Team 70

CA. No. 13-1246

In the United States Court of Appeals for the Twelfth Circuit

NEW UNION WILDLIFE FEDERATION,

Plaintiff-Appellant

v.

NEW UNION DEPARTMENT OF ENVIRONMENTAL PROTECTION,

Intervenor-Appellant,

v.

JIM BOB BOWMAN,

Defendant-Appellee

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

BRIEF FOR THE NEW UNION DEPARTMENT OF ENVIRONMENTAL PROTECTION
Intervenor-Appellant

TABLE OF CONTENTS

TABLE OF AUTHORITIES

UNITED STATES SUPREME COURT

UNITED STATES COURTS OF APPEAL

UNITED STATES DISTRICT COURTS

CONSTITUTIONAL PROVISIONS

FEDERAL RULES OF CIVIL PROCEDURE

STATUTES

REGULATIONS

OTHER AUTHORITIES

JURISDICTIONAL STATEMENT

The district court had original jurisdiction in this civil action under 28 U.S.C. § 1331 (2006), as well as subject matter jurisdiction over the Plaintiff's claim under the Clean Water Act ("CWA"), 33 U.S.C. § 1365 (2006). The NUEDP and NUWF filed a timely appeal following the district court's grant of summary judgment to the defendant, Jim Bowman. (R. at 1). This court has jurisdiction under 28 U.S.C. § 1291 (2006). Venue is proper under 28 U.S.C. § 1391(b)(1)(2) because the defendant resides in the district and the events giving rise to the claim occurred within the district

STATEMENT OF THE ISSUES

I. Whether New Union Wildlife Federation (NUWF) has standing to sue Jim Bob Bowman (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's (NUDEP) 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

STATEMENT OF THE CASE

This is an appeal from a final order of the District Court for the District of New Union granting Jim Bob Bowman's (Bowman) motion for summary judgment on all counts, and denying New Union Wildlife Federation's (NUWF) motion for summary judgment. (R. at 11). This case began when NUWF sent valid notice of intent to sue under the citizen suit provision of the CWA, 33 U.S.C. § 1365 to Bowman and the New Union Department of Environmental Protection (NUDEP). (R. at 4). Shortly after NUDEP notified Bowman that he violated both state and federal law, they agreed upon a settlement agreement, issued by NUDEP to Bowman, which was incorporated into an administrative order. *Id.*

NUDEP continued its action by filing a complaint against Bowman under § 505 of the Clean Water Act (CWA) in the United States District Court For the District of New Union. (R. at 5). NUWF filed its own complaint under § 505 seeking civil penalties and an injunctive order to remove the fill material and restore the wetlands. *Id.* Shortly after, NUDEP filed a motion to intervene in the NUWF action. *Id.* NUDEP then filed a motion to enter into a decree identical to the terms of the administrative order Bowman consented to. *Id.*

NUWF filed a motion to intervene in the NUDEP action, consolidate the NUDEP and NUWF actions, and in opposition to the NUDEP/Bowman consent decree. *Id.* The district court declined to act on any of the motions, except to grant NUDEP's motion to intervene. *Id.* After discovery, the parties filed cross-motions for summary judgment. *Id.* The district court held that: (1) NUWF lacked standing; (2) Bowman's violations were wholly past; (3) NUDEP was already diligently prosecuting a civil action, thus barring NUWF's citizen suit; and (4) that Bowman did not violate the CWA. (R. at 11).

NUDEP filed a timely Notice of Appeal, challenging the district court's finding on standing, and violation of the CWA. (R. at 1). NUWF filed a Notice of Appeal challenging the district court on all four holdings. *Id.*

STATEMENT OF THE FACTS

Bowman owns one thousand acres of wooded or formerly wooded property hydrologically connected to the Muddy River. (R. at 3). The River is used for miles both upstream and downstream of his property for recreational navigation. *Id*. On June 15, 2011, Bowman began clearing a portion of the wetlands by knocking down trees, leveling vegetation, and burning the trees he pushed into windrows. (R. at 4). He then pushed the leveled trees, vegetation and ashes into ditches. *Id.* Next, Bowman leveled the resulting field, pushing soil

from the high portions of the field into trenches and low lying portions of the field. *Id.* Lastly, he created a wide swale to drain the field into the Muddy. *Id.* He completed this activity on July 15, 2011. *Id.* Bowman's only subsequent activities have consisted of planting wheat seeds and draining the property via the earlier contracted swale. (R. at 5).

When NUWF learned of Bowman's activities, it notified him of its intent to sue for violating the CWA. (R. at 4). After, NUDEP immediately sent Bowman a notice for violating both state and federal laws. *Id.* Both notifications were consistent with the citizen suit provision notice requirement. *Id*. NUDEP and Bowman then entered into a settlement agreement. *Id.* Less than a month later, they incorporated the settlement agreement into an administrative order. *Id.* In the order, Bowman agreed to stop his land clearing activities, convey both a conservation easement and a seventy-five foot buffer zone between the easement and his new field to NUDEP. *Id.* He also agreed to construct and maintain a year-round artificial wetland on the buffer zone, keep the easement in its natural state, and allow public entry for daytime recreational use. *Id.* The agreement did not include a monetary penalty. *Id.* The consent decree is still pending. (R. at 5). NUWF filed its own complaint on August 30, 2011, more than a month after the land clearing activities ceased. *Id.*

NUWF is a not for profit organization with the purpose of protecting "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. *Id*. Members elect its Board of Directors, the governing body of the organization, which in turn elects the officers, including the President. *Id.*

Three of NUWF's members, Dottie Milford, Effie Lawless and Zeke Norton, filed affidavits stating that they use the Muddy River for recreational boating, fishing and picnicking.

(R. at 6). They testified that they are aware of the differences in the Muddy River from Bowman's alleged pollution and that they feel a loss from the destruction of the wetlands. *Id.* Milford testified that the Muddy looks more polluted after Bowman's activities. *Id.* Furthermore, Norton hunts for frogs in the area for recreational and subsistence purpose. *Id.* He testified that he has found fewer frogs in the vicinity of Bowman's property since Bowman's actions. *Id*

STANDARD OF REVIEW

This Court reviews the district court's grant of summary judgment *de novo*, applying the same standard as the district court. *Envtl. Conservation Org. v. City of Dall.*, 529 F.3d 519, 524 (5th Cir. 2008). Federal Rule of Civil Procedure 56(a) states, "the court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a); *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-27 (1986). If a party cannot prove an essential element of their case and would bear that burden at trial, summary judgment may be granted after adequate time for discovery. *Celotex,* 477 U.S. at 323. The burden of proof is on the moving party and all inferences will be made in a light most favorable to the non-moving party. *Id*.

