TEAM # 71

C.A. No. 13-1246

In the United States Court of Appeals for the Twelfth Circuit

NEW UNION WILDLIFE FEDERATION,

Plaintiff-Appellant,

— V. —

NEW UNION DEPARTMENT OF ENVIRONMENTAL CONSERVATION,

Intervenor-Appellant,

— V. —

JIM BOB BOWMAN,

Defendant-Appellee.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE TWELFTH CIRCUIT

BRIEF FOR DEFENDANT—APPELLEE

Counsel for Defendant—Appellee
Jim Bob Bowman

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JURISDICTIONAL STATEMENT

The judgment of the United States District Court for the District of New Union was entered on June 1, 2012. The petition for the writ of certiorari was granted by this Court on September 14, 2012. This Court has jurisdiction pursuant to 28 U.S.C. § 1294(1) (2012).

ISSUES PRESENTED FOR REVIEW

I. Does a citizen-plaintiff have standing to seek relief under Section 505 of the Clean Water Act and Article III of the Constitution without demonstrating an injury-in-fact as contemplated by the statute?

II. May a citizen-plaintiff seek relief under the Clean Water Act when there is no continuing violation by the defendant?

III. May a citizen-plaintiff seek relief under the Clean Water Act despite diligent prosecution of the defendant by a state agency?

IV. Does land clearing for agricultural purposes constitute a "discharge of fill material" under Section 404 of the Clean Water Act?

STATEMENT OF THE CASE

This is an appeal from the Order of the District Court dated June 1st 2012 in the United States District Court of Appeals for the Twelfth Circuit in the case of New Union Wildlife Federation (NUWF) v. New Union Department of Environmental Conservation (NUDEP) v. Jim Bob Bowman. The Order held that NUWF lacked standing to bring a citizen suit against Bowman pursuant to the Clean Water Act, Federal Water Pollution Control Act 33 U.S.C. §§ 1251-1376 (2012) (hereinafter *CWA*), that there is no continuing violation as required for subject matter jurisdiction under the CWA, that the citizen suit is barred but NUDEP's diligent prosecution of Bowman and that Bowman did not violate CWA, 33 U.S.C. § 1344 (hereinafter *Section 404*) . NUWF takes issue with all of the holdings. NUDEP takes issue with the holdings the NUWF didn't have standing to bring a citizen suit and that Bowman did not violate Section 404 of the CWA. Following the timely appeals against the Order of the Court, all parties were ordered to brief all of the issues on September 14, 2012.

STATEMENT OF FACTS

Jim Bob Bowman owns a one-thousand acre wetland contiguous with the Muddy River in the state of New Union. Parts of the wetland "are inundated every year when the river is high." Op.1. People use the Muddy River for recreational navigation. Id. On June 15, 2011, Bowman cleared some trees and vegetation from his property for agricultural purposes. He also dug a drainage ditch. A strip that is 150 feet wide with trees and vegetation remains along the bank of the Muddy River. All of Bowman's activities concluded around July 15, 2011. Op. 2. Since that time, Bowman only planted his field with winter wheat. Op. 3.

NUWF sued Bowman for an alleged violation of the CWA. Shortly thereafter, NUDEP sued Bowman for alleged violations of state and federal law. Despite never conceding any violation of law, Bowman entered into a settlement with NUDEP. He agreed to refrain from clearing the remaining strip of wetland, to convey a conservation easement consisting of the strip of uncleared property with an additional 75 foot buffer zone, to create an artificial wetland on the 75 foot buffer zone, and to maintain the remaining uncleared strip as a wetland. The public may access this conservation easement at anytime during the day for recreational purposes. Ultimately, the agreement was incorporated "into an administrative order issued by NUDEP to Bowman, which Bowman consented to on August 1, 2011." Op. 2.

Despite the administrative order, NUDEP brought suit on August 10, 2011 in federal court against Bowman for violating the CWA. On September 5, 2011, NUDEP filed a motion to enter a decree, the terms of which are identical to the state administrative order, and Bowman agreed. Op. 3.

On August 30, 2011, NUWF filed the present suit asking for "civil penalties and an order requiring Bowman to remove the fill material and restore the wetlands." Op. 3. Around

September 15, 2011, "NUDEP filed a motion to intervene in the NUWF case, which this court subsequently granted." Op. 3.

