Team 62

C.A. No. 13-1246

In the United States Court of Appeals for the Twelfth Circuit

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NEW UNION WILDLIFE FEDERATION,

Plaintiff-Appellant,

v.

NEW UNION DEPARTMENT OF ENVIRONMENTAL CONSERVATION,

Intervenor-Appellant,

v.

JIM BOB BOWMAN,

Defendant-Appellee.

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

BRIEF FOR THE NEW UNION WILDLIFE FEDERATION
Plaintiff-Appellant

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JURISDICTIONAL STATEMENT

This case is on appeal from the District Court of New Union. R. at 1. The district court had proper subject matter jurisdiction over this case because the case's issues arise under a law of the United States, the Clean Water Act ("CWA" or "Act"), 33 U.S.C. §§ 1251–1387 (2006). Federal district courts have original jurisdiction over all civil actions arising under laws of the United States. 28 U.S.C. § 1331 (2006). The suit was brought by the New Union Wildlife Federation ("NUWF") pursuant to § 505 of the Act, 33 U.S.C. § 1365, charging the defendant Jim Bob Bowman ("Bowman") with having filled wetlands without a permit in violation of §§ 301(a) and 404 of the CWA. R. at 1. The district court granted summary judgment on all claims in favor of Bowman. R. at 1–2. NUWF appeals from the district court's final judgment. The Court of Appeals for the Twelfth Circuit has proper jurisdiction to review a final judgment of the District Court of New Union. 28 U.S.C. § 1291 (2006).

STATEMENT OF THE ISSUES

I. Whether an environmental organization has standing to sue for CWA violations when its members recreationally use the river adjacent to the defendant's property and fear that the defendant's land clearing and draining activities have polluted the river.

II. Whether failure to remove unlawfully added dredge and fill material and to restore wetlands constitutes a continuing or ongoing violation under § 505(a) of the CWA.

III. Whether a settlement between the defendant and a state agency which would not require the defendant to remove pollutants or restore the former wetlands constitutes "diligent prosecution" under § 505(b) of the CWA and thus bars a citizen suit.

IV. Whether the defendant violated § 301(a) of the CWA, which requires a permit for any addition of dredge or fill materials to navigable waters, by failing to obtain a § 404 dredge and fill permit before he pushed leveled vegetation and ashes into a trench dug into a wetland.

STATEMENT OF THE CASE

NUWF filed an action under § 505 of the CWA, 33 U.S.C. § 1365, against Bowman for filling wetlands without a permit in violation of §§ 301(a) and 404 of the CWA, *id.* §§ 1311(a), 1344. R. at 3. NUWF seeks civil penalties and an order requiring Bowman to remove the fill material and restore the wetlands. R. at 3. The New Union Department of Environmental Protection ("NUDEP") intervened in this action, and NUWF and Bowman filed cross motions for summary judgment. R. at 3.

The United States District Court for the District of New Union granted Bowman's motion for summary judgment on all counts, finding that: (1) NUWF lacked standing to bring a citizen suit against Bowman; (2) there is no continuing violation as required for jurisdiction under § 505(a) of the CWA, 33 U.S.C. § 1365(a); (3) NUDEP's diligent prosecution of Bowman barred the citizen suit as per § 505(b) of the CWA, *id*. § 1365(b); and (4) Bowman did not violate § 404, *id.* § 1344, because he did not discharge dredged or fill material to a water of the United States. R. at 1. Plaintiffs appealed to this Court, and this Court granted review on September 14, 2012. R. at 2.

STATEMENT OF THE FACTS

Jim Bob Bowman owns 1,000 acres of wetlands adjacent to the Muddy River. R. at 3. The river near Bowman's property is 500 feet wide and 6 feet deep and is commonly used for recreational navigation and fishing. R. at 3, 6. The entirety of Bowman's property consists of wetlands that are hydrologically connected to the Muddy. R. at 3–4. The wetlands, which absorb sediments and serve as buffers for flooding, serve an important function in maintaining the integrity of the Muddy. R. at 6. Prior to Bowman's actions, the wetlands were covered with trees and other typical wetland vegetation. R. at 3.

On June 15, 2011, Bowman began clearing the wetlands for agriculture. He bulldozed down and burned vegetation, pushed the felled vegetation and ashes into a trench, and then leveled the trench. R. at 4, 7. Afterwards, he formed a ditch and drained the wetlands into the Muddy. R. at 4. By around July 15, 2011, he had cleared all of the land except for a strip 150 feet wide immediately adjacent to the river which was difficult clear; this strip he planned to bulldoze after the wetlands were completely drained. R. at 4.

NUWF is a membership organization whose mission is to protect the fish and wildlife of New Union. R. at 4. Several of NUWF's members boat and fish recreationally in the Muddy River and picnic on its banks near the Bowman property. R. at 6. On July 1, 2011, after learning of Bowman's illegal clearing activities, NUWF sent Bowman, the Environmental Protection Agency ("EPA"), and NUDEP a notice of intent to sue Bowman for his violation of the § 404 of the CWA due to the discharge and continuing presence of dredged or fill material in the wetlands without a permit. R. at 4.

NUDEP responded to the notice by sending Bowman a notice of violation informing him that he had violated § 404 of the CWA. R. at 4. In response, Bowman negotiated an agreement with NUDEP in which Bowman agreed not to clear the remaining 150-foot strip of wetlands that he had planned to bulldoze after it had drained. R. at 4. He conveyed this small strip, along with a 75 foot buffer zone, to the State as a conservation easement. R. at 4. The easement is approximately 3.36 acres.[1] The easement included a right of public entry for appropriate day-

[1] The length of the easement is the length of the property along the shoreline: 650 feet. *See* R. at 3. The width of the easement is the 150-foot uncleared strip plus the 75-foot buffer zone: approximately 225 feet. *See* R. at 4. Thus, the area of the conservation easement is approximately 146,250 sq. ft. ((650)(150+75)), which is equivalent to 3.357 acres.

time recreational uses. R. at 4. Bowman also agreed to construct and maintain a year-round partially-inundated wetland in the 75 foot buffer zone. R. at 4, 6.

Although Bowman was subject to a penalty of up to $125,000 for his CWA violations, NUDEP refused to issue a penalty to Bowman. R. at 4. NUDEP also refused to require that Bowman restore the filled wetlands. R. at 4. Instead, Bowman was permitted to keep the cleared land as it was, except for in the narrow buffer zone, where he had to restore the wetland. R. at 4. NUDEP and Bowman consolidated this agreement into an administrative order on August 1, 2011. R. at 4.

On August 10, NUDEP initiated a suit in federal court under § 505 of the CWA. R. at 5. However, NUDEP did not prosecute Bowman further; instead, on September 5, it entered a decree that was identical to the administrative order and thus still did not contain penalties or a remediation requirement. R. at 5.