SUMMARY OF THE ARGUMENT

The district court erred in holding that NUWF did not have associational standing because the members' allegations do not constitute an injury in fact fairly traceable to the clearing of Bowman's field. NUWF satisfied Art. III, § 2 associational standing because the members' of the group did have standing themselves, the interests NUWF seeks to protect are germane to the organizations purpose, and individual members are not required to participate in the claim, or to obtain the relief requested. In particular, the members of the group did suffer an injury-in-fact because Bowman's activities polluted the Muddy River, interfering with their

aesthetic, recreational and subsistence use of the River and wetland area around Bowman's property. As well, the injury is fairly traceable to Bowman's actions and was clearly not the result of some third party not before the Court.

Alternatively, the district court was correct in holding that there is no continuing or ongoing violation to establish subject matter jurisdiction. The court found that NUWF could not reconcile the continuing violation jurisdictional requirement articulated in § 505 of the CWA and recognized by the Supreme Court in *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Foundation*. Specifically, NUWF could not prove Bowman continued to violate the CWA on or after the date the suit was filed, nor could NUWF show a reasonable likelihood that Bowman's violations would recur. He ceased his land clearing activities. Moreover, his only subsequent activities have included planting wheat seeds and draining the property through the drainage swale he constructed earlier. Without a continuing or ongoing violation, the case is essentially mooted and no longer justiciable.

The district court was also correct in holding that NUDEP's diligent prosecution met all the requirements in the CWA to bar NUWF's suit. Generally, a citizen-plaintiff may bring a citizen suit against someone who violates the CWA, unless the state has commenced and is diligently prosecuting a civil action. Here, NUDEP took immediate action to enter into a consent decree with Bowman and filing a complaint in federal court. Not only did NUDEP address NUWF's concern regarding Bowman's land clearing activities, it also negotiated considerable concessions from Bowman. Therefore, NUDEP has sufficiently cleared the low threshold court require to show diligent prosecution to bar NUWF's suit.

Finally, the district court erred in holding that Bowman's land clearing activities did not violate the CWA. The court found that no discharge under § 404 because no new material was

introduced to his wetland when he uprooted, burned, and redeposited trees and vegetation. But the statutes plain language, Congressional intent, and regulations issued jointly by EPA and COE clearly require that the redeposit of dredged material is an activity regulated by § 404. Applying an EPA interpretation that a "discharge" requires the addition of material from an outside source to the § 402 dredge and fill permit program is not a permissible construction. The district court erred as a matter of law in granting *Chevron* deference to this interpretation despite clear Congressional and agency intent to the contrary.

ARGUMENT

I. NUWF has associational standing to sue Jim Bob Bowman for violating the CWA because its members suffered an injury-in-fact fairly traceable to Bowman's alleged violations

Federal court's will only hear a claim if it is a valid "case or controversy" under the Constitution. U.S. CONST. art. III, § 2. Several requirements allow plaintiffs to satisfy the case-or-controversy requirement. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992). The doctrine of standing "is an essential and unchanging part of the case-or-controversy requirement." *Id*. Standing requires courts to determine at the outset whether a specific person is the proper party to bring forth the matter to the court for resolution. *Sierra Club v. Morton*, 405 U.S. 727, 731 (1972).

When Congress enacted the citizen suit provision in the Clean Water Act (CWA), it incorporated standing into the definition of "citizen." *See* 33 U.S.C. § 1365(g)(defining "citizen" as "a person or persons having an interest which is or may be adversely affected."); *id*. (including environmental groups within the citizen suit provision under the definition of "person."). Even though citizens and environmental groups are granted statutory standing under the CWA, they

must still satisfy the constitutional requirements of standing. *Defenders of Wildlife*, 504 U.S. at 560.

a. NUWF has third party associational standing

An environmental group can establish standing to bring a suit on its own behalf, or for its members. *Edmonson v. Leesville Concrete Co., Inc*., 500 U.S. 614, 629 (1991); *Warth v. Seldin*, 422 U.S. 490, 511 (1975). When the CWA is involved, standing may be satisfied if any "person or persons having an interest" is or may be "adversely affected." *Friends of the Earth v. Gaston Copper Recycling Corp*., 628 F.3d 387, 396 (4th Cir. 2011). An environmental organization satisfies standing when bringing suit on behalf of its members if: (a) the members of the group would have standing themselves; (b) "the interests it seeks to protect are germane to the organizations purpose;" and (c) individual members are not required to participate in the claim, or to obtain the relief requested. *E.g. Hunt v. Washington State Apple Advertising Comm'n*, 432 U.S. 333, 343 (1977); *Friends of the Earth v. Chevron Chem.*, 129 F.3d 826, 827-28 (5th Cir. 1997); *Save Ourselves v. United States Army Corps of Eng'rs*, 958 F.2d 659, 661 (5th Cir. 1992); *North Carolina Shellfish Growers Ass'n v. Holly Ridge Assocs., Inc*., 278 F.Supp. 2d 654, 662 (E.D.N.C. 2003); *California Sportfishing Alliance v. Diablo Grande, Inc*., 209 F.Supp. 2d 1059, 1065 (E.D. Cal. 2002); *NRDC v. Texaco*, 800 F.Supp. 1, 7 (D. Del. 1992). So long as these factors are established, NUWF is "an appropriate representative of its members, entitled to invoke the court's jurisdiction." *Hunt*, 432 U.S. at 342-43).

NUWF is a voluntary membership organization and its members have standing to bring a suit independently. The interests NUWF seeks to protect are germane to the organization's purpose "to protect the fish and wildlife of the state by protecting their habitats, among other things." (R. at 4). NUWF's CWA claim does not require the participation of individual members

in the lawsuit. Therefore, the court below erred in granting Bowman's motion for summary judgment on this issue, and this Court should reverse the district court's holding to find that NUWF has established standing sufficient to satisfy the requirements of Article III.

1. NUWF members have standing to bring suit themselves

As a starting point, NUWF must establish that its' members have standing to bring suit themselves. *Hunt*, 432 U.S. at 343. Individual standing turns on three factors: (1) whether the party suffered a personal "injury-in-fact;" (2) whether the injury is "fairly traceable to the challenged action of the defendant, and not the result of the independent action of some third party not before the court;" and (3) "it must be likely" that the injury may be "redressed by a favorable decision." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-561 (1992)(internal quotations omitted).

