Team Number 61

C.A. No. 13-1246

IN THE UNITED STATES COURT OF APPEALS
FOR THE TWELFTH CIRCUIT

New Union Wildlife Federation,

Plaintiff-Appellant,

v.

New Union Department of Environmental Protection,

Intervenor-Appellant,

v.

Jim Bob Bowman,

Defendant-Appellee.

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

BRIEF FOR THE INTERVENOR-APPELLANT

SUMMARY OF THE CASE AND REQUEST FOR ORAL ARGUMENT

The New Union Department of Environmental Protection ("NUDEP") appeals the District Court's Order holding that the New Union Wildlife Federation ("NUWF") did not have standing to bring its citizen suit under § 505 of the Clean Water Act ("CWA"). 33 U.S.C. § 1365 (2006). The District Court's ruling on this issue should be reversed because Bowman's activities caused NUWF members to have a fear and disdain of using Muddy Rivers. Further, the court's injunction would grant legal use to the members, as well as alleviate fear of future pollutants.

The District Court's ruling that there is no continuing violation as required for subject matter jurisdiction under § 505(a) of the CWA should be upheld because Jim Bob Bowman ("Bowman") ceased his activities on July 15, complied with the settlement provisions with NUDEP, and NUDEP is in the midst of current legal action with Bowman and they were allowed to intervene in the NUWF suit.

Additionally, the District Court's ruling that NUWF's citizen suit is barred by NUDEP's diligent prosecution of Bowman under § 505(b) of the CWA should be upheld. The District Court was correct in its ruling because by filing a complaint with the lower court just a month after receiving NUWF's notice letter and by negotiating a settlement agreement with Bowman, NUDEP satisfied the requirements for diligent prosecution under the CWA.

Finally, the District Court's ruling that Bowman did not violate § 404, 33 U.S.C. § 1344, of the CWA should be reversed because dredged spoil and vegetative fill constitute an addition of a pollutant as they were not present prior to Bowman's activities, and congress and the EPA intended for such activities to require a permit.

NUDEP requests 30 minutes for oral argument.

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JURISDICTIONAL STATEMENT

On August 30, 2011, New Union Wildlife Federation ("NUWF") filed a section 505 complaint against Jim Bob Bowman ("Bowman") with the United States District Court for the District of New Union pursuant to 33 U.S.C. § 1365(b)(1)(B) (2006). (R. 5). The district court had jurisdiction under 33 U.S.C. § 1365(a) (2006).

This appeal is made following a final judgment of the district court. On June 1, 2012, the district court issued an Order granting Bowman's motion for summary judgment on all grounds in Civ. 149-2010. (R. 3). This Court has jurisdiction under 28 U.S.C. § 1291 (2006) to review the district court's judgment, because the judgment disposed of all parties' claims. (R. 11).

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

I. Whether NUWF has standing to sue Jim Bob Bowman for violating the CWA?

F*riends of the Earth, Inc. v. Laidlaw Envtl. Services (TOC), Inc.*, 528 U.S. 167(2000)
Hunt v. Washington State Apple Adver. Comm'n, 432 U.S. 333 (1977)
Lujan v. Nat'l Wildlife Fed'n, 497 U.S. 871 (1990)
Sierra Club v. Morton, 405 U.S. 727 (1972)

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

Allen County Citizens for Environment, Inc. v. BP Oil Co., 966 F.2d 1451 (6th. Cir. 1992)
Connecticut Coastal Fishermen's Association v. Remington Arms Co., Inc., 989 F.2d 1305 (2d Cir. 1993)
S.Rep. No. 92-414 (1971)
H.R.Rep. No. 92-911 (1972)
33 U.S.C. § 1365(a)(1) (2006)

III. Whether NUWF's citizen suit has been barred by NUDEP's diligent prosecution of Bowman as set out in § 505(b) of the CWA?

Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Foundation, Inc., 484 U.S. 49, 59 (1987)
Karr v. Hefner, 475 F.3d 1192 (10th Cir. 2007)
North & South Rivers Watershed Ass'n v. Scituate, 949 F.2d 552 (1st Cir. 1991)
The Piney Run Preservation Ass'n v. The County Com'rs Of Carroll County, Maryland, 523 F.3d 453 (4th Cir. 2008)
33 U.S.C. § 1365 (2006)

IV. Whether Bowman violated the CWA when he moved dredged and fill material from one part of the wetland adjacent to navigable water to another part of the same wetland?

Avoyelles Sportsmen's League, Inc. v. Marsh, 715 F.2d 897 (5th Cir. 1983)
National Wildlife Fed'n v. Gorsuch, 693 F.2d 156 (D.C. Cir. 1982)
United States v. Deaton, 209 F.3d 331 (4th Cir. 2000)
National Pollutant Discharge Elimination System (NPDES) Water Transfers Rule, 73 FR 33697 (June 13, 2008) (codified at 40 C.F.R. pt. 122)

STATEMENT OF THE CASE

On July 1, 2011, NUWF sent a notice of its intent to sue Bowman under § 505, 33 U.S.C. § 1365, of the CWA to NUDEP. Shortly after, NUDEP contacted Bowman and sent him notice of violation of both state and federal law by clearing his field. (R. 4). The two parties reached a settlement, which was incorporated in an administrative order issued by NUDEP to Bowman. Bowman consented to the order on August 1, 2011. (R. 4).

On August 10, 2011, NUDEP filed a complaint against Bowman in federal court under the CWA § 505, 33 U.S.C. § 1365 for filling wetlands without a permit in violation of §§ 301(a) and 404 of the CWA. Id. §§ 1311(a), 1344. (R. 5). On September 5, NUDEP filed a motion to enter a decree, the terms of which are identical to the state administrative order. (R. 5). On August 30, 2011, NUWF filed its own § 505 complaint seeking civil penalties and an order requiring Bowman to remove the fill material and restore the wetlands. (R. 5).

On September 15, 2012, NUWF filed a motion to intervene in the NUDEP § 505 action, to consolidate the NUDEP and NUWF actions, and an opposition to entry of a decree proposed by NUDEP. (R. 5). At that time, NUDEP also filed a motion to intervene in the NUWF case, which this Court later granted. (R. 5). On November 1, 2011, the lower court granted NUDEP's motion to intervene in the NUWF case. (R. 5).

After discovery, all parties filed cross-motions for summary judgment. (R. 5). Bowman filed a motion for summary judgment on four grounds: 1) NUWF lacked standing because neither it nor its members suffered an injury in fact fairly traceable to Bowman's alleged violations; 2) the lower court lacked subject matter jurisdiction because any violations were wholly past; 3) the lower court lacked subject matter jurisdiction because the State of New Union had already taken an enforcement action and fully resolved the violations; and 4) the lower court

lacked subject matter jurisdiction because a key element of a CWA cause of action, addition, was not satisfied. (R. 5). NUWF filed a motion for summary judgment on one ground: Bowman violated the CWA by adding dredge and fill material to navigable waters from a point source without a § 404 permit. (R. 5).