On August 30, 2011, NUWF filed a complaint under § 505 of the CWA, the citizen suit provision, seeking civil penalties and an order requiring Bowman to remove the fill material and to restore the wetlands to their former state. R. at 5. NUWF submitted affidavits from three of its members and allowed Bowman to depose them. R. at 6. All three members boat and fish recreationally in the Muddy River and picnic on its banks near the Bowman property. R. at 6. They testified that wetlands help maintain the integrity of rivers by absorbing sediment and pollutants and serving as buffers when the river floods. R. at 6. They stated that they feared that the Muddy River has become more polluted because of Bowman's activities and that it will become even more polluted if other nearby wetlands are drained for agriculture. R. at 6. One member, Dottie Milford, testified that the Muddy River looks more polluted now than it did before Bowman cleared his land. R. at 6. Another member, Zeke Norton, testified that he had

been catching frogs on and around the Bowman property for many years. R. at 6. The Bowman property had been especially productive, but now there are no frogs in the drained field and far fewer in the remaining woods. R. at 6. Norton may have been trespassing when he went frogging there. R. at 6. A NUDEP biologist also testified at a deposition about the wetland that Bowman would establish in the buffer zone under the proposed settlement. R. at 6. The biologist stated that he believes that the new wetland will provide a rich wildlife habitat for frogs. R. at 6.

STANDARD OF REVIEW

The standard of review on appeal of summary judgment is de novo. *Clift v. Clift*, 210 F.3d 268, 269–70 (5th Cir. 2000). Summary judgment is appropriate only when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c). When reviewing a grant of summary judgment, the court must review the facts in the light most favorable to the party opposing summary judgment -- here, the citizen-suit plaintiffs. *Scott v. Harris*, 550 U.S. 372, 378 (2007).

SUMMARY OF THE ARGUMENT

The district court erred in granting summary judgment on each claim. First, NUWF has standing to bring suit. Second, the federal courts have subject matter jurisdiction because there is a continuing and ongoing violation, as required by § 505(a) of the CWA. Third, NUDEP's actions do not rise to the level of diligent prosecution under § 505, so NUWF's suit is not barred. Finally, Bowman's actions violated the CWA because he added a pollutant to the waters of the United States without a permit.

The district court denied that the citizen-suit plaintiffs had standing, characterizing the injury to plaintiffs' recreational interests in the Muddy River as "speculative." However, the threshold for a showing of injury is lower than the district court acknowledged. Plaintiffs with a

direct interest in the suit have standing to sue, and members of NUWF have sufficiently alleged a direct interest: they swim and boat in the river near Bowman's property, and pollution in the river will diminish their enjoyment of these activities. One member stated that ever since Bowman drained his field, there are far fewer frogs that he can catch in the adjacent wetlands. The injury need not be significant to establish standing, nor need it have completely stopped the plaintiffs from pursuing the recreational activities they claim are now injured.

The district court also erred in finding that there was not a continuing or ongoing violation. For subject matter jurisdiction, § 505 of the CWA requires that alleged violations be continuing or ongoing rather than wholly past. 33 U.S.C. § 1365(a). Most courts have recognized that a violation is continuing as long as the dredge and fill material remains on the defendant's property. The possibility of injunctive relief differentiates a continuing or ongoing violation from a wholly past violation. Addition of fill material, unlike the discharge of industrial pollutants, changes circulation patterns in the water and has long-lasting impacts that may be undone if the wetlands are restored.

Finding that Bowman's violation was wholly past would lead to perverse results. Citizen suit plaintiffs must give the EPA notice of a violation and then wait an additional sixty days before they may file suit. If, as in this case, the violator can complete his activity within that sixty day period, he could then avoid a citizen suit because his violation would be "wholly past." Such a system would undermine the Clean Water Act's clear goal of minimizing harm to water bodies and wetlands. If instead the violation is continuing and ongoing, the defendant would have an incentive to halt his activity early on for fear of losing his investment should he lose the lawsuit and have to restore the land. Although a violation can remain ongoing indefinitely, parties need not fear citizen suits for dredge and fill activities that occurred many years before.

The doctrine of laches prevents suits by plaintiffs who have slept on their rights from seeking injunctions, and in calculating civil penalties, the court may consider whatever factors justice requires in the particular case.

The district court erred in finding that NUDEP's civil action constituted diligent prosecution. Citizen suits may not be brought under the CWA where the EPA or the State is diligently prosecuting the violator in a court of the United States. NUDEP has filed a civil action in the district court, but its actions do not rise to the level of diligent prosecution. A prosecution cannot be diligent if it does not require the prosecuted party to come into compliance — and NUDEP's prosecution does not come anywhere near to requiring compliance. NUDEP wishes to enter a decree that would allow Bowman to use for agriculture nearly one thousand acres of unlawfully drained and leveled wetlands, in return for preserving the 150 foot strip he has not yet cleared and maintaining a wetland on an additional 75 foot buffer zone. Where there were 1,000 acres of wetlands, only 3.36 acres will remain. If defendants like Bowman can escape liability and use the wetlands they have destroyed for more economically valuable purposes by settling claims with state agencies, they will have no incentive to follow the CWA. The court should scrutinize the agreement between NUDEP and Bowman, rather than assuming that NUDEP's actions constituted diligent prosecution.

Finally, the district court erred in finding that Bowman's actions did not violate the CWA. Bowman's actions clearly violated the Act, which prohibits "any addition of any pollutant to navigable waters from any point source" without a permit granted under § 402 or § 404. 33 U.S.C. §§ 1311(a), 1362(12). The lower court correctly held that the first three elements of the offense were met; the only element that is contended here is whether Bowman's actions constituted a prohibited addition that would require a dredged or fill permit. The law is clear on

this point, however: Bowman's actions in moving leveled vegetation and ashes qualify as "sidecasting" dredge spoil, which is a prohibited addition according to the EPA and federal circuit-level case law. The case is particularly strong for counting Bowman's actions as addition of a pollutant because he not only moved excavated material from one part of the wetland to another, but also burned the material and thus added the ashes, which were not at all present before his activity. There is an exception for requiring a permit, but the scope of this exception is very narrow: the exception is available only for incidental fallbacks from dredging activity. Bowman's burning vegetation and leveling the remains does not fit this narrow exception.

For § 402 permits regulating the discharge of traditional pollutants, EPA has embraced a "unitary navigable waters" theory under which transferring polluted water from one water body to another is not an "addition," since all water bodies are the same navigable water for the purposes of § 402 regulation. However, this rule does not apply to the § 404 permit program. Unlike for water transfers, digging up a wetland introduces pollutants into the wetland every time the excavation takes place. In addition, the EPA has declared that it regulates redepositions under § 404. Finally, Congress created a regulatory scheme for dredged or fill material separate from other pollutants under the NPDES program; thus, "addition," read in conjunction with "pollutant," must be interpreted differently for § 404 than for § 402.

