits," of importance here,

"[d]ischarges from a water transfer." 40 C.F.R. § 122.3 (i) (2012). A water transfer is defined as "an activity that conveys or connects waters of the United States without subjecting the transferred water to intervening industrial, municipal, or commercial use." *Id*. Further, "[t]his exclusion does not apply to pollutants introduced by the water transfer activity itself to the water being transferred." *Id*.

Clarifying the definition of water transfer in the preamble for the final rule, the EPA specified that a water transfer "must be conveyed from one water of the US to another water of the US." *Water Transfer Rule,* 73 Fed. Reg. at 33699. Distinguishing from other types of conveyances, the EPA stated that "[c]onveyances that remain in the same water of the U.S., therefore, do not constitute water transfers under this rule . . . ." *Id*. However, without adding a statutory interpretation or case law to support this claim, the EPA stated that although not a water transfer, "movements of water within a single water body are also not subject to NPDES permitting requirements." *Id*. To a situation akin to the present case, the preamble stated that "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." *Id*. at 33703. Further, the "EPA believes that today's final rule will not have an effect on the 404 program." *Id*.

2. *Judicial Review of Agency Interpretation*

The District Court was incorrect with the judicial review of the EPA's interpretation of the Water Transfer Rule. The Supreme Court established the process for judicial review of an agency's statutory interpretation in the landmark case *Chevron, U.S.A., Inc. v. Natural Resources Defense Council*, 467 U.S. 837 (1984). The Court determined that if Congress explicitly granted an agency the authority to interpret the statute, then the agency's interpretation

governs. *Id*. at 842-843. If Congress did not explicitly provide the authority to interpret the statute, then a court needs to determine "whether the agency's answer is based on a permissible construction of the statute." *Id*. at 842-843.

Subsequent to the *Chevron* decision, the Supreme Court modified the approach in *United States v. Mead Corp*., 533 U.S. 218 (2001). Ruling on whether a tariff classification by the Customs Service was entitled to deference, the Court reduced *Chevron* deference to circumstances where 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." *Mead*, 533 U.S. at 226-7. Clarifying, the Court noted that Congressional delegation of authority "may be shown in a variety of ways, as by an agency's power to engage in adjudication or notice-and-comment rulemaking . . . ." *Id*. at 227. The Court noted that an interpreting court should still show respect to the agency interpretation based on "degree of the agency's care, its consistency, formality, and relative expertness, and to the persuasiveness of the agency's position." *Id*. at 228.

The present case should not be entitled to *Chevron* deference and should be analyzed under *Mead*. Bowman arguably conducted a water transfer within the water body when he moved water and pollutants around the wetland property during the clearing. (R. at 4). The Water Transfer Rule creates the exception for not requiring a NPDES permit of Water between two distinct bodies of water. 40 C.F.R. § 122.3 (i). However, nowhere in the language of the rule does it state an exemption for situations that are not a water transfer. *Id*.

While the EPA in the final rule preamble did state that "a water transfer movements of water within a single water body are also not subject to NPDES permitting requirements." *Water Transfer Rule,* 73 Fed. Reg. at 33699. This statement was not within the language of the final

rule and was not within the confines of the formal rulemaking process because initially the proposed rule was to "expressly state that water transfers are not subject to regulation under section 402 of the CWA." *Id*. at 33699. Therefore, this language is not as the Supreme Court articulated, "carrying the force of law" and should not have *Chevron* deference. *Mead*, 533 U.S. at 227. Thus, the Twelfth Circuit should interpret these words in the preamble with respect to the EPA's "degree of the agency's care, its consistency, formality, and relative expertness, and to the persuasiveness of the agency's position." *Id*. at 228.

The District Court's interpretation of the present case as a water transfer exempt from the NPDES permit directly contradicts EPA's determination – which should also be respected – that "EPA believes that today's final rule will not have an effect on the 404 program", and would result in an inconsistency in the EPA's position. *Water Transfer Rule,* 73 Fed. Reg. at 33703. Further, if the District Court position were held, NPDES permit program would be entirely irrelevant anytime someone with a bulldozer would want to clear a wetland and the NPDES permit has been determined as the best approach to meeting the goals of the CWA. *See Friends of Everglades v. S. Fla. Management Dist.*, 570 F.3d 1210, 1225 (11th Cir. 2009) ("The NPDES permitting program is the centerpiece of the Clean Water Act"). Finally, the EPA provided reasoning for its position that CWA § 404 would not be affected, but a water transfer within one body of water was a blanket statement, thus diminishing that statement's persuasiveness. *Water Transfer Rule,* 73 Fed. Reg. at 33699-703.