NUDEP joined Bowman in his motion for summary judgment on the second (continuing violation) and third (diligent prosecution) issues and joined NUWF in its motion for summary judgment on the first (standing) and fourth (CWA violation) issues. (R. 5).

On June 1, 2012, the lower court granted summary judgment in favor of Bowman on all four counts. (R. 11). Subsequently, NUWF and NUDEP both filed a Notice of Appeal. (R. 1). NUWF appeals the decision of the lower court with respect to its holding on all four issues. (R. 1). NUDEP appeals the lower court's decision on only two grounds: 1) NUWF did not have standing to bring a citizen suit against Bowman and 4) Bowman did not violate the CWA. (R. 1).

STATEMENT OF THE FACTS

NUDEP serves as the state of New Union's environmental protection agency. (R. 3). The federal Environmental Protection Agency (EPA) has properly delegated to NUDEP the authority to implement and enforce the CWA. (R. 4).

Bowman owns one thousand acres of wooded or previously wooded land adjacent to the Muddy River near the town of Mudflats in New Union. (R. 3). It is undisputed the property is a wetland.(R. 3-4). The property lies within the Muddy's one hundred year flood plain, portions of which are inundated every year when the river is high and the property is hydrologically connected to the Muddy. (R. 3).

On June 15, 2011, Bowman began land clearing operations without a permit. (R. 4). He used a bulldozer to knock down trees, level vegetation, and push trees and vegetation into windrows. (R. 4). Bowman then burned the windrows. (R. 4). He pushed leftover, non-burnt material consisting of vegetation and trees into trenches he dug for the purpose of burring them. (R. 4). Once the vegetation was burned and cleared, Bowman leveled the resulting portions of the wetland and dug a wide ditch that ran to the back of his property for the purpose of draining the wetland. (R. 4). Though he left a strip of land 150 feet wide adjacent to the Muddy, Bowman only left this area until the ditch had fully drained the wetland because that portion was overly saturated and difficult to work with a bulldozer when wet. (R. 4). Bowman never attempted to get a permit for his activities on the property. (R. 4).

NUWF is a not-for-profit corporation organized under the laws of New Union and for the purpose of protecting the state's fish and wildlife habitats. (R. 4). It is funded and governed by its members. (R. 4). Members Dottie Milford, Zeke Norton, and Effie Lawless used Muddy River for boating, fishing, picnics and recreation and became aware of Bowman's activities. (R. 6).

They claimed these activities made the water appear more polluted and obliterated a frog gigging area of the Muddy River. (R. 6). NUWF thus sent a notice of its intent to sue Bowman under the CWA's section 505 citizen suit provision to Bowman, the EPA, and NUDEP on July 1, 2011. 33 U.S.C. § 1365 (2006).

NUDEP contacted Bowman shortly after and notified him of his violations of state and federal law. (R. 4). Bowman entered into a settlement agreement with NUDEP agreeing to clear no more land, and though maintaining he did not violate any law, Bowman also agreed to convey a conservation easement consisting of a 150-wide strip of still-wooded, uncleared property adjacent to the Muddy. (R. 4). Bowman was also required to relinquish an additional 75 foot buffer zone between the wooded area and the new field. (R. 4). He was required to construct a year-round wetland in that buffer zone, and although NUDEP did not impose the 125,000 they were authorized to enforce, they did require Bowman to allow public recreational use of the conservation easement during appropriate hours. (R. 4). The injunction further prevents Bowman from any construction or development other than constructing and maintaining the wetland in the year-round conservation easement. (R. 4).

NUDEP issued an administrative order to Bowman, reflecting these requirements on August 1, 2011. (R. 4). A state statute virtually identical in relevant parts to §§ 309 (a) and (g) of the CWA gave NUDEP authority to issue such an administrative order. (R. 4). In September of 2011, Bowman noticed the field he had cleared had sufficiently drained in order to plant winter wheat; none of the wheat was planted on the year-round conservation easement. (R. 5).

NUDEP brought suit in federal court, filed a complaint against Bowman, and filed a still-pending motion to enter a decree, mirroring the terms of the administrative order, on September 5, 2011. (R. 5).

SUMMARY OF THE ARGUMENT

The lower court's judgments as to standing and Bowman's violation of the CWA should be reversed. The lower court's judgment should be upheld as to Bowman's wholly past violation and NUDEP's diligent enforcement of the CWA.

NUWF has standing because their members sustained an injury when Bowman dredged and filled wildlife habitat they used for recreational activities. Members were unable to boat, fish, and hike in the area; the order imposed on Bowman allowed them to resume those activities.

Based on the plain language and legislative intent of 33 U.S.C. § 1365(a)(1), Bowman's violation was wholly past and not continuing or intermittent, because he complied with NUDEP's requests and all that remains in the Muddy River are decomposing pollutants. (R. 4). Furthermore, the legislative history indicates primary enforcement of the CWA was intended for the government, and NUDEP is in the midst of ongoing legal action. (R. 5).

NUDEP diligently prosecuted a civil action by filing a complaint in a federal court just a month after receiving NUWF's notice letter and by negotiating a settlement with Bowman within a month thereafter. (R. 7). The settlement required Bowman to immediately cease further violations of § 404; to deed a conservation easement over a large portion of his property, lessening its value, preserving its natural state, and opening it to public use; and construct and maintain a wetland at considerable expense. (R. 7-8).

Finally, Bowman violated the CWA because his dredge and land clearing activities constitute an addition under § 404. (R. 4). The unitary waters theory does not apply because Bowman dug a ditch and deposited vegetation from the same wetland it was removed from and these activities are not water transfers as defined by the EPA. (R. 4).

STANDARD OF REVIEW

Issues of standing are reviewed under the traditional *de novo* standard of review. *Sierra Club Lone Star Chapter v. Cedar Point Oil Co. Inc.*, 73 F.3d 546, 555 (5th Cir. 1996); *United States v. Real Prop. and All Furnishings Known as Bridwell's Grocery*, 195 F.3d 819, 821 (6th Cir. 1993).

The standard of review for cases involving statutory interpretation and preclusion, encompassing the continuing violation, diligent prosecution, and addition issues, are reviewed under a highly deferential abuse of discretion standard of review. *Sierra Club v. U.S. Army Corps of Engineers*, 645 F.3d 978, 983 (8th Cir. 2011); *Conservation Law Foundation v. Federal Highway Admin.*, 24 F.3d 1465, 1471 (1st Cir. 1994).

ARGUMENT

I. NUWF has standing to sue Bowman because his dredge and fill activities polluted the water and depleted the frog habitat enough to affect members' enjoyment of the Muddy River and the relief sought would redress the injury.

To establish standing, a plaintiff must prove: an injury in fact, that is fairly traceable to the alleged violations, and is redressable by the court. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992). An association has standing to bring suit on behalf of its members when its members would otherwise have standing to sue in their own right, the interests at stake are germane to the organization's purpose, and neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit. *Friends of the Earth, Inc. v. Laidlaw Envtl. Services (TOC), Inc.*, 528 U.S. 167, 180-81 (2000).