ARGUMENT

I. NUWF has standing to bring suit because its members experienced actual injury to their concrete and particularized recreational interests.

The standing inquiry is focused on the plaintiff's right to bring suit in a federal court. The plaintiff must show: (1) "invasion of a legally protected interest which is (a) concrete and particularized and (b) actual and imminent, not conjectural or hypothetical;" (2) that the injury can fairly be traced to the defendant's allegedly unlawful conduct; and (3) that prevailing in the

lawsuit will redress the plaintiff's injury. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992). Recreational and aesthetic interests are cognizable interests for standing purposes, *Sierra Club v. Morton*, 405 U.S. 727, 734-35 (1972), and organizations may bring lawsuits on behalf of members if at least one member would have standing to bring the suit, *id.* at 739.

The purpose of the injury-in-fact requirement is to ensure that plaintiffs have enough of a personal stake in the outcome of the lawsuit to advocate vigorously in the adversary process. *Massachusetts v. EPA*, 549 U.S. 497, 517 (2007). Where there is a direct nexus between the plaintiff and the area of environmental degradation, as there is here, scientific proof of the environmental harm is not required. *Friends of the Earth v. Gaston Copper Recycling Corp.*, 204 F.3d 149, 159 (4th Cir. 2000). After all, the focus of the standing inquiry is injury to particular human beings, not to the environment. *Friends of the Earth v. Laidlaw Environmental Services (TOC), Inc.*, 528 U.S. 167, 181 (2000).

While an injury must be "actual and imminent," *Lujan*, 504 U.S. at 560, it need not have already occurred, nor need it be a substantial injury, *Gladstone Realtors v. Vill. of Bellwood,* 441 U.S. 91, 99 (1979) ("the plaintiff must show that he personally has suffered some actual *or threatened* injury") (emphasis added); *United States v. Students Challenging Regulatory Agency Procedures,* 412 U.S. 669, 689 n. 14 (1973) (rejecting the government's argument that standing should be limited to those who have been significantly affected and noting that "an identifiable trifle" will support standing); *see also Sierra Club, Lone Star Chapter v. Cedar Point Oil Co*., 73 F.3d 546, 557 n. 23 (5th Cir. 1996) ("CWA cases from other circuits corroborate our observation that the threshold for the injury requirement is fairly low.").

The NUWF members' affidavits easily satisfy the threshold for injury in fact. NUWF members testify that they boat and fish recreationally in the Muddy River and picnic near the

Bowman property. R. at 6. They fear that the Muddy has become more polluted because of Bowman's destruction of the wetlands. R. at 6. Dottie Milford testified that the Muddy looks more polluted to her since Bowman cleared his land. R. at 6. These are not speculative injuries: plaintiffs have a reasonable apprehension that Bowman's activities will impair their enjoyment of their recreational activities because they recognize the connection between his activities and pollution in the river in which they boat and fish. Milford testified that her aesthetic interests have already been diminished. R. at 6.

Courts have found standing based on similar assertions by plaintiffs. In *Cedar Point Oil Co*., three members of the Sierra Club described how they used the Galveston Bay for recreational activities, and each stated that he was concerned that plaintiff's discharges of produced water from its oil drilling activities "adversely affects the water quality and the wildlife of the bay" and was therefore concerned that continued discharges would, in the future, impair his ability to enjoy recreational activities. 73 F.3d at 556. The members had not yet suffered an injury, but the court nonetheless found that they had standing. *Id.*

The conservation easement, which would shield Bowman's cleared field from view, will likely not remedy the visible water pollution in the river itself. At the very least, whether the richer wetland habitat that allegedly will be established in the buffer area will allow the Muddy River to return to its pre-2011 level of pollution and thus redress the plaintiff's injuries is a question of material fact for trial. Summary judgment was not appropriate. *See* Fed. R. Civ. P. 56(c).

As the lower court acknowledged, Norton suffered another direct injury since the destruction of the wetlands reduced the number of frogs that he can catch. R. at 6. The court denied that Norton had standing to sue only because he might have been trespassing when he

caught frogs on the Bowman property. R. at 6. However, Norton's testimony adequately shows an injury to legally protected interests. The reduction in the number of frogs in the woods and buffer area after Bowman drained his field suggests that the drainage of the field had effects beyond the field and reduced the number of frogs Norton could catch on surrounding lands not owned by Bowman. R. at 6. It is reasonable to conclude that removing the fill material and restoring the wetlands would create a better habitat for frogs and thus redress Norton's injury.

The NUDEP biologist's testimony that the buffer zone will provide a better habitat for frogs once fully-established does not negate Norton's injury, which will continue until the wetland is reestablished. The accuracy of the biologist's testimony also presents an issue of material fact for trial, so summary judgment was not properly granted. *See* Fed. R. Civ. P. 56(c).

II. Because the continued presence of fill material in a wetland constitutes unlawful pollution, Bowman is in violation of an effluent standard or limitation until he removes the dredge or fill material.

Section 505(a) of the CWA states that "any citizen may commence a civil action on his own behalf against any person . . . who is alleged to be in violation of . . . an effluent standard or limitation under this chapter. . . ." 33 U.S.C. § 1365(a). An effluent standard or limitation includes any unlawful act under § 301 of the Clean Water Act, such as discharging dredged or fill materials into navigable waters without a permit. *Id.* § 1365(f).

The Supreme Court has interpreted § 505(a) to mean that a party may bring suit for a CWA violation as long as the violation is not "wholly past." *Gwaltney of Smithfield v. Chesapeake Bay Found.*, 484 U.S. 49, 57 (1987). Most lower courts, in interpreting the "wholly past" requirement as applied to unlawful dredge and fill materials, have found that a violation like Bowman's is not wholly past as long as the fill material remains. *See, e.g.*, *Stillwater of Crown Point Homeowner's Ass'n, Inc. v. Kovich,* 820 F. Supp. 2d 859, 895 (N.D. Ind. 2011);

City of Mountain Park v. Lakeside at Ansley, LLC, 560 F. Supp. 2d 1288, 1296 (N.D. Ga. 2008). Any other reading of the statute would allow a person who has unlawfully discharged dredge and fill materials to escape liability by completing his unlawful activity before a lawsuit can be filed, undermining the CWA's goal of "restor[ing] and maintain[ing] the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a).

A. NUWF may bring suit because there remains a possible injunctive remedy: the restoration of the wetlands.

The Supreme Court interpreted § 505(a) in *Gwaltney*, where it considered whether citizen-plaintiffs could bring suit for wholly past remedies. 484 U.S. at 57. The Court concluded that they could not: both the language of the statute and the legislative history make clear that citizen suits are "primarily forward-looking." *Id.* at 59. "Forward-looking" means that the citizen suits must be focused on harm that can be averted in the future, not on harm that occurred in the past. *Id*. The *Gwaltney* Court consistently linked citizen suits with the possibility of injunctive relief. From the definition of "citizen" as "a person . . . having an interest which is or may be adversely affected," 33 U.S.C. § 1365(g), to the legislative history, which "frequently characterized the citizen suit provisions as 'abatement' provisions or as injunctive measures," *Gwaltney*, 484 U.S. at 61, each piece of evidence that the Court used to reach its holding focused on § 505's focus on future, preventable harm to the citizen-suit plaintiffs.

