TEAM NUMBER: 63

C.A. No. 13-1246

IN THE UNITED STATES
COURT OF APPEALS FOR THE TWELFTH CIRCUIT

NEW UNION WILDLIFE FEDERATION
Plaintiff-Appellant – Cross-Appellee

v.

JIM BOB BOWMAN
Defendant-Appellee – Cross-Appellant

v.

NEW UNION DEPARTMENT OF ENVIRONMENTAL PRESERVATION
Intervenor-Appellee – Cross-Appellant

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

Brief for JIM BOB BOWMAN, Defendant-Appellee

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STATEMENT OF JURISDICTION

Plaintiffs, New Union Wildlife Federation (NUWF), brought suit in the United States District Court for the District of New Union, and the judgment of that court was entered on June 1, 2012. (R. at 1.) NUWF and the New Union Department of Environmental Protection (NUDEP) each filed a Notice of Appeal. This Court has appellate jurisdiction to review the judgment pursuant to 28 U.S.C. § 1291 (2006).

STATEMENT OF ISSUES

I. Whether NUWF has standing under the Clean Water Act (CWA) to bring the action.

II. Whether CWA § 505 confers federal subject matter jurisdiction when the violations are not ongoing, are not intermittent, and are wholly past.

III. Whether NUDEP's diligent prosecution of Jim Bob Bowman's (Bowman) actions bars NUWF's citizen suit.

IV. Whether Bowman's actions constituted an "addition" of pollutant to the wetland and were therefore a violation of the CWA when he moved material from one area of the wetland to another but there was no net increase in the amount of material in the wetland.

STATEMENT OF THE CASE

This is an appeal from an order of the United States District Court for the District of New Union granting Bowman's motion for summary judgment and denying NUWF's motion for summary judgment. (R. at 3, 11.) NUWF filed an action against Bowman under the citizen suit provision of the CWA § 505, 33 U.S.C. § 1365 (2006), alleging that Bowman violated CWA §§ 301 and 404 by filling wetlands without a permit. *Id.* §§ 1311(a), 1344. (R. at 3.) NUDEP

intervened in the action. (R. at 3, 5.)

After discovery, NUWF and Bowman filed cross motions for summary judgment. (R. at 3.) The district court found that NUWF lacked standing to bring a citizen suit action against Bowman, that the court lacked subject matter jurisdiction because any violations were wholly past, that the court lacked subject matter jurisdiction because NUDEP took enforcement action and fully resolved any violations, and that the court lacked subject matter jurisdiction because there was no "addition" of pollutants to the wetland. (R. at 6-11.)

NUWF filed a Notice of Appeal challenging all four of the district court's holdings. (R. at 1.) NUDEP filed a Notice of Appeal challenging the district court's holdings that NUWF did not have standing to bring a citizen suit and that Bowman did not violate CWA § 404. *Id*.

STATEMENT OF THE FACTS

Bowman owns one thousand acres of land adjacent to the Muddy River, which includes 650 feet of shoreline. (R. at 3.) The property is wholly within the one-hundred year flood plain and portions of the property are inundated every year when the river is high. *Id*. The property is hydrologically connected to the Muddy River and is a wetland, as determined by the U.S. Army Corps of Engineers' (the Corps) Wetlands Determination Manual. (R. at 3-4.)

On June 15, 2011, Bowman began to clear his property using a bulldozer to knock down trees and other vegetation. *Id*. Bowman then pushed the cleared vegetation into windrows and

burned the windrows. (R. at 4.) Next, he used the bulldozer to dig trenches, pushed the ashes into the trenches, and leveled the resulting field. *Id*. He did not clear a 150-foot wide strip of land that runs the length of his property adjacent to the Muddy River. *Id*. To complete his field, he created a wide ditch that ran from the back of his property to the Muddy River in order to drain the land. *Id*. Bowman finished clearing the land on or about July 15, 2011. *Id*.

On July 1, 2011, NUWF, sent a Bowman notice of intent to sue under CWA § 505, 33 U.S.C. § 1365 (2006), the citizen suit provision. *Id*. NUWF also sent notice of its intent to sue Bowman to the U.S. Environmental Protection Agency (EPA) and the State of New Union/NUDEP. *Id*. NUWF is a non-profit corporation that serves to protect New Union's fish and wildlife by protecting their habitats, among other things. *Id*. NUWF is a membership organization that is funded by its members' dues and contributions. *Id*. Its members elect the Board of Directors, which in turn elects the officers, including the President. *Id*.

Shortly thereafter, NUDEP contacted Bowman and sent him a notice of violation to inform him that his land clearing activities had violated both state and federal law. *Id*. The EPA has properly delegated authority to implement the CWA to NUDEP. *Id*. Bowman maintains he did not violate state or federal law, but he entered into a settlement agreement with NUDEP. *Id*. Under the settlement agreement, he acceded that he would not clear additional wetlands in the area, that he would convey a conservation easement to NUDEP on the 150-foot wide strip of un-

cleared property, and that he would convey an additional seventy-five foot buffer zone between the wooded area and the new field. *Id*. Both strips of land run the entire 650 feet of his property adjacent to the wetland. *Id*. Additionally, Bowman agreed to construct and maintain a year-round wetland on the buffer zone. *Id*. The conservation easement, which includes the 150 foot strip and the seventy-five foot buffer zone, allows public entry for appropriate, day-use, recreational activities, requires that Bowman keep the easement in its natural state, and forbids him from developing besides constructing and maintaining the artificial wetland. *Id*.

