Civ. App. No. 13-1246

IN THE UNITED STATES COURT OF APPEALS FOR THE TWELFTH CIRCUIT ON APPEAL FROM THE JUDGMENT OF THE DISTRICT COURT FOR THE DISTRICT OF NEW UNION

NEW UNION WILDLIFE FEDERATION,
Plaintiff-Appellant,
v.

NEW UNION DEPARTMENT OF ENVIRONMENTAL PROTECTION,
Intervenor-Appellant,
v.

JIM BOB BOWMAN,
Defendant-Appellee

Brief of Plaintiff-Appellant In Support of Plaintiff's Appeal from the Judgment of the District Court for the District of New Union

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TEAM # 65

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QUESTIONS PRESENTED

I. Whether New Union Wildlife Federation (NUWF) has standing to sue Jim Bob Bowman for violating the Clean Water Act (CWA).

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

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

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

PROCEDURAL HISTORY

On July 1, 2011, shortly after its members became aware of Bowman's activities, NUWF sent a notice of its intent to sue Bowman under § 505 of the CWA, id. § 1365, the citizen suit provision, to Bowman, EPA, and the State of New Union/NUDEP. (R. at 4). The EPA has properly delegated authority to implement the CWA to NUDEP. Bowman does not contest the validity of the notice. (R. at 4).

NUDEP contacted Bowman shortly thereafter and sent him a notice of violation informing him that he had violated both state and federal law by clearing the field. (R. at 4). Bowman then entered into a settlement agreement with NUDEP, under which he agreed not to clear more wetlands in the area. (R. at 4). He also agreed to convey to NUDEP a conservation easement on the 150 foot wide strip of still wooded property adjacent to the Muddy that he had not yet cleared plus an additional 75 foot buffer zone between that wooded area and the new

field. (R. at 4). He agreed to construct and maintain a year-round wetland on that 75 foot buffer zone. (R. at 4). NUDEP and Bowman incorporated their agreement into an administrative order issued by NUDEP to Bowman, which Bowman consented to on August 1, 2011. (R. at 4). A state statute virtually identical in relevant parts to §§ 309 (a) and (g) of the CWA, id. §§ 1319 (a), (g), grants NUDEP authority to issue such administrative orders. (R. at 4). Although the statute authorizes NUDEP to include an administrative penalty of up to $125,000 in such orders, NUDEP included no penalty is the order to Bowman. (R. at 4).

On August 10, 2011, after issuing the administrative order to Bowman, NUDEP chose to bring suit in federal court and filed a complaint against Bowman in this Court under § 505 of the CWA. (R. at 5). On August 30, 2011, NUWF filed its own § 505 complaint seeking civil penalties and an order requiring Bowman to remove the fill material and restore the wetlands.(R. at 5). On September 15, 2012, it filed a motion to intervene in the NUDEP § 505 action, to consolidate the NUDEP and NUWF actions, and an opposition to entry of the decree proposed by NUDEP in the NUDEP § 505 action. (R. at 5). At about the same time, NUDEP filed a motion to intervene in the NUWF case, which this Court subsequently granted. (R. at 5).

After discovery, Bowman and NUWF filed cross-motions for summary judgment on four grounds: 1) whether NUWF has standing to sue; 2) whether the violations are ongoing; 3) whether NUDEP has diligently prosecuted Bowman; and 4) whether the "addition" element of the Clean Water Act was violated. NUDEP joined Bowman in his motion for summary judgment on the second and third issues and joined NUWF in its cross-motion for summary judgment on the first and fourth issues. (R. at 5). The lower Court granted Bowman's motion for summary judgment on all counts. (R. at 3).

STATEMENT OF FACTS

Respondent Bowman owns one thousand acres of wooded or previously wooded land adjacent to the Muddy River near the town of Mudflats in the State of New Union. (R. at 3). The property is wholly within the one-hundred year flood plain of the Muddy. (R. at 3). Portions of Bowman's property are inundated every year. (R. at 3). Bowman's property is hydrologically connected to the Muddy River. (R. at 4). The Parties agree that the property is a wetland, as determined by the U.S. Army Corps of Engineers' (the Corp's) Wetlands Determination Manual, and that the Muddy is a navigable water. (R. at 3, 4).

On June 15, 2011, Bowman began bulldozing his wetland property. (R. at 4). He used the bulldozer to knock down trees, level the soil and vegetation, and push the vegetation into windrows, which he then burned. (R. at 4). Next, he dug trenches and pushed the trees, leveled vegetation, and ashes into them. (R. at 4). Finally, he formed a wide ditch that ran from the back of his property to the river in order to drain the field into the Muddy. (R. at 4). Bowman completed this work on July 15, 2011. (R. at 4). In September 2011, Bowman observed that the field had sufficiently drained to plant and sowed it with winter wheat. (R. at 5). He left a strip of land approximately 150 feet wide adjacent to the Muddy to clear after it had drained because it was the most difficult part of the property to work with the bulldozer, especially when it was saturated. (R. at 4). This strip runs along the 650 foot length of river frontage on his property. (R. at 4).

NUWF is a not for profit corporation organized under the laws of New Union. (R. at 4). Its purpose is to protect the fish and wildlife of the state by protecting their habitats, among other things. (R. at 4). It is a membership organization funded by members' dues and contributions. (R. at 4). Three of its members, Dottie Milford, Zeke Norton, and Effie Lawless, testified that they

use the Muddy on or in the vicinity of Bowman's property for recreation. (R. at 6). They are aware that wetlands serve valuable functions in maintaining the integrity of rivers, including the Muddy, both acting to absorb sediment and pollutants and serving as buffers for flooding. (R. at 6). Although they cannot see a difference in the land from the river or its banks, they are aware of the differences and feel a loss from the destruction of the wetlands, fearing the Muddy is more polluted as a result and will be far more polluted if other adjacent wetlands are cleared and drained for agricultural uses. (R. at 6). To Milford, the Muddy looks more polluted than it did prior to Bowman's activities. (R. at 6.) In addition, Norton testified that he has frogged the area, including Bowman's property, for years for recreational and subsistence purposes, but can no longer find more than two or three good sized frogs in the remaining woods and buffer area. (R. at 6). A NUDEP biologist testified that, once fully-established, the new, year-round, partially-inundated wetland in the buffer zone will provide richer wetland and frog habitat than the former, occasionally-inundated wetland presently occupied by the field. (R. at 6).

SUMMARY OF ARGUMENT

NUWF has established Article III standing sufficient to bring suit. Standing requires (1) a concrete and particularized, actual or imminent, injury in fact, (2) a causal connection between the injury and the actions of the defendant, and (3) a likelihood that the injury will be redressed by a favorable decision. *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992). Three of NUWFs members frequently use the Muddy River for boating, fishing, and picnicking and one member additionally uses the area to frog. Since Bowman's illegal filling of his wetlands, one member has noticed that the river looks more polluted and another is unable to successfully frog. These are concrete and particularized injuries that have already occurred. Based on timing, the injuries meet the non-scientifically certain burden of demonstrating sufficient causality. Further, all

injuries would be redressed if NUWF receives its requested order requiring Bowman to return the wetlands to their natural state. Because members of NUWF have standing on their own, NUWF as an organization has standing on their behalf.

The district court incorrectly heavily relied on *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Found., Inc.*, 484 U.S. 49 (1987), to determine that Bowman's violations were wholly in the past and not continuous as required by CWA 505(a)'s phrase "alleged to be in violation." However, the dissipative nature of the pollutants in *Gwaltney* is fundamentally different than the lingering and eroding pollutants in this case. A number of courts who have evaluated the unique properties of CWA § 404 pollutants and CWA § 402 pollutants that linger in an area have held that so long as the pollutant was remediable and remained in the water, a continuing violation existed sufficient to establish subject-matter jurisdiction. *See e.g., Sasser v. Adm'r*, 990 F.2d (4th Cir. 1993). Guidance should also be taken from the numerous cases that rely on the same "alleged to be in violation" language in the Resource Conservation and Recovery Act (RCRA) and have found that past disposal of wastes can constitute continuing violations. *See e.g., Cox v. City of Dallas, Tex.*, 256 F.3d 281 (5th Cir. 2001). Finally, public policy concerns support finding a continuing violation in this case because otherwise bad actors will be shielded from citizen suits if they quickly and secretly illegally fill wetlands before citizens have a chance to bring suit.