Most courts that have dealt with dredged materials have held that violations are continuing until illegally dumped fill material has been removed. *See, e.g.*, *Kovich,* 820 F. Supp. 2d at 895 ("This Court finds the weight of authority . . . to be persuasive that the continued presence of fill material in the waterway constitutes a continuing violation."); *City of Mountain Park*, 560 F. Supp. 2d at 1296 ("The majority of cases dealing with fill materials appear to adopt the approach . . . of deeming the pollution "ongoing" as long as the polluting fill material

remains in the water."). Much of the damage from dredge and fill material comes not from the movement of the soil but from lasting changes in the character of the land. *See* 40 C.F.R. § 232.2 (2012) (defining fill material to include artificial islands and fill needed for buildings and infrastructure); 40 C.F.R. § 230.41 (2012). For example, the additional material may alter currents and circulation patterns, leading to degradation of water quality and wildlife habitat. 40 C.F.R. § 230.41. After removing the fill material, degraded wetlands can be restored to perform the functions they used to perform, such as trapping sediment and pollutants. *See* 50 C.F.R. § 84.11 (defining wetland restoration).

Gwaltney involved not a violation of a § 404 dredge and fill permit, as is the case here, but repeated exceedances of effluent limitations under a § 402 effluent limitations permit. 484 U.S. at 53. Gwaltney argued that the violation was wholly past because there was no evidence that it had violated its permit for several weeks before plaintiffs filed a complaint. *Id.* at 55. The Court disagreed, holding that a violation is not wholly past if there is "a reasonable likelihood that a past polluter will continue to pollute in the future." *Id.* at 58. Justice Scalia, concurring, noted that the phrase "to be in violation" "suggests a state rather than an act — the opposite of a state of compliance." *Id.* at 69. A plant would not be in compliance if "a past effluent problem is not recurring at the moment but the cause of that problem has not been completely and clearly eradicated." *Id.* In the present case, just as in *Gwaltney*, the violation is not wholly past. The presence of dredge and fill material in Bowman's former wetlands will continue to degrade water quality in the river, and Bowman can eradicate the cause of the problem by restoring the wetlands.

B. The use of the words "in violation" for injunctive relief under both the citizen suit provision in § 505(a) and the EPA enforcement provision in § 309(a) suggests that citizens, like the EPA, must be able to bring suit as long as the violation can be remedied, as is the case here.

Section 309 lays out the process for government enforcement of the CWA. *See* 33 U.S.C. § 1319 (2006). Section 309(b) authorizes the Administrator of EPA "to commence a civil action for appropriate relief, including a permanent or temporary injunction, for any violation for which he is authorized to issue a compliance order under subsection (a) of this section." *Id.* § 1319(b). Under subsection (a), the Administrator is authorized to issue a compliance order when he "finds that any person is in violation" of applicable law, including by unlawfully discharging pollutants into the waters. *Id.* §1319(a). The *Gwaltney* court noted "the parallel language of § 309(a) and § 505(a)" and distinguished § 309(a) and (b) from § 309(d), which authorizes the EPA to sue for civil penalties. 484 U.S. at 58. Unlike § 309(a) and (b), § 309(d) did not have the "in violation" language, so it could be applied for wholly past violations. *Id.*

If Bowman is not "in violation" of the permit requirement after he has completed his land clearing activities, then neither the citizen-plaintiffs nor the federal government would be able to bring suit against Bowman for injunctive relief. But courts have long recognized that the United States may demand restoration of wetlands that have been illegally dredged and filled in actions under § 309(b), even if the land-clearing activity was completed. *See, e.g.*, *United States v. Bailey,* 571 F.3d 791, 795 (8th Cir. 2009) (upholding restoration order after party had completed building a road); *United States v. Cumberland Farms of Conn., Inc.*, 826 F. 2d 1151, 1161 (1st Cir. 1987) (upholding injunction to restore wetlands under suit brought by the Army Corps of Engineers under § 309(b)). It is implausible that the phrases "alleged to be in violation" and "is in violation," both regarding injunctive relief for violations of the same sections of the Clean

Water Act, would mean different things in § 309 and § 505 merely because a different party is bringing suit.

C. Finding a wholly past violation when Bowman completed his illegal dredge and fill activity after being served notice of suit but before a complaint was filed would undermine the effectiveness of citizen suits for enforcing § 404 violations.

The purpose of citizen suits under the Clean Water Act is to enforce the law when governmental enforcement is insufficient. *Gwaltney,* 484 U.S. at 60. Barring citizen suits when a party has completed unlawful activities that can still be remedied undermines this important enforcement power.

The Supreme Court in *Gwaltney* noted "the practical difficulties of detecting and proving chronic episodic violations of environmental standards." 484 U.S. at 65. Just as citizens will have a difficult time knowing when a plant will discharge pollutants into the water, citizens are unlikely to know when a party has stopped its illegal dumping activities. The lower court's reading would give people an incentive to finish illegal fill activities as quickly as they can in order to avoid citizen suits.

In the case at hand, NUWF notified Bowman of its intent to sue before Bowman had finished his land clearing activities. By the time it filed suit on August 30, however, Bowman had already completed his land-clearing work. If, as the lower court held, Bowman could be sued only until he finished his land-clearing activities, he would have had an incentive to finish his illegal land-clearing activities as quickly as possible to avoid liability. Such a reading undermines the effectiveness of the citizen suit provision.

D. The Clean Water Act and equitable principles adequately protect interests of parties whose draining and filling activities have occurred long ago.

The Clean Water Act does not include a statute of limitations, so the general five year statute of limitations in 28 U.S.C. § 2462 applies, at least as to the civil penalties. *Pub. Interest Research Grp. of N.J., Inc. v. Powell Duffryn Terminals, Inc.*, 913 F.2d 64, 75 (3d Cir. 1990); *Sierra Club v. Chevron U.S.A. Inc.*, 834 F.2d 1517, 1521 (9th Cir. 1987). Since the unlawful presence of dredge and fill material is a continuing violation of the Clean Water Act, the statute of limitations does not run until the material is removed. *See, e.g. United States v. Reaves*, 923 F. Supp. 1530, 1534 (M.D. Fla. 1996).