NUWF has standing because its members were directly affected by Bowman's dredging and filling activities which caused them to have fear and apprehension toward the Muddy River. Further, NUWF has standing as an association because its members have standing as individuals and the purpose of the organization, protecting habitats for wildlife, is germane to what is at stake in this litigation—wildlife habitat on the Muddy River.

A. NUWF fulfills the requirements of standing for judicial review.

To establish standing, a plaintiff must prove: an injury in fact, that is fairly traceable to the alleged violations, and that is redressable by the court. *Lujan*, 504 U.S. at 560. NUWF fulfills all three of these requirements.

In environmental cases, injury in fact occurs when the plaintiffs use the area and their aesthetic and recreational values of the area are lessened by the challenged activity. *Id* at 183. (citing *Sierra Club v. Morton*, 405 U.S. 727, 735 (1972)). In *Friends of the Earth, Inc.*, the defendants illegally dumped mercury into a large river system known as the North Tyger River.

Friends of the Earth, Inc., 528 U.S. at 181. Members of the environmental groups suing the company all lived near the river and used it for picnicking, fishing, swimming, camping and boating. *Id.* One member testified he no longer did these activities because he was concerned about pollutants from the defendant's discharges. *Id.* When driving over the river, the member thought it looked and smelled polluted. *Id.* That member further stated he had a specific area he fished as a boy, but no longer did because of his concern of the pollutants. *Id.* at 182. The rest of the members relied on at trial feared economic loss and a general loss of accessibility to recreational activities such as fishing, boating, and hiking along the river. *Id.* at 181. The members all attributed these feelings of loss to a fear that the water was polluted. *Id.* The defendant introduced scientific evidence that the pollutants discharged in the water caused no health risk whatsoever to humans. *Id.* at 182. The court, however, properly reasoned that the injury to the environment is not the question; the question regards injury to the plaintiff. *Id.*

The injury in fact must be fairly traceable to the alleged violation. In *Lujan v National Wildlife Federation*, one of the organization's members used unspecified portions of an immense tract of territory, on some portions of which mining activity has occurred or probably would occur by virtue of the governmental action. *Id.* at 183 (citing *Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871, 889 (1990)). The court found these allegations too vague and untenable to find a traceable connection to the injury. *Id.* In contrast, the affidavits and testimony presented by the organization members in *Friends of the Earth, Inc.* asserted specifically which discharges of pollutants (mercury) caused specific concerns and effected specific recreational activities such as fishing, hiking, and boating. *Id.* at 184.

Civil penalties and injunctive relief under clean water violations redress the plaintiff's injury by deterring current and future violations. In *Friends of the Earth, Inc.*, plaintiffs seeking

civil penalties satisfied this requirement of standing because the court found such penalties abate and prevent future violations. *Id.* at 186; see also *Hudson v. United States*, 522 U.S. 93, 102 (1997) (civil penalties have a deterring effect and are remedial to future behavior); *Department of Revenue of Montana v. Kurth Ranch*, 511 U.S. 767, 778 (1994) (civil penalties impose fiscal burdens on individuals and deter certain behavior). The court noted that by encouraging defendants to discontinue current violations and deter them from committing future ones, they afford redress to plaintiffs who are injured or threatened with injury as a consequence of ongoing unlawful conduct. *Friends of the Earth, Inc.*, 528 U.S. at 186. The redressability of civil penalties is especially apparent in cases like *Friends of the Earth, Inc.* where the injury revolves around a fear and concern of pollutants, because by preventing and deterring such pollutants, civil penalties abate such fears. *Id.*

The members of NUWF have sustained an injury in fact because Bowman's land clearing and dredging activities has affected their use and aesthetic appreciation of the Muddy River. Like in *Friends of the Earth, Inc.*, where members used the Tyger River for boating, fishing, picnics, and recreational activities, here, the members of NUWF used the Muddy for boating, fishing, picnics, and recreational activities. (R. 6). Like one member in *Friends of the Earth, Inc.* stated he no longer fished a specific area because of a concern for the pollutants, here, Norton's frog gigging spot has been destroyed and depleted by Bowman's activity. (R. 6). Likewise, in *Friends of the Earth, Inc.*, a member stated the water looked more polluted to him; here, Milford similarly testified the water appeared to be more polluted to him. Finally, a general feeling of loss toward the river in *Friends of the Earth, Inc.* constituted an injury, regardless of actual pollutants. Here, the members all fear they have lost a portion of the Muddy and are afraid of future dredging that could potentially pollute the water more. (R. 6). The fact that Bowman

offered evidence that the buffer zone will provide richer habitat is irrelevant, because the injured party is the individuals, not the environment. (R. 6).

The clearing and dredging activities of Bowman are the direct cause of NUWF member's injury, and civil penalties and injunctive relief redress the injury by preventing future violations. In *Friends of the Earth*, the court found the injury fairly traceable because the members who testified and were deposed could state with specificity how the pollutants affected them. Likewise, here the members of NUWF state the water looks more polluted to them, and they are unable to do specific recreational activities such as frogging. (R. 6). Further, civil penalties in *Friends of the Earth, Inc.* were sufficient redressability to alleviate the fears of the member. Likewise, here, civil penalties and injunctive relief imposed by the court would deter future violations by Bowman and others, therefore alleviating the fears of future river contamination and loss. (R. 4). The administrative order requires Bowman to allow recreational use on his property, nullifying any trespass or illegality that would ensue from frogging in the area, and allow the members legal access to the land. (R. 4). Thus, NUWF meets the requirements for standing.

B. NUWF fulfills the standing requirements for an association.

An association has standing to bring suit on behalf of its members when its members would otherwise have standing to sue on their own right, the interests at stake are germane to the organization's purpose, and neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit. *Friends of the Earth, Inc.*, 528 U.S. at 180-81. NUWF has fulfilled the requirements of standing for an association.

In *Friends of the Earth, Inc.*, individual members of the organization testified to the injuries they sustained due to a violators discharge of pollutants. The court found these members

fulfilled the requirements for an individual to acquire standing. In *Hunt*, the purpose of the association was the protection and promotion of the Washington apple industry. *Hunt v. Washington State Apple Adver. Comm'n*, 432 U.S. 333, 344 (1977). The interest at stake was the loss of North Carolina customers due to state regulation on apple grading system. *Id.* at 335. The court found the purpose of the association was germane to the interest at stake, because the interest at stake was exactly what the association was charged with protecting—the Washington apple industry. *Id.* at 344. Finally, in *Hunt*, the claims for declaratory and injunctive relief did not require individualized proof to be resolved. *Id.*

NUWF fits the associational requirements to gain standing for judicial review. NUWF relies on affidavits from three members: Dottie Milford, Zeke Norton, and Effie Lawless. (R. 6). Each member fits the requirements for standing as described above. The purpose of NUWF is to protect the fish and wildlife of the state by protecting their habitats. (R. 4). Further, the interests at stake to lose are habitats of frogs and other wildlife as the result of unauthorized dredging and filling of the Muddy River. (R. 6). Just as in *Hunt*, here, the purpose of NUWF is germane to the interest at stake, because the interest at stake to lose is the precise interest NUWF is charged with protecting—wildlife habitats. Finally, just as in *Hunt*, were no individualized relief was required for a declaratory and injunctive relief, here, NUWF members require no individualized relief when the penalty being sought is a civil penalty and an order for Bowman to remove the fill material. (R. 5).