NUWF's suit is not barred by lack of subject matter jurisdiction. Supreme Court precedent has indicated that the diligent prosecution section of CWA is a claim-processing rule, not a subject matter jurisdiction provision. *Henderson v. Shinseki,* 131 S.Ct. 1197 (2011); *La. Envtl. Action Network v. City of Baton Rouge*, 677 F.3d 737, 748 (5th Cir. 2012). Therefore, NUWF's claim is protected by the safeguards of Federal Rule of Civil Procedure 12(b)(6)—the

district court is required to accept all well-pleaded facts in NUWF's complaint as true and view the facts in the light most favorable to NUWF. *Id.* at 745.

Courts have noted that the limitation of citizen suits relates only to actions for civil penalties, not injunctive or declaratory relief. *Paper, Allied-Indus., Chem. And Energy Workers Int'l Union v. Cont'l Carbon Co.*, 428 F.3d 1285, 1298 (10th Cir. 2005); *Orange Env't, Inc. v. Cnty. of Orange*, 860 F. Supp. 1003, 1017 (S.D.N.Y. 1994). Thus, even if the state was diligently prosecuting an action against the defendants, injunctive relief would still be appropriate, and NUWF's claim for injunctive relief may proceed. *Orange Env't, Inc. v. Cnty. of Orange*, 860 F. Supp. 1003, 1017 (S.D.N.Y. 1994).

Bowman violated CWA § 404 when he dredged the wetland and filled it with the bulldozed vegetation. These activities constituted a "discharge of a pollutant" under CWA § 301(a), defined as the addition of a pollutant, despite the fact that he did not introduce new material to the area. Courts have concluded that the term "addition" when taken in the context of the statute, means the addition of a pollutant, though not necessarily the addition of outside materials. Instead, an addition of a pollutant can include creation of a pollutant from the reconstruction of formerly benign materials. *Borden Ranch P'ship v. U.S. Army Corps of Eng'rs*, 261 F.3d 810, 815 (9th Cir. 2001); *U.S. v. Deaton*, 209 F.3d 331, 335 (4th Cir. 2000). Accordingly, when Bowman bulldozed the vegetation, stripped the soil, and filled the ditches of his property, he created a pollutant where before there was none, thereby adding a pollutant.

Although CWA § 404 allows for limited exceptions to the permit requirement, which include "normal farming activities" Bowman's actions did not meet this definition. A person who discharges a pollutant incidental to an excepted activity such as the "normal farming activities" of CWA § 404(f)(1)(A) still falls under the permit requirement if their actions change

the nature or the purpose of the wetland and impair the circulation or reach of a navigable water. 33 U.S.C. 1344(f)(2). Dredging, bulldozing, and subsequently planting on the wetland brought the land into a substantially different use and impaired the flow of the water while impairing the reach of the adjacent navigable water. Thus, even though Bowman may try to argue that his activities resembled normal agricultural activities like plowing, he would still have needed a permit under CWA § 404 to commence his land clearing operations lawfully.

STANDARD OF REVIEW

The appropriate standard of review of the district court's grant of summary judgment is de novo. *Harvey v. Horsley,* 166 F.3d 1217 (9th Cir. 1998). Summary judgment is appropriate if the evidence, read in the light most favorable to the nonmoving party, demonstrates that there is no genuine issue of material fact, and that the moving party is entitled to judgment as a matter of law. Fed.R.Civ.P. 56(c). If a nonmoving party bears the burden of proof at trial, he must establish each element of his claim with "'significant probative evidence tending to support the complaint. *Barnett v. Centoni,* 31 F.3d 813, 815 (9th Cir. 1994).

ARGUMENT

I. THE DISTRICT COURT ERRED IN HOLDING THAT APPELLANT NEW UNION WILDLIFE FEDERATION LACKS ARTICLE III STANDING BECAUSE IT IS REPRESENTING MEMBERS WHO CAN ESTABLISH INDIVIDUAL STANDING AND THE ISSUE IS GERMANE TO THE PURPOSE OF NUWF SUFFICIENT TO ESTABLISH ORGANIZATIONAL STANDING

Article III of the United States Constitution limits the jurisdiction of federal courts to hearing actual cases or controversies. U.S. Const. Art. III, §2, cl.1. This has been interpreted, most recently in *Lujan v. Defenders of Wildlife*, to require injury in fact, causation, and redressibility. 504 U.S. 555 (1992). NUWF has organizational standing on behalf of several of its members because they would have standing to bring suit on their own and because the interests harmed are relevant to the mission of NUWF. Therefore, the district court erred when it held that NUWF has not established sufficient standing to proceed on the merits.

A. NUWF has standing because it meets the three requirements established in Lujan: injury in fact, a causal connection, and redressability

The modern standing doctrine was established in *Lujan*. 504 U.S. 555 (1992). There, Defenders of Wildlife attempted to bring suit against the Department of Interior for failing to enforce the Endangered Species Act (ESA) on federal projects that were taking place outside of the United States. *Id*. To establish standing, the organization submitted affidavits from two members who had visited the threatened areas in the past and, although they did not actually see any of the endangered animals, planned on returning to the areas sometime in the future. *Id*. at 563-64. In an opinion by Justice Scalia, the Court determined that the plaintiff's injury must be concrete and particularized, "affect[ing] the plaintiff in a personal and individual way." *Id*. at n.1. In addition, the injury must be "actual or imminent" and cannot be a general injury to members of the public. *Id*. at 560. Despite requiring expanded proof to demonstrate standing, Scalia

affirmed that aesthetic purposes are still "undeniably a cognizable interest for [the] purpose of standing." *Id*. at 562-63.

Post-*Lujan*, in order for citizens to bring suit, they must establish: (1) a concrete and particularized, actual or imminent, injury in fact, (2) a causal connection between the injury and the actions of the defendant, and (3) a likelihood that the injury will be redressed by a favorable decision. *See e.g.*, *Summers v. Earth Island Inst.*, 555 U.S. 488 (2009); *Granite State Outdoor Advert., Inc*. v. *City of Clearwater, Fla*., 351 F.3d 1112 (11th Cir. 2003); *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83 (1998); *Mirant Potomac River, LLC v. U.S. EPA*, 577 F.3d 223 (4th Cir. 2009). NUWF clearly establishes all three requirements and therefore has sufficient standing to bring suit.

i. Injury in fact is satisfied because members of NUWF are affected by the aesthetic degradation of the Muddy River and the inability to successfully frog in the area.

The district court improperly determined that Dottie Milford, Zeke Norton, and Effie Lawless had not satisfied the injury in fact requirement by demonstrating a concrete and particularized, actual or imminent, injury in fact. (R at 4). An individual meets the injury in fact requirement by showing that "she or he has an economic, aesthetic, or recreational interest in a particular place . . . and that the interest is impaired by the challenged conduct." *Nat'l Res. Def. Council v. EPA*, 437 F. Supp. 2d 1137 (C.D. Cal. 2006).

Milford, Norton, and use the Muddy River for recreational boating and fishing and often picnic on its banks, on or in the vicinity of Bowman's property. (R. at 6). Ongoing pollution from the illegal fill material combined with the loss of ecosystem services, of which Milford, Norton, and Lawless are well aware, threaten their enjoyment of the river and its banks. In addition, Milford testified that the Muddy looks more polluted now than it did before Bowman's destruction of the wetlands. (R. at 6). The court held in *Sierra Club v. Morton*, 405 U.S. 727

(1972), that plaintiffs adequately allege injury in fact when they claim that they use the affected area and that the aesthetic and recreational values of the area will be lessened by the challenged activity. *Id*. at 735. In addition, Milford's claim that the water looks more polluted is concrete and actual because she has already seen a difference in the water as opposed to merely a fear of increased pollution. (R. at 6). Unlike in *Lujan*, where organization members had only visited the area once and had no concrete plans to return, Milford, Norton, and Lawless frequently visit the Muddy River for fishing, boating, and picnicking. (R. at 6). This regular pattern of use and enjoyment contrasts starkly from the "someday" goals to visit the endangered species at risk in *Lujan*.