SUMMARY OF THE ARGUMENT

NUWF does not have standing to sue Bowman under the CWA. Standing requires an injury-in-fact traceable to an alleged violation of law that is redressable by the judiciary. NUWF demonstrated no injury-in-fact because its members experienced "conceivable" injuries not of the kind contemplated by Congress in the CWA. 33 U.S.C. § 1365 (hereinafter *Section 505*). Citizen-plaintiffs may not seek relief under the CWA in the absence of an ongoing violation by the defendant. NUWF's claim is moot because Bowman's violation is "wholly past," as evidenced by his cessation of filling the wetlands and his acquiescence to the subsequent settlement agreement. Further, Bowman's failure to remedy the effects of his activity in the landfill do not constitute an "ongoing violation." Diligent prosecution of defendants by state agencies also bars citizen suits under the CWA. Bowman reached a settlement with NUDEP to mitigate any possible effects of his actions on the surrounding wetlands, constituting diligent prosecution under the CWA and rendering any citizen suit groundless. Bowman did not violate Section 404 of the CWA because he did not deposit "fill material" into the wetlands on his property or the Muddy River. Bowman did not add any material to the Muddy River or his own property. Furthermore, Bowman's actions were "normal farming activities" and are exempt from prosecution under Section 404(f). Bowman therefore respectfully requests this Court uphold the ruling of the District Court on all grounds.

ARGUMENT

I. The District Court Correctly Held that NUWF Does Not Have Standing to Sue Bowman Under the Clean Water Act.

The District Court properly applied United States Supreme Court jurisprudence with respect to standing. Standing in general requires: 1) an injury-in-fact; 2) that is traceable to an alleged violation of law; and 3) that is redressable by the judiciary. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-561 (1992). The plaintiff must meet all three elements. In the case at bar, NUWF has not proven an injury-in-fact and therefore does not have standing to sue Bowman.

A. Standing Under Section 505 of the Clean Water Act requires, *inter alia*, an injury-in-fact of the type contemplated by the drafters of the statute.

1. General standing requires, inter alia, an injury-in-fact.

Plaintiffs in legal proceedings must establish an injury-in-fact caused by the defendant's violation of law that can be addressed by the courts. *Lujan*, 504 U.S. at 560-561. This rigorous three-prong test has a well-documented basis in constitutional history and helps safeguard the rights of defendants, the ability of plaintiffs to seek relief, and the efficiency of the federal court system.

The judicial application of standing acts as a gatekeeper to prevent unnecessary and excessive adjudication. The concept of standing is rooted in the separation of powers and requires judicial action as a "last resort, and as a necessity." *Allen v. Wright*, 468 U.S. 737, 752 (1984) (internal citations omitted). It is a question of "whether the litigant is entitled to have the court decide the merits of the dispute . . . [and concerns both] constitutional limitations on federal-court jurisdiction and prudential limitations on its exercise." *Warth v. Seldin*, 422 U.S. 490, 498 (1975) (citing *Barrows v. Jackson*, 346 U.S. 249, 255-256 (1953)). Furthermore,

standing is a constitutionally authorized effort to limit "the role of courts in a democratic society." *Warth*, 422 U.S. at 498; (see also *Schlesinger v. Reservists to Stop the War*, 418 U.S. 208, 221-227 (1974)).

A plaintiff in any lawsuit must present a "case or controversy" within the meaning of U.S. CONST. art. III, § 2, cl. 1. In order to meet this threshold, the plaintiff must have "such a personal stake in the outcome of the controversy as to warrant his invocation of federal court jurisdiction and to justify exercise of the court's remedial powers on his behalf." *Warth*, 422 U.S. at 498. The judiciary may only exercise its powers over a controversy when the plaintiff suffers "some threatened or actually injury resulting from the putatively illegal action." *Linda R.S. v. Richard D.*, 410 U.S. 614, 617 (1973).

To establish a "case and controversy," a citizen-plaintiff must demonstrate an injury that is the type of injury Congress addressed under a particular statute and the citizen-plaintiff must be within the "zone of interest" protected by the statute. *Fed. Election Comm'n v. Akins*, 524 U.S. 11, 20 (1998); *Ass'n of Data Processing Servs. Org., Inc. v. Camp*, 397 U.S. 150, 153 (1970); *Allen,* 468 U.S. at 751. The parameters of the "zone of interest" depend upon the subject matter of the statute.