In conclusion, NUWF meets the requirements for general standing, as well as the standing requirements for an association.

II. The District Court did not have subject matter jurisdiction under 33 U.S.C. § 1365 because Bowman's clearing operations were not continuing or intermittent as required by the plain language and congressional intent inherent in the CWA.

Bowman's violations are wholly past and thus the lower court's ruling on this issue should be upheld. Under 33 U.S.C. § 1311(a), except as otherwise provided, the discharge of any pollutant by any person is unlawful. 33 U.S.C. § 1311(a) (2006). In order to lawfully discharge pollutant, an individual must obtain a permit pursuant to 33 U.S.C. § 1344. 33 U.S.C. § 1344 (2006). If an individual fails to obtain a permit and unlawfully discharges pollutant, any citizen may commence a civil action against any person *who is alleged to be in violation* of an effluent standard or limitation. 33 U.S.C. § 1365(a)(1) (2006) (emphasis added). By its express terms, § 1365 may be violated when there is a continuous or intermittent violation and not one that is wholly past. *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Foundation, Inc.*, 484 U.S. 49, 59 (1987).

In determining whether Congress intended to create a private right of action under a federal statute without saying so explicitly, courts look first to the plain language of the statute and then review the legislative history to determine congressional intent. *Middlesex County Sewerage Authority v. National Sea Clammers Ass'n*, 452 U.S. 1, 13 (1981). A defendant violates the CWA when there is a continuing or intermittent violation. *Gwaltney*, 484 U.S. at 49. The CWA uses plain present tense language to indicate that it is narrowed to only such violations. *Id*. (noting another section specifies "citizen" as "a person...having an interest which is or may be adversely affected[,]" making plain that the harm to be addressed lies in the present or the future, not the past). Moreover, Congress's intentions bolster the narrowness of the continuing violation statute. *Id*. at 54-59.

Bowman's compliance with NUDEP's Administrative Order shows that his alleged violation is wholly past. Narrowing the CWA to present or future violations properly comports

with the plain language of the statute as well as the history of the legislature. Therefore, the district court's decision should be affirmed.

A. The plain language of 33 U.S.C. § 1365 shows that it was intended only for continuing and intermittent violations and does not apply to Bowman's violation as it was wholly past.

Interpreting the meaning of a statute starts with examining the plain language of the statute itself. *Consumer Product Safety Commission v. GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980). The CWA can be a mechanism to render judgment against a violator in violation of certain effluent standards. 33 U.S.C. § 1365 (2006). The most natural reading of this requirement is a requirement that citizen-plaintiffs allege a continuous or intermittent violation. *Gwaltney*, 484 U.S. at 57. Such citizen-plaintiffs must show that there is a reasonable likelihood that a past polluter will continue to pollute in the future, since Congress phrased this provision in such a way as to eliminate ambiguity. *Id*. The critical time for determining whether there is an ongoing violation is when the complaint is filed. *See Atlantic States Legal Found. v. Tyson Foods, Inc.*, 897 F.2d 1128, 1134 (11th Cir. 1990); *Chesapeake Bay Found. v. Gwaltney of Smithfield, Ltd.*, 890 F.2d 690, 693-94 (4th Cir. 1989). Moreover, other provisions of the CWA bolster the continuous or intermittent violation interpretation. *Id*. at 59. Subsection (f) of § 1365 indicates that a citizen suit may only be brought for violations of a permit limitation "which is in effect." 33 U.S.C. § 1365(f) (2006); *Gwaltney*, 484 U.S. at 59. The notice provisions in subsection (b)(1)(A) states that citizens must give notice to violators and the State in which the alleged violation "occurs." 33. U.S.C. § 1365(b)(1)(A); *Gwaltney*, 484 U.S. at 59. Finally, and most indicative of the undeviating use of present tense is the subsection (g) definition of a citizen as "[a] person...having an interest which is or may be adversely affected" by the defendant's violation. 33 U.S.C. § 1365(g); *Gwaltney*, 484 U.S. 59.

The plain language of the CWA supports the contention that once the specific violation is over and remedial measures are complete, the violation is as well. In *Allen County Citizens for Environment*, a citizen-plaintiff organization appealed the grant of summary judgment for two oil companies allegedly violating the CWA. *Allen County Citizens for Environment, Inc. v. BP Oil Co.*, 966 F.2d 1451, 1 (6th. Cir. 1992). The citizen-plaintiff organization's complaint was filed after the oil companies already complied with an administrative enforcement action. *Id*. The court noted that the most natural reading of the "to be in violation" requirement included continuing or intermittent violations; thus, because the violations were already remedied pursuant to the administrative order, summary judgment should have been rendered. *Id*. (citing *Gwaltney*, 484 U.S. at 57).

The plain language of the CWA indicates that leftover pollutants does not equal a continuing violation. In *Connecticut Coastal Fishermen's Association*, a trap and skeet shooting club had clay skeet and lead bullets discharged into a body of water. *Connecticut Coastal Fishermen's Association v. Remington Arms Co., Inc.*, 989 F.2d 1305, 1308-09 (2d Cir. 1993). A governmental agency issued an administrative order for the gun club to fix the problem of discharging lead and clay deposits into the body of water before the citizen-plaintiff organization filed a complaint. *Id*. at 1311. In order for the citizen-plaintiff organization to survive the gun club's motion for summary judgment, it had to show that the gun club's violation was continuing or likely to continue. *Id*. at 1311. The court reasoned that because the gun club complied with the administrative order and there was little evidence showing that the gun club was likely to continue discharging pollutants, summary judgment was properly granted. *Id*. at 1312-13. Although the citizen plaintiff alleged that the pollutants were still depositing in the body of water, the court noted that the present violation requirement stipulated by the plain language of

the CWA would be undermined if a violation included the mere decomposition of pollutants. *Id*. at 1313.

Here, Bowman's alleged violation is wholly past as he stopped clearing the field and complied with NUDEP's administrative order. As stated in the CWA itself and interpreted by *Gwaltney* and *Allen County Citizens for Environment*, a violation alleged under the CWA must be continuing or intermittent and not wholly past. *Connecticut Coastal Fishermen's Association* indicates that a violation is wholly past once an administrative order is complied with and the continuing decomposition of pollutants does not prolong the violation. Here, Bowman finished draining his field into the Muddy River on July 15, 2011. (R. 4). This alleged violation initiated an administrative order from NUDEP, to which Bowman consented on August 1, 2011. (R. 4). The violation at this point became wholly past as Bowman complied with the Administrative Order by fulfilling the requirements to clean the Muddy River, leaving only nature to clear away the remaining pollutants.