Further, the district court inappropriately ignores the testimony of Norton, who has frogged in the area for years for recreational and subsistence purposes. (R. at 6). Norton stated that he was aware of "no trespassing" signs on Bowman's property but had frogged there anyway. (R. at 6). The court correctly points out that Norton's inability to illegally frog on Bowman's property is not an injury that can support standing. However, the court fails to give appropriate credit to the fact that Norton does not frog exclusively on Bowman's property but also frogs in the area surrounding the property. He testified that he used to be able to find at least a dozen frogs in the right season but now is lucky to find two or three. (R. at 6). His loss of subsistence and enjoyment from this contamination constitutes a specific and actual injury in fact.

In attempt to minimize the actual harm that has already come to Milford, Norton, and Lawless, NUDEP submitted deposition from one of its biologists who claims that once the easement area is fully-established, it will provide a richer wetland habitat than the one that existed before. (R. at 6). Speculation that at some future time the injuries to Milford, Norton, and

Lawless will be mitigated is insufficient to counteract the concrete harms that they have already suffered and are continuing to suffer. The critical time for determining standing is when the action commences so subsequent potential remediation is irrelevant. *Friends of the Earth, Inc. v. Laidlaw Envtl. Services (TOC), Inc.*, 528 U.S. 167 (2000). Furthermore, whether their harms will be mitigated is a question of fact that is inappropriate to deal with at the summary judgment stage and the case must be allowed to proceed on the merits. Fed. R. Civ. P. 56 (a).

ii. A causal connection does not have to be definitively scientifically established to avoid summary judgment and the visible pollution of the Muddy River since Bowman's destruction of the wetlands is sufficient evidence to imply causation.

The second element that must be met to demonstrate Article III standing is causation – that is a "fairly traceable connection between plaintiff's injury and complained-of conduct of defendant." *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 103 (1998). Notably, "fairly traceable" does not require scientific certainty. *See Mancuso v. Consol. Edison Co. of N.Y.*, 130 F. Supp. 2d 584, 592 (S.D. N.Y. 2001), *aff'd*, 2002 WL 15505 (2nd Cir. 2001) ("[T]here is no need to prove with scientific certainty that defendant's actions caused the harm . . . question of whether [CWA] plaintiffs have alleged an injury in fact that is fairly traceable to alleged violative conduct is one which is distinct from that of whether plaintiffs have meritorious claim); *Pa. Pub. Interest Research Grp., Inc. v. P.H. Glatfelter Co*., 128 F. Supp. 2d 747 (M.D. Pa. 2001) (holding that the fact that the alleged aesthetic injury as a result of paper mill's discharges into creek might not ultimately establish that their injuries were caused by the discharges did not deprive them of standing to bring suit under the CWA); *S.C. Wildlife Fed'n v. S.C. Dept. of Transp.*, 485 F. Supp. 2d 661 (D.S.C. 2007) ("Traceability is not as rigorous as tort causation . . . a plaintiff does not have to show to a scientific certainty that the defendant's actions caused the

precise harm that plaintiff suffered.") (citing *Pub. Interest Research Grp. of New Jersey, Inc. v Powell Duffryn Terminals, Inc*., 913 F.2d 64, 72 (3d Cir. 1990)).

Milford's testimony that the river looks more polluted and Norton's testimony that the frog population seems to have severely decreased are fairly traceable to the destruction of hundreds of acres of frog habitat and pollutant removing wetlands that formerly existed on Bowman's property.

In its decision, the district court stated that the only "direct" injury is that Norton can no longer illegally frog on the cleared land. However, *Lujan* does not require that the alleged injury be direct in order to be fairly traceable. *See e.g., Duke Power Co. v. Carolina Envtl. Study Group, Inc.,* 438 U.S. 59 (1978) (determining that the causation requirement for standing can be satisfied absent direct proof of injury).

iii. The source of the pollutants in the wetlands remains and is capable of being redressed by the court because the fill material can be removed and the wetlands can be restored to their original state

The plaintiffs' injuries will be redressed by a favorable decision. The district court correctly found no issue with this required element of standing. NUWF is seeking civil penalties and an order requiring Bowman to remove the fill material and restore the wetlands. When the wetlands are back to their original state, they will serve as a filter to remove pollutants from the river and will provide more suitable habitat for frogs.

B. Because the three elements of Lujan are satisfied by Milford, Norton, and Lawless, NUWF has associations standing.

An association has standing to bring suit on behalf of its members when three requirements are met: (1) when its members would have the requisite level of standing to sue on their own, (2) the interests are germane to the association's purpose, and (3) neither the claim nor the relief requested require the individual participation of members in the suit. *Friends of the*

Earth, Inc. v. Laidlaw Envtl. Services (TOC), Inc., 528 U.S. 167 (2000); *Ecological Rights Found. v. Pacific Lumber Co*., 230 F.3d 1141 (9th Cir. 2000); *N.M. ex. rel. Richardson v. Bureau of Land Mgmt.*, 565 F.3d 683 (10th Cir. 2009).

As established in Part A., Milford, Norton, and Lawless have the requisite level of standing to bring suit on their own. New Union Wildlife Federation is an organization whose purpose is to protect the fish and wildlife of New Union by protecting their habitats, among other things. (R. at 4). The filling of a wetland and subsequent pollution of the river damage the habitats of both fish and wildlife in New Union so the interests pursued in this lawsuit are germane to the association's purpose. In addition, the members are not required to participate in the suit apart from establishing standing because no single member is indispensible to proper resolution of the case. *Hunt v. Wa. State Apple Adver. Com'n*, 432 U.S. 333 (1977).

II. THE DISTRICT COURT INCORRECTLY FOUND THAT IT HAD NO SUBJECT-MATTER JURISDICTION DUE TO THE ABSENCE OF A CONTINUING VIOLATION AS REQUIRED BY 33 U.S.C. § 1365(a)

CWA § 301(a) prohibits the discharge of any pollutant without a permit and defines "discharge of a pollutant" as any addition of any pollutant to navigable waters from any point source. CWA § 502(12). CWA § 505(a) allows citizens to bring suit against an alleged polluter that is "alleged to be in violation" of § 301(a).

In making its decision, the district court relied on the Supreme Court decision in *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Found., Inc.*, 484 U.S. 49 (1987). In *Gwaltney*, the Supreme Court held that citizen suits cannot be brought based on wholly past violations, but instead required citizen-plaintiffs to demonstrate a state of continuous or intermittent violation. *Id*. at 49. In other words, citizen-plaintiffs are required to show "a reasonable likelihood that a past polluter will continue to pollute in the future." *Id*. at 57. The district court incorrectly

applied the *Gwaltney* holding to the facts of this case and determined that Bowman added fill material to wetlands from June 15, 2011 until July 15, 2011 but has not added any additional pollutants to the water since that day and found that there was not a reasonable likelihood that he would add pollutants in the future. However, the facts at hand, namely the nature of the pollutant, renders *Gwaltney* inapplicable. Bowman's discharge of fill material did not instantly pollute the river but rather is slowly being washed away, perpetuating the addition of pollutants. (R. at 4). Because of such continuous – or intermittent – release of pollutants, the district court erred in granting this part of Bowman's motion for summary judgment.

A. Unpermitted fill material continues to add pollutants while it remains in the river and is therefore a continuing violation under CWA §505(a).