The lower court stated that if this violation were continuing it would obviate the statute of limitations. R. at 7. However, CWA and the equitable doctrine of laches adequately protect defendants from claims to remedy long ago injuries. The Act allows for considerations of justice to play a role in determining the amount of a civil penalty in court: "In determining the amount of a civil penalty the court shall consider the seriousness of the violation or violations, the economic benefit (if any) resulting from the violation, . . . the economic impact of the penalty on the violator, and such other matters as justice may require." 33 U.S.C. § 1319(d). Further, claims for injunctive relief could be barred by the doctrine of laches if the plaintiff inexcusably delayed in filing suit in a way that prejudiced the defendant. *See, e.g. Allens Creek/ Corbetts Glen Preservation Grp., Inc. v. Caldera,* 88 F. Supp. 2d 77, 82-85 (W.D.N.Y. 2000) (holding that citizen suit was barred by laches when plaintiffs knew of defendant's construction schedule for wetland development but did not commence lawsuit until construction was nearly complete).

III. NUDEP's actions do not satisfy the diligent prosecution requirements of § 505.

The purpose of the Act's citizen suit provision is "to abate pollution when the government cannot or will not command compliance." *Gwaltney,* 484 U.S. at 62. Under § 505, citizen-suit plaintiffs must give sixty days notice of the intent to sue to the State, EPA, and the

violator, § 1365(b)(1)(A), which enables a violator to establish compliance or the State to initiate a prosecution, *see Gwaltney*, 484 U.S. at 60. Citizens are barred from bringing suit if the violator ceases the violations, or if the EPA or the 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 . . ." 33 U.S.C. § 1365(b)(1). Under § 309(g)(6)(A), the CWA extends this diligent prosecution bar to cases in which the federal government or the State is diligently bringing an administrative action under the CWA or a state statute comparable to the CWA. *Id.* § 1319(g)(6)(A).

Federal courts have examined a number of factors in determining diligent prosecution: (1) whether the prosecution secured compliance with the CWA, *Friends of Milwaukee's Rivers v. Milwaukee Metro. Sewerage Dist.*, 382 F.3d 743, 760 (7th Cir. 2004); (2) whether violations are likely to occur in the future, *Envtl. Conservation Org. v. City of Dallas*, 529 F.3d 519, 528–29 (5th Cir. 2008); and (3) whether the penalties were sufficient to deter defendants from further violations, *Friends of the Earth v. Laidlaw Environmental Services (TOC), Inc.*, 890 F. Supp. 470, 491–94, 497–98 (D.S.C. 1995), *rev'd on other grounds*, 149 F.3d 303 (4th Cir. 1998); *rev'd on other grounds*, 528 U.S. 167 (2000). In the present case, NUDEP's settlement with Bowman did not constitute diligent prosecution because it did not require Bowman to comply with the Act (and thus necessarily did not stop future violations), nor did it contain sufficient penalties to deter future violations. Finally, granting summary judgment to render this settlement diligent prosecution is contrary to the intent of the Act. At the very least, the question of whether the action is continuing and thus the prosecution not diligent is a factual question for the jury, and thus summary judgment was improper. This Court should remand this case so that the lower

court can scrutinize the interaction between NUDEP and Bowman in order to determine whether the prosecution rose to the level of diligence.

A. NUDEP's settlement did not constitute diligent prosecution because it did not require compliance with the CWA.

Although the Supreme Court has not explicitly defined diligent prosecution, the text of the statute makes clear that for prosecution to be diligent, it must compel compliance. 33 U.S.C. § 1365(1)(B) (stating that a case is barred if a State "has commenced and is diligently prosecuting… [an] action … to require *compliance* . . . ") (emphasis added); *see also Milwaukee Metro.*, 382 F.3d at 760 (noting that to constitute diligent prosecution, the State's actions must be capable of requiring compliance); *Pub. Interest Research Grp. of N.J., Inc. v. Rice*, 774 F. Supp. 317, 325–26 (D.N.J. 1991) (finding that a citizen suit was not precluded because EPA's actions were inadequate to compel compliance). This straightforward reading of § 505(1)(B) is consistent with the Supreme Court's observation in *Gwaltney* 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." 484 U.S. at 60 (emphasis added); *see also id.* at 60 n.3 ("[C]itizen's suits are barred only if the Administrator has commenced an action *to require compliance*.") (emphasis added).

In *Milwaukee Metropolitan,* the defendant sewage district violated its discharge permit and the CWA by discharging untreated sewage into navigable waters of the United States. 382 F.3d at 748. Defendants argued that the state's prosecution, which included litigation in 1976 and stipulations in 1977, 2001, and 2002, constituted diligent prosecution. *Id.* However, the Court of Appeals for the Seventh Circuit found that the stipulations would not result in the defendant's eventual compliance with the Act. *Id.* at 764. Thus, the court held that the State had not engaged in diligent prosecution. *Id*.

Just as the stipulations were insufficient to result in compliance in *Milwaukee Metropolitan*, so too is the settlement agreement in the present case insufficient to result in compliance with the Act. Bowman's CWA violation will continue until he removes the pollutants from the wetlands and restores the wetlands to their original state. *See supra* Part II (explaining that, because dredged and fill material remains in place for years after the guilty party acts, CWA violations are continuing until the illegally dumped fill material has been removed). Thus, just as in *Milwaukee Metropolitan*, in this case, the diligent prosecution requirement has not been satisfied by NUDEP and Bowman's settlement agreement.

B. NUDEP's settlement did not constitute diligent prosecution because Bowman's violations will continue if NUWF's citizen suit does not go forward.

Even when a settlement compels compliance, courts have found non-diligent prosecutions if citizen-suit plaintiffs can demonstrate that there is a realistic prospect that the alleged violations will continue despite the government's actions. *City of Dallas*, 529 at 528–29 ("If a citizen-suit plaintiff demonstrates that there is a realistic prospect that the violations alleged in its complaint will continue notwithstanding the government-backed consent decree, then a less-than-diligent prosecution might have been shown."); *La. Envtl. Action Network v. Sun Drilling Prod. Corp.*, 716 F. Supp. 2d 476, 481 (E.D. La. 2010). Because the settlement agreement in this case did not require that Bowman come into compliance with the CWA at all, as explained above, Bowman's CWA violations will continue unless NUWF is able to bring its citizen suit requiring that Bowman remove the pollutants. Thus, NUDEP's settlement does not constitute diligent prosecution.

C. NUDEP's settlement did not constitute diligent prosecution because it did not remove the economic benefit of non-compliance.

Several courts have evaluated diligent prosecution by analyzing whether the state-imposed penalty is sufficient to deter the activity in question. A penalty that does not remove the economic benefit of non-compliance may indicate that the prosecution is not diligent. *See Laidlaw*, 890 F. Supp. at 491–94, 497–98 (finding that a citizen suit is not barred by a sate's prosecution that did not recover the economic benefit of noncompliance); *Atl. States Legal Found., Inc. v. Tyson Foods, Inc.*, 897 F.2d 1128, 1141 (11th Cir. 1990) (finding that a district court's determination that no fines were necessary for a CWA violation was an abuse of discretion). The civil penalty is meant to deter future violations of the Act by considering the economic impact of the penalty. *See Tull v. U.S.*, 481 U.S. 412, 422–23 (1987) (citing 123 Cong. Rec. 39191 (1977) (remarks of Sen. Muskie citing EPA memorandum outlining enforcement policy)).