Thus, the plain language of 33 U.S.C. § 1365 applies only to continuing or intermittent violations which cannot apply here as Bowman's violation is wholly past, and the district court properly granted summary judgment.

B. Congress's intended purpose for 33 U.S.C. § 1365 indicates that it was only intended for continuing or intermittent violations and primarily for governmental action which does not apply to Bowman's action and renders NUWF's action obsolete.

Although there may be ambiguity in statutory language, when the legislative history shows that no difference was in fact intended, the presumption is rebutted. *United States v. Stauffer Chemical Co.*, 684 F.2d 1174, 1184 (6th Cir. 1982).

Congressional intent shows that the CWA was designed primarily to be enforced by the government for continuing and intermittent violations and is primarily for injunctive relief. The

Senate Report of the CWA stated, "The Committee intends the great volume of enforcement actions be brought by the State." S.Rep. No. 92-414, at 64 (1971). It further noted that citizen suits are proper only "if the Federal, State, and local agencies fail to exercise their enforcement responsibility." *Id*. By permitting citizen suits for past violations, the purpose of the CWA intended by Congress is undermined. *Gwaltney*, 484 U.S. at 61. The House Report of the CWA shows that it was intended for injunctive measures. H.R.Rep. No. 92-911, at 407 (1972). Senator Eagleton stated: "citizen suits [...] are brought for the purpose of abating pollution." *Id*. Similarly, Senator Muskie noted that citizen suits can be brought against continuous and intermittent violations. *Id*. Both Reports also connect the CWA with the Clean Air Act. *Gwaltney*, 484 U.S. at 62. This connection suggests that the "alleged to be in violation" language indicates a common purpose of permitting citizens to diminish pollution once the government cannot command compliance. *Id*.

Here, Bowman's dealings with NUDEP and his compliance with orders to abate the pollution rendered NUWF's suit obsolete. Congressional intent shows that the CWA was meant to be enforced by the government. NUDEP entered into a settlement agreement with Bowman prior to the NUWF suit, for him to not clear more wetlands and create a conversation easement thereby mitigating the pollution. (R. 4). This indicates that the violation was not continuing or intermittent—the type of violation that congressional intent asserts the CWA was designed to punish. Moreover, NUDEP subsequently initiated suit against Bowman on August 10, 2011, twenty days before NUWF initiated suit. (R. 5). Such state action is what congress intended and renders NUWF's citizen suit unnecessary and obsolete. Moreover, the district court granted NUDEP's Motion to Intervene into NUWF's suit, indicating that the court adheres to congressional intent of giving enforcement priority to the government. (R. 5).

The plain language and legislative history of 33 U.S.C. § 1365 indicate that it was intended to cover only continuing and intermittent violations. Moreover, the legislative intent shows that the CWA was primarily intended for governmental enforcement. Thus, as Bowman's violation is wholly past and NUDEP is still in the midst of legal action with Bowman, NUWF's action is obsolete and the district court properly granted summary judgment.

III. NUDEP's prosecution of and consent decree with Bowman satisfy the requirements for diligent prosecution under the CWA's citizen suit provision.

The court below correctly found that NUDEP's actions met all of the requirements in the statute to bar NUWF's suit.

Citizen suits are barred when a state has commenced and is diligently prosecuting an enforcement action in a court of the United States. 33 U.S.C. § 1365(b)(1)(B). Citizens bringing suit face a presumption of diligence and a heavy burden. *See Atlantic States Legal Foundation, Inc. v. Eastman Kodak Co.,* 933 F.2d 124 (2d Cir. 1991); *Jones v. City of Lakeland*, 175 F.3d 410, 414 (6th Cir. 1999).

NUDEP commenced a civil action in a district court of the United States. It diligently prosecuted that action by filing a complaint with the lower court just a month after receiving NUWF's notice letter and by negotiating a settlement with Bowman within a month thereafter. (R. 7). The settlement required Bowman to immediately cease further violations of § 404; to deed a conservation easement over a large portion of his property, lessening its value, preserving its natural state, and opening it to appropriate public use; and construct and maintain a partially-inundated wetland at considerable expense. (R. 7-8). These measures preserve the viewscape of the Muddy River and enhance the wetlands environment on the site. (R. 8). NUDEP embodied these measures in an administrative order issued to Bowman and subsequently filed a complaint and submitted a consent decree against Bowman. (R. 4-5).

A. By filing a complaint with the lower court, NUDEP commenced a civil action in a district court of the United States.

Citizen suits are barred when the state has taken enforcement action to require compliance with the CWA in a federal or state court. 33 U.S.C. § 1365(b)(1)(B). *See also Jones v. City of Lakeland*, 175 F.3d 410, 414 (6th Cir. 1999).

Here, on July 1, 2011, NUWF sent a notice of its intent to sue Bowman under 33 U.S.C. § 1365, of the CWA to NUDEP. Shortly after, NUDEP contacted Bowman and sent him notice of violation of both state and federal law by clearing his field. (R. 4). The two parties reached a settlement, which was incorporated in an administrative order issued by NUDEP to Bowman. Bowman consented to the order on August 1, 2011. (R. 4). On August 10, 2011, NUDEP filed a complaint against Bowman in the United States District Court for the District of New Union under 33 U.S.C. § 1365 for filling wetlands without a permit in violation of §§ 301(a) and 404 of the CWA. Id. §§ 1311(a), 1344. (R. 5). On September 5, NUDEP filed a motion to enter a decree, the terms of which are identical to the state administrative order. (R. 5). Though that motion is still pending, NUDEP has initiated an action in a court in order to alleviate the discharge of pollutants in the Muddy River. (R. 5).

B. By filing a complaint with the lower court just a month after receiving NUWF's notice letter and by negotiating a settlement agreement with Bowman, NUDEP satisfied the requirements for diligent prosecution under the CWA.

An enforcement action will ordinarily be considered "diligent" it "is capable of requiring compliance with the [CWA] and is in good faith calculated to do so." *The Piney Run Preservation Ass'n v. The County Com'rs Of Carroll County, Maryland*, 523 F.3d 453 (4th Cir. 2008); *Friends of Milwaukee's Rivers v. Milwaukee Metro. Sewerage Dist.,* 382 F.3d 743, 760 (7th Cir. 2004). Diligence is presumed. *See Karr v. Hefner*, 475 F.3d 1192, 1198 (10th Cir. 2007) (stating "citizen-plaintiffs must meet a high standard to demonstrate that [a government agency]

has failed to prosecute a violation diligently"). Citizen-plaintiffs must meet a high standard to demonstrate that the state has failed to prosecute a violation diligently. *Id.* Section 1365(b)(1)(B) does not require government prosecution to be far-reaching or zealous. *Id.* at 1197. Thus, a citizen-plaintiff cannot overcome the presumption of diligence merely by showing that the agency's prosecution strategy is less aggressive than he would like or that it did not produce a completely satisfactory result. *Id.*

The indicia courts have considered in determining whether the government is diligently prosecuting an action include: whether the government sought or required compliance with the violation alleged by the citizen; whether the government was monitoring the violator's activities after its settlement with the polluter; whether the violations are likely to continue if the citizen suit does not go forward; and whether the penalties assessed remove the economic benefit of non-compliance. *See* Edward Lloyd, *Citizen Suits and Defenses Against Them*, SN085 ALI-ABA 847, 871 (2008).