The three members of NUWF, Dottie Milford, Zeke Norton, and Effie Lawless, have standing to bring suit themselves as citizens under the CWA citizen suit provision. 33 U.S.C. §1365(g). These members have filed affidavits explaining how their use and enjoyment of Muddy River is affected by Bowman's actions, sufficient to claim standing. *Am. Canoe Ass'n v. City of Louisa Water & Sewer Comm'n*, 389 F.3d 536, 541 (6th Cir. 2004); *Piney Run Pres. Ass'n v. Carroll Cnty.*, 50 F.Supp. 2d 443, 446 (D. Md. 1999), *rev'd on other grounds*, 268 F.3d 225 (4th Cir. 2001)(noting that "[c]ourts have often relied upon affidavits to establish standing in citizen suits."). This Court should find that the members suffered an injury-in-fact, their injury is causally connected to Bowman's conduct, and their injury is redressable by a favorable decision.

i. Members suffered injury-in-fact that is concrete and particularized, and actual and imminent

Principally, the members suffered an "injury-in-fact" as a result of Bowman's actions: his land clearing activities was an "invasion of a legally protected interest" that is "concrete and

particularized," as well as "actual or imminent." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992). Recognized injuries may aesthetic, recreational, or conservational. *See e.g., Japan Whaling Ass'n v. Am. Cetacean Soc'y*, 478 U.S. 221, 230 (1986)(holding that aesthetic whale watching interests were sufficient to satisfy standing); *United States v. Students Challenging Regulatory Agency Procedures*, 412 U.S. 669, 686-87 (1973)(noting that the injury may be economic, aesthetic, recreational, or environmental); *Sierra Club v. Morton*, 405 U.S. 727, 734 (1972)(stating that aesthetic, environmental, and economic interests are "deserving of legal protection through the judicial process."); *Animal Welfare Inst. v. Kreps*, 561 F.2d 1002, 1007-1008 (D.C. Cir. 1977)(finding the members complaint, that they were unable to enjoy or photograph fur seals subject to slaughter, was a sufficient injury to find standing). Moreover, the relevant injury-in-fact is *personal injury*, not environmental injury. *Friends of the Earth, Inc. v. Laidlaw Envtl. Services, Inc.*, 528 U.S. 167, 181 (2000).

To show an injury-in-fact under the CWA, the members must satisfy multiple elements. First, they must show direct and concrete injuries from Bowman's actions, not merely speculation that pollution may be present in the water. *See generally Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992)(emphasizing that the plaintiff must demonstrate a concrete injury); *Pub. Interest Research Grp., Inc. v. Magnesium Elektron, Inc*., 123 F.3d 111, 120-21 (3d Cir. 1997)(holding that the plaintiff failed to show an actual or tangible injury). Second, they must demonstrate a temporal and geographical relationship to the environmental injury. *Defenders of Wildlife*, 504 U.S. at 564-67; *Ecological Rights Found. v. Pac. Lumber Co*., 61 F. Supp. 2d. 1042, 1057 (N.D. Cal. 1999)(finding that the members' temporal and geographical relation to the environmental harm were "too sporadic or attenuated" to show an injury-in-fact). Next, the members must currently use the Muddy River and not have "some day intentions" to

return. *Defenders of Wildlife*, 504 U.S. at 564; *Dubois v. USDA*, 102 F.3d 1273, 1282-83 (1st Cir. 1996)(determining that the plaintiff showed an injury-in-fact where he claimed that he consistently visited and engaged in recreational activities in the area of the water body in question). Fourth, the members' injuries must be imminent. *Whitmore v. Arkansas*, 495 U.S. 149, 155-58 (1990)(noting that the plaintiff must show that the threatened injury is "certainly impending."). Finally, they must objectively show the Muddy River is polluted. *Friends of the Earth, Inc. v. Gaston Copper Recycling Corp.*, 179 F.3d 107, 113-14 (4th Cir. 1999); *Magnesium Elektron*, 123 F.3d at 120-21.

All three members use Muddy River for recreational boating, fishing, and picnicking. (R. at 6). In line with the Supreme Court's precedent, the plaintiff's undoubtedly use the area of the challenged activity. *Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871, 887-889 (1990). These members do not fall within the standing defect in *Sierra Club v. Morton*, where the environmental organization "failed to allege that it or its members would be affected in any of their activities or pastimes." *Sierra Club v. Morton*, 405 U.S. 727, 735 (1972). Here, the members meet the requirements of CWA § 505 because NUWF essentially alleges that its members' "health, recreational, aesthetic and environmental interests . . . have been, are being, and will be adversely affected by" the pollution caused by Bowman's wetland clearing activities. *Chesapeake Bay Found., Inc. v. Am. Recovery Co., Inc*., 769 F.2d 207, 209 (4th Cir. 1985). The increased pollution and destroyed wetland, from which the members can detect a difference, has significantly influenced their recreational. (R. at 6). The members have thus espoused a reasonable concern that pollution due to Bowman's activities has harmed their aesthetic and recreational interests in the Muddy River. *See Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. Inc*., 528 U.S. 167, 181 (2000).

Likewise, Zeke Norton frogs the general vicinity of Bowman's property for recreational and subsistence purposes. (R. at 6). As the Supreme Court has noted, "the desire to use or observe an animal species, even for purely aesthetic purposes, is undeniably a cognizable interest for the purpose of standing." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 562-63 (1992). NUWF properly submitted affidavits alleging specific facts supporting that Bowman's actions directly affect Norton. *Id.* at 563. Norton does not have "some day" plans to return to Muddy River for frogging; he returns annually, only to now find significantly fewer frogs in the area in the vicinity of Bowman's property, supporting a finding of an actual injury that is neither conjectural or hypothetical. *Id.* at 564.

Furthermore, the members have provided sufficient proof of their injuries to survive summary judgment on this issue. To invoke federal jurisdiction at the summary judgment stage, "each element must be supported in the same way as any other matter on which the plaintiff bears the burden of proof, *i.e.*, with the manner and degree of evidence required at the successive stages of litigation." *Id.* at 561. To survive summary judgment, the party must factually show "perceptible harm." *Id.* at 566. At this stage, the District Court must draw all reasonable readings in favor of the plaintiff " and must not dismiss the complaint unless it appears to doubt that the plaintiff can prove no set of facts in support of its claim that would entitle it to relief." *Mountain State Legal Found. v. Bush*, 306 F.3d 1132, 1134 (D.C. Cir. 2002), *cert. denied*, 540 U.S. 812 (2003)(citing *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957)); *see also Scott v. Harris*, 550 U.S. 372, 380 (2007) ("At the summary judgment stage, facts must be viewed in the light most favorable to the nonmoving party."). This case is undoubtedly at the summary judgment stage. (R. at 5). Accordingly, it is clear that NUWF's members can prove more than what is required to withstand summary judgment, having alleged specific facts that support their injuries-in-fact.

ii. There is a causal connection between members' injury and Bowman's conduct

Second, plaintiffs must sufficiently allege that the injury-in-fact was caused by Bowman's actions. *Defenders of Wildlife*, 504 U.S. at 560-61. The "line of causation" between Bowman's conduct and the injuries faced may not indirectly result "from the independent action of some third party not before the court." *Allen v. Wright*, 468 U.S. 737, 757 (1984). Thus, the members must demonstrate a substantial likelihood that Bowman's caused the injury. *Defenders of Wildlife*, 504 U.S. 560-61; *NRDC v. Texaco*, 800 F. Supp. 1, 9 (D.Del. 1992). Even if the NUWF member's harm was indirect, they may nonetheless show standing. *Duke Power Co. v. Carolina Envtl. Study Grp., Inc*., 438 U.S. 59, 72 (1978); *Warth v. Seldin*, 422 U.S. 490, 504 (1975). Moreover, even supposing this causal connection is attenuated, such lines of causation are sufficient to establish standing. *United States v. Students Challenging Regulatory Agency Procedures*, 412 U.S. 669, 688 (1973). Hence, if the continued pollution of the Muddy will eventually injure the members' interests, such a remote injury will still establish standing. *See id* (finding that the alleged injury of increased use of non-recyclable commodities would eventually occur, and that injury of greater litter ultimately could affect them).