In the present case, the settlement agreement permits Bowman to reap significant economic benefits from his continual noncompliance. Bowman illegally cleared, drained, and filled the wetlands for agricultural purposes. R. at 4–5. He will likely gain significant income from this noncompliance. Bowman might argue that constructing and maintaining a wetland on the buffer zone that he conveyed to the State is costly, and thus should be considered a penalty. However, the economic benefit that Bowman will derive from the agricultural use of his cleared land will likely be greater than the cost of the wetlands maintenance or else he would not have agreed to the settlement. In addition, the conservation easement is only about 3.36 acres. *Supra* note 1. Thus, Bowman is walking away from his illegal land-clearing activities with limited financial loss and a net gain of almost 1,000 acres of agricultural land.

Furthermore, the settlement sets a bad precedent by not removing the benefit of non-compliance from Bowman. If defendants like Bowman can destroy wetlands for more

economically valuable purposes, and in exchange need only cede a small portion of their land to the State, they will have little incentive to comply with the CWA. Therefore, because NUDEP's settlement did not remove the economic benefit of compliance, this Court should examine whether or not the prosecution was truly diligent.

D. The facts of the case and the purpose of the Act mandate that this Court scrutinize the interaction between NUDEP and Bowman in order to determine whether the prosecution rose to the level of diligence.

Although state enforcement decisions are generally presumed diligent, courts have stated that "a diligent prosecution analysis requires more than mere acceptance at face value of the potentially self-serving statements of a state agency and the violator with whom it settled regarding their intent with respect to the effect of the settlement." *Milwaukee Metro.*, 382 F.3d at 760. Many courts have scrutinized the interaction between the defendant and the agency in order to determine whether there was in fact diligent prosecution. *See, e.g., id.; Laidlaw*, 890 F. Supp. at 491–94, 497–98; *Ark. Wildlife Fed'n v. ICI Americas, Inc.*, 29 F.3d 376 at 380 (8th Cir. 1994). Here, because the facts suggest that the prosecution may not be diligent, this Court should scrutinize the interaction to remain true to the purpose of the Act.

The purpose of the citizen suit provision is to empower citizens to bring cases when the state "cannot or will not command compliance." *Gwaltney*, 484 U.S. at 62. Thus, when there is a genuine dispute as to whether the prosecution cannot command compliance – as there is in this case – it would be contrary to the intent of the Act to not scrutinize the nature of the prosecution.

IV. Bowman's actions in moving leveled vegetation and ashes across a wetland require a dredge and fill permit because they constitute a prohibited "addition" under the Clean Water Act.

The CWA prohibits "the discharge of any pollutant by any person." 33 U.S.C. § 1311(a). Section 502(12) interprets the "discharge of a pollutant" as "any addition of any pollutant to

navigable waters from any point source." 33 U.S.C. § 1362(12). Permits for the discharge of dredged or fill material are granted on a limited basis under § 404 of the CWA; effluent limitations are regulated separately under the National Pollutant Discharge Elimination System ("NPDES") as per § 402. 33 U.S.C. §§ 1342, 1344. Here, the district court has established the existence of three elements: "pollutant," "navigable waters," and "point source." R. at 8–9. The only element that is contested on appeal is whether Bowman's actions constituted a prohibited "addition" that would require a dredge and fill permit.

Bowman added pollutants to a wetland when he leveled the trenches filled with vegetation and ashes, thereby moving these vegetation and ashes from one location to another within a wetland. *See* R. at 4. Thus, his actions constituted a prohibited "addition" that required a dredge and fill permit, which he failed to obtain before commencing operations. *See* R. at 3. There are two primary arguments for why Bowman's activities constituted an addition. First, Bowman's actions amounted to "sidecasting," which the EPA and courts have determined to be a category of prohibited "addition." *See United States v. Deaton*, 209 F.3d 331, 335 (4th Cir. 2000). Second, contrary to the Defendant's assertions, the EPA definition of addition as being "from the outside world" used in the § 402 NPDES context cannot be extended to the separate § 404 dredge and fill permit context. Thus, this Court should reverse the lower court's summary judgment that the element of "addition" was not satisfied.

A. Moving leveled vegetation and ashes across a wetland amounts to "sidecasting," a form of prohibited addition that involves redepositing excavated material into the same wetland.

Bowman's land-clearing actions, in which he moved leveled vegetation and ashes across a wetland, amounted to "sidecasting," a category of wetland activity that is a prohibited addition unless the party has a dredge and fill permit. *See Deaton*, 209 F.3d at 335; Clean Water Act

Regulatory Programs, 58 Fed. Reg. 45,008, 45,013 (Aug. 25, 1993). A permit is not required if the actions in question constitute an incidental fallback. *See* 404 Program Definitions, 40 C.F.R. § 232.2 (1993). However, Bowman's actions in actively burning the vegetation and leveling the remains did not constitute incidental fallback. *See* R. at 4. Instead, they were illegal "sidecasting."

a. Bowman's actions meet the definition of "sidecasting," a prohibited addition which requires a dredge and fill permit.

Sidecasting is defined as "the deposit of dredged or excavated material from a wetland back into that same wetland." *Deaton*, 209 F.3d at 335. The EPA has long considered sidecasting to be regulated under § 404. 58 Fed. Reg. at 45,013. Although some courts initially struggled with the idea of redeposition as an "addition," *see, e.g.*, *United States v. Wilson*, 133 F.3d 251, 259 (4th. Cir. 1997) ("'Addition' requires the introduction of a new material into the area, or an increase in the amount of a type of material which is already present."); *Nat'l Mining Ass'n v. U.S. Army Corps of Eng'rs,* 145 F.3d 1399, 1404 (D.C. Cir. 1998) ("[W]e fail to see how there can be an addition of dredged material when there is no addition of material."), courts have now caught up with the agency's expert understanding that redepositing excavated material into the same waters can cause environmental harms and thus must be regulated under the CWA*, see Deaton*, 209 F.3d at 337; *Greenfield Mills, Inc. v. Macklin*, 361 F.3d 934, 947–48 (7th Cir. 2004); *Borden Ranch P'ship v. U.S. Army Corps of Eng'rs*, 261 F.3d 810, 814–15 (9th Cir. 2001).

In *Deaton*, the Fourth Circuit reversed its decision in *Wilson* by ruling that addition "encompasses sidecasting in a wetland." *Deaton*, 209 F.3d at 337. The appellee in *Deaton* dug a drainage ditch and cast the excavated material to the side of the ditch within the same wetland without a § 404 permit. *Id.* at 333. The court found that this action amounted to a prohibited

addition because the negative effects of dredged material are the same regardless of whether the dredged material originated from the same wetland. *Id.* at 336.