NUDEP incorporated the agreement into an administrative order and Bowman consented on August 1, 2011. *Id*. A state statute that is effectively identical in relevant parts to CWA §§ 309 (a) and (g), 33 U.S.C. §§ 1319 (a), (g) (2006), grants NUDEP authority to issue these administrative orders. *Id*. The statute also authorizes NUDEP to impose a penalty of up to $125,000 on such orders, however, NUDEP included did not include a penalty in its order to Bowman. *Id*.

On August 30, 2011, NUWF filed a § 505 complaint in which it sought civil penalties and an order that required Bowman to remove the fill material and restore the wetlands. (R. at 4.) On or about September 15, 2012, NUDEP filed a motion to intervene. *Id*.

In September 2011, Bowman observed that his field had sufficiently drained and he planted and sowed winter wheat. (R. at 4, 7.) The field encompasses all of the property besides

the 225-foot wide conservation easement that is adjacent to the Muddy River. (R. at 4.)

STANDARD OF REVIEW

The standard of review for granting summary judgment is *de novo*. Summary judgment is appropriate if "there is no genuine issue as to any material fact and . . . the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c) (1987).

SUMMARY OF THE ARGUMENT

NUWF lacks standing to sue Bowman for violating the CWA. None of NUWF's members can claim that they have suffered an injury in fact that is fairly traceable to the actions committed by Bowman. *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992). There are three elements that must be met for NUWF to have standing to sue Bowman under the CWA. NUWF has failed to show that any of its members have suffered an injury in fact that is fairly traceable to Bowman's actions. While recreational and aesthetic injuries can constitute injuries in fact, a general feeling of a change felt by the defendant's actions is not enough. *Sierra Club v. Morton*, 405 U.S. 727 (1972).

NUWF asserts that that there is a continuing violation under the CWA § 505, 33 U.S.C. § 1365 (2006), citizen suit provision, however, the violations are wholly past because Bowman ceased his activities on July 15, 2011. The Supreme Court held in *Gwaltney of Smithfield v. Chesapeake Bay Found.*, 484 U.S. 49, 57 (1987), that § 505 only confers federal subject matter

jurisdiction when (1) the violation was ongoing or (2) there is a continuing likelihood of intermittent violations. The Court clarified that § 505 did not confer federal subject matter jurisdiction over violations that were wholly past. *Id.*

The Fourth Circuit provided a framework for determining whether there were ongoing or intermittent violations on remand in *Gwaltney*. *Chesapeake Bay Found. v. Gwaltney of Smithfield*, 844 F.2d 170, 172 (4th Cir. Va. 1988); *on remand from* 484 U.S. 49, 57 (1987). The framework that the violations are not ongoing or intermittent when (1) whether any remedial actions were taken to alleviate the violations, (2) the probability that such measures will be effective, and (3) any other evidence relevant to whether the risk of continued violation was completely eradicated when the citizen-plaintiff filed suit. *Id.* Bowman meets all three of the factors; therefore his violations are not ongoing or intermittent. Thus, § 505 does not confer jurisdiction because it only confers jurisdiction over violations that are ongoing or intermittent.

Other lower courts have established a framework for determining when a violation is considered wholly past under *Gwaltney*. Generally, these lower courts either take an expansive approach or a narrow approach to interpreting wholly past violations. Under the expansive approach, courts consider whether the risk of continued violation has been eradicated. *See Sierra Club v. Union Oil Co.*, 853 F.2d 667, 671 (9th Cir. 1988). Under the narrow approach, courts consider whether there are any continuing residual effects of the discharge. *Hamker v. Diamond*

Shamrock Chem. Co., 756 F.2d 392, 397 (5th Cir. 1985). Bowman's violations are wholly past under either approach and § 505 does not confer subject matter jurisdiction.

NUWF's citizen suit is barred by NUDEP's diligent prosecution of Bowman's alleged violations. A citizen suit is barred if "the Administrator or State has commenced and is diligently prosecuting a civil or criminal action" against a violator to enforce an order. 33 U.S.C. § 1365(b)(1)(B) (2006). Diligently prosecuting means that the State or Administrator is prosecuting an enforcement action against the violator in a state or federal court. *Friends of the Earth v. Consolidated Rail Corp.*, 768 F.2d 57 (2nd Cir. 1985). An administrative action alone is not sufficient for a diligent prosecution. *Washington Pub. Interest Research Grp. v. Pendelton Woolen Mills*, 11 F.3d 883 (9th Cir. 1993). NUDEP entered into a settlement agreement with Bowman where he was to stop developing the wetlands on his property and convey a conservation easement and a buffer zone between the land that had been cleared and Muddy River. (R. at 4.) Thus, NUDEP's diligent prosecution bars NUWF's citizen suit.

NUWF and NUDEP contend that Bowman violates CWA §§ 301(a) and 404, 33 U.S.C. §§ 1311(a), 1344 (2006), and that he satisfies all of the elements required for a violation, including the requirement that there be an "addition" of pollutants. CWA § 301, *id*. § 1311, prohibits the discharge of pollutants except under a § 402 or § 404 permit. Under the CWA a discharge is "any addition of any pollutant to navigable waters from any point source." CWA §

502(12)(A), *id.* § 1362(12)(A). Thus, to violate the CWA, Bowman must have added a pollutant to the wetland. Bowman did not, however, add a pollutant to the wetland because he simply moved native material from one part of the wetland to another and did not introduce any new material or increase the total quantity of material present. Alternatively, Bowman did not add pollutant to the wetland because the EPA is entitled to *Chevron* deference and has interpreted the term "addition" with regard to the unitary waters theory to determine that the transfer of pollutants between navigable waters is not an addition of pollutants.