Bowman's land clearing activities resulted in a drained field. (R at 4). This field has directly resulted in diminishing the frogging population. (R at 6). Now Norton can no longer reasonably rely on using the area for his frogging activities. *Id*. Moreover, since Bowman's actions, the members are aware of the increased pollution of Muddy River. *Id*. Milford even testified that the river looks more polluted. *Id*. The members also rationally fear that the River would be more polluted if other wetlands are similarly cleared; if Bowman's actions are found to not be an injury-in-fact, more landowners will clear their wetlands, causing the Muddy to be past

the point where it could be considered a desirable destination. Thus, Bowman's activities have directly caused the members an injury-in-fact, and this harm is not the result of any third party.

iii. Member's Injury is Likely to Be Redressable by a Favorable Decision

Finally, the members must demonstrate that their injuries are capable of redress. *Valley Forge Christian Coll. v. Am. United for Separation of Church and State*, 454 U.S. 464, 472 (1982); *Pub. Interest Research Grp., Inc. v. Powell Duffryn Terminals, Inc*., 913 F.2d 64, 73 (3d Cir. 1990). If the citizen states an injury to waters of the United States in which he has a cognizable interest, not discouraged by civil penalties or barred by an injunction, further violations will redress the injury. *E.g. Save Our Community v. EPA*, 971 F.2d 1155, 1161 (5th Cir. 1992); *NRDC v. Texaco*, 800 F.Supp. 1, 10-11 (D. Del. 1992); *Puerto Rico Campers' Ass'n v. Puerto Rico Aqueduct & Sewer Auth*., 219 F.Supp 2d 201, 211 (D.P.R. 2002). Where the relief sought, if granted, would benefit the injured members, "it can be reasonably supposed" that the injury is capable of redress by a favorable decision. *Warth*, 422 U.S. at 515.

The fact that NUWF and its members seek a civil penalty along with injunctive relief is fundamental. Because "civil penalties have some deterrent effect" against possible future violations, they effectively redress the members' environmental injuries for standing purposes. *Friends of the Earth, Inc. v. Laidlaw Envtl. Services, Inc*., 528 U.S. 167, 185-86 (2000). As well, civil penalties could be "a sanction that effectively abates that conduct and prevents its recurrence," which provides the members with "a form of redress." *Id.* at 186. Even if civil penalties are not payable to the members, such judicial relief "is [still] causally connected to a citizen-plaintiff's injury." *Sierra Club v. Simkins Industries, Inc*., 847 F.2d 1109, 1113 (4th Cir. 1988), *cert. denied*, 491 U.S. 904 (1989).

Here, ordering Bowman to restore the wetland would redress the members' injuries. As the members noted, wetlands serve a valuable function in maintaining the integrity of the Muddy River. (R. at 6). Wetland ecosystems directly benefit the recreational and aesthetic values associated with the area; hence, restoration would include both ecological and societal benefits. *Benefits of Restoration*, EPA (last updated Nov. 6, 2012), http://tinyurl.com/cdd6hp7. The new artificial wetland would be significantly smaller and deprive the members from fully enjoying one of the last true bastions of nature. *See Wetland Restoration, Creation, and Enhancement*, NOAA, 10, http://tinyurl.com/ctr6pxq.

Moreover, animal species *depend* on wetlands to survive. *Id.* at 5. Even if the new artificial wetland produces a higher quality habitat, it will not be the same size as the original. (R. at 6). Despite the biologist's testimony, there is no guarantee that a richer habitat would lead to more frogs. (R. at 6). Wetlands have the ability to support complex food chains that an artificial wetland may not. *Wetland Creation and Restoration: The Status of the Science Vol. II*, EPA, 18 (Oct. 1989), http://tinyurl.com/c9dc8qd. As well, wetlands provide ample breeding ground; a smaller artificial wetland may not provide the same benefits to the frog population. *Id*. at 18-19. Thus, restoring the wetland would create an ecosystem ripe for frogging, and positively redress Norton's injury.

2. The interests NUWF seeks to protect are germane to the organizations purpose

Next, NUWF sufficiently alleges that the interests it seeks to protect are germane to its' purpose. Whether the interests are germane to the organizations purpose is an "undemanding" test. *See Presidio Golf Club v. Nat'l Park Serv*., 155 F.3d 1153, 1159 (9th Cir. 1998)("[C]ourts have generally found the germaneness test to be undemanding"). NUWF's "litigation goals"

must only be "pertinent to its special expertise and the grounds that bring its membership together." *Humane Soc'y v. Hodel*, 840 F.2d 45, 65 (D.C. Cir. 1998).

Hence, NUWF must act "as a true representative of its members." *Sierra Club v. Aluminum Co. of Am.*, 585 F.Supp. 842, 850 (N.D.N.Y. 1984)(citing *Pac. Legal Found. v. Gorsuch*, 690 F.3d 725, 729-31 (9th Cir. 1982)). Actual membership, as opposed to mere contributions, is essential. *Health Research Grp. v. Kennedy*, 82 F.R.D. 21, 26-27 (D.D.C. 1979). Control exercised by members of an organization through organizational elections is essential to giving them a voice in the association. *Id*.

NUWF's stated goals show its claim on behalf of its members is germane to the organizations purpose: "to protect the fish and wildlife of the state by protecting their habitats, among other things." (R. at 4). The individual members' interests are largely identical to the organizations goal of maintaining the Muddy River's surrounding wetland environment for recreational, aesthetic or economic purposes, as voluntary members willingly pay dues to support NUWF's goals. *Id*. These members also elect the governing body of the organization that craft the agenda. *Id.* Thus, NUWF's interest in maintaining the wildlife habitat in the vicinity of Bowman's property falls within the zone of interests protected by the CWA, because NUWF's interests are consistent with the purposes of the CWA; the interests are so consistent that it would be reasonable to assume that Congress intended to permit the suit. *Douglas Cnty. v. Babbitt*, 48 F.3d 1495, 1500 (9th Cir. 1995), *cert. denied*, 516 U.S. 1042 (1996).

3. Individual members not required to participate in the claim or to obtain relief requested

Generally, claims solely for monetary relief require individual membership participation, and so associations cannot make these claims for its members. *United Food & Commercial Workers Union Local 751 v. Brown Grp., Inc*., 517 U.S. 544, 546 (1996); *Pennsylvania*

Psychiatric Soc'y v. Green Spring Health Servs., Inc., 280 F.3d 278, 284 (3d Cir. 2002). However, NUWF has also requested injunctive relief, which does not require participation of individual members under such circumstances. *Hunt v. Washington State Apple Advertising Comm'n,* 432 U.S. 333, 343-43 (1977); *Presidio Golf Club*, 155 F.3d at 1159. Even where members must testify and undergo discovery, participation "by each allegedly injured party" is not considered necessary, and thus does not prohibit associational standing. *Hosp. Council of W. Pennsylvania v. City of Pittsburgh*, 949 F.2d 83, 89-90 (3d Cir. 1991).