The structure of the CWA indicates that Congress intended federal and state governments primarily to enforce the CWA. *Gwaltney of Smithfield v. Chesapeake Bay Foundation*, 484 U.S. 49, 60 (1987) (noting "[t]he great volume of enforcement actions [are intended to] be brought by the State.") (citing S.Rep. No. 92-414, at 64 (1971), *reprinted in 2 A Legislative History of the Water Pollution Control Act Amendments of 1972*, p. 1482 (1973)). Although courts often refer to citizen-plaintiffs as "private attorney generals," Congress did not intend to give citizens and the government equal roles in CWA enforcement. *See e.g., Sierra Club v. Peterson*, 705 F.2d 1475, 1479 (9th Cir. 1983). *See also* Mark A. Ryan, *The Clean Water Act Handbook*, 216-217 (3d ed. 2011).

Rather, the primary responsibility for the enforcement of the CWA rests with the government; citizens merely provide a second level of enforcement. *See Piney Run*, 523 F.3d 453 (4th Cir. 2008). The Supreme Court in *Gwaltney* noted that the citizen suit provision has the "central purpose of permitting citizens to abate pollution *when the government cannot or will not command compliance*"). *Gwaltney*, 484 U.S. at 60; *North & South Rivers Watershed Ass'n v. Scituate*, 949 F.2d 552 (1st Cir. 1991) (citing *Gwaltney*). Citizens are meant to "supplement rather than to supplant governmental action." *Id.*

Citizens should not be permitted to file suit for only past violations "in order to seek the civil penalties that the Administrator chose to forgo," because such actions would infringe on the Administrator's discretion to enforce the CWA in the public interest. *Gwaltney*, 484 U.S. at 61. In *Friends of the Earth v. Laidlaw Environmental Services*, Justice Scalia suggested the citizen suit provision was not intended as an opportunity to second guess the actions of state enforcement agencies. *Laidlaw*, 528 U.S. 167, 212, n.4 (Scalia, J., dissenting). Thus, where 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. *Scituate*, 949 F.2d at 557. Courts "should not interpret § 1365 in a manner that would undermine the [government's] ability to reach voluntary settlements with defendants." *Karr*, 475 F.3d at 1198. As the Supreme Court has recognized: "If citizens could file suit ... in order to seek the 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*, 484 U.S. at 61.

Government enforcement is so far preferred to citizen enforcement that virtually any government action will bar a citizen suit. In *Scituate*, a citizen's group suit was barred by a state's diligent enforcement action and preclusion extended to civil penalty actions and to

injunctive and declaratory relief. There, a state agency issued an administrative order to the owner and operator of a sewage treatment facility that was discharging pollutants into a coastal estuary without a federal permit. *Id.* at 552. The state agency did not impose civil penalties. *Id.* at 554. The state did order the defendant to cease any new connections to its sewer system; take steps to plan, develop, and construct a new treatment facility; hookup a sewer moratorium; submit periodic groundwater test results; and begin extensive upgrades to the facility. *Id.* The construction and maintenance costs were approximately one million dollars, and the order left open the possibility of imposing penalties. *Id.* at 557. The court considered these compliance requirements "mandatory and ongoing tasks." *Id.* As such, the state's administrative order represented a "substantial, considered[,] and ongoing" response to the violation. Notwithstanding an alleged ongoing violation, the state's actions satisfied the CWA's diligent prosecution requirement. *Id.* at 557-558 (noting "violations may continue despite everything reasonably being done by the [s]tate […] to correct them").

Even though compliance measures were of vital concern to the community, injunctive relief was not required merely because the state was not be taking the precise action the community wanted it to. *Id.* at 558.

Here, NUDEP's enforcement is preferable to citizen action. NUDEP filed a complaint against Bowman with the lower court just a month after receiving NUWF's notice letter and reached a compliance settlement with Bowman within a month thereafter. (R. 7). NUDEP filed a motion to enter a decree, mirroring the terms of the state administrative order, on September 5, 2011. (R. 5). Like the terms of the administrative order in *Scituate*¸ NUDEP's administrative order required Bowman to immediately cease further land clearing operations; to deed a conversation easement over a large portion of his property; and construct and maintain a

partially-inundated wetland. (R. 4). Like the tasks in *Scituate*, NUDEP's compliance requirements are mandatory and ongoing tasks. Moreover, like the state in *Scituate* did not impose civil penalties but imposed construction and maintenance costs, here, though NUDEP did not impose civil penalties, NUDEP's requirements cost Bowman considerable expense. (R. 8). Moreover, in deeding a conservation easement over a large portion of his property, Bowman incurred a loss in value to his property. By complying with NUDEP's public access requirement, Bowman is now limited in how he can use his property, further lessening its economic benefit to him. As such, NUDEP's administrative order represents a substantial, considered, and ongoing response to Bowman's violation, satisfying the CWA's diligent prosecution requirement.

NUWF is not entitled to relief merely because NUDEP did not take the precise action NUWF wanted it to. NUDEP's imposed measures preserve the viewscape of the Muddy River and enhance the wetlands environment on the site. (R. 8). They will allow Mr. Norton to legally frog in an area that eventually will provide an enhanced environment for frogs. (R. 8). Finally, the partially-inundated wetland will provide richer wetland habitat than the former, occasionally-inundated wetland presently occupied by the field. (R. 6). NUDEP thus appears to have accomplished more through its action than NUWF seeks to achieve on their own.

Thus, NUWF failed to meet its high burden of establishing that the NUDEP enforcement action did not satisfy the diligent prosecution standard.

IV. Bowman violated the CWA because by bringing new pollutants in the form of dredged spoil and fill material into the Muddy, Bowman's activities were within the statutory definition of, legislative intent behind, and the EPA's definition of the term "addition."

Bowman violated § 404 of the CWA, requiring reversal of the lower court's ruling on this issue. Section 301(a) of the CWA prohibits discharge of any pollutant by any person, except in compliance with a permit under §§ 402 or 404. 33 U.S.C. § 1311(a) (2006). Section 404

prohibits the discharge of pollutants without a permit. 33 U.S.C. § 1344. By its express terms, section 404 regulates "the discharge of dredged or fill material into the navigable waters at specified disposal sites." *Id.* The CWA defines "discharge of a pollutant" to mean "any addition of any pollutant to navigable waters from any point source." 33 U.S.C. § 1362(12) (2006). All parties agree that the three elements pollutant, navigable waters, and point source have been met. (R. 8-9). The only element on appeal is that of addition. (R. 9).