2. Standing in environmental harm cases requires the kind of injury or injuries contemplated by Congress.

In cases where citizen-plaintiffs allege environmental harm in violation of federal statutes, such as the Clean Water Act, Federal Water Pollution Control Act 33 U.S.C. §§ 1251-1376 (2012) (hereinafter *Clean Water Act*), the "injury" requirement to establish standing is not injury to the environment but rather injury to the plaintiff. *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.,* 528 U.S. 167 (2000). Therefore, the "zone of interest" in such cases may involve "'aesthetic, conservational, and recreational' as well as economic values." *Ass'n of*

Data Processing Serv. Org, Inc., 397 U.S. at 154 (citing *Scenic Hudson Pres. Conf. v. Fed Power Comm'n,* 354 F.2d 608, 616 (2nd Cir. 1965)). When the plaintiff is an organization, individual members must prove that they have been injured by the defendant's actions. *Summers v. Earth Island Inst.*, 129 S.Ct. 1142, 1151-1152 (2009). Courts should only find standing when plaintiffs provide evidence of injury-in-fact suffered by individuals and caused by the defendant's environmental actions. Anything short of requiring "a factual showing of perceptible harm" would turn determinations of standing into "academic exercises in the *conceivable*." *Summers*, 129 S.Ct. at 1152; *Lujan*, 504 U.S. at 566 (emphasis added). "Conceivable" harm is a lower standard than injury-in-fact and therefore does not meet the case and controversy requirement of U.S. CONST. art. III, § 2, cl. 1.

B. NUWF did not prove injury-in-fact and therefore does not have standing.

NUWF failed to prove an injury-in-fact caused by Bowman's actions. NUWF presented speculative evidence that failed to prove its inclusion in the "zone of interest" as discussed by the Court in *Akins* and instead constitutes a "conceivable" harm that *Summers*, *Lujan*, and *Students Challenging Regulatory Agency Procedures (SCRAP)* all criticized as insufficient for standing. *Akins* 524 U.S. at 23, *Summers,* 129 S.Ct. at 1152; *Defenders of Wildlife*, 504 U.S. at 566; *United States v. Students Challenging Regulatory Agency Procedures (SCRAP)*, 412 U.S. 669, 688 (1973). All of those opinions require "a factual showing of perceptible harm" to document injury-in-fact, *id.* and the testimony of NUWF's members in the case at bar did not reach that standard.

NUWF offered testimony from only three of its members, none of whom proved injury-in-fact under the CWA The witnesses "[feared] that the Muddy is more polluted," but admitted they "cannot see a difference in the land from the river or its banks." Order p. 6. Only one

witness visibly saw a difference in the waterway itself and none of the witnesses indicated that Bowman's actions affected their aesthetic, conservational, or recreational use of the Muddy River. Order p. 6. One witness, Zeke Norton, may have experienced temporary economic loss from the decreased number of frogs directly following Bowman's land clearing, but Norton's trespassing and frogging were illegal. Order p. 6. It is doubtful that Congress' intended "zone of interest" included citizens using wetlands for criminal activity. The nature of Norton's perceived economic losses preclude his participation as a plaintiff to a suit under 33 U.S.C. § 1365(a)(1) ("33 U.S.C. § 1365" is hereinafter referred to as "Section 505"). The other two witnesses experienced only the kind of "conceivable" injuries that the Court refuses to recognize.

NUWF did not prove an injury-in-fact caused by Bowman's actions. Its complaint is therefore not redressable by the judiciary and the District Court properly held that NUWF does not have standing to file suit under Section 505(a)(1) of the CWA.

II. The Lower Court Rightly Dismissed NUWF'S Complaint Because Bowman's "Wholly Past" Activities Mooted the Case or Controversy.

The lower court correctly decided that NUWF's claim is moot because Bowman's activity on his wetlands is "wholly past." The aforementioned "cases and controversies" requirement also includes the doctrine of mootness. Mootness of a case occurs when there is no longer a live issue for which the court can provide meaning relief, and thus results in dismissal of the case. *Arizonans for Official English v. Arizona*, 520 U.S. 43, 45 (1997).

Under the CWA Section 505(a)(1), citizens may bring suit against an individual who is "alleged to be in violation of" the CWA. The Supreme Court interpreted this language as barring citizen suits against perpetrators of "wholly past" violations under the principles of mootness. *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Found., Inc.* 484 U.S. 49, 57-59 (1987). If the

defendant raises an issue of mootness, the citizen plaintiff must demonstrate through evidence that there is a "reasonable likelihood that a past polluter will continue to violate in the future," *id*. at 57, which may be evidenced by violations committed after the complaint was filed. *Chesapeake Bay Found. Inc. v. Gwaltney of Smithfield, Ltd.*, 890 F.2d 690, 693 (4th Cir. 1989). A good faith allegation by the complainant is sufficient to satisfy the citizen-plaintiff's heavy burden of showing the alleged violator's future harm. *Gwaltney,* 484 U.S. at 64. Once the complainant alleges an ongoing violation, the burden shifts to the alleged violator to prove that it is "absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur." *Friends of the Earth,* 528 U.S. at 189 (quoting *United States v. Concentrated Phosphate Export Ass'n.,* 393 U.S. 199, 203 (1968)).