NUWF is a not for profit voluntary membership organization, funded by members' dues and contributions. (R. at 4). Only those members harmed are participating in the litigation. As well, because injunctive relief is requested on appeal, other members would not be required to participate.

II. This Court lacks subject matter jurisdiction under § 505(a) of the CWA because any violations are wholly past

Even though NUWF has satisfied the threshold question of associational standing on behalf of its members, the lack of a continuing or ongoing violation for CWA § 505(a) subject matter jurisdiction renders the citizen suit moot. Court's are allowed to hear a citizen suit filed under CWA §505 when a discrete fill action transpired in the distant past. 33 U.S.C. §1365(a)(1). However, the Clean Water Act does not approve citizen suits to remedy *wholly past* violations of the act. *Gwaltney v. Chesapeake Bay Found., Inc.*, 484 U.S. 49, 64 (1987). Therefore, NUWF's suit is mooted because the issue of Bowman's injurious activities no longer presents this Court with a legally cognizable interest to address. *See Murphy v. Hunt*, 455 U.S. 478, 481 (1982); *Alaska Ctr. for the Env't v. United States Forest Serv.*, 189 F.3d 851, 854 (9th Cir. 1999). Additionally, neither NUWF nor its members have a personal stake in the outcome of the case. *See Arizonans for Official English v. Arizona*, 520 U.S. 43, 68 n.22 (1997); *United States Parole*

Comm'n v. Geraghty, 445 U.S. 388, 397 (1980). Finally, citizen's must "make a good-faith allegation of [a] continuous or intermittent violation." *Id.* at 64. However, Bowman's claimed activities are wholly past, and as such, are not a continuing or ongoing violation as required by CWA § 505(a) for subject matter jurisdiction.

a. NUWF fails the disjunctive prong test for continuous and intermittent violations

A continuing or ongoing violation can be shown either by: (1) proving actual violations continued on or after the suit was filed; or (2) "adducing evidence from which a reasonable trier of fact could find a continuing likelihood of a recurrence in intermittent or sporadic violations." *Chesapeake Bay Found., Inc., v. Gwaltney of Smithfield, Ltd*., 844 F.2d 170, 171-72 (4th Cir. 1988). Per the following, the District Court was correct in concluding that there is no continuing or ongoing violation.

1. NUWF cannot prove an ongoing violation because violations did not continue on or after the date the complaint was filed

According to the Supreme Court, citizens may only bring a suit if they can make a "good faith allegation of continuous or intermittent violation[s]" when the complaint is filed. *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Found., Inc.*, 484 U.S. 49, 64 (1987). Otherwise, the citizen suit provisions' notice requirement would completely "undermine the supplementary role" of the citizen suit provision envisioned by Congress. *Id.* at 60. Hence, the controversy "must be extant at all stages of review, not merely at the time the complaint is filed." *Arizonans for Official English v. Arizona*, 520 U.S. 43, 67 (1997). Consequently, once the case becomes moot, this Court no longer has subject matter jurisdiction over the suit. *See id.*

NUWF has failed to make a "good faith allegation of [a] continuous or intermittent violation," because it is clear that Bowman's land clearing activities have ceased. *Id*. at 64. Bowman stopped his land-clearing operations on or about July 15, 2011, roughly two weeks after he was given notice by NUWF and NUDEP. (R. at 5). NUWF's complaint was filed on August

30, 2011, more than a month after Bowman ceased his land clearing operations. (R. at 5). His only subsequent activities have included planting wheat seeds and draining the property through the draining ditch he constructed earlier. (R. at 5, 7). Even NUWF agrees that Bowman's activity is not continuing to be in violation of the CWA. (R. at 7)

2. NUWF cannot prove an ongoing violation because there is no reason to believe Bowman will resume activity

Furthermore, NUWF has not "adduced evidence from which a reasonable trier of fact could find a continuing likelihood of a recurrence in intermittent or sporadic violations." *Chesapeake Bay Found., Inc. v. Gwaltney of Smithfield, Ltd*., 890 F.2d 690, 694 (4th Cir. 1989). "Intermittent or sporadic violations do not cease to be ongoing until the date when there is no real likelihood of repetition." *Id.* at 171-72. A continuing violation is not a single event, but rather occurs when the conduct endures. *United States v. Rutherford Oil Corp.*, 756 F.Supp. 2d 782, 790 (S.D. Tex. 2010). The violation is over once the violator no longer adds the pollutant. *Nat'l Parks & Conservation Ass'n v. TVA*, 502 F.3d 1316, 1322 (11th Cir. 2007); *Rutherford*, 756 F.Supp. 2d at 791. Hence, if the violator stops discharging the pollutant, the violation ceases and the statute of limitations begins. *Id*. at 793; 33 U.S.C. §1311(a). "The fact that a continuing impact exists from" Bowman's past violations does not make the violation continuing. *United States v. Telluride Co*., 884 F.Supp 404, 408 (D.Colo. 1995), *rev'd on other grounds*, 146 F.3d 1241 (10th Cir. 1998).

There is no reason to believe Bowman will resume the land-clearing activity. Bowman is not adding more dredged spoil or fill to the property. (R. at 7). He also consented to an administrative order issued by NUDEP, under which he agreed not to clear any more wetlands in the area, to create a year-round artificial wetland, and to convey a conservation easement to NUDEP. (R. at 4). While this consent decree is still pending and does not include an

administrative penalty, violation may subject Bowman to criminal liability, providing a sufficient deterrence for Bowman to not continue the activity. For example, failure to abide by NUDEP's administrative order may subject Bowman to a misdemeanor charge as a "negligent" violation of the CWA. 33 U.S.C. §1319(c)(1). Upon the finding of a misdemeanor, fines may be issued up to $25,000 per day and to one-year imprisonment. *Id*. Thus, a reasonable trier of fact is unlikely to find the possibility that Bowman's activities will recur.

III. This Court lacks subject matter jurisdiction because the State of New Union has already taken an enforcement action and fully resolved the violations

NUWF is barred from bringing the civil suit because NUDEP "has commenced and is diligently prosecuting a civil or criminal action in a court of the United States." 33 U.S.C. § 1365(b)(1)(B). NUWF is likewise barred from bringing a civil suit under § 1319 (g)(6)(A), which states that citizen suits are barred when "a State has commenced and is diligently prosecuting an action under a State law comparable to this subsection…" 33 U.S.C. § 1319(g)(6)(A). It is undisputed that the NUDEP represents the State and negotiated an administrative order under the authority delegated by the EPA. (R. at 4).