Other federal circuit courts have also adopted *Deaton*'s understanding of sidecasting as a prohibited addition. *See, e.g.*, *Macklin*, 361 F.3d at 947–48; *Borden Ranch P'ship*, 261 F.3d at 814–15. Furthermore, the Sixth Circuit recently directly accorded deference to EPA's interpretation of sidecasting as a prohibited addition. *United States v. Cundiff*, 555 F.3d 200, 214 (6th Cir. 2009); *see also* Brief of Appellee at 31, *United States v. Cundiff*, 555 F.3d 200 (6th Cir. 2009) (Nos. 05-5469, 05-5905, 07-5630) ("Sidecasting has been within the regulatory definition of 'discharge of dredged material' since the Corps first defined it.").

Bowman's actions provide a stronger case for sidecasting as an "addition" than did actions of the appellee in *Deaton*. Whereas the *Deaton* appellee was merely excavating dirt from a drainage ditch and casting it aside, 209 F.3d at 333, Bowman burned the knocked-down vegetation and actively leveled the remains with a bulldozer, R. at 4. Since the act of excavation is enough to make dirt into a pollutant with the capacity to harm the wetland, 209 F.3d at 335–36, an even stronger case can be made that the burned and relocated vegetation was a pollutant here. Thus, Bowman's activities fall squarely within the definition of a prohibited "sidecasting" that warrants a dredge and fill permit.

The lower court attempts to discredit the long line of case law that defines sidecasting as an addition by claiming that "nothing is added when a defendant moves soil." R. at 10. However, it is "well-settled doctrine" that some redeposits do require a dredge and fill permit. Revisions to the Clean Water Act Regulatory Definition of "Discharge of Dredged Material," 64 Fed. Reg. 25,120, 25,121 (May 10, 1999); *see also Nat'l Mining Ass'n*, 145 F.3d at 1405 (emphasizing that the Corps retains § 404 permitting authority over some forms of redeposits). Redeposits of

excavated material have similar harmful effects on hydrology and the environment as outside material and thus must be regulated under the CWA. *Deaton,* 209 F.3d at 336 (citing 40 C.F.R. § 230.41).

Even before the discussion of sidecasting by the courts and the EPA, the Fifth Circuit found that "[t]he word 'addition[,'] as used in the definition of the term 'discharge,' may reasonably be understood to include 'redeposit.'" *Avoyelles Sportsmen's League, Inc. v. Marsh*, 715 F.2d 897, 923 (5th Cir. 1983); *see also Rybachek v. EPA,* 904 F.2d 1276, 1285 (9th Cir. 1990) ("[E]ven if the material discharged originally comes from the streambed itself, such resuspension may be interpreted to be an addition of a pollutant"); *United States v. M.C.C. of Fla., Inc.*, 772 F.2d 1501, 1506 (11th Cir. 1985); *Borden Ranch P'ship*, 261 F.3d at 814–15. These cases thwart the lower court's attempt at discrediting *Deaton*'s line of cases finding that "sidecasting" is indeed a form of "addition" that requires a dredge and fill permit.

b. Bowman's actions do not meet the definition of "incidental fallback," a narrow exception to requiring a dredge and fill permit.

If the redeposit of dredged material constitutes an "incidental fallback," a dredge and fill permit is not required. 404 Program Definitions, 40 C.F.R. § 232.2 (1993). The EPA defines incidental fallback as the "redeposit . . . of dredged material that is incidental to excavation activity." Further Revisions to the Clean Water Act Regulatory Definition of "Discharge of Dredged Material," 66 Fed. Reg. 4,550, 4,575 (Jan. 17, 2001). Although industry has attempted to expand the scope of the exception, courts have granted "considerable deference" to the EPA in determining the difference between incidental fallback and regulable redeposits. *Nat'l Mining Ass'n*, 145 F.3d at 1405; *see also Am. Mining Cong. v. U.S. Army Corps of Eng'rs*, 120 F. Supp. 2d 23, 30 (D.C. Cir. 2000).

Bowman's operations were neither "incidental" nor "fallbacks." Bowman moved vegetation and ashes from one part of the wetland to another in order to fill the wetlands. R. at 4. He dug a trench for the purpose of relocating vegetation remains and ashes there. R. at 4. The material did not "*simply fall[] back* in the same general location." *Am. Mining Cong.*, 120 F. Supp. at 31 (citing *Am. Mining Cong. v. U.S. Army Corps of Eng'rs*, 951 F. Supp. 267, 273 (D.C. Cir. 1997)) (emphasis added). Therefore, the incidental fallback exception does not exempt Bowman from the dredge and fill permit requirement.

In conclusion, Bowman's actions amounted to "sidecasting," a form of prohibited addition which requires a dredge and fill permit. The fact that excavated material was redeposited within the same wetland does not prevent sidecasting from being a prohibited addition. A narrow exception to requiring a dredge and fill permit is if the redeposition constitutes an "incidental fallback"; however, Bowman's purposeful land-clearing activities do not fall into this exception. Therefore, Bowman violated the CWA by not obtaining a dredge and fill permit before initiating sidecasting activities.

B. Since redeposition is regulated as an "addition" within the wetland context, the district court cannot apply the definition "from the outside world," used exclusively for the NPDES program.

The lower court attempts to apply the definition of addition as coming "from the outside world," which is the EPA's interpretation of "addition" within the context of the § 402 NPDES program. NPDES Water Transfers Rule, 73 Fed. Reg. 33,697, 33,700 (Jun. 13, 2008) (noting that "addition" may reasonably be limited to circumstances in which "the point source itself physically introduces a pollutant into a water from the outside world.") (quoting *Nat'l Wildlife Fed'n v. Gorsuch*, 693 F.2d 156, 175 (D.C. Cir. 1982)). However, this definition does not apply to "addition" in the context of the § 404 dredge and fill permit program. First, the EPA has stated

that addition within § 404 *does* include redeposits. *See* 64 Fed. Reg. at 25,121 ("[S]ome redeposits of dredged material in waters of the United States constitute a discharge of dredged material and therefore require a section 404 permit."). Second, Congress created distinct regulatory schemes for the NPDES program and for dredged or fill material, resulting in different interpretations of "addition." *See* S. Conf. Rep. 92-1236 (1972), *reprinted in* 1972 U.S.C.C.A.N. 3776, 1972 WL 12735 at 3818–19 (noting that although the Senate initially proposed that dredged or fill material be regulated under the NPDES program, the final bill adopted the House's proposal to create § 404, a separate regulatory scheme for this distinct pollutant). Therefore, this Court should reverse the lower court's decision to define § 404 addition as coming "from the outside world," because both the EPA and Congress intended to afford a distinct interpretation of "addition" under the dredged and fill permit program than for the NPDES program.

a. The district court cannot apply EPA's interpretation of the NPDES program to the dredge and fill permit program, because requiring addition to be "from the outside world" would contradict EPA's understanding that the dredge and fill permit program encompasses redepositions.