ARGUMENT

I. New Union Wildlife Federation lacks standing to sue Jim Bob Bowman for violating the Clean Water Act.

NUWF cannot satisfy the requirements to establish standing under CWA. Standing must be established to fall under the "cases' or controversy" requirement in U.S. Constitution. U.S. CONST. art. III, § 2, cl. 1.In order to establish standing, the Court has set down a three-part test in *Lujan. See Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992). "The party invoking federal jurisdiction bears the burden of establishing these elements." *Id.* at 560. A plaintiff must first establish that there is an "injury in fact." *Id.* Next, the plaintiff must show that the injury is "fairly traceable" to the Appellee. *Id.* Finally, the Appellant must show that a favorable judgment from the court would redress the injury. *Id.* at 561. In order to overcome a summary judgment,

the plaintiff must present evidence that their members are directly injured by the defendant's action. *Id.*

The District Court correctly determined that NUWF lacked standing under the CWA. NUWF failed to show that its members would suffer an injury in fact that is fairly traceable to Bowman's actions. In addition, the conservation easement and the buffer zone that NUDEP has ordered Bowman to build will improve that environment from its previous state. NUWF has only alleged speculative injuries and any aesthetic injury will be fixed by the easement and buffer zone.

A. New Union Wildlife Federation has failed to establish an injury is fact to satisfy standing.

In order to establish standing, the plaintiff must show that they have suffered an "injury in fact" that is actual or imminent. *Id.* at 560. The Supreme Court has defined actual injuries to include aesthetic, conservational, recreational, and economic injuries. *See Sierra Club v. Morton,* 405 U.S. 727 (1972). Aesthetic injuries can include the impairment of enjoyment of observing wildlife or scientific research. *Id.* An organization, such as an environmental group, can sue on behalf of its members against an agency or person that is violating the CWA. *See Summers v. Earth Island Institute,* 555 U.S. 488 (2009). In order to satisfy the standing requirement, only one member has to show they would suffer an injury in fact from the violator's action. *Id.*

An "injury in fact" must be "concrete and particularized…actual or imminent" and is not "conjectural" or "hypothetical." *Lujan* at 560. In *Lujan*, an environmental organization sued the Secretary of the Interior stated that a rule promulgated by the Secretary in regards to the funding of overseas activities that could threaten endangered species in Egypt and Sri Lanka. *Id.* at 557-59. To establish standing, two members testified that they had visited the areas in question and had observed the endangered species in their habitats. *Id.* at 563. They both claimed that their enjoyment of observing the crocodile and elephant in their natural habitat would be diminished by the development projects and that they intended to go back to see the animals in the future. *Id.* While the Court did say that these could be an injury in fact, the injury alleged in this case was not imminent enough. *Id.* at 564. The members had no concrete plans to return to Egypt or Sri Lanka and only an inclination to return at some point in the future. The Court stated that the "some day" plans to return with no concrete details were not sufficient to satisfy the actual or imminent requirement for standing. *Id.*

An injury can include aesthetic, recreational, and conservational injuries as well as economic injuries. *Sierra Club v. Morton*, 405 U.S. 727 (1972). In *Sierra Club*, the Court stated that so long as a member of an environmental organization has suffered an injury the organization might sue of their behalf. *Id.* at 739. The mere interest in a situation is not enough to establish standing no matter how long the interest has lasted. *Id.* The Sierra Club attempted to

establish standing based on their interest in preservation and conservation of the environment. *Id.* at 739-40. The Court would not extend standing to this type of injury because of the floodgate that would be opened by allowing this type of standing to be allowed.

In contrast, the Court in *Massachusetts v. EPA* allowed a state to have standing in a suit against EPA for its refusal to issue regulations for carbon dioxide emissions from cars. *Massachusetts v. E.P.A*, 549 U.S. 497 (2007). Unlike the cases where an environmental organization must prove the injury of a member, a state is a "special" type of entity in that it has its citizens to represent. *Id.* at 519-20. The Court allowed the state to have standing because of the danger of rising sea levels to the property owners on the coast of the state. *Id.* at 521-22.

NUWF does not meet the requirements for standing under the CWA. Like the environmental organization in *Lujan*, the NUWF has affidavits from three of its members that state they are aware of the changes in the environment due to Bowman's actions and fear how future actions will affect the environment. R. at 6. One of the members, Dottie Milford, testified that Muddy looked "more polluted to her than it did prior to Bowman's activities." *Id.* Another member, Norton, stated that he frogged the Bowman's property before it was cleared and captured many good frogs then. *Id.* He also stated that after the clearing he has been unable to get as many frogs. *Id.* Norton did admit that he knew he was trespassing while he was frogging. *Id.* The members' testimony does not constitute an injury because there is not actual or imminent

injury. *Id.* None of the members were allowed on Bowman's property. Courts generally do not consider hindrance of an illegal activity as an injury that is actionable. *Id.* The injuries alleged by the members of NUWF are not actual or imminent. A sense of the change in the environment because of the clearing is not enough for an actual injury. A general fear of the effects of future actions is not enough to constitute an imminent injury. None of Bowman's actions have hindered the members from enjoying Muddy except the one member who illegally trespassed on Bowman's property.