The Court, in *Gwaltney*, emphasized the "alleged to be in violation" language of CWA § 505(a)(1), reasoning that "the most natural reading of 'to be in violation' is a requirement that citizen plaintiffs allege a state of either continuous or intermittent violation." 484 U.S. 49, 57.This is different than "to have violated" or "to be violating" and emphasizes that the discharge of pollutants cannot be wholly past and that violation is a state as opposed to an act. *Id*. at 49-50. Justice Scalia emphasized in his *Gwaltney* concurrence that once a person violates the CWA, they remain in violation according to 505(a) until they put in place remedial measures that eliminate the cause of the violation. *Id.* at 69. Bowman has converted the wetland into a farm field, aside from his easement under the consent decree. (R. at 5). He added fill material without the requisite § 404 permit and has not taken any remedial measures. (R. at 4). Subject-matter jurisdiction "depends on the state of things at the time of the action brought" and therefore Bowman's agreement under the consent decree to construct a wetland on the buffer zone is irrelevant. *Id*. at 69 (Scalia, J., concurring). Despite a significant amount of case law supporting the position that the violation continues as long as the unpermitted and unremediated fill

remains, the district court manipulated the holding in *Gwaltney* in attempt to make it fit these circumstances.

i. *Gwaltney* dealt with a § 402 violation that is factually distinct from the § 404 violation at issue in this case.

Gwaltney dealt with a violation of a National Pollutant Discharge Elimination System (NPDES) wastewater discharge permit under §402 of the CWA as opposed to the unpermitted filling of wetlands under §404. This difference between pollutants in a wastewater discharge stream and those from wetland fill is not arbitrary. In *Gwaltney*, the most substantial violations concerned fecal coliform, chlorine, and total Kieldahl nitrogen (TKN). *Id*. at 53. Because of the CWA violations, Gwaltney installed a new chlorination system and upgraded its wastewater treatment system. *Id*. at 53-54. As a result, the last violation occurred several weeks before the suit was brought. *Id*. at 55.

While not always the case, wastewater stream discharges typically include liquids and dissolved solids that instantly pollute a water body and are quickly diluted and washed away by the flow of the receiving stream, making them almost impossible to remove. When such §402 NPDES permits are violated and the pollutants are instantly dispersed and never sediment out – as was the case in *Gwaltney* – it follows logically that a situation where there is a single violation and where remedial measures have been taken or where it is unlikely that there will be any subsequent violations, citizens cannot bring an action. Though there was a well-established history of violations, Gwaltney installed new equipment to prevent more violations. 484 U.S. at 55. Due to the operation of the new equipment, there had been no violations for a few weeks and there was no evidence to support the claim that Gwaltney would violate in the future.

The nature of the *Gwaltney* pollutants as quickly dissipating and having an immediate impact on the surrounding environment and the installation of new equipment to eliminate the

chance of future violations is common in § 402 case law. *See e.g.*, *Upper Chattahoochee Riverkeeper Fund, Inc. v. City of Atlanta*, 953 F. Supp. 1541 (N.D. Ga. 1996) (holding that there was no ongoing violation where violations of NPDES permit had ceased 4 years before complaint was filed due to installation of a chemical feed system). Of course, not all pollutants under § 402 exhibit such characteristics. If pollutants persist in an area, as would be the case with PCBs and other pollutants that sediment out of the water column, they become an ongoing source of pollution to the receiving water and meet the § 505(a) requirement of a continuing violation. *See Werlein v. U.S.*, 746 F. Supp. 887 (D. Minn. 1990) (holding that when toxic wastes migrate over time, there is ongoing pollution of that waterway even though all contaminants were dumped years earlier); *Umatilla Waterquality Protective Ass'n, Inc. v. Smith Frozen Foods, Inc*., 962 F. Supp. 1312 (D. Or. 1997) (holding that the ongoing migration of pollutants, even though no more were being added, constituted a CWA violation).

Violations of § 404 are a very different matter since the addition of dredged and fill material always constitutes the addition of solid pollutants that are not easily dispersed and continue to threaten the ecosystems and water quality of the area until they are removed. It is this distinction between the dissipating nature of the pollutants in most § 402 permits and in *Gwaltney* as opposed to the lingering nature of pollutants in most § 404 permits and in this instance that the district court unpersuasively failed to recognize. Because of such differences, *Gwaltney* cannot bear the weight that respondents place on it.

ii. Subsequent case law supports the distinction between the nature of pollutants at issue in *Gwaltney* and those at issue in this case

A large volume of case law supports this distinction. In *Sasser v. Adm'r*, 990 F.2d 127 (4th Cir. 1993), the court noted that "[e]ach day the pollutant remains in the wetlands without a permit constitutes an additional day of violation" and therefore found a continuing violation of

§404 of the CWA. Other courts that have faced the issue of continuing or ongoing violations with respect to fill material under CWA § 404 have come to the same conclusion. *See e.g.*, *Informed Citizens United, Inc. v. USX Corp*., 36 F. Supp. 2d (S.D. Tex. 1999) (holding that reliance on *Gwaltney* was misplaced because it involved a wastewater violation and that when dealing with violations of § 404 permits, a violation is continuing until illegally dumped fill material has been removed). Conversely, those courts that have dealt with situations where § 402 NPDES permit violations had ceased due to installation of new treatment systems correctly recognized that there were only wholly past and not continuing violations. *See e.g., Upper Chattahoochee Riverkeeper Fund, Inc. v. City of Atlanta*, 953 F. Supp. 1541 (N.D. Ga. 1996).

iii. A finding of continuous violations in the case will not render the continuing violation requirement of § 505(a) meaningless

Despite this case law, the district court determined that if they were to find a continuing violation based on the fact that the fill material continues to pollute the environment as long as it remains in place, it would render the continuing violation requirement under § 505(a) meaningless. It is correct to note that the CWA prohibits the addition of a pollutant and therefore the continuing violation must include the continuing addition of pollutants. Here again, the distinction between the nature of the pollutants is very important. Most violations of the CWA, especially under NPDES permits issued under § 402, will not continue to add pollutants to the receiving water. Rather, they dissipate, and therefore would not make up a continuing violation unless there was a real chance of new additions in the future. However, unlike in *Gwaltney* and like the facts in this case, some § 402 permit violations and all § 404 violations involve the addition of a solid that continues to add pollutants to the water until it is removed.

As for the district court's related concern that the statute of limitations would never start to run if such violations were considered ongoing, they are once again mistaken. The statute of

limitations would continue to work as normal with the starting date being the date at which time citizens become aware or should have become aware of the ongoing violation. 28 U.S.C. § 2462; *see also Pub. Interest Research Grp. of New Jersey, Inc. v Powell Duffryn Terminals, Inc*., 913 F.2d 64, 73-76 (3rd. Cir. 1990).

iv. Case law dealing with RCRA and its identical "alleged to be in violation" language similarly support finding a continuing violation where pollutants are remediable and continue to pollute

Additional support can be drawn from application of continuing violation requirements that exist in the Resource Conservation and Recovery Act (RCRA). The "to be in violation" language of CWA § 505(a) mirrors that of RCRA. 42 U.S.C. § 6972. For example, courts have held that where contaminants continue to seep through soil and water after the actual dumping of the contaminants, "a continuing violation surely may exist." *Gache v. Town of Harrison*, 813 F. Supp. 1037, 1040 (S.D.N.Y. 1993); *see also Cox v. City of Dallas, Tex*., 256 F.3d 281 (5th Cir. 2001) (holding that past disposal of wastes can constitute a continuing violation as long as it remains remediable and has not been cleaned up); United States v. Price, 523 F. Supp, 1055, 1071 (D.N.J. 1981) (holding that RCRA could apply to defendants' activities that ceased in 1972).