While some courts have found that a continuing violation occurs when a wetland still contains dredged material that was improperly filled, *Sasser v. Adm', EPA,* 990 F.2d 127 (4th Cir. 1993); *United States v. Reaves*, 923 F.Supp. 1530, 1533-34 (M.D. Fla. 1996); and *United States v. Ciampitti*, 669 F.Supp. 684, 699-700 (D.N.J. 1987), other courts disagree. The court must distinguish between the effects of a one-time violation and an ongoing violation. *Nat'l Parks & Conservation Ass'n v. TVA*, 502 F3d 1316, 1322 (11th Cir. 2007). *See also Gwaltney*, 484 U.S. at 69 (Scalia, J., concurring in the judgment) ("be[ing] in violation," "violating," and "hav[ing] committed a violation" have different connotations). In *United States v. Rutherford Oil Corp.*, 756 F.Supp.2d 782, 790-91 (S.D. Tex.), the defendant's failure to remedy the consequences of a past violation did not constitute a continuing violation. "A continuing violation applies where the conduct is ongoing, rather than a single event." *Id*. (quoting, *Interamericas Invs, Ltd. v. Bd. of Governors of the Fed. Reserve Sys.*, 111 F.3d 376, 382 (5th Cir. 1997)). In *Rutherford*, the court noted that the effects of a violation do not constitute new

violations; rather "[o]nce the violator stops adding a pollutant in violation of a permit, the violation is over." *Id.*, 756 F.Supp.2d at 790. *See also Hamker v. Diamond Shamrock Chem. Co.*, 756 F.2d 392, 397 (5th Cir. 1985); *United States v. Telluride Co.*, 884 F.Supp. 404, at 407-08 (D. Colo. 1995) *rev'd on other grounds*, 146 F.3d 1241, 1244, 1249 (10th Cir. 1998); *McDougal v. County of Imperial*, 942 F.2d 668, 674-75 (9th Cir. 1991); and *Ward v. Caulk*, 650 F.2d 1144, 1147 (9th Cir. 1981).

Bowman's actions are "wholly past," rendering NUWF's claim moot, so the case was rightly dismissed by the District Court. Because the issue of mootness was raised at trial, NUWF had the burden of showing that there was a reasonable likelihood that Bowman would violate the CWA in the future. NUWF failed to do so. NUWF was incorrect in alleging that Bowman's activities within his wetland constituted an ongoing violation because Bowman has not remediated the effects of his activities on his wetland. Bowman's activities took place within a one-month time frame, which occurred over a year ago. Even if Bowman is *in violation*, this would have occurred because he *violated* the CWA during one single event. These must be distinguished, as stated by Scalia in his concurrence in *Gwaltney*. *Id.*, 484 U.S. at 69. Bowman's alleged violation ceased on July 15, 2011, and the fact that his land has mostly remained leveled does not constitute a new violation each day it remains. Further, the lower court correctly reasoned that there would be significant consequences if it holds that a violation is continuous and ongoing until the dredged and fill material is removed. First, Section 505 of the CWA imposes the demand for continuing violations and to rule alternately would render this requirement meaningless. Second, the statute of limitations would likewise be rendered meaningless. Every day the material remains in the wetland, the statute of limitations accrues anew.

This lawsuit should be distinguished from *Sasser*, 990 F.2d at 129, *Reaves*, 923 F.Supp. 1533-34, and *Ciampitti*, 669 F.Supp. at 699-700, because those cases involved statutes providing injunctive relief that required remedy of the effects of the violation, so that failure to remedy was a continuing violation. *Rutherford*, 756 F.Supp.2d at 792-793. Here, there is no controlling statute requiring injunctive relief for the wetland to be remediated.

Further, Bowman's settlement agreement, which subsequently became an executive order, mooted NUWF's claim. In the NUDEP settlement, Bowman agreed to convey a small, uncleared area to NUDEP as a conservation easement and maintain it as a natural wetland. He also agreed to construct wetland buffer areas around the easement and to refrain from violating the CWA in the future. Bowman's acquiescence and compliance with that agreement is evidence that there is no reasonable likelihood that Bowman will violate the CWA in the future. The fact that Bowman reached this settlement even before the lawsuit was filed strongly suggests that this claim was moot even from its commencement in court. Compare with, *Atl. States Legal Found. v. Eastman Kodak, Co*., 933 F.2d 124, 127 (2d Cir. 1991) (citizen suit mooted because it alleged the same violations as a subsequent enforcement action that resulted in a settlement). See also, *Orange Env't, Inc. v. County of Orange*, 923 F.Supp. 529, 538 (S.D.N.Y. 1996) (defendant was in compliance after acceding to an off-site remediation order despite the filled wetlands in question not being restored; thus, the injunctive relief claim was moot).