Congress intended citizens suits to be used when the government "cannot, or will not command compliance." *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Found., Inc.*, 484 U.S. 49, 62 (1987). Congress considered citizen actions to be a "useful *additional* tool" in the fight against pollution. *Id.* (emphasis added). Additionally, the words "in court" are conspicuously absent from § 1319(g)(6), implying Congress meant to expand the prohibition on citizen suits in its amendment, barring them in lieu of a consent decree or court action. *See Pape v. Menominee Paper Co., Inc.*, 911 F.Supp. 273, 277 (W.D. Mich. 1994). By bringing the action in court, NUDEP is undoubtedly diligently prosecuting Bowman for his actions.

a. Enforcement of the CWA is primarily the responsibility of the government and actions of the state are given a presumption of diligence

State action in citizen suits are presumed to be diligent, shifting a heavy burden on to the citizen-plaintiff to prove otherwise. *Karr v. Hefner*, 475 F. 3d 1192, 1198 (10th Cir. 2007). The government has the primary responsibility to enforce the CWA; hence the citizen suits are meant to supplement, not supplant, government action. *See Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Found., Inc.*, 484 U.S. 49, 60 (1987); *Piney Run Pres. Ass'n v. Cnty. Comm'r of Carroll Cnty.*, 523 F.3d 453, 456 (4th Cir. 2008); *Sierra Club v. Hamilton Cnty. Bd. of Cnty. Comm'rs*, 504 F.3d 634 (6th Cir. 2007); *N. and S. Rivers Watershed Ass'n v. Town of Scituate*, 949 F.2d 552, 555 (1st Cir. 1991).

Courts defer to states prosecution, establishing a low bar to find diligence. *Atl. States Legal Found., Inc. v. Hamelin*, 182 F. Supp. 2d 235, 246 (N.D.N.Y. 2001)(holding that courts are required to defer to a state's "plan of attack"). Deference is to be given to the "agency's expertise" to encourage good faith negotiation of voluntary settlements with the government. *Id* at 459; *Karr*, 475 F.3d at 1198. Moreover, the governmental action is not required to be "far-reaching" or "zealous;" rather, it must only be diligent. *Karr*, 475 F.3d at 1197 (holding that an unsatisfactory result does not infer lack of diligence); *Piney Run*, 523 F.3d at 459 (finding no lack of diligence simply because the state actions are less aggressive than citizens would like).

Once NUWF informed NUDEP of Bowman's violation, NUDEP immediately sent Bowman notice of his violation, and entered into a settlement agreement. NUDEP then incorporated the agreement into an administrative order, which Bowman agreed to approximately a month later. NUDEP continued its action by filing a complaint against Bowman and a motion to enter into the decree. Considering the deferential and low diligence bar, NUDEP has been more than diligent, and this Court should defer to the State's actions.

b. NUDEP addressed citizen concerns, accomplished more than the citizen suit contemplated, did not hinder public participation, and obtained a substantial financial commitment from Bowman

In determining diligence, courts look to the substance of an administrative order, whether it addressed the same issues as the citizens' suit, availability of public participation and monetary penalties assessed. *Arkansas Wildlife Fed'n v. ICI Americas, Inc.*, 29 F.3d 376, 382 (8th Cir. 1994); *N. and S. Rivers Watershed Ass'n. v. Town of Scituate*, 949 F.2d 552, 556 (1st Cir. 1991)(finding diligence in the absence of a financial penalty because the state was authorized to assess penalties and the action taken by the government sought to "remedy the same violations" as the citizen suit); *Atl. States Legal Found., Inc. v. Hamelin*, 182 F.Supp. 2d 235, 247 (N.D.N.Y. 2001)(finding the state was diligent in part because the defendant was required to submit plans for "restoration of an intermittent watercourse" as well as a wetlands monitoring plan). Where the government action requires compliance, it is considered diligent, *Piney Run,* 523 F.3d at 460, and the government and citizen actions do not have to coincide. *Karr*, 475 F.3d at 1197, 1199 (finding diligence despite the EPA not addressing all of the well sites listed in the citizen complaint). Courts have also found diligence where the actions culminated in a consent judgment and the government accomplished more than the citizen suit sought to achieve. *Id.* at 1198.

In this case, NUWF was concerned with the destruction of the wetlands adjacent to the Muddy River. NUDEP negotiated with Bowman to stop clearing the wetlands immediately. NUDEP went far beyond stopping the violation, also requiring Bowman to convey a conservation easement, a seventy-five foot buffer zone between that easement and his new field, and to construct a year-round, partially-inundated artificial wetland. Bowman must keep the easement in its natural state. The easement will be open to the public during the day for recreational use, and the partially-inundated wetland will create a better environment for frogs.

By securing these concessions, NUDEP accomplished more than the citizen suit sought to achieve.

Additionally, absence of citizen participation in the administrative enforcement process does not necessarily authorize a citizen suit. In *Arkansas Wildlife Fed'n v. ICI Americas, Inc.*, the court held that without evidence of state action denying interested parties an opportunity to participate in the administrative enforcement action, the exception to the bar on citizen suits did not apply. *Arkansas Wildlife Federation v. ICI Americas, Inc.*, 29 F.3d 376, 382 (8th Cir. 1994). Similar to *Arkansas Wildlife*, there is no evidence NUDEP attempted to thwart citizen participation in the administrative enforcement process. No impediments were in place to halt NUWF from intervening. Instead, NUWF chose to file an action in federal court.

Moreover, failure to impose a monetary penalty does not automatically authorize a citizen suit. *Scituate*, 949 F.2d at 556. The State needs flexibility in its bargaining power and is not required to impose either the maximum penalty or a monetary fine. *Cmty. of Cambridge v. City of Cambridge*, 115 F.Supp. 2d 550, 557 (D. Md. 2000). The court in *Cambridge* held that a minimal monetary penalty did not amount to lack of diligence because the city was bearing other substantial costs *and* the MDE had the ability to assess penalties in the future. *Id* at 557. Moreover, the court in *N. and S. Rivers Watershed Ass'n. v. Town of Scituate* held that diligence did not require the use of financial penalties. *Scituate*, 949 F. 2d at 556.

Although no official monetary penalty was imposed, the concessions made by Bowman constitute a substantial financial commitment. Like the city in *Cambridge,* Bowman will incur large expenses in creating and maintaining the wetland. These costs have the potential of being greater than a one-time monetary penalty. Bowman has lost agricultural and development value in the land because he is barred from developing the easement in any way. Moreover, NUDEP

reserves the right to impose future penalties and pursue criminal action. In response to Bowman's violation, NUDEP took aggressive action and imposed more than sufficient penalties.

IV. Bowman's land clearing activities, which introduced previously nonexistent dredged and fill materials into his wetland property, constituted a discharge of pollutants in violation of CWA §§301(a) and 404

A violation of the CWA occurs when a person engages in "the discharge of any pollutant," except in compliance with a permit issued under §§ 402 or 404. 33 U.S.C. § 1311(a). Section 402 permits are required "for the discharge of any pollutant," while § 404 permits are required "for the discharge of dredged or fill materials into the navigable waters." *Id.* §§ 1342, 1344. The CWA defines "discharge of a pollutant" as "any addition of any pollutant to navigable waters from any point source." *Id.* § 1362(12). Four elements must be satisfied to establish a violation of the CWA: "addition," "pollutant," "navigable waters" and "point source." *Id*. The parties dispute only whether the element of "addition," which is not defined by the CWA, is met by Bowman's land clearing operations.