These types of cases that deal with slow seepage of waste materials are factually more similar to the facts of this case than *Gwaltney* is. Like waste material, fill material can be deposited in a single dumping and the effects of pollutants can be felt years later. Courts have properly recognized this important fact when it comes to citizen suits under RCRA, finding continuing violations even where dumping was completed years earlier. This court should use similar logic to find a continuing violation in this case.

v. Public policy considerations demand that Bowman's actions are punishable under the CWA citizen suit provision

The purpose of the CWA is to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a). To achieve the objective, the Act set a goal to eliminate the discharge of pollutants into navigable waters by 1985. Id. at (a)(1). The district court's interpretation of ongoing violation seeks to circumvent the purpose of the act by providing a legal shelter for those who quickly and permanently damage wetlands before suit can be brought against them. If fill material that remains in wetlands is not viewed as an ongoing violation, the state governments and Army Corps of Engineers will bear the entire burden of enforcement and it is unrealistic that they are capable of doing so. It is for this reason, that citizen suits are an important part of the federal environmental laws. This not only encourages potential violators to act quickly, but to act secretly as well. If their actions are not discovered until they are completed, citizens would not be able to bring suit. Conversely, finding that unpermitted fill material that remains in a wetland is a continuous violation will prevent bad actors and allow responsible citizens to enforce the CWA in attempt to fulfill its lofty goal.

III. A CITIZEN SUIT UNDER THE CLEAN WATER ACT MAY NOT BE DISMISSED FOR LACK OF SUBJECT MATTER JURISDICTION; THE SUIT MAY PROCEED IN ORDER TO SEEK INJUNCTIVE RELIEF.

NUWF's suit is not barred by lack of subject matter jurisdiction. Supreme Court precedent has indicated that the diligent prosecution section of CWA is a claim-processing rule, not a subject matter jurisdiction provision. *Henderson v. Shinseki,* 131 S.Ct. 1197 (2011); *La. Envtl. Action Network v. City of Baton Rouge*, 677 F.3d 737, 748 (5th Cir. 2012). Therefore, NUWF's claim is protected by the safeguards of Federal Rule of Civil Procedure 12(b)(6)—the district court is required to accept all well-pleaded facts in NUWF's complaint as true and view the facts in the light most favorable to NUWF. *La. Envtl. Action Network*, 677 F.3d 737, 745 (5th Cir. 2012).

Courts have noted that the limitation of citizen suits relates only to actions for civil penalties, not injunctive or declaratory relief. *Paper, Allied-Indus., Chem. And Energy Workers Int'l Union v. Cont'l Carbon Co.*, 428 F.3d 1285, 1298 (10th Cir. 2005); *Orange Env't, Inc. v. Cnty. of Orange*, 860 F. Supp. 1003, 1017 (S.D.N.Y. 1994). Thus, even if the state was diligently prosecuting an action against the defendants, injunctive relief would still be appropriate, and NUWF's claim for injunctive relief may proceed. *Orange Env't, Inc.*, 860 F. Supp. 1003, 1017 (S.D.N.Y. 1994).

A. The Court improperly ruled that it did not have subject matter jurisdiction because of diligent prosecution by NUDEP. The text, context, and relevant historical treatment of 33 U.S.C. § 1365(b)(1)(B) show that diligent prosecution is a claim processing rule, not a subject matter jurisdiction question.

Given the important differences between jurisdictional provisions and claim-processing rules, the Supreme Court has provided guidance to the lower courts on the proper analysis to use to determine if a statutory provision is jurisdictional. *La. Envtl. Action Network*, 677 F.3d 737, 747 (5th Cir. 2012).

In *Arbaugh v. Y & H Corp.*, 546 U.S. 500 (2006), the Court enunciated the following "readily administrable bright line" rule: A provision is jurisdictional "[i]f the Legislature *clearly states* that a threshold limitation on a statute's scope shall count as jurisdictional." *Id.* at 515–16. (emphasis added) However, "when Congress does not rank a statutory limitation on coverage as jurisdictional, courts should treat the restriction as nonjurisdictional in character." *Id.* at 516.

The Court has stated that "a rule should not be referred to as jurisdictional unless it governs a court's adjudicatory capacity, that is, its subject-matter or personal jurisdiction. Other rules, even if important and mandatory ... should not be given the jurisdictional brand." *Henderson* 131 S.Ct. 1197, 1202-03 (2011)."Among the types of rules that should not be described as jurisdictional are ... 'claim-processing rules,' " which are "rules that seek to promote the orderly progress of

litigation by requiring that the parties take certain procedural steps at certain specified times." *Id.* at 1203.

In *Reed Elsevier,* 130 S.Ct. 1237 (2010), the Court elaborated that "context, including [the Supreme] Court's interpretation of similar provisions in many years past, is relevant to whether a statute ranks a requirement as jurisdictional." *Id.* at 1248. The Court stated that "the jurisdictional analysis must focus on the 'legal character' of the requirement, which [is] discerned by looking to the condition's text, context, and relevant historical treatment." *Id.* at 1246 (citations omitted).

In a case of first impression the Fifth Circuit Court of Appeals applied the *Reed Elsevier* analysis in *La. Envtl. Action Network,* 677 F.3d 737(5th Cir. 2012) as follows:

i. The legislature did not clearly state that the threshold limitation on the scope of CWA. 33 U.S.C. § 1365(b)(1)(B) shall count as jurisdictional.

The language of § 1365(b)(1)(B) does not "clearly state[ ]" that the "diligent prosecution" bar is jurisdictional. *Arbaugh,* 546 U.S. at 515. This provision "does not speak in jurisdictional terms or refer in any way to the jurisdiction of the district courts." *Zipes v. Trans World Airlines, Inc.,* 455 U.S. 385 (1982); *La. Envtl. Action Network,* 677 F.3d 737, 748 (5th Cir. 2012). Although it is true that CWA § 505(b)(1)(B) is phrased in mandatory language, the Supreme Court has "rejected the notion that 'all mandatory prescriptions, however emphatic, are ... properly typed jurisdictional.'"*Henderson,* 131 S.Ct. 1197, 1205 (alteration in original) (citation omitted); *La. Envtl. Action Network,* 677 F.3d 737, 748 (5th Cir. 2012). Thus, the language of § 1365(b)(1)(B) does not provide a clear indication that Congress intended the provision to be jurisdictional. *Id.*

ii. The context of the legislation does not indicate that it was to be read together with other sections that bar claims based on subject matter jurisdiction.

The placement of the "diligent prosecution" provision within the CWA also does not indicate that Congress "wanted [the] provision to be treated as having jurisdictional attributes." *Henderson*, 131 S.Ct. 1197 (2011). *La. Envtl. Action Network*, 677 F.3d 737, 748 (5th Cir. 2012). Congress placed 33 U.S.C § 1365(b)(1)(B) in the "Notice" section of the CWA citizen suit provision. *See Henderson*, 131 S.Ct. 1197 (2011) ("[T]he title of a statute or section can aid in resolving an ambiguity in the legislation's text.") (alteration in original) (citation and internal quotation marks omitted); *La. Envtl. Action Network*, 677 F.3d 737, 748 (5th Cir. 2012).

The "Notice" section also includes the requirement that a citizen provide notice of the alleged violation to the alleged violator, the State, and the EPA sixty-days prior to filing a citizen suit. *See* CWA § 505(b)(1)(A). The sixty-day notice provision is a typical "claim-processing rule." *See Henderson*, 131 S.Ct. 1197 (2011) (holding that Title VII's requirement that claimants timely file a discrimination charge with the EEOC before filing an action in federal court is nonjurisdictional); *La. Envtl. Action Network*, 677 F.3d 737, 748 (5th Cir. 2012). The placement of the "diligent prosecution" bar in the "Notice" section, alongside a typical claim-processing rule, suggests that Congress intended the "diligent prosecution" bar to be a claim-processing rule. *See Henderson*, 131 S.Ct. 1197 at 1205 (2011) (finding that the placement of a provision in a subchapter entitled "Procedure" indicated that "Congress regarded the 120–day limit as a claim-processing rule"); *La. Envtl. Action Network*, 677 F.3d 737, 748 (5th Cir. 2012).