Finally, citizen-plaintiffs are required to give notice of their intent to sue the alleged violator, the Administration, and the State according to Section 505 (b)(1)(A). Rather than merely notifying the alleged defendant to the upcoming lawsuit, the purpose of the 60-day notice is to inform an individual of their alleged violations so that the individual has time to comply with the CWA before the suit is filed. *Gwaltney*, 484 U.S. at 59-60. NUWF's lawsuit exemplifies

the reasoning behind the 60-day notice requirement. Even though he did not concede to the allegations, once he was provided notice, he came into NUDEP's desired compliance, thus obviating the need for this lawsuit. Because he complied and subsequently expressly agreed to stay in compliance, the case or controversy in NUWF's suit was moot from its commencement.

The doctrine of mootness includes Article III mootness and prudential mootness. *Ali v. Cangermi*, 419 F.3d 722, 723-24 (8th Cir 2005). If a case is moot under Article III, the court cannot hear the claim, *Rendell v. Rumsfeld*, 484 F.3d 236, 240 (3d Cir. 2007). Prudential mootness however provides discretion to the court on deciding whether the case is moot despite lack of mootness under Article III. *Chamber of Commerce v. U.S. Dep't of Energy*, 627 F.2d 289, 291 (D.C. Cir. 1980); *see also Blanciak v. Allegheny Ludlum Corp.*, 77 F.3d 690, 700 (3d. Cir. 1996) and *S-1 v. Spangler*, 832 F.2d 294, 297 (4th Cir. 1987). In *Sierra Club v. United States Army Corps of Eng'rs*, 277 Fed Appx. 170, 172-173. (3rd Cir. 2008) (unpublished), the case was prudentially moot because the alleged violator had filled all of the 7.69-acre wetland except for 0.12 acres. Here, Bowman cleared and filled all of his 1,000-acre wetland with the exception of a 150-foot wide strip. Op. 2. Even if the court were to find that this case is not moot under Article III, the court should still uphold the dismissal of the case under prudential mootness because a substantial amount of the wetland had been cleared.

The lower court correctly concluded that NUWF's claims should be dismissed on mootness because his activities are "wholly past." Bowman ceased these activities in July, 2011 after a substantial portion of the wetland was leveled and subsequently entered into agreements assuring that he would not continue the activity in the future.

III. NUDEP's Prior State Action Bars a Citizen-Suit Under Section 505(a)(1).

Section 505(b)(1)(B) of the CWA states that "[n]o action may be commenced under subsection (a)(1) of this section . . . 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 . . ." that was allegedly violated. 33 U.S.C. § 1365(b)(1)(B). This section sets out the limitation for citizen suits under the CWA. Citizen suits are barred when the government agency is enforcing the standards and acting in the interest of the public. *Arkansas Wildlife Fed'n v. ICI Americas, Inc.,* 29 F.3d 376, 380 (8th Cir. 2004). A citizen suit is appropriate only when the government action is not sufficiently diligent. *Lockett v. EPA,* 319 F.3d 678, 684 (5th Cir. 2003). It is the citizen-plaintiff's burden to prove the government's lack of diligence. *Karr v. Hefner,* 475 F.3d 1192, 1198 (10th Cir. 2007).

The agency's diligence is presumed by the courts. *Connecticut Fund for the Env't v. Contract Plating Co.,* 631 F.Supp. 1291, 1293 (D. Conn. 1986). Further, "the state [enforcement] agency must be given great deference to proceed in a manner it considers in the best interests of all parties involved." *Arkansas Wildlife Fed'n v. ICI Americas Inc.,* 842 F.Supp. 1140, 1147 (E.D.Ark.1993). Also, when the citizen's suit seeks "duplicative enforcement actions," nothing is added to the prior state action and instead strains the agency's limited resources. *North and South Rivers Watershed Ass'n Inc. v. Town of Scituate,* 949 F.2d 522, 556 (1st Cir. 1991).

