Team No. 14

C.A. No. 13-1246
Civ. No. 149-2012

---

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 NEW UNION WILDLIFE FEDERATION, Plaintiff-Appellant

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases — Page(s)

United States Supreme Court Cases

TABLE OF AUTHORITIES (CONT'D)

Cases — Page(s)

United States Circuit Court of Appeals Cases

TABLE OF AUTHORITIES (CONT'D)

Cases — Page(s)



United States District Court Cases

TABLE OF AUTHORITIES (CONT'D)

Cases — Page(s)



Constitution



Statutes

TABLE OF AUTHORITIES (CONT'D)

Cases — Page(s)



Federal Rules



Federal Regulations



Secondary Sources

## JURISDICTIONAL STATEMENT

Appellant New Union Wildlife Federation ("NUWF" or "Plaintiff") filed a Complaint in the United States District Court for the District of New Union on August 30, 2011 pursuant to the Clean Water Act (CWA) § 505, 33 U.S.C. § 1365 (2006). The district court has federal question jurisdiction over the Complaint under the general federal jurisdiction statute, 28 U.S.C. § 1331 (1980). On June 1, 2012, the district court granted Defendant's motion for summary judgment on all grounds. This order is a final judgment, and Notice of Appeal was timely filed pursuant to Fed. R. App. P. 4(a)(1), so this Court has proper jurisdiction pursuant to 28 U.S.C. § 1291 (2006).

## STATEMENT OF THE ISSUES

I. Whether NUWF has standing to sue Defendant for violating the CWA when its members have proffered evidence that Defendant's actions have adversely impacted their use of, and interests in, the area in which the Defendant's private property is situated.

II. Whether the Defendant violated CWA § 301(a) when he redeposited and "sidecasted" dredged and fill material from one part of his wetland adjacent to a navigable water of the United States to another part of the same wetland without a CWA § 404 permit.

III. Whether there is a continuing or ongoing violation—as required by § 505(a) of the CWA for subject matter jurisdiction—when the Order minimally abates the environmental impact and does not eliminate the risk of continuous or intermittent violations.

IV. Whether NUDEP failed to diligently prosecute the Defendant for CWA violations—as required for subject matter jurisdiction under CWA § 505—when the Order does not compel restoration of the wetlands nor impose any statutorily-authorized penalties.

## STATEMENT OF THE CASE

Plaintiff NUWF is appealing the district court's final judgment issued on June 1, 2012, Civ. 149-2012, granting Jim Bob Bowman's ("Defendant") motion for summary judgment on all grounds, and denying Plaintiff's motion for summary judgment on the same. R. at 11. On July 1, 2011, Plaintiff sent Defendant proper notice of its intent to sue after its members—who use the Muddy for recreation—noticed Defendant's clearing operations on his adjacent wetlands. *Id.*

Thereafter, the New Union Department of Environmental Protection ("NUDEP") issued Defendant a "notice of violation" stating his land-clearing operations had violated both state and federal law. *Id.* Defendant and NUDEP then entered into a no-fault settlement that required Defendant: (1) to cease clearing and construction activities on wetlands in the area; (2) to convey to NUDEP a conservation easement on 3.36 riverfront acres (comprised of the 2.24 remaining wooded acres adjacent to the Muddy and a 1.12 acre buffer between said strip and the leveled land); (3) to maintain this conservation easement in its natural state and allow daytime public access; and (4) to construct and maintain a year-round wetland on the buffer zone. R. at 4. Upon Defendant's consent, the parties incorporated this agreement—which failed to include any administrative penalty—into an administrative order ("Order") on August 1, 2011. *Id.*

NUDEP filed a complaint against Defendant in federal district court under CWA § 505 on August 10, 2011 ("NUDEP suit"). On August 30, 2011, NUWF filed its own § 505 action against Defendant seeking civil penalties and an order requiring Defendant to remove the dredged and fill material and restore the wetlands ("NUWF suit"). R. at 5. On September 5, 2011, NUDEP filed a motion to enter a decree ("Decree")—the terms of which are identical to the Order—in the NUDEP suit; the Defendant consented to this motion, but it remains pending. *Id.* On September 15, 2011, NUWF filed motions to intervene in the NUDEP suit, to consolidate

the two § 505 actions, and to oppose entry of the Decree in the NUDEP suit; all motions remain pending. *Id*. At the same time, NUDEP filed a motion to intervene in the NUWF suit. The District Court granted only NUDEP's motion to intervene during a November 1, 2011 status conference on both suits, without prejudice to NUDEP's right to enforce violations of the proposed Decree or to NUWF's right to continue with its action. *Id*.