Furthermore, the "diligent prosecution" provision is located "in a provision 'separate' from those granting federal courts subject-matter jurisdiction over ... [the] claims." *Reed Elsevier*, 130 S.Ct. at 1245–46 (citation omitted). *La. Envtl. Action Network*, 677 F.3d at 748 (5th Cir. 2012). The district courts have subject matter jurisdiction over CWA citizen suits pursuant to the general federal question jurisdiction statute, 28 U.S.C. § 1331, and the CWA's

jurisdictional provision, CWA § 505(a). *La. Envtl. Action Network*, 677 F.3d 737 at 748 (5th Cir. 2012). Neither of these provisions specifies any threshold requirement for subject matter jurisdiction, let alone ties its jurisdictional grant to the issue of diligent prosecution. *La. Envtl. Action Network*, 677 F.3d at 748 (5th Cir. 2012).

Instead, the "diligent prosecution" bar is located in a separate provision of the CWA that does not pertain or refer to jurisdiction. *La. Envtl. Action Network*, 677 F.3d 737 at 748 (5th Cir. 2012). *See Arbaugh.*, 546 U.S. at 515 (2006). (holding that Title VII's employee-numerosity requirement is nonjurisdictional because it is located in a provision separate from those granting courts subject matter jurisdiction and the provision does not speak in jurisdictional terms).

Thus, 33 U.S.C. § 1365(b)(1)(B)'s location in a provision separate from the jurisdiction-granting provisions indicates that Congress did not intend the provision to be jurisdictional. *La. Envtl. Action Network*, 677 F.3d 737, 748 (5th Cir. 2012).

iii. The historical treatment factor also does not indicate that the provision ranks as jurisdictional.

The "historical treatment" factor also does not indicate that the provision ranks as jurisdictional. *Reed Elsevier,* 130 S.Ct. at 1246 (2010). No Supreme Court cases have determined that the "diligent prosecution" provision of the CWA, or any similar provision in other environmental statutes, is jurisdictional. *La. Envtl. Action Network*, 677 F.3d at 748 (5th Cir. 2012).

"There is thus no 'long line of [Supreme] Court [ ] decisions left undisturbed by Congress' on which to rely." *Gonzalez v. Thaler,* 132 S.Ct. at 648 n. 3 (2012) (citation omitted); *See Henderson,* 131 S.Ct. at 1203 (2011) ("When a long line of [Supreme] Court[ ] decisions left undisturbed by Congress has treated a similar requirement as jurisdictional, we will presume

that Congress intended to follow that course.") (citations and internal quotation marks omitted). *La. Envtl. Action Network*, 677 F.3d at 748 (5th Cir. 2012).

The Fifth Circuit's conclusion that the CWA's "diligent prosecution" provision is nonjurisdictional was buttressed by the Seventh Circuit's recent decision in *Adkins v. VIM Recycling, Inc.*, 644 F.3d 483 (7th Cir.2011). *La. Envtl. Action Network*, 677 F.3d 737, 749 (5th Cir. 2012). There, the court held that the "diligent prosecution" provision of the Resource Conservation and Recovery Act ("RCRA")—which is virtually identical to the "diligent prosecution" provision of the CWA[6]—is not jurisdictional. *Adkins v. VIM Recycling, Inc.*, 644 F.3d at 492 (7th Cir.2011). Applying the guiding principles of the recent Supreme Court cases, the Seventh Circuit concluded that, because "RCRA's limits on citizen suits appear in separate provisions that do not 'speak in jurisdictional terms,' " the RCRA "diligent prosecution" bar is a nonjurisdictional claim-processing rule. *Id.* (citations omitted). *La. Envtl. Action Network*, 677 F.3d at 749 (5th Cir. 2012).

iv. Since the provisions in CWA. 33 U.S.C. § 1365(b)(1)(B) are not jurisdictional, NUWF is entitled to an opportunity to prove its well-pled allegations that there is no diligent prosecution.

If the provision is not jurisdictional, then NUWF is protected by the safeguards of Federal Rule of Civil Procedure 12(b)(6)—the district court is required to accept all well-pleaded facts in NUWF's complaint as true and view the facts in the light most favorable to NUWF. *La. Envtl. Action Network*, 677 F.3d 737, 745 (5th Cir. 2012)

B. The CWA does not bar all citizen suits once government action has commenced. A citizen suit may proceed in order to seek injunctive relief.

A strict reading of the statute, indicates that 33 U.S.C § 1365(b)(1)(B) grants jurisdiction over all types of civil remedies, the limitation in CWA § 309(g)(6)(A) only strips jurisdiction with regard to the district court's ability to impose civil penalties. *Paper, Allied-Indus., Chem.*

And Energy Workers Int'l Union v. Cont'l Carbon Co., 428 F.3d 1285, 1298 (10th Cir. 2005). Lower Courts have noted that the limitation of citizen suits relates only to actions for civil penalties, not injunctive or declaratory relief. *Orange Env't, Inc. v. Cnty. of Orange*, 860 F. Supp. 1003, 1017 (S.D.N.Y. 1994). Thus, even if the state was diligently prosecuting an action against the defendants, injunctive relief would still be appropriate. *Id.*

i. The citizen suit section of CWA has been misinterpreted by other Circuit Courts of Appeals.

These statutes have been analyzed by three different Circuit Courts of Appeals. *N. & S. Rivers Watershed Ass'n, Inc. v. Town of Scituate*, 949 F.2d 552 (1st Cir. 1991) (ruling all citizen suits are barred once governmental action has commenced.); *Arkansas Wildlife Fed'n v. ICI Americas, Inc.***,** 29 F.3d 376 (8th Cir. 1994) (same ruling as *Scituate*); and *Paper, Allied-Indus.*, 428 F.3d 1285 (10th Cir. 2005) (declining to follow First and Eighth Circuits by ruling that only civil penalty suits are barred when non-judicial agency action has commenced, in which case injunctive relief and other civil actions are still allowed.) Unfortunately none of the Circuit Courts have interpreted the statute entirely properly. *Orange Env't, Inc.*, 860 F. Supp. 1003, 1018 (S.D.N.Y. 1994) (declining to follow the First Circuit in ruling that the statutes only bar citizen suits seeking civil penalties, even though a governmental judicial action has commenced.)

All three Circuits base their rulings on reasoning in *Gwaltney*, 484 U.S. at 59 (1987). *Scituate*, 949 F.2d at 556 (1st Cir. 1991); *Arkansas Wildlife Fed'n***,** 29 F.3d 376 (8th Cir. 1994); *Paper, Allied-Indus*, 428 F.3d at 1298 (10th Cir. 2005). In *Gwaltney*, the specific question on appeal was whether civil penalties could be sought for wholly past violations of the Clean Water Act. *Paper, Allied-Indus.*, 428 F.3d at 1298 (10th Cir. 2005). The *Gwaltney* Court reasoned that "[t]he bar on citizen suits when governmental enforcement action is under way suggests that the citizen suit is meant to supplement rather than to supplant governmental action." *Gwaltney*, 484

U.S. at 60 (1987). The Court further proved its point that citizen actions were limited to current violations by reasoning that "[i]f the Administrator or the State commences enforcement action within that 60-day period, the citizen suit is barred, presumably because governmental action has rendered it unnecessary." *Id.* at 59.

The *Gwaltney* Court in its haste to prove that violations must be present tense evidently failed to realize the extent to which some of the lower circuits would rely on this language to interpret the statute as barring all citizen suits once governmental action has commenced. *Scituate,* 949 F.2d 552 (1st Cir. 1991); *Arkansas Wildlife Fed'n***,** 29 F.3d 376 (8th Cir. 1994)

In fact, the statute expressly states that "in any such [governmentally prosecuted] action in a court of the United States any citizen may intervene as a matter of right." CWA § 505 (b)(1)(B) (caption added). But that any governmentally prosecuted violation "shall not be the subject of a civil penalty action under subsection (d) of this section or section 1321(b) of this title or section 1365 [citizen suit section] of this title." CWA § 309 (g)(6)(A) (caption added). This is in keeping with the *Gwaltney* reasoning that the statute has the "central purpose of permitting citizens to abate pollution when the government cannot or will not command compliance." *Gwaltney,* 484 U.S. at 62(1987).

ii. The legislative history supports citizen suits for injunctive relief.

The legislative history of the Act provides additional support for our reading of CWA § 505. *Gwaltney,* 484 U.S. at 61 (1987).