The text of §404, and overall purpose of the CWA, demonstrate that Congress clearly intended to regulate the redeposit of dredged and fill material back into the waters from which they were removed. Regulations issued jointly by the United States Army Corps of Engineers (COE) and the Environmental Protection Agency (EPA) confirms that redeposits are within the scope of this statute. 33 C.F.R. § 323.2 (2008); 44 C.F.R. § 232.2 (2008). In finding that no "discharge" occurred, the court below incorrectly relied on EPA interpretations that a "discharge" requires an "addition of pollutants" from "the outside world" and does not occur when pollutants are transferred among "unitary navigable waters." *Nat'l Wildlife Fed'n v. Gorsuch*, 693 F.2d 156, 165 (D.C. Cir. 1982); National Pollutant Discharge Elimination System (NPDES) Water Transfers Rule, 73 FR 33,697 (June 13, 2008) (codified at 40 C.F.R. pt. 122). EPA's interpretations of "addition" were developed under the separate statutory scheme of § 402

in the limited context of water transfers. *Gorsuch*, 693 F.2d 156. Applying these fact-specific interpretations to the inapposite dredge and fill activities in the present case disregards the statute's plain meaning, Congressional intent, and EPA's own regulatory interpretation of § 404 discharges. The effect of this statutory construction would be the virtual elimination of the dredge and fill permit program from the CWA, which is an impermissible construction of the CWA. The district court erred as a matter of law in granting *Chevron* deference to EPA's narrow interpretations of "addition" in concluding that Bowman did not violate § 404 of the CWA.

a. The plain language, structure and purpose of the CWA indicate clear Congressional intent for §404 to regulate the redeposit of dredged and fill material

Courts and agencies "must give effect to the unambiguously expressed intent of Congress." *Chevron, U.S.A., Inc. v. Nat'l Res. Def. Council, Inc.*, 467 U.S. 837, 843 (1984). In addressing questions of statutory construction, courts "must first determine whether the statutory text is plain and unambiguous." *Carcieri v. Salazar*, 555 U.S. 379, 387 (2009). Pertinent to resolving ambiguity is "the cardinal rule that statutory language must be read in context since a phrase gathers meaning from the words around it." *Gen. Dynamics Land Sys., Inc. v. Cline*, 540 U.S. 581, 582 (2004). *See also Robinson v. Shell Oil Co*., 519 U.S. 337, 341 (1997) (directing courts to evaluate ambiguity in light of "the broader context of the statute as a whole."). Courts must also apply "traditional tools of statutory construction" to determine whether Congress expressed specific intent regarding the issue in question. *Chevron*, 467 U.S. at 843, n.9.

The CWA defines "discharge of a pollutant" to mean "any addition of any pollutant to navigable waters from any point source." 33 U.S.C. § 1362(12). The statute is silent, however, on the meaning accorded to "addition." When used without qualification, the term "discharge" refers to "discharge of a pollutant." *Id* § 1362(16). Permits issued under §404 required "for the discharge of dredged or fill materials into the navigable waters." *Id* § 1344. The use of the term

"discharge" for §404 permit purposes *is* qualified, which reasonably suggests that it does not refer to "discharge of a pollutant" and thus does not contemplate the corresponding "addition" definition. When read as a whole, then, the plain meaning of this provision suggests that "addition" requirement does not apply to the "discharge of dredged or fill materials." *Id*. § 1362.

The plain meaning of the term "dredged material" contemplates redeposit into the originating body of water, as dredged materials by definition come from water. 33 C.F.R. § 323.2(c). The CWA also implies redeposit is assumed to be regulated here, dictating that § 404 permits are required for "[a]ny 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." 33 U.S.C. § 1344(f)(2). The statutory language Congress employed in this provision focuses chiefly on the consequences suffered by the body of water, not the source from which the dredged or fill material originated. This focus on the environmental impact of regulated discharges is consistent with Congress' stated purpose for the CWA "to restore and maintain the chemical, physical and biological integrity of the Nation's waters." *Id*. § 1251(a). *See Minnehana Creek Watershed Dist. v. Hoffman*, 597 F.2d 617, 627 (8th Cir. 1979) (legislative history of CWA indicates Congressional intent to "control the degradation of aquatic resources that results from any replacement of water with fill material…").

Applying a narrow interpretation on "addition" to § 404 would virtually eliminate the regulation of dredge-and-fill activities, which are clearly done with the purpose of "brining an area of the navigable waters into a use to which it was not previously subject." 33 U.S.C. § 1344(f)(2). The elimination of this prominent regulatory program would undoubtedly frustrate Congress' intended purpose for the CWA to control water degradation. The court below was keen to apply the traditional principle of statutory construction favoring terms to be given the

same definition through a statute. The resulting marginalization of the § 404 permit program disregards clear Congressional intent in favor of rigid linguistic uniformity. Where these two principles of statutory construction conflict, the Supreme Court defers to Congress. *Alt. Cleaners & Dyers v. United States*, 286 U.S. 427, 443 (1932) ("Where the subject-matter to which the words refer is not the same in the several places where they are used . . . the meaning well may vary to meet the purposes of the law . . . ."). Equally strong is the principle that statutes should be construed "so as to avoid rendering superfluous any parts thereof." *Astoria Fed. Sav. & Loan Ass'n v. Solimino*, 501 U.S. 104, 111 (1991).

b. EPA and COE regulations clearly define §404 discharges to include redeposit of dredged materials and explicitly distinguish §402 discharge regulations as inapposite to the dredge-and-fill context

Despite clear Congressional intent that redeposit of dredged and fill material constitute a discharge for § 404 purposes, the CWA's various overlapping permit programs and technical language may nevertheless create ambiguity. When a statutory provision remains ambiguous after thorough analysis of Congressional intent, *Chevron* deference is afforded to an agency's statutory interpretation that is deemed "a permissible construction of the statute." *Chevron*, 476 U.S. at 483. In light of this ambiguity, EPA and COE have jointly issued regulations confirming that "the term discharge of dredged materials means any addition of dredged materials into, including redeposit of dredges materials other than incidental fallback within, the waters of the United States." 44 C.F.R. § 232.2; 33 C.F.R. § 323.2.

These EPA and COE regulations, which further Congressional intent and the overall purpose of the CWA, are "permissible construction[s] of the statute" requiring Chevron deference. *Chevron*, 467 U.S. at 843. The district court erred as a matter of law in failing to defer to EPA and COE regulations holding redeposit to be a discharge requiring compliance with a § 404 permit. In concluded that redeposit of dredged and fill material does not constitute an "addition,"

the court impermissibly "substitute[d] its own construction of [the] statutory provision for a reasonable interpretation made by" EPA and COE. *Id*. at 844.