The term "addition" as found in 33 U.S.C. § 1362(12) refers to the introduction of material that was not present before. *Greenfield Mills, Inc. v. Macklin*, 361 F.3d 934, 949 (7th Cir. 2004); *United States v. Deaton*, 209 F.3d 331, 335 (4th Cir. 2000); *Avoyelles Sportsmen's League, Inc. v. Marsh*, 715 F.2d 897, 923 (5th Cir. 1983). Section 1362(6) explicitly defines dredged spoil as a pollutant, and requiring a permit under § 404. *Deaton*, 209 F.3d at 335.

Bowman violated section 301(a) of the CWA because his filling of the Muddy River wetland, using burnt vegetation and dredged spoil, added a type of element to the wetland that was not present prior to his activities. The outside world definition applies to § 402 regulations and is not applicable to § 404 because Congress and the EPA intended to include dredging and filling acts as regulatory offenses under § 404. Further, the unitary navigable waters theory is not applicable to the current violation because Bowman's activities do not constitute a water transfer, and if they did they would still be found to violate the rule set forth by the EPA.

A. Bowman's activities of dredging and filling a wetland with burnt pilings, dredged spoil and cleared vegetation constitute an addition of a pollutant that was not present before as required by § 1311(a) of the CWA.

Bowman's dredging, filling, and piling violate the CWA, and the district court's decision should be reversed. The term addition refers to the introduction of a material that was not previously present in a wetland or navigable water. *Id.* The term addition appears in regards to

permits required under § 402 as well as § 404. 33 U.S.C. § 1311(a) (2006). Under § 402, the term addition has been interpreted as when a point source itself physically introduces a pollutant into water from the outside world. *National Wildlife Fed'n v. Gorsuch*, 693 F.2d 156, 175 (D.C. Cir. 1982). It is assumed that identical words appearing in a different part of the same statute have the same meaning; however, this presumption readily yields to the controlling force of the circumstance that the words are employed, and whether congressional intent indicates a different meaning. *Sorenson v. Sec'y of Treasury of U.S.*, 475 U.S. 851, 860 (1986); *Helvering v. Stockholms Enskilda Bank*, 293 U.S. 84, 87 (1934).

The term "addition" under § 404 of the CWA refers to types of material introduced to a wetland that was not present before the activity of the defendant. *Deaton*, 209 F.3d at 335. Dredge and fill material that is deposited back into the same wetland from which they were removed constitutes an addition. *Id.* In *Deaton,* a violator used a back hoe, a front-end track loader, and a bulldozer, to dig a 1,240 foot ditch in order to drain his property which was a known wetlands area. *Id.* at 333. While digging, the violator piled the excavated dirt on either side of the ditch, a practice known as side-casting. *Id.* The *Deaton* court concluded that once that material was removed from the wetland it became "dredged spoil," a statutory pollutant and a type of material that up until then was not present in the wetland. *Id.* at 335. The court found it irrelevant that what became dredged spoil was previously present in the same property in the form of dirt and vegetation in an undisturbed state. *Id.* The court relied on the logic that, although it came from the very same wetland, what was deposited was a pollutant that had not been there before-dredged spoil. *Id.* Likewise in *Avoyelles Sportsmen's League, Inc.,* violators used bulldozers to fell trees and vegetation and push such trees and vegetation into windrows. *Avoyelles Sportsmen's League, Inc*., 715 F.2d at 921. The violators than burned the windrows

and used the bulldozer to scatter and bury the remaining unburned trees and vegetation in pits to help level the wetland. *Id.* Violators used bulldozers to level the remaining cleared areas, as well as to dig a ditch to drain the area. *Id.* Excavated earth from the ditch was deposited alongside the ditch in the same wetland. *Id.* The court found these activities would alter the character of the wetland because it was material that did not exist in the wetland before, and was therefore a § 404 violation. *Id.* at 923.

Congressional intent and legislative history support requiring a permit for the redeposit of dredge and fill under § 404. The CWA was designed to restore and maintain the chemical, physical and biological integrity of the Nation's waters. 33 U.S.C. § 1251(a) (2006); *Avoyelles Sportsmen's League, Inc.,* 715 F.2d at 923. Further, Congress explicitly stated the term 'navigable waters' be given the broadest possible constitutional interpretation. S. Rep. No. 2770, at 178 (1972) (Conf. Rep). The senate committee explained the need for a broad definition of navigable waters was to control the discharge of pollution at the source. *Id*. Congress repeatedly recognized the importance of protecting wetlands if the nation was to realize the statutory goal of restoring the chemical and biological integrity of the nation's waters. *Id.* Senator Muskie, one of the primary sponsors of the CWA, explained that the systematic destruction of the Nation's wetlands causes serious ecological damage as wetlands are the Nation's most biologically active areas. 869 Cong. Rec. 1952 (1977). Senator Muskie spoke at length about wetlands as spawning grounds for fish and shellfish that populate the ocean as well as other myriads of bird species and wildlife. *Id.* Senator Muskie specifically noted "the unregulated destruction of these areas is a matter which needs to be corrected and which implementation of section 404 has attempted to achieve." *Id.* Further supporting the legislative history and congressional intent to protect

wetlands as found above, congress explicitly included dredged spoil as a violations of § 404. 33 U.S.C.A. § 1362(6) (2006).

The outside world definition of the term addition as applied to § 402 does not apply to § 404 because Congress intended for the word to be applied differently. It is assumed identical words in the same statute have identical meaning; however, this assumption must readily yield to congressional intent that indicates different. *Sorenson,* 475 U.S. at 860. In *National Wildlife,* the EPA argued that an addition was a discharge required a § 402 permit only if materials were introduced into the water "from the outside world." *National Wildlife Fed'n,* 693 F.2d at 165. The term addition under § 404 does not have the same "outside world" definition as in § 402, because Congress explicitly requires a permit for dredged spoil under § 404. *Avoyelles Sportsmen's League, Inc.*, 715 F.2d at 924. Dredged material is by definition material that comes from the water itself. *Id.* A requirement that dredged spoil must come from an outside source would effectively remove the dredge-and-fill provision from the statute. *Id; see also Greenfield Mills, Inc.*, 361 F.3d at 948; *Deaton*, 209 F.3d at 336.