NUDEP diligently prosecuted the matter at hand. Bowman owns land that is considered wetlands by the U.S. Army Corp of Engineers' Wetlands Determination Manual. Due in part to the threat of flooding, Bowman commenced land-clearing operations that knocked down trees and leveled vegetation. His land clearing activities allegedly violated state and federal law. Bowman and NUDEP subsequently entered into a settlement stipulating that Bowman would not

clear more wetlands, would convey a conservation easement to NUDEP including a 75 foot buffer zone between the easement and the new field, would maintain a year-round wetland on the buffer zone, and would keep the easement in its natural state and allow public use. The court accepted this agreement.

NUDEP's diligently prosecuted prior state action bars NUWF's claim in this matter. A penalty, plans relating to restoration and monitoring of wetlands, and a schedule for restoration work may constitute diligent prosecution. *Atl. States Legal Found. v. Hamelin,* 182 F. Supp.2d 235, 244 (N.D.N.Y. 2001). In the case at bar, Bowman agreed not to clear any more wetlands, conveyed a conservation easement, maintains a year-round buffer zone for the wetlands, and allowed public access for recreational use. This goes above and beyond diligence because it is more than just a schedule for restoration; it is basically an injunction against any further damages to the wetlands on and near Bowman's property.

NUWF will argue that because NUDEP had the authority to include an administrative penalty up to $125,000 but chose not to enforce any sort of monetary judgment that they did not diligently prosecute the matter. Although, "a lenient penalty that is far less than the maximum penalty may provide evidence of non-diligent prosecution" it is not dispositive. *See Friends of the Earth,* 890 F.Supp. at 491. The court in *Connecticut Coastal Fishermen's Ass'n v. Remington Arms Co., Inc.*, found diligent prosecution, even though the remedy required by the state agency was more lenient than that sought by the citizens suit. *Id.*, 777 F.Supp. 173, 185 (D. Conn. 1991). Further, diligence was found when a fine of $100,000 out of a possible $2,270,000 was assessed. *Cmty. of Cambridge Envtl. Health & Cmty. Dev. Group v. City of Cambridge,* 115 F. Supp. 2d 550, 556 (D. Md. 2000). Therefore, non-diligent prosecution is not inferred just because

NUDEP used their discretion to determine that the best possible solution for the alleged violations did not include monetary sanctions.

Furthermore, NUWF has not overcome the burden of presumption of diligence in the agency's order. Diligence is usually found if the action "is capable of requiring compliance with the Act and is in good faith calculated to do so." *See Friends of Milwaukee's Rivers v. Milwaukee Metro. Sewerage Dist.,* 382 F.3d 743, 760 (7th Cir.2004). *See also Karr v. Hefner,* 475 F.3d 1192, 1198 (10th Cir. 2007) and *The Piney Run Pres. Ass'n v. The County Com'rs Of Carroll County, MD*, 523 F.3d 453, 459 (4th Cir. 2008). It is not enough to overcome the presumption of diligence by showing that the settlement is less aggressive or less satisfactory than the citizen-plaintiff would prefer. *Id.* Non-diligence will not only be established by creating a prospective schedule of compliance. *See Weinberger v. Romero-Barcelo,* 456 U.S. 305, 318 (1982); *Piney Run Pres. Ass'n*, 523 F.3d at 459.

After the agreement between NUDEP and Bowman was reached, NUWF then filed their own complaint with the Court. NUWF was seeking civil penalties and an order that would require Bowman to remove the fill material and restore the wetlands. Although NUWF finds that other measures would be more appropriate to properly sanction for his alleged violations of the clean water act, this is not enough to overcome the presumption of diligence by NUDEP. *Piney Run Pres. Ass'n*, 523 F.3d at 459. NUWF offers no other evidence as to why the settlement is not diligent and should not stand.

Lastly, the same alleged violations are at issue in both the NUDEP settlement agreement and NUWF's citizen-plaintiff suit. The Supreme Court stated in *Gwaltney,* "the citizen suit is meant to supplement rather than to supplant governmental action." *Id.*, 484 U.S. at 60. Further, in *Scituate,* "[w]hat the [Appellant's] suit seeks to remedy is already in the process of being

remedied by the [Consent Judgment]" therefore the action cannot stand. *Id*., 949 F.2d at 556. Even though NUWF is seeking additional or different penalties than what were included in the order between Bowman and NUDEP, they are seeking sanctions for the same violations that have already been diligently prosecuted. Therefore, their action cannot stand.

NUDEP's diligent prosecution of the alleged violations against Bowman has barred NUWF from seeking further penalties. Since the action has already been taken and resolved, NUWF cannot continue with their action unless they can overcome the presumption of diligent prosecution, or if they are seeking sanctions for different violations. NUWF failed to do either. Therefore, NUWF's suit is barred by this prior state action.