The District Court incorrectly leaned on the reasoning of the Eleventh Circuit in *Friends of Everglades*, 570 F.3d 1210 (11th Cir. 2009) to justify Bowman's actions as not requiring a NPDES permit in line with the EPA's Water Transfer Rule. In that case, the Eleventh Circuit applied *Chevron* deference to the Water Transfer Rule and accepted the EPA determination of

the unitary waters theory that "transferring pollutants between navigable waters is not an addition to navigable waters is a permissible construction of that language." (internal quotations omitted). *Id*. However, as previously discussed, Bowman's actions do not constitute a water transfer as defined by the Water Transfer Rule and are factually different than pure water transfers. *See Friends of the Everglades*, 570 F.3d 1210 (11th Cir. 2009) (where water was pumped between several canals and the issue centered on whether these required NPDES permits); *S. Fla. Water Mgmt. Dist. v. Miccosukee Tribe of Indians*, 541 U.S. 95, (2004) (the case centered on whether water pumped between canals requires a NPDES permit). This factual distinction results in the inapplicability of the Water Transfer Rule, thus, the interpretation of the Eleventh Circuit should not be persuasive in the present case.

iii. Bowman's actions constituted an industrial or commercial use or a transfer with an addition of a pollutant within the language of the rule resulting in the water transfer exception inapplicable.

The Water Transfer Rule does not exempt water transfers that involve "intervening industrial, municipal, or commercial use from the NPDES requirements." 40 C.F.R. 122.3. Applying a plain meaning interpretation, Bowman's activities should constitute an industrial use. Webster's dictionary defines "industrial" as "of or belonging to industry" and "industry" is defined as "a department or branch of a craft, art, business, or manufacture. A division of productive or profit making business." *Webster's Third New International Dictionary*, 1155 (Philip Babcock Grove, 2002). Bowman's actions of using a bulldozer to "knock down trees" and "dig trenches" and "leveling vegetation" can reasonably be interpreted as a manufacture and an industrial use. (R. at 4). Further, the developing of the Bowman property should be interpreted as an intervening commercial use because it can reasonably be interpreted that Bowman is

developing the property for some economic benefit because he started farming on the land. *Id*. at 5.

An additional provision within the rule states, "[t]his exclusion does not apply to pollutants introduced by the water transfer itself to the water being transferred." 40 C.F.R. 122.3 (2012). Should the court find that a water transfer within the confines of the Water Transfer Rule occurred when Bowman dug a ditch to drain his property into the Muddy River, as previously argued, Bowman's activities constituted an addition of a pollutant when the vegetation and other material was redeposited into the ground. Bowman pushed water and pollutants from one part of his former wetlands to another part of his former wetlands and material was burned and pushed into ditches. (R. at 9). Therefore, these actions indicate a situation where pollutants are being added to the water being transferred, whether within one water body or between two district navigable bodies of water and results in the water transfer exclusion inapplicable.

**Conclusion**

This Court should find that (1) NUWF has standing to sue Bowman for violating the CWA and the court below erred in granting Bowman's motion for summary judgment on this issue; (2) The violations by Bowman are wholly past and the court below was correct in granting summary judgment on this issue as there is no continuing or ongoing violation as required by § 505(a) of the CWA; (3) NUDEP's prosecution of and consent decree with Bowman satisfy the requirements for diligent prosecution as set out in § 505(b) of the CWA and the court below was correct in granting summary judgment on this issue; and (4) Bowman's actions, in moving dredged and fill material from one part of a wetland adjacent to navigable water to another part of the same wetland, satisfied all

of the elements required for a violation of §§ 301(a) and 404, including addition, and hence the court below erred in granting summary judgment on this issue.

Respectfully Submitted,

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