The EPA has applied this inclusive interpretation of § 404 discharges to regulate activities highly similar to the present case position, in which vegetation was uprooted and then replaced into the wetlands from where it was removed. *Avoyelles Sportsmens' League, Inc. v. Marsh*, 715 F.2d 897, 923 n.40 (5th Cir. 1983)("[A]t oral argument, the federal defendant explained…if the vegetation were cut down and put back into the wetlands soil, however, then there would have been a redeposit in the wetland, and hence a discharge."). *See also United States v. Moses*, 496 F.3d 984, 991 (9th Cir. 2007)("Even if no new materials were added to the Creek bed by [defendant's] activities, simply dredging up and redepositing what was already there is sufficient to run afoul of the CWA.").

EPA and COE have explicitly chosen to apply a broad interpretation of "discharge" in the context of § 404 dredge-and-fill activities. The agencies have been equally explicit in distinguishing the § 402 permit program from that of § 404. EPA was careful to strictly limit the application of its "unitary navigable waters" theory, which holds that no discharge occurs "when a pollutant is conveyed along with, and already subsumed entirely within, navigable waters and the water is not diverted for an intervening use." National Pollution Discharge Elimination System (NPDES) Water Transfer Rule, 73 Fed. Reg. 33,697 (June 13, 2008)(codified at 40 C.F.R. pt. 122). This theory came with an unambiguous disclaimer: "This rule focuses exclusively on water transfers and does not affect any other activity that may be subject to NPDES permitting requirements." *Id.*

EPA articulated its "outside world" requirement for an "addition" to constitute a § 402 discharge as part of a litigation position that dam operations do not require a § 402 permit. *See*

Gorsuch, 693 F.2d 156 (D.C. Cir. 1982); *Nat'l Wildlife Fed'n v. Consumers Power Co.*, 862 F.2d 580 (6th Cir. 1988). The COE stated it does not "believe that the analysis of the *Gorsuch* and *Consumer Powers* decisions is controlling [under § 404]. These cases did not address what constitutes an addition of dredges materials to waters of the United States." Clean Water Act Regulatory Programs, 58 FR 45008-01.

c. Applying EPA's "outside world" and "unitary waters" theories to discharges regulated by the §404 permit program is not a permissible construction of this provision and the district court erred in granting *Chevron* deference to this interpretation

Despite the determination that a statutory phrase is ambiguous and "left a gap" for the administering authority to fill, Congressional intent must still be honored. *Chevron*, 467 U.S. at 843. Deference is not afforded to an agency interpretation that would "alter the clearly expressed intent of Congress." *Bd. of Governors of Fed. Reserve Sys. v. Dimension Fin. Corp.*, 474 U.S. 361, 368 (1986). Nor is it granted to an agency interpretation that is "not one that Congress would have sanctioned." *United States v. Shimer*, 367 U.S. 374, 382 (1961).

Applying EPA's "unitary navigable waters" theory and "outside world" requirement for an addition to occur would exclude dredge-and-fill activities from § 404 permit requirements, virtually eliminating this provision from the Clean Water Act. The EPA agrees that "it would not be reasonable to require that dredged material enter waters of the U.S. 'from the outside world' since dredged material, by definition, is contained in the waters themselves." Clean Water Act Regulatory Programs, 58 FR 45008-01. *Avoyelles Sportsmen's League, Inc. v. Marsh*, 715 F.2d 897, 923-24 (5th Cir. 1983)("'dredged' material is by definition material that comes from the water itself. A requirement that all pollutants must come from outside sources would effectively remove the dredge-and-fill provision from the statute."). This result would severely frustrate Congressional intent to "to restore and maintain the chemical, physical, and biological integrity

of the Nation's waters…[and] that the discharge of pollutants into the navigable waters be eliminated." 33 U.S.C. §1251(a).

In formulating its "unitary navigable waters" theory and "outside world" requirement for an "addition of pollutants," the EPA neither contemplated dredge-and-fill activities, nor intended such activities to be governed by this theory. The cases in which EPA advanced the "outside world" theory dealt only with dam operations; specifically, whether changes to the water and materials contained therein that occurred when the water flowed through the dam constituted an "addition." *See Gorsuch*, 693 F.2d 156; *Nat'l Wildlife Fed'n v. Consumers Power Co.*, 862 F.2d 580 (6th Cir. 1988).

The *Consumers Power* court determined that no "discharge of pollutants" occurred when water containing live fish flowed into the dam, at which point some of these pre-existing fish were killed. Subsequently, the same body of water flowed out – but with dead fish instead of live fish. *Consumers Power Co.*, 862 F.2d at 580. A key distinguishing feature in *Consumers Power* is the fact that live fish, which constitute "biological materials," are no more a pollutant than dead fish. 33 U.S.C. § 1362. This fact let the court to conclude that the dam's "movement of pollutants already in the water is not an "addition" of pollutants to navigable waters of the United States." *Consumers Power*, 862 F.2d at 581. The *Gorsuch* court also found no "discharge of pollutants" to have occurred when a dam adversely impacted the quality of water that flowed through its operations. In this case, EPA argued that the water-quality changes did not actually constitute "pollutants" for CWA purposes. *Gorsuch*, 693 F.2d 156, 165.

In the present case, respondent physically removed vegetation from the wetland, converted it to "dredged and fill material," and then subsequently redeposited this material back into the wetland. Prior to respondent's activities, the wetland contained trees and vegetation. Once he

uprooted and burned these trees and vegetation, this material became "dredged and fill material" – material regulated by § 404 of the CWA that were not present before. The activities in *Consumer Powers* and *Gorsuch* did not include the removal and reintroduction of fundamentally changed materials. The EPA recognized that where such a removal and reintroduction of pollutants occurs in the water transfer context, an "addition" would occur. *Consumer Powers Co.*, 862 F.2d 580, 585 ("The EPA points out that when fish are removed from the waters of the United States, and subsequently dead fish or fish parts are released into the waters, an 'addition' of pollutants occurs.").

The plain language of the statute, Congressional intent, and EPA and COE regulations all unambiguously place Bowman's activities squarely within a "discharge of dredged and fill material" requiring compliance with a § 404 permit. 33 U.S.C. § 1344. The district court imposed an unreasonable interpretation of a § 404 discharge, disregarding these controlling authorities and constituted an unreasonable construction of the statutory provision. Its decision finding no addition to have occurred during Bowman's land clearing activities is clearly erroneous.

CONCLUSION

This Court should hold that NUWF has associational standing to bring its claims, there is no continuing or ongoing violation for subject matter jurisdiction, NUDEP has diligently prosecuted the case, and that Bowman violated the CWA. For the foregoing reasons, NUDEP respectfully requests that this Court reverse the decision of the district court on the first and third counts to overturn Bowman's motions for summary judgment.

Respectfully submitted,

Counsel for New Union Department of Environmental Protection