The lower court incorrectly applied EPA's "unitary navigable waters" theory requiring an addition to be "from the outside world" to the dredge and fill permit context. *See* R. 9–10. The "unitary navigable waters" theory, developed under the NPDES Water Transfers Rule, excludes water transfers among water bodies from the NPDES permit program by considering all water bodies as one navigable water for the purposes of § 402. NPDES Water Transfers Rule, 73 Fed. Reg. at 33,697. However, the definition of "addition" under this theory should not be applied to the dredge and fill permit context. Unlike in the NPDES context, the EPA has consistently stated

that redeposition of pollutants into the same wetlands should be regulated under § 404. *See* 64 Fed. Reg. at 25,121.

The EPA regulates differently in the dredge and fill context because of the differences between water transfers and wetlands redeposits. The EPA's "unitary navigable waters" theory is supported by *National Wildlife Federation v. Gorsuch*, 693 F.2d 156 (D.C. Cir. 1982), and *National Wildlife Federation v. Consumers Power Co.*, 862 F.2d 580 (6th Cir. 1988), NPDES Water Transfers Rule, 73 Fed. Reg. at 33,700, two cases which do not apply to the § 404 permit program.[2] In *Gorsuch*, the court explains why addition in the water transfer context should only constitute of pollutants "from the outside world" — because pollution occurs "when the pollutant first enters navigable water" and no further pollution occurs "when the polluted water later passes . . . from one body of navigable water . . . to another." 693 F.2d at 175. *Consumers Power* agrees with this interpretation. 862 F.2d at 584. However, this construction of "addition" is not relevant for the dredge and fill permit context. When part of the wetland is excavated, it becomes "dredged spoil," a pollutant with the capacity to harm the environment. See *Deaton*, 209 F.3d at 335–36. Thus, every time excavated material is redeposited into the same wetland, it is additionally polluting the wetland — unlike in the case of water transfers, where no additional harm occurs when polluted water passes through to another water body.

[2] Although the Seventh Circuit in *Macklin* views *Gorsuch* and *Consumers Power* as being "undercut severely" by the *Deaton* decision that redeposition can be an addition, this is a faulty reading of existing case law that blurs the line between § 402 and § 404. *Macklin*, 361 F.3d at 947 (discussing *Gorsuch*, 693 F.2d at 174–75; *Consumers Power*, 862 F.2d at 584; *Deaton*, 209 F.3d at 335).

This difference explains why the EPA chooses to regulate redeposits under § 404 as opposed to under the "unitary navigable waters" theory. The EPA must be granted judicial deference in its reasonable distinction between "addition" under the NPDES program and that under the dredged and fill permit program. *See Cundiff*, 555 F.3d at 214 (granting such deference). The lower court erred in applying the definition of "addition" under the NPDES program to the dredge and fill permit context. Doing so contradicted EPA's position, which should be granted deference, that redeposition into wetlands is regulated under § 404.

b. The district court cannot transfer a definition from §402 to §404, because Congress intended them to be distinct schemes regulating separate pollutants.

The lower court blurred the line between § 402 and § 404 by separating addition and pollutant. *See* R. at 10. However, the element of addition must be read in conjunction with the pollutant element. *See Deaton*, 209 F.3d at 335 ("[T]he statute does not prohibit the addition of material; it prohibits 'the addition of *any pollutant*.'") (emphasis added). Congress intended to provide distinct regulatory schemes when it separated out a certain type of pollutant, dredged material, from the NPDES program. *See* S. Conf. Rep. 92-1236, 1972 U.S.C.C.A.N. at 3818–19. Therefore, the word "addition" is "found in such dissimilar connection [to the element of pollution] as to warrant the conclusion that they were employed in the different parts of the act with different intent." *Sorenson v. Sec'y of Treasury of U.S.*, 475 U.S. 851, 860 (1986) (quoting *Helvering v. Stockholms Enskilda Bank*, 293 U.S. 84, 87 (1934)).

In *Deaton*, which is similar to the present case, the court read the addition element along with the element of pollution. 209 F.3d at 335. It distinguished the addition of "material" from the addition of "pollutant," and found that because wetland matter transforms into a pollutant when it is excavated, the addition does not have to originate from outside the wetland. *Id.* Thus,

the court read the addition element organically with the element of pollutant. If a certain pollutant is deliberately distinguished from other pollutants for the purposes of regulation, "addition," read organically with "pollutant," would have a different meaning depending on the pollutant in question.

This was the case when Congress intentionally separated out dredged material from the NPDES regulatory scheme. The dredge and fill permit program was initially proposed by the Senate as part of the § 402 NPDES system. S. Conf. Rep. 92-1236, 1972 U.S.C.C.A.N. at 3818. The House, however, created the separate § 404 to oversee regulation of dredged and fill material. *Id.* at 3818–19. The two sections provide for distinct regulatory schemes for their respective pollutants. Whereas the NPDES program is an EPA vehicle for imposing § 301-mandated technology-based discharge limits on point sources, the Corps oversees and grants permits under the dredge and fill permit program based on environmental impacts. 33 U.S.C. §§ 1342, 1344. Thus, since the regulation of pollutants is distinct under § 402 and § 404, "addition" should be understood, in conjunction with these regulations, to have different definitions in the two sections.

This Court should interpret "addition" consistent with Congress' intent to separate one type of pollutant — dredged or fill material — from other pollutants in a permitting scheme. Because the regulation in § 404 is very different from that in § 402, a definition of "addition" developed in a strictly § 402 context cannot be transferred to § 404. This is especially true when the EPA, in enforcing the wishes of Congress, chose to provide a different interpretation of "addition" for § 404. Therefore, the lower court cannot apply the "from the outside world" definition provided under the NPDES program to "addition" in § 404.

CONCLUSION

The district court's grant of summary judgment was improper on all counts. First, NUWF has standing to bring suit because its members experienced actual injury to their concrete and particularized recreational interests. Second, the continued presence of fill material on Bowman's former wetlands constitutes a continuing and ongoing violation, as required for subject matter jurisdiction by § 505(a) of the CWA. Third, NUDEP's settlement agreement with Bowman does not rise to the level of diligent prosecution under § 505, so NUWF's citizen suit is not barred. Finally, Bowman's actions violated §§ 301 and 404 of the CWA because he added a pollutant to waters of the United States without a permit. Summary judgment is only proper when there is no genuine issue of material fact, which is not the case here. For these reasons, appellant respectfully requests that this Court reverse summary judgment on all four counts and remand the case to the district court.

Respectfully submitted,

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Counsel for New Union Wildlife Federation