Members of Congress frequently characterized the citizen suit provisions as "abatement" provisions or as injunctive measures. *Id*; *see, e.g.,* Water Pollution Control Legislation, Hearings before the Subcommittee on Air and Water Pollution of the Senate Committee on Public Works, 92d Cong., 1st Sess., pt. 2, at 707 (Sen. Eagleton) ("Citizen suits ... are brought for the purpose

of abating pollution"); H.R.Rep. No. 92–911, p. 407 (1972), Leg.Hist. 876 (additional views of Reps. Abzug and Rangel) ("[C]itizens may institute suits against polluters for the purpose of halting that pollution"); 33693 (1972), 1 Leg. Hist. 163 (Sen. Muskie) ("Citizen suits can be brought to enforce against both continuous and intermittent violations"); *id.* at 33717, 1 Leg. Hist. 221 (Sen. Bayh) ("These sorts of citizen suits—in which a citizen can obtain an injunction but cannot obtain money damages for himself—are a very useful additional tool in enforcing environmental protection laws"). *Gwaltney*, 484 U.S. 49 at 61 (1987).

Senator Bayh's interpretation is particularly persuasive as he refers to the exact type of situation NUWF finds itself in. NUWF is seeking and should be granted injunctive relief from the violation of the CWA. (R. 5)

IV. BOWMAN VIOLATED SECTION 404 OF THE CLEAN WATER ACT WHEN HE MOVED DREDGED AND FILL MATERIAL FROM ONE PART OF A WETLAND ADJACENT TO A NAVIGABLE WATER TO ANOTHER PART OF THE SAME WETLAND.

Under the Clean Water Act, it is unlawful to add any pollutants to navigable waters. Section 303(a) of the Clean Water Act reads: "Except as in compliance with this section and sections 302, 306, 307, 318, 402, and 404 of this Act, the discharge of any pollutant by any person shall be unlawful." 33 U.S.C. § 1311. The Act defines the phrase "discharge of a pollutant" as the addition of any pollutant to a navigable water. 33 U.S.C. §1362(12). A "pollutant" includes dredged spoil, biological materials, rock, sand, and cellar dirt. 33 U.S.C. §1362(6). As the district court correctly noted, the parties do not dispute that Bowman's dredged materials constitute pollutants, that his wetland falls under CWA jurisdiction due to its adjacency to a navigable water, and that the equipment he used in his dredging constitute point sources. (R. at 8, 9). The district court incorrectly found, however, that dredging this wetland and turning up

materials formerly confined to the wetland floor was not an "addition" of a pollutant and therefore not a violation of CWA §404. Furthermore, while some activities are excepted from the permitting requirements of CWA §404, Bowman's activities do not fall into any of these categories.

A. Bowman's act of moving dredged and fill material constitutes a discharge of a pollutant in violation of The Clean Water Act.

i. By disturbing and moving dredged and fill material within the wetland, Bowman sufficiently added a pollutant to the waters to constitute an unlawful discharge of a pollutant.

An addition of a pollutant includes redeposit of materials originating from the same water source. The word "addition" may be reasonably understood to include the idea of a "redeposit" under the Act. *Avoyelles Sportsmen's League v. Marsh*, 715 F.2d 897, 923 (5th Cir. 1983). Activities that merely mix the soil of a wetland bed with the material above it still constitute "additions" of pollutants, even if that material eventually falls back into the same place. *Borden Ranch P'ship v. U.S. Army Corps of Eng'rs*, 261 F.3d 810, 815 (9th Cir. 2001). In *Borden*, the plaintiff argued that his deep ripping activities only "churned up" the soil but allowed the soil to redeposit, and so could not constitute an "addition" of a pollutant. *Id*. Nonetheless, the court concluded that the deep ripping constituted an addition under the Act because the soil and the water, formerly kept in their separate places, were benign materials, but ripping them up and creating dredged material created a pollutant where before there had been none. *Id*. In this way, it drew a distinction between the addition of any material and the statutory "addition of a pollutant."

Redepositing excavated wetland materials further constitutes an "addition" under the Act. *U.S. v. Deaton*, 209 F.3d 331 (4th Cir. 2000). In *Deaton*, the property owner engaged in "sidecasting," or returning excavated wetland material to that same wetland. *Id*. at 334. The

property owner similarly argued that he had not added anything within the meaning of the Act, and the court refuted this logic, stating instead, "Congress determined that plain dirt, once excavated from waters of the United States, could not be redeposited into those waters without causing harm to the environment." *Id*. at 336. The court emphasized that mixing and excavating material that had formerly been naturally separate added a pollutant to the land where before that same material had been benign. *Id*.

Even without adding new material to the wetland, by bulldozing the area and dredging the soil, Bowman's actions constitute an "addition" of dredged materials under the Act. Upon commencing his land clearing activities, Bowman felled trees, dredged soil, and dug drainage ditches in the wetland. (R. at 4). While he did not bring in new materials to fill the land or apply chemicals to the land, these actions still constitute an "addition" for the purposes of the Act. Borden clearly did more than just "churn up" the soil, as in *Borden*. By pushing it around, he went beyond the "redeposit" of materials that the *Avoyelles* court still held to constitute an "addition for the purposes of the Act. Thus, his argument that he introduced no new materials is irrelevant to the conclusion that he nonetheless discharged a pollutant in violation of CWA § 404.

ii. Neither the "outside world" nor the "unitary navigable waters" theories that the district court used to refute the claim that Bowman's actions constituted an "addition" apply to Section 404 of the Clean Water Act.

The district court's improperly extended to CWA § 404 the "outside world" theory of additions as applied to CWA § 402. The court first stated that moving dredged and fill material within the same wetland could not constitute an "addition" because, under the "outside world" interpretation of the term, an addition must come from outside of the wetland. (R. at 9). To justify this interpretation, the district court looked to the fact that CWA § 404 was a permitting

scheme and stated that it would still be reasonable for the EPA to want to control the transportation of dredged materials from one point source to a second body of water. This analysis, however, ignores the larger purpose of the Act. The Act by its structure intends not merely to regulate the transportation of dredged materials, but to generally prohibit the discharge of pollutants, defined in CWA § 502 to include dredged materials. This is evident from the language of CWA § 301(a), which strictly prohibits the "discharge of pollutants" except as in compliance with later regulations. It is further clarified in CWA § 101 by the stated purpose of the act itself, namely to ". . .restore and maintain the chemical, physical, and biological integrity of the Nation's waters." While the district court found no explicit definition of "addition" as it applied to CWA § 404, the wealth of case law specific to the discharge of dredged or fill material thoroughly refutes the "outside world" interpretation of addition.

The district court's use of the "unitary navigable waters" theory under CWA § 404 underscores its own argument that finding no addition here leaves the permitting power of the Act intact. The court further referred to the idea that all navigable waters are treated as one for the purposes of the Act. (R. at 8). Yet it went on to say that the permitting powers of § 404 could reasonably be read not to regulate dredging the beds of navigable waters, but transporting dredged materials from one navigable water body to another. (R. at 9.) However, under the theory that all navigable water bodies are one for the purposes of the Act, the EPA would have no power to regulate the transportation of materials *from* one navigable waterway *to* another, because both would be classified as the same body of water. Not only would this theory render the permitting powers of CWA § 404 toothless, but it would further confront the same conflicts with the purpose of the Act that arise when the court applied its "outside world" theory to CWA § 404.

B. Bowman's actions were not exempt from the permit requirements of CWA § 404 and thus he violated the Act by discharging dredge or fill material into a wetland adjacent to a navigable water without a permit.

Under Section 404 of the Act, any discharge of dredged or fill material into the reach of navigable waters that is not expressly exempt from the permitting requirements must have a permit to be lawful. Section 404(f)(2) of the Clean Water Act states:

> "Any discharge of dredged or fill material into the navigable waters incidental to any activity having as its purpose bringing an area of the navigable waters into a use to which it was not previously subject, where the flow or circulation of navigable waters may be impaired or the reach of such waters be reduced, shall be required to have a permit under this section."