IV. The District Court Correctly Held that Bowman Did Not Violate Section 404 of the Clean Water Act.

Bowman did not violate 33 U.S.C. § 1344 (hereinafter *Section 404*) because he did not discharge dredge or fill material into the Muddy River and, in the alternative, his actions would be exempt from Section 404 as "normal farming activities." Bowman did not discharge "dredge material" because none of his actions took place in the waterway itself and no material was "excavated or dredged" from the river or riverbed. Bowman also did not discharge "fill material" because the types of materials resulting from his land clearing activities do not constitute "fill material." Furthermore, Bowman did not make an "addition" of material into navigable waters.

A. Bowman did not discharge "fill material" into the waterways of the United States.

The CWA prohibits the discharge of pollutants without a permit. 33 U.S.C. § 1311(a); Section 404. Pollutants include, *inter alia*, dredge and fill material. Section 404 of the CWA regulates the discharge of these types of pollutants. "Fill material" is "material placed in waters of the United States where the material has the effect of: (i) Replacing any portion of water of the

United States with dry land; or (ii) Changing the bottom portion of a water of the United States." 33 C.F.R. § 323.2(e)(1). "Dredged material" is material excavated or dredged from waters of the United States." 33 C.F.R. § 323.2(c). "Discharge of material means the addition of [these types of pollutants] into waters of the United States." 33 C.F.R. § 323.2(f).

None of Bowman's actions involved dredging of material from the Muddy River. Instead, NUDEP and NUWF accused him of making an addition of fill material into the waterway. The only judge-created definition of "fill material" is flawed because it misinterprets both Congressional intent and regulatory language. Furthermore, the EPA's definition of "addition" exculpates Bowman from any violation of Section 404.

1. Land clearing alone does not discharge fill material into waters of the United States.

The only original case on-point defining land clearing as "fill material," *Avoyelles v. Marsh,* 715 F.2d 897 (5th Cir. 1983), misinterprets the intent of Section 404, and Bowman respectfully asks that this Court adopt a more reasonable approach to fill material created by agricultural activity. In *Avoyelles*, the Fifth Circuit recognized the Congressional intent of the CWA to "'restore and maintain the chemical, physical, and biological integrity of the Nation's waters' . . . [and] the importance of protecting wetlands as a means of reaching statutory goals," then counterintuitively concluded that agricultural land clearing activity is a violation of the CWA. *Avoyelles*, 715 F.2d at 923-924 (citing 33 U.S.C. § 1251(a); 3 *Legislative History*, at 281 (H.Conf.Rep. No. 830)). "Fill material" is "material placed in waters of the United States where the material has the effect of . . . [r]eplacing any portion of a water of the United States with dry land; or [c]hanging the bottom elevation of any portion of a water of the United States." CWA Statute 404(e); 40 C.F.R. § 232.2. Land clearing alone does not necessarily "replace" water with

"dry land" or alter "the bottom elevation" of a body of water. The Fifth Circuit went too far when it included land clearing in its definition of "discharge of fill material."

In the case at bar, Bowman's activity will not damage the wetlands on and near his property. Furthermore, the defendant in *Avoyelles* used a discing procedure that went beyond the type of superficial surface activities on Bowman's land. Even if the Fifth Circuit was correct in finding the *Avoyelles* defendant in violation of Section 404, it reached its result by misconstruing Section 404.

2. Bowman did not make an "addition of any pollutant to navigable waters."

The Supreme Court requires the judiciary to give deference to the Environmental Protection Agency's interpretation of the CWA. *EPA v. National Crushed Stone Ass'n*, 449 U.S. 64, 83 (1980). The Court also assumes the "natural presumption that identical words used in different parts of the same act are intended to have the same meaning." *Atl. Cleaners & Dryers v. United States*, 286 U.S. 427, 433 (1932). In 1982 the EPA interpreted Section 402, which governs discharges of pollutants into navigable waters, and the definition of "addition" as used in the agency's regulations. *Nat'l Wildlife Fed'n v. Gorsuch*, 693 F.2d 156, 165 (D.C. Cir. 1982). A trial court rejected the EPA's interpretation, and the District of Columbia Circuit correctly overturned the lower court for lack of deference to the agency. *Id.*, at 161. The CWA and related EPA regulations use nearly identical language regarding Section 402 and Section 404 violations. Absent any official interpretation of "addition" of fill material into waterways, the similarities between the language of the two sections of the CWA allows application of Section 402 definitions in matters regarding Section 404. *Sorenson v. Sec'y of the Treasury*, 475 U.S. 851, 860 (1986).