The NUWF's interest in protecting the wildlife and their habitats is not sufficient to establish standing. Similar to *Sierra Club*, the courts would not extend standing to the NUWF merely because of their interest in protecting the environment. *Sierra Club v. Morton,* 405 U.S. 727 (1972). Unlike the state in *Massachusetts v. EPA*, NUWF cannot claim that it has the responsibility of protecting the interest of the citizens of New Union. *Massachusetts v. E.P.A,* 549 U.S. 497 (2007). NUWF would be held to the standard of establishing that a member has suffered an actual or imminent, concrete and particularized injury, which it has failed to do.

B. The alleged injuries would not be fairly traceable to the Jim Bob Bowman's actions.

An injury must be fairly traceable to the challenged activities of the defendant and not the actions of a third party. *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs., Inc.,* 528 U.S. 167

(2000). In *Laidlaw*, the Court found that the injuries suffered by the plaintiffs were fairly traceable to the illegal pollution by the defendant. *Id.* at 183-84. Several of the members of the environmental organizations testified that they had enjoyed recreational activities along the North Tyger River for years and they were unable to continue enjoying them because of the fears of the discharged pollutants would have on their health. *Id.* at 181-83. Prospective property owners declined to purchase land near the river for fear of the continued pollution from the defendant. *Id.* The Court stated that these constituted injuries that were fairly traceable to the defendant's actions. *Id.* at 184-86.

In *Massachusetts v. EPA*, the rise of the sea levels was considered fairly traceable to the emissions of carbon dioxide form cars. *Massachusetts v. E.P.A*, 549 U.S. 497 (2007). Scientific evidence showed the effects of carbon dioxide known as the greenhouse gases. *Id.* at 523-24. Although it is a global problem, the Court reasoned that the car emissions in the United States. *Id.* Even though the car emissions were considered a minimal part of the problem of rising sea levels, the Court reasoned that any amount of reduction in carbon dioxide emissions would be helpful to the overall problem. *Id.* at 525-26.

NUWF may be able to show the alleged injuries are fairly traceable to Bowman's activities. Similar to the river in *Laidlaw*, the Muddy River has been enjoyed by the members of NUWF in the past and they claimed that they sensed the changes in the environment. *Laidlaw*,

528 U.S. at 181-83; R. at 6. However, unlike the members in the *Laidlaw*, the NUWF members cannot see a difference in the land near the river but they "feel" a difference because of the destruction of the wetlands. *Id.* The NUWF members do not fear that Bowman's activities had endangered their health by polluting the Muddy River. Their recreational activities have not been hindered by Bowman's actions. *Id.* Unlike the problem of greenhouse gases in *Massachusetts v. E.P.A.*, NUWF has not alleged that Bowman's activities have contributed to a global problem, which they must protect the citizens of New Union from.

C. A favorable decree from this court would not redress the injury.

The final element of the standing requirement is that the court hearing the case must be able to redress the problem. *Lujan* at 556. In *Lujan*, the Court found that it could not redress the problem of endangering the wildlife in Egypt and Sri Lanka. *Id.* at 568. The agencies that were helping to fund the development projects in those areas were not the only source of money for the projects. *Id.* at 571. Even if the Court were to rule in favor of the plaintiffs, the development projects would not be stopped or hindered in anyway. *Id.* The amounts of funding contributed to the projects were not substantial enough to affect the outcome of the projects. *Id.* The agencies did not have supervisory authority over the projects and their lack of involvement would do nothing to redress the problem. *Id.* The injury the members put forth is the danger to the endangered species in Egypt and Sri Lanka and the Court would not be able to issue any decree

that would protect the endangered species. *Id.* at 569. There was no way for the Court to redress the plaintiff's injury.

Contrast the situation in *Massachusetts v. EPA* where the Court found that they could redress the problem of greenhouse gas emissions. *Massachusetts v. E.P.A*, 549 U.S. 497 (2007). The Court reasoned that any reduction in the emissions of carbon dioxide could help to mitigate the problem of the rising sea levels. *Id.* at 525-26. While global warming is considered a problem that each industrialized nation is a major contributor to, the Court stated that the emissions in the United States could still affect the overall problem. *Id.*

The injuries alleged by the members of NUWF could not be redressed by a decree from this Court. The NUWF members have not alleged that Bowman has been polluting the river that the Court could order him to stop or clean up. R. at 4. Bowman has already committed to allotting a conservation easement and creating a buffer zone between his land and the river. *Id.* These measures would solve and even improve the condition of the river. R. at 6.

II. Clean Water Act § 505 does not confer subject matter jurisdiction on the federal courts because Bowman's alleged violations are not ongoing or intermittent but are wholly past.

The CWA citizen suit provision, § 505, 33 U.S.C. § 1365 (2006), permits a private citizen to commence a suit, in the absence of federal or state enforcement, against any person who has allegedly violated an effluent limitation regulation. In *Gwaltney of Smithfield v.*

Chesapeake Bay Found., 484 U.S. 49, 57 (1987), the Supreme Court established that § 505 only confers federal subject matter jurisdiction over citizen suits for violations that are ongoing or intermittent, not for violations that are wholly past.

Thus, § 505 only confers federal subject matter jurisdiction when the citizen-plaintiff makes a good faith allegation that either (1) the violation was ongoing on or after the date the complaint was filed or (2) there is a continuing likelihood of intermittent violations. *See Id*. at 57; *Ohio Valley Envtl. Coal., Inc. v. Hobet Mining, LLC*, 723 F. Supp. 2d 886, 888 (S.D. W. Va. 2010). Federal subject matter jurisdiction does not exist, the Court clarified, when violations are wholly past. *Gwaltney* at 59-60.