33 U.S.C. §1344(f)(2). CWA § 404(f)(1) explicitly lists those dredging activities that are exempt from permitting requirements. These include, in relevant parts, discharges, "from normal farming, silviculture, and ranching activities such as plowing, seeding, cultivating, minor drainage, harvesting for the production of food, fiber, and forest products, or upland soil and water conservation practices." *Id*. at § 404(f)(1)(A).

Activities that alter or destroy wetlands may not constitute "normal farming activities." Under both EPA regulations and case law, deep ripping does not qualify as a "normal farming activity." *Borden Ranch P'ship*, 261 F.3d 810, 815 (9th Cir. 2001). In *Borden*, the U.S. Army Corps of Engineers and the EPA issued a letter to the plaintiff explicitly stating that deep ripping was not a normal, agricultural plowing activity because deep ripping "destroys the hydrological integrity" of wetlands and is therefore regulated by CWA § 404. *Id.* at 813. Additionally, while acknowledging the "normal farming" exception, the court pointed to the qualifying language at the end of the statute stating that any of the excepted activities still require a CWA permit if they discharge dredged or fill material incidentally while changing the use of the water. *Id.* at 815 (citing 33 U.S.C. § 1344(f)(2)). Although such benign activities as substituting one wetland crop

for another would be normal farming activities exempt from CWA regulation, even normal plowing falls within CWA jurisdiction when it substantially changes wetlands. *Id.* (citing *Avoyelles Sportsmen's League, Inc. v. Marsh*, 715 F.2d 897, 925 (5th Cir. 1983)). The court found that, although deep ripping does not introduce new materials into wetlands, the court concluded that it was performed for the purpose of converting the wetland into another type of land and that in the process, the destruction of the soil layer constituted an impairment to adjacent navigable waters. *Id*. Thus, the court concluded that deep ripping does not meet the normal farming exception and requires a permit under CWA § 404. *Id.*

Any activity that requires substantial hydrological alterations requires a permit under the Act. *U.S. v. Akers*, 785 F.2d 814, 820 (9th Cir.1986). In *Akers*, the court stated that, "the intent of Congress in enacting the Act was to prevent conversion of wetlands to dry lands," and accordingly classified "as non-exempt those activities which change a wetland's hydrological regime." *Id.* at 822. Following the importance of this language, a later district court found that draining a wetland was an activity regulated under CWA § 404 even though there was no discharge, because draining altered or destroyed the wetland. *Save Our Cmty. v. EPA*, 741 F. Supp. 605 (N.D. Texas 1990).

Bowman's activities do not fall into any of the Act's "normal farming" exceptions. Even if Bowman's dredging activities were performed for agricultural purposes, they nonetheless significantly altered or destroyed the wetland. In the process, much like the deep ripping of *Borden*, dredging the wetland would similarly destroy the soil layer and constitute an impairment to adjacent navigable waters. By pushing soil from one part of his wetland to others, bulldozing wetland vegetation, and creating drainage ditches (R. at 4), Bowman significantly altered the character and use of the wetland. The fact that he did not introduce new material is irrelevant, as

both *Ackers* states that the point of the statute is to prevent a wetland's conversion to a dry land, and *Borden* explicitly found that a wetland's character can be altered absent the addition of new materials.

V. CONCLUSION

For the foregoing reasons, NUWF asks that the Court reverse the District Court's ruling in favor of Summary Judgment, and remand for trial on the merits of the claim.

APPENDIX – RELEVANT STATUTORY TEXT

28 U.S.C. § 2462

Except as otherwise provided by Act of Congress, an action, suit or proceeding for the enforcement of any civil fine, penalty, or forfeiture, pecuniary or otherwise, shall not be entertained unless commenced within five years from the date when the claim first accrued if, within the same period, the offender or the property is found within the United States in order that proper service may be made thereon.

33 U.S.C. § 1311(a)

(a) Illegality of pollutant discharges except in compliance with law
Except as in compliance with this section and sections 1312, 1316, 1317, 1328, 1342, and 1344 of this title, the discharge of any pollutant by any person shall be unlawful.

33 U.S.C. § 1319(g)(6)(a)

(g) Administrative penalties
(6) Effect of order
(A) Limitation on actions under other sections
Action taken by the Administrator or the Secretary, as the case may be, under this subsection shall not affect or limit the Administrator's or Secretary's authority to enforce any provision of this chapter; except that any violation--
(i) with respect to which the Administrator or the Secretary has commenced and is diligently prosecuting an action under this subsection,
(ii) with respect to which a State has commenced and is diligently prosecuting an action under a State law comparable to this subsection, or
(iii) for which the Administrator, the Secretary, or the State has issued a final order not subject to further judicial review and the violator has paid a penalty assessed under this subsection, or such comparable State law, as the case may be, shall not be the subject of a civil penalty action under subsection (d) of this section or section 1321(b) of this title or section 1365 of this title.

33 U.S.C. § 1344(f)(1)(A) and (f)(2)

(f) Non-prohibited discharge of dredged or fill material
(1) Except as provided in paragraph (2) of this subsection, the discharge of dredged or fill material--
(A) from normal farming, silviculture, and ranching activities such as plowing, seeding, cultivating, minor drainage, harvesting for the production of food, fiber, and forest products, or upland soil and water conservation practices;
is not prohibited by or otherwise subject to regulation under this section or section 1131(a) or 1324 of this title (except for effluent standards or prohibitions under section 1317 of this title).

(2) Any discharge of dredged or fill material into the navigable waters incidental to any activity having as its purpose bringing an area of the navigable waters into a use to which it was not previously subject, where the flow or circulation of navigable waters may be impaired or the reach of such waters be reduced, shall be required to have a permit under this section.

33 U.S.C. § 1362(6) and (12)

Except as otherwise specifically provided, when used in this chapter:

(6) The term "pollutant" means dredged spoil, solid waste, incinerator residue, sewage, garbage, sewage sludge, munitions, chemical wastes, biological materials, radioactive materials, heat, wrecked or discarded equipment, rock, sand, cellar dirt and industrial, municipal, and agricultural waste discharged into water. This term does not mean (A) "sewage from vessels or a discharge incidental to the normal operation of a vessel of the Armed Forces" within the meaning of section 1322 of this title; or (B) water, gas, or other material which is injected into a well to facilitate production of oil or gas, or water derived in association with oil or gas production and disposed of in a well, if the well used either to facilitate production or for disposal purposes is approved by authority of the State in which the well is located, and if such State determines that such injection or disposal will not result in the degradation of ground or surface water resources.

(12) The term "discharge of a pollutant" and the term "discharge of pollutants" each means (A) any addition of any pollutant to navigable waters from any point source, (B) any addition of any pollutant to the waters of the contiguous zone or the ocean from any point source other than a vessel or other floating craft.

33 U.S.C. § 1365(a) and (b)(1)(B)

(a) Authorization; jurisdiction
Except as provided in subsection (b) of this section and section 1319(g)(6) of this title, any citizen may commence a civil action on his own behalf--

> **(1)** against any person (including (i) the United States, and (ii) any other governmental instrumentality or agency to the extent permitted by the eleventh amendment to the Constitution) who is alleged to be in violation of (A) an effluent standard or limitation under this chapter or (B) an order issued by the Administrator or a State with respect to such a standard or limitation, or
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> **(2)** against the Administrator where there is alleged a failure of the Administrator to perform any act or duty under this chapter which is not discretionary with the Administrator.

The district courts shall have jurisdiction, without regard to the amount in controversy or the citizenship of the parties, to enforce such an effluent standard or limitation, or such an order, or to order the Administrator to perform such act or duty, as the case may be, and to apply any appropriate civil penalties under section 1319(d) of this title.

(b) Notice
No action may be commenced—

(1) under subsection (a)(1) of this section—

(B) if the Administrator or State has commenced and is diligently prosecuting a civil or criminal action in a court of the United States, or a State to require compliance with the standard, limitation, or order, but in any such action in a court of the United States any citizen may intervene as a matter of right.