Finally, any deference given to the EPA's rule regarding § 402 has no effect on courts interpretations on § 404 violations because EPA explicitly states it should not. The EPA explicitly states that the § 402 rule "will not have an effect on the 404 program… because 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." National Pollutant Discharge Elimination System Water Transfers Rule, 73 Fed. Reg. 33697 (June 13, 2008) (codified at 40 C.F.R. pt. 122). Furthermore, the EPA does not endorse an "outside world" definition that requires the material containing the pollutant to come from outside of the wetland

it is removed from. *Id.* The EPA itself states this is evident as it has a long standing practice of not requiring permits for transfers between separate water bodies. *Id.* The EPA, rather, is more in line with the rule being advocated here: "EPA believes that an addition of a pollutant under the Act occurs when pollutants are introduced from outside the waters being transferred." *Id.* Under this definition it is not the material containing the pollutant that must come from the outside world, but the pollutant itself must have not before been present. *Id.*

Bowman's activities have violated the explicit intentions of Congress and the EPA in promulgating § 404 of the CWA. Just as in *Deaton* and *Avoyelles Sportsmen's League, Inc.,* Bowman has cleared and dredged a wetland without a permit. (R. 4). As in both cases, Bowman has dug a ditch in order to drain a wetland. (R. 4). As the defendant in *Avoyelles Sportmen's League, Inc.,* used a bulldozer to pile and burn windrows, and then buried those windrows in order to help fill and level the property, Bowman has done just that. (R.4). From June 15, 2011 to July 15, 2011 Bowman used a bulldozer to knock down trees, level other vegetation, and push trees and vegetation into windrows which were subsequently burned. (R. 4). Like the defendant in *Avoyelles Sportmen's League, Inc.,* Bowman then used the Bulldozer to push the remaining unburned vegetation and trees into holes to level the land, and then dug a ditch in order to drain the property. (R. 2). Just as the court in *Deaton* and *Avoyelles Sportmen's League, Inc.,* reasoned, these materials- dead trees, burnt vegetation, and the dredged up dirt from the ditch-constituted an addition to the wetlands because as dredged and fill material they did not previously exist in that form. The material Bowman used to fill and drain his land previously existed in the form of trees and soil; after he was done those same elements became something new-dredged spoil.

Furthermore, Bowman's activity violated the intended purpose of the CWA, which is to restore and maintain the chemical, physical and biological integrity of the Nation's waters by

regulating pollutants at their source. Bowman's activity not only circumvented this intended purpose of the act, but also damaged a wetland which, as noted by Senator Muskie above, requires adequate regulatory degree because of their importance to the nation's water systems in general. The intent to regulate pollutants at its source is best effectuated by regulating dredging and filling activities in wetlands, because wetlands are important buffer zones for larger bodies of navigable waters at noted above. Furthermore, Congressional intent and legislative history reveals a desire for the term "addition" to include dredged material excavated from within the same wetland it is disposed. To force a definition that would read that intention out of the statute would go against the congressional purpose of enacting the statute, as well as long standing rules of statutory construction. Finally, the EPA itself has stated that it is irrelevant where the material containing the pollutant came from, it is only important that the pollutant itself did not before exist in the wetland.

Bowman's activities violated § 404 of the CWA because dredged and fill material are regulated under the express language of the statute, congressional intent, and the EPA does not endorse an outside world definitions that requires the material the pollutants are in come from the outside world.

B. The unitary navigable waters exemption does not apply because dredging and filling activities does not fit the EPA definition of a water transfer.

The unitary waters theory holds that it is not an addition to navigable waters to move existing pollutants from one navigable water source to another. *Friends of Everglades v. S. Florida Water Mgmt. Dist.*, 570 F.3d 1210, 1217 (11th Cir. 2009). The EPA has recently adopted this rule in June 2008. *Id.* at 1218. Under the EPA definition of the unitary waters theory, water transfers do not require NPDES permits because they do not result in the addition of a pollutant. National Pollutant Discharge Elimination System Water Transfers Rule, 73 Fed. Reg. 33697

(June 13, 2008) (codified at 40 C.F.R. pt. 122). The EPA rule defines water transfer 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.* The EPA explicitly states this rule focuses exclusively on water transfers and does not affect any other activity that may be subject to NPDES permitting requirements. *Id.* The EPA further states that this rule's legal authority extends only to § 402 regulation. *Id.*

The EPA's water transfer exemption does not apply to dredging activities because dredging and fill activities are not water transfers under the rule. The rule defines water transfer as activity that conveys or connects waters of the United States *without* subjecting the transferred water to intervening industrial, municipal, or commercial use. *Id.* The rule gives examples of intervening industrial, municipal, or commercial use as water that is withdrawn to be used as cooling water, drinking water, irrigation, or any other use such that it is no longer a water of the U.S. before being returned to a water of the U.S. *Id.* In contrast the court defines water pumping stations, pipes, canals, or other structures used solely to facilitate the transfer of the water as not an intervening use. *Id.* The EPA rule further does not exempt the removal of solids and redeposit of solids during the water treatment process even though that solid waste originated in the water it was removed. *Id.* The EPA rule further expounds on this logic, requiring permits for pollutants introduced by the water transfer activity itself. *Id.* The rule noted that "water transfers should be able to be operated and maintained in a manner that ensures they do not themselves add pollutants to the water being transferred." *Id.* Finally, the EPA explicitly states that legal authority of the rule only extends to § 402 violations, and has no effect on the § 404 permit program, under which discharges of dredged or fill material still requires a permit. *Id.*

Deference given to the EPA's rule does not affect the current situation because the EPA rule only applies to § 402 violations, and dredge and fill activities do not constitute a water transfer. The rule exempts intervening industrial use when the water is changed into something other than a water of the United States. *Id.* Here, Bowman's dredging changes what was once a wetland, into dredged spoil and fill, something that is no longer a water of the United States. (R. 4). Likewise, the EPA rule defines "not an intervening use" as a "water pumping station, pipe, canal or other structure," all of which deal with water passing through a man-made structure or tunnel. Here, Bowman's activities do not pass water through a structure; to the contrary, the wetland is dug up and deposited in the same spot it was removed. (R. 4). Dredging and fill material are also not affected by this rule because, just as the view of the EPA toward water treatment plants, the removal and redeposit of solids from the water constitutes a waste and still requires a permit. The EPA rule further requires that a water transfer does not itself add a pollutant; not only is Bowman's activity not a water transfer because the wetland is subject to intervening use, the dredging of land adds a pollutant that was not there before-dredged spoil. (R. 4).

Bowman's dredge and fill activities constitute an addition as required by § 404 of the CWA because he introduced a pollutant that was not previously present in the wetland-dredged spoil. Further, the unitary water theory, as adopted under the EPA's water transfer rule, does not apply here because Bowman's activities subjected the water to intervening use, and added a pollutant that was not previously present.

CONCLUSION

WHEREFORE, NUDEP asks this Court to (1) reverse the lower court's holding that NUWF did not have standing to bring its citizen suit under § 505 of the CWA; (2) uphold the lower court's holding that there is no continuing violation as required for subject matter jurisdiction under § 505(a) of the CWA; (3) uphold the lower court's holding that NUWF's citizen suit is barred by NUDEP's diligent prosecution of Bowman under § 505(b) of the CWA; and (4) reverse the lower court's ruling that Bowman did not violate § 404 of the CWA.

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Respectfully submitted,

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