Gwaltney did not, however, establish a framework for determining whether the violations are ongoing or intermittent or whether they are wholly past. Although the Court defined an ongoing or intermittent violation as "a reasonable likelihood that a past polluter will continue to pollute in the future," the Court did not instruct how to determine whether a reasonable likelihood of future violation exists. *Id.* at 57. Additionally, the Court did not establish the point at which a violation becomes wholly past. *Id.*

The Fourth Circuit provided a solution to the first issue when *Gwaltney* was remanded. The court expanded on the definition of an ongoing or intermittent violation by providing several factors to weigh when determining whether a reasonable likelihood existed that a past polluter

will pollute in the future. *Chesapeake Bay Found. v. Gwaltney of Smithfield*, 844 F.2d 170, 172 (4th Cir. Va. 1988); *on remand from* 484 U.S. 49, 57 (1987). Similarly, the Fourth Circuit established that intermittent violations are considered ongoing violations until the date of no real likelihood of repetition. *Id.* Thus, intermittent and ongoing violations undergo the same analysis in this context. *Id.*

Other lower courts have provided a solution to the second issue by determining when a violation is considered wholly past under *Gwaltney*. Courts have generally taken either an expansive approach or a narrow approach to determine whether the violations are wholly past under *Gwaltney*. Section 505 does not confer jurisdiction for the violations that are wholly past.

A. Section 505 does not confer federal subject matter jurisdiction because Jim Bob Bowman's alleged violations are not ongoing or intermittent.

Bowman's alleged violations are not ongoing or intermittent because they do not meet the factors that the Fourth Circuit established for determining whether a violation is ongoing or intermittent. Therefore, § 505 does not confer federal subject matter jurisdiction over the suit.

On remand in *Gwaltney*, the Fourth Circuit provided several factors for determining whether a reasonable likelihood exists that a past polluter will not continue to pollute in the future. *Chesapeake Bay Found.* at 172. The factors the court set forth were (1) whether any remedial actions were taken to alleviate the violations, (2) the probability that such measures will be effective, and (3) any other evidence relevant to whether the risk of continued violation was

completely eradicated when the citizen-plaintiff filed suit. *Id.*; *Sierra Club v. Union Oil Co.*, 853 F.2d 667, 671 (9th Cir. Cal. 1988) (adopting and applying the Fourth Circuit's continuing or intermittent violation analysis).

Bowman meets all three of the factors, and therefore is not likely to continue to violate in the future. Bowman meets the first factor because he took remedial actions to alleviate the alleged violations. R. at 4. Bowman's first remedial measure was to halt all clearing activities and to agree with NUDEP that he would not clear additional wetland. *Id.* In doing so, he relinquished its agricultural and developmental value and preserved the area in its natural state. Additionally, Bowman conveyed a conservation easement to NUDEP that stretched 650 feet along the Muddy River shoreline and was 150 feet wide. *Id.* Moreover, Bowman conveyed a seventy-five foot wide buffer zone between the wooded area and the field and agreed to construct and maintain a year-round wetland there. *Id.*

Furthermore, Bowman meets the second factor because his remedial measures are highly probable to be effective. By halting all clearing activities, Bowman has eradicated the possibility of any future violations. Moreover, the conservation easement ensures a portion of Bowman's land is currently more protected than it was previously because the easement preserves the property. Additionally, the buffer zone that Bowman constructed, once fully established, will provide a higher quality wetland habitat for wildlife and will be constantly inundated, whereas

the previous wetland was only occasionally inundated. R. at 6.

Finally, Bowman meets the third factor because other evidence demonstrates that the risk of continued violations is completely eradicated. Bowman's only subsequent activities were planting wheat seeds and draining the property through the previously constructed ditch. Furthermore, the conservation easement requires Bowman to keep the easement area in its natural state, and forbids him from developing it in any way other than constructing and maintaining the artificial wetland.

Thus, under the three factors that the Fourth Circuit set forth to determine whether an ongoing or intermittent violation exists, Bowman's alleged violations are not ongoing or intermittent. Therefore, § 505 does not confer jurisdiction because it only confers jurisdiction over violations that are ongoing or intermittent.

B. Section 505 does not confer federal subject matter jurisdiction because Jim Bob Bowman's alleged violations are wholly past.

Courts vary in how they interpret wholly past violations under *Gwaltney*. Some courts adopt an expansive interpretation while others adopt a narrow interpretation. *See Wilson v. Amoco Corp.*, 33 F. Supp. 2d 969, 975 (D. Wyo. 1998). The expansive interpretation is based on whether the risk of continued violation has been eradicated. *See Sierra Club v. Union Oil Co.*, 853 F.2d 667, 671 (9th Cir. 1988). The narrow interpretation is based on whether there are any continuing residual effects of the discharge. *Hamker v. Diamond Shamrock Chem. Co.*, 756 F.2d

392, 397 (5th Cir. 1985). Under either interpretation, Bowman's violations are wholly past and § 505 does not confer subject matter jurisdiction.

1. Jim Bob Bowman's alleged violations are wholly past because the risk of continued violation has been eradicated.

Under the expansive interpretation, a violation is wholly past when the potential risk of continued violation is eradicated. *Sierra Club* at 671. Bowman's alleged violations are wholly past because he eradicated any potential risks of continued violation.