In the case at bar, the Record contains no EPA interpretation of Section 404 relating to Bowman's actions. This Court may rely on the agency's Section 402 rulings on the definition of "addition." *Atl. Cleaners & Dryers*, 286 U.S. at 433; *Sorenson*, 475 U.S. at 860. "Addition" of a pollutant requires the introduction of an element from "the outside world" to a body of water or wetland. *Nat'l Wildlife Fed'n v. Gorsuch*, 693 F.2d 156, 175 (D.C. Cir. 1982). Bowman did not violate Section 404 because he did not add anything to the wetlands on his property. He dug a drainage ditch into the Muddy River, but no materials transported through that ditch are from "the outside world." Any materials moved about the wetlands by Bowman's actions were already there.

B. Bowman's actions fall under the 404(f) exemption for "normal farming" activities.

The CWA does not require a permit for the discharge of material into waterways as part of "normal farming" activities. Section 404(f)(1). Farmers may alter the use of wetlands without a permit so long as they neither impair the "flow or circulation of navigable waters" nor reduce the "reach of such waters." *id.*; Section 404(f)(2). Some courts interpret this "normal farming" exemption to include activities that do not reduce or destroy wetlands (*Borden Ranch P'ship v. United States Army Corps of Eng'rs,* 261 F.3d 810, 813-15 (9th Cir. 2001), *aff'd* 537 U.S. 99 (2002); *United States v. Brace*, 41 F.3d 117, 124 (3rd Cir. 1994); *United States v. Akers*, 785 F.2d 814 (9th Cir. 1985); *United States v. Huebner*, 752 F.2d 1235, 1240 (7th Cir. 1985)), and some courts incorrectly interpreted it as limited to existing farming operations. *United States v. Larkins*, 852 F.2d 189, 192 (6th Cir. 1988); *United States v. Cumberland Farms of Connecticut,* 647 F.Supp. 1166, 1175 (D. Mass. 1986), *aff'd,* 826 F.2d 1151 (1st Cir. 1987).

Congress intentionally omitted farming activities from Section 404 restrictions. In a wooded area, land clearing is necessary for farming. Although four Circuit Courts have held that

new farming activity is not exempt under Section 404(f)(1)(A), this is an issue that neither this Court nor the Supreme Court has addressed. The legislative history of Section 404 indicates that Congress indeed intended permits for certain agricultural activities--constructing dikes, levees, and "other fills" in wetlands and waterways--but does not mention land clearing by farmers. 123 Cong. Rec. S19636 (daily ed. Dec. 15, 1977) (statement of Sen. Stafford). Absent further congressional guidance, the courts should interpret "normal" farming activities to mean something more than existing farming activities. Courts who limit the Section 404(f)(1)(A) exemption to existing activities construe the statute too narrowly and do so without congressional intent. Bowman asks this Court to take a more reasonable interpretation of "normal farming activities" to include the actions necessary to commence agriculture.

Bowman cleared his property for normal farming purposes. He did not construct a dike or levee and he did not take any action in the adjacent stream or on its shore. R. 4. This type of land clearing is the only way to prepare wooded areas for "normal farming activities," and Bowman's agricultural interests fall within Congress' exemption for Section 404 permit requirements.

CONCLUSION

A citizen-plaintiff does not have standing to sue under the CWA without proving an injury-in-fact of the kind contemplated by Congress. NUWF proved no such injury. A defendant in a CWA action is not liable to citizen-plaintiffs if his or her actions are in the past. Bowman's land clearing activities are completed. Diligent prosecution under the CWA bars suits by citizen-plaintiffs. NUDEP addressed Bowman's actions, and the two parties reached a reasonable settlement. Land clearing does not, by itself, discharge fill material into wetlands or waterways. Normal farming activities are exempt from Section 404 of the CWA. Bowman's activities were agricultural in nature and did not discharge fill material into the Muddy River or surrounding wetlands. For the above reasons, the decision of the District Court should be upheld.

APPENDIX

U.S. CONST. art. III, § 2.

> The judicial power shall extend to all cases, in law and equity, arising under this Constitution, the laws of the United States, and treaties made, or which shall be made, under their authority;—to all cases affecting ambassadors, other public ministers and consuls;—to all cases of admiralty and maritime jurisdiction;—to controversies to which the United States shall be a party;—to controversies between two or more states;—between a state and citizens of another state;—between citizens of different states;—between citizens of the same state claiming lands under grants of different states, and between a state, or the citizens thereof, and foreign states, citizens or subjects.