Bowman eradicated any potential risks of continued violation because he ceased his clearing activities on July 15, 2011 and promised not to return to them. R. at 7. No additional drainage flows from the field, which demonstrates that the risk of any continued violations have been eradicated because the entire premise upon which the alleged violations were based upon was that material was draining from the field into the Muddy River. *Id.*

Not only did Bowman eradicate the risks of continued violation, but also he actually improved the land by creating a conservation easement that is 150 feet wide and stretches along the entire 650 feet of his property bordering the Muddy River. The conservation easement ensures that the land will not be destroyed by human action and the buffer zone is a healthier wetland than the one it replaced. Thus, not only is the risk of continued violation eradicated but the wetland is in an improved condition.

2. Jim Bob Bowman's alleged violations are wholly past because there are no continuing residual effects.

Under the second, less stringent test, a violation is wholly past even when there are continuing residual effects from a discharge because "continuing residual effects resulting from a discharge are not equivalent to a continuing discharge." *Amoco Corp.* at 975; *Aiello v. Town of Brookhaven*, 136 F. Supp. 2d 81, 120 (E.D.N.Y. 2001). Thus, Bowman's alleged violations are wholly past, even if there happen to be continuing residual effects of the discharge.

The drainage from Bowman's property has ended, thus the violation is wholly past. Moreover, any assertions that NUWF sets forth regarding the residual effects of Bowman's alleged violations are irrelevant because residual effects from the drainage do not constitute a continuing violation. Thus, Bowman's alleged violations are wholly past because the runoff has ended and residual effects do not constitute continuing drainage.

In sum, § 505 does not confer federal subject matter jurisdiction because Bowman's violations are not ongoing or intermittent according to the Fourth Circuit's three factors and are wholly past under both the expansive and the narrow interpretation of wholly past.

III. New Union Department of Environmental Protections' diligent prosecution of Jim Bob Bowman's actions bars New Union Wildlife Federation's citizen suit.

The purpose of the citizen suit provision in the CWA is for citizens to enforce compliance with the Act when the government is unable or unwilling to pursue enforcement. *See Gwaltney*, 484 U.S. at 60. However the citizen suit can be barred if "the Administrator or State

has commenced and is diligently prosecuting a civil or criminal action" against a violator to enforce an order. 33 U.S.C. § 1365(b)(1)(B) (2006). The citizen suits are meant to supplement the government's enforcement. *Gwaltney*, 484 U.S. at 60; *Laidlaw*, 528 U.S. 167 (2000). For a citizen suit to be barred, an Administrator or State must be "diligently prosecuting" the violator in a court of law. *Id.*

A. New Union Department of Environmental Protection has diligently prosecuted Jim Bob Bowman because diligent prosecution requires that the State or Administrator has commenced an enforcement action in a state or federal court that will ensure the compliance with the Act.

In several circuits, diligent prosecution has meant that the state or Administrator has filed an action against the violator in a state or federal court to enforce compliance with a statute or order. *See e.g. Friends of the Earth v. Consol. Rail Corp.*, 768 F.2d 57 (2nd Cir. 1985); *Karr v. Hefner*, 475 F.3d 1192 (10th Cir. 2007); *Piney Run Pres. Ass'n v. Cnty. Comm'rs of Carroll Cnty.*, 523 F.3d 453 (4th Cir. 2008). In *Friends of the Earth*, the defendant, Consolidated Rail Corp. (Consolidated), violated its NPDES permits issued by the New York State Department of Environmental Conservation (DEC). *Friends*, 768 F.2d at 59. In response, DEC commenced an administrative proceeding against Consolidated and ordered consent decrees. *Id.* Friends filed a citizen suit against Consolidated under the citizen suit provision in the CWA. *Id.* The Second Circuit held that an administrative action is not sufficient to serve as a bar to a citizen suit. *Id.* at

63. The plain language of the CWA states that a bar to a citizen suit is an enforcement action in a state or federal court. *Id.*

In *Karr*, the EPA filed an action against the defendants for violating the CWA by introducing sources of pollution without NPDES permits. *Karr,* 475 F.3d at 1194. The EPA entered into a Consent Decree with the defendants for compliance with the statute. *Id.* The plaintiffs filed a complaint against the defendants following the issuance of the Consent Decree. *Id.* at 1195. The Tenth Circuit found that the EPA enforcement action and the consent decree were sufficiently diligent prosecution of the violations under the CWA and the citizen suit was dismissed. *Id.* at 1200. The Consent decree was sufficient to ensure compliance with the statute. *Id.*

NUWF's citizen suit is barred by NUDEP's diligent prosecution of Bowman's alleged violations of the CWA. Unlike the administrative action in *Friends* that was found not sufficient for diligent prosecution, NUDEP filed an enforcement action in a federal court in addition to the administrative proceedings against Bowman. *Friends of the Earth v. Consol. Rail Corp.,* 768 F.2d 57 (2nd Cir. 1985); R. at 5. Similar to the EPA's enforcement action in *Karr* that was found to be sufficient for diligent prosecution, NUDEP's enforcement action against Bowman constitutes diligent prosecution. *Karr v. Hefner*, 475 F.3d 1192 (10th Cir. 2007); R. at 5. NUDEP sent notice to Bowman that he had violated state and federal law by clearing the field after

NUWF had sent notice to the NUDEP and Bowman that it intended to commence a citizen suit against Bowman. R. at 4. Consequently, Bowman entered into a settlement agreement with NUDEP where he agreed not to develop anymore of the wetlands on his property, to convey a conservation easement and a buffer zone between the cleared field and the river. *Id.* NUDEP converted the settlement agreement into an administrative order that Bowman agreed to on August 1, 2012. *Id.* In addition, NUDEP filed suit in federal court and brought a complaint against Bowman for violations of the CWA. R. at 5. Subsequently, NUWF filed a complaint under the CWA against Bowman. *Id.*

B. Administrative actions are not sufficient to qualify as diligent prosecution for compliance with a statute.

A solely administrative action is not sufficient for diligent prosecution. *Washington Pub. Interest Research Grp. v. Pendelton Woolen Mills*, 11 F.3d 883 (9th Cir. 1993). Similar to the administrative action in Friends, in *Washington*, the Ninth Circuit found that the language in the CWA barred citizen suits only when the state has commenced an action in a court. *Id.* at 886. The defendant violated its NPDES permits and the EPA issued compliance orders. *Id.* at 884-85. The plaintiff commenced the action for violations of the CWA and the Ninth Circuit found that the administrative action did not bar the citizen suit. *Id.*

Diligent prosecution requires that the enforcement action be for requiring compliance with the Act and good faith in the prosecution. *Piney Run Pres. Ass'n v. Cnty. Comm'rs of*

Carroll Cnty., 523 F.3d 453 (4th Cir. 2008). In *Piney Run*, the environmental organization filed a suit against the county commissioners for violating the NPDES permits. *Id.* at 545. The Maryland Department of Energy (MDE) began administrative proceedings against the County for violating the permits. Id at 547. MDE filed a suit against the County for compliance with the permit. *Id.* MDE and the County entered into a Consent Judgment that was entered by the circuit court. *Id.* at 457-58. Subsequently, the environmental organization filed suit for the same violations of the NPDES permits that MDE has already prosecuted. *Id.* The Fourth Circuit found that MDE's enforcement action and Consent Judgment were diligent prosecution because it required compliance with the CWA and was in good faith to do so. *Id.* at 460.

NUDEP's filing of the enforcement action against Bowman in the federal court is enough to constitute diligent prosecution. Similar to the enforcement action in *Piney Run* that was found diligent prosecution, NUDEP's enforcement action is enough for diligent prosecution. The enforcement of NUDEP's administrative order in federal court would ensure the compliance with the CWA and would be a good faith effort for compliance. R. at 5.

IV. Jim Bob Bowman did not violate the Clean Water Act because he did not add material to the wetland.

Under CWA § 301, 33 U.S.C. § 1311(a) (2006), the discharge of pollutants is prohibited except when in compliance with a permit issued under § 402 or § 404. The CWA defines discharge as "any addition of any pollutant to navigable waters from any point source." CWA §

502(12)(A), *id.* § 1362(12)(A). Furthermore, "navigable waters" has been construed to include wetlands. *United States v. Riverside Bayview Homes*, 474 U.S. 121, 131-32 (1985).

Thus, to violate the CWA, Bowman must have added a pollutant to the wetland. Bowman did not, however, add a pollutant because he simply moved native material from one part of the wetland to another, he did not introduce any new material or increase the total quantity of material present. Alternatively, Bowman did not add pollutant to the wetland because the EPA is entitled to *Chevron* deference and has interpreted the term "addition" with regard to the unitary waters theory to determine that the transfer of pollutants between navigable waters does not constitute an addition of pollutants to navigable waters.

A. Jim Bob Bowman did not add material to the wetland because he merely moved native soil a few feet within the wetland and there was no net increase in materials in the area.

Bowman did not add material to the wetland because he did not increase the amount of material present in the area. In order to have an "addition" of material to a wetland, there must be a net increase in the amount of a new or currently existing material introduced into that area. *United States v. Wilson*, 133 F.3d 251, 259-60 (4th Cir. Md. 1997). Although soil may be definitionally transformed into "dredged spoil," which is a statutory pollutant, when it is excavated from the wetland, it is not added to the site. *Nat'l Mining Ass'n v. United States Army Corps of Eng'rs*, 145 F.3d 1399, 1404 (D.C. Cir. 1998). Moving native soil a few feet within a

wetland does not constitute a discharge. *Wilson* at 259-60.

Bowman did not add any material to the wetland when he cleared the land or when he dug trenches because he simply moved the vegetation and trees from one place to another. R. at 8. Additionally, Bowman did not add material to the wetland when he placed the cleared material in the trenches because he was merely transferring material from one area of his wetland to another. *Id.* In all of his actions, there was no net increase in materials present in the area, thus there was not addition of pollutants. The soil was transformed in definition only into dredged spoil when he excavated it. Therefore, Bowman did not violate the CWA because he did not add material to the wetland.

B. In the alternative, Jim Bob Bowman did not add material to the wetland because the EPA is entitled to *Chevron* deference and has held that transferring existing pollutants from one navigable water to another does not constitute an "addition" of pollutants.

Even if the Court does not agree that the dredged material is not an addition of pollutant because Bowman did not introduce new material to the wetland, the Court should defer to the EPA's NPDES Water Transfers Rule and still hold that Bowman did not violate the CWA. The Water Transfers Rule adopts the "unitary navigable waters" theory under which all navigable waters are one for purposes of § 301(a). CWA § 301(a), 33 U.S.C. § 1311(a) (2006); 73 Fed. Reg. 33,697-708 (June 13, 2008) (*codified at* 40 C.F.R. § 122.3(i)). Thus, to transfer existing

pollutants from one navigable water to another is not considered an "addition" of pollutants. Moreover, although the EPA's interpretation of "addition" has only been applied in CWA § 402 cases, never § 404 cases, the same term has the same meaning throughout a given statute, unless Congress clearly provides otherwise. *See Sorenson v. Sec'y of the Treasury*, 475 U.S. 851 (1986).

The EPA's interpretation of "addition" is entitled to *Chevron* deference because the term is ambiguous in the statute and the EPA's interpretation is reasonable. Under *Chevron*, a court must defer to the administering agency's interpretation when a statutory term is ambiguous and the agency's interpretation of the term is based on a reasonable construction of the statute. *Chevron, U.S.A. v. NRDC*, 467 U.S. 837, 843 (1984). Thus, the court should (1) apply the traditional tools of statutory interpretation to determine whether Congress has directly addressed the precise issue or whether the term is ambiguous. If the term is ambiguous, the court should (2) determine whether the agency's answer is based on a permissible construction of the statute. *Id*.

1. The Environmental Protection Agency's determination meets *Chevron* step one because the term "addition" is ambiguous in the Clean Water Act.

In the first step of a *Chevron* analysis, courts apply the traditional tools of statutory interpretation, which include examining the statute's legislative history as well as the term's plain meaning, its contextual meaning, and its meaning in light of the entire statute, to determine

whether Congress directly addressed the precise issue. *See Miami-Dade Cnty. v. EPA*, 529 F.3d 1049, 1063 (11th Cir. 2008). Congress has not directly addressed how the term "addition" should be interpreted under the CWA and the term is ambiguous because the statutory language could be interpreted in a number of ways. *Friends of Everglades v. S. Florida Water Mgmt. Dist.*, 570 F.3d 1210, 1222-23 (11th Cir. 2009).

First, the term is ambiguous when considered within its plain meaning. The language "addition ... to navigable waters" may mean an addition to a single body of navigable water from any source whatsoever, or it may mean an addition to all navigable waters from an outside source. *Friends of Everglades* at 1223.

Second, the term is ambiguous when considered in its context. In the CWA, Congress used both "any navigable waters" and the unmodified "navigable waters" to mean the same thing in some instances and to mean different things in other instances. *Id*. at 1225.

Third, the language is ambiguous in the broader context of the statute as a whole. In light of the CWA's broad and ambitious general purpose, there are two reasonable ways to interpret the "any addition of any pollutant to navigable waters from any point source" language of § 502(12)(A). CWA § 502(12)(A), 33 U.S.C. § 1362(12)(A) (2006). In one sense the phrase means "any addition ... to [any] navigable waters;" in the other sense the phrase means "any addition ... to navigable waters [as a whole]." *Friends of Everglades* at 1227. When two reasonable,

competing interpretations of the same statutory language exist, it is the very definition of ambiguous. *Id*. (*citing United States v. Acosta*, 363 F.3d 1141, 1155 (11th Cir. 2004)). Moreover, the CWA's legislative history does not conclusively support either interpretation. *Nat'l Wildlife Fed'n v. Gorsuch*, 693 F.2d 156, 166, 175 (D.C. Cir. 1982). For these reasons, the language of the CWA permits either interpretation of the term "addition" and the term is ambiguous. *See id*. *Friends of Everglades* at 1227.

2. The Environmental Protection Agency's determination meets *Chevron* step two because the Environmental Protection Agency's construction of the term "addition" is reasonable.

In the second step of *Chevron*, courts consider whether the administrative agency's interpretation was a reasonable interpretation of the statutory language. *Chevron* at 843. Additionally, a court may not substitute its own construction of a term for an agency's reasonable interpretation of the term. *Id*. at 843 n. 11.

In this case, the court should defer to the EPA because it is the agency primarily responsible for administering NPDES. *See Nat'l Wildlife Fed'n v. Consumers Power Co.*, 862 F.2d 580, 584 (6th Cir. 1988). Moreover, courts should follow the interpretation of the agency charged with executing the statute unless there are compelling reasons that the interpretation is wrong. *See id.* (*citing Red Lion Broad. Co. v. FCC*, 395 U.S. 367, 381 (1969)).

Courts have held that the EPA's interpretation is one of two reasonable readings, as

discussed in the *Chevron* step one analysis in the previous section. *Friends of Everglades* at 1228. Thus, the EPA's interpretation is not "arbitrary, capricious, or manifestly contrary to the statute" and the court should defer to the EPA's interpretation. *Id*.; *Chevron* at 844.

In sum, the EPA's interpretation of "addition," which adopts the unitary waters theory that the transfer of pollutants between navigable waters is not an "addition ... to navigable waters," is a permissible interpretation of the CWA language. Therefore, this Court should defer to the EPA's interpretation and should hold that Bowman did not violate the CWA because his actions did not constitute an addition of pollutants to navigable water.

CONCLUSION

NUWF lacks standing to sue Bowman under the CWA because it cannot establish an injury in fact that is fairly traceable to Bowman's actions. There is no continuing or ongoing violation of §505(a) of the CWA for subject matter jurisdiction because all of Bowman's alleged violations are wholly past. NUWF's citizen suit is barred by NUDEP's diligent prosecution in bringing an enforcement action against Bowman in federal court. Bowman did not violate he CWA when he moved dredge and fill material from one part of a wetland adjacent to navigable water to another part of the same wetland. The District Court's dismissal of the suit against Bowman should be affirmed.