After discovery, the parties filed cross-motions for summary judgment on the issues of standing, subject matter jurisdiction and the alleged CWA violation; the district court granted for Defendant and denied for Plaintiff. R. at 11. NUWF and NUDEP each filed a Notice of Appeal. R. at 1. NUWF is challenging all four of the district court's holdings, while NUDEP is appealing only the court's findings that NUWF lacked standing to bring suit pursuant to CWA § 505, *id.* § 1365, and Defendant did not violate CWA §§ 301(a), 404, *id.* §§ 1311(a), 1344.

## STATEMENT OF THE FACTS

Prior to June 15, 2011, Defendant owned 1000 acres of land in the State of New Union "covered with trees and other vegetation characteristic of wetlands," wholly within the 100-year flood plain of the adjacent Muddy River—a 500-foot wide, navigable, recreational waterway—and hydrologically connected to the same. R. at 3. Additionally, while only 650 feet of Defendant's lot directly abut the Muddy, Defendant's "wetlands serve valuable functions in maintaining the integrity of rivers, including the Muddy, both acting to absorb sediment and pollutants and serving as buffers for flooding." R. at 6. Indeed, portions of Defendant's property "are inundated every year when the river is high," making it an ideal habitat for a wide variety of water-thriving wildlife such as frogs. R. at 3.

However, on June 15, 2011, Defendant began clearing the wetlands: he bulldozed trees and leveled other vegetation, pushed these debris into windrows that he subsequently burned,

and dug trenches, which he filled with the remaining trees, vegetation, and ashes. R. at 4. "[H]e [then] formed a wide ditch or swale to drain the field into the Muddy," leaving only a roughly 2.24 acre saturated strip of land adjacent to the river untouched "because it was the most difficult part of the property" to bulldoze. *Id.* At the conclusion of his work, on or about July 15, 2011, Defendant had transformed the 1000-acre mature wetland into a 997.76-acre field that, by September 2011, was sufficiently drained for sowing winter wheat. R. at 5.

NUWF is a non-profit corporation organized under the laws of New Union to protect fish and wildlife habitat of the state. R. at 4. At least three of its members—Dottie Milford, Zeke Norton, and Effie Lawless—have suffered injury due to Defendant's illegal acts. R. at 6. All three alleged they "use the Muddy for recreational boating and fishing, often picnicking on its banks, on or in the vicinity of Defendant's property." *Id.* They also stated, "[a]lthough they cannot see a difference in the land from the river or its banks, they are aware of the differences and feel a loss from the destruction of the wetlands" and fear the cumulative impact Defendant's actions could have on the area. *Id.* Ms. Milford testified that the Muddy looks more polluted to her than it did prior to the Defendant's activities. *Id.* Mr. Norton further averred that, although he has previously frogged the area for years with particular success on Defendant's property, in the time since the bulldozing activities have ceased, he has found no frogs in the drained field and only a handful in the remaining woods and buffer area. *Id.* Though Norton admitted he might have been trespassing when he frogged the former wetland, he also affirmed that his long-time frogging activities were area-wide and not limited to the Defendant's property. *Id.*

## STANDARD OF REVIEW

Federal courts of appeals review *de novo* district court decisions granting summary judgment. *Natural Res. Def. Council v. U.S. E.P.A.*, 543 F.3d 1235, 1249 (9th Cir. 2008).

## SUMMARY OF THE ARGUMENT

The order granting Defendant's motion for summary judgment and denying Plaintiff's motion for summary judgment should be reversed on all grounds. NUWF has standing to maintain this lawsuit through its members or on its own alone because both it and its members have suffered injuries fairly traceable to Defendant's destructive wetland-clearing activities and redressable by the remedies sought from this Court. That NUWF members lacked right of access to the wetland does not change the fact that they articulated individual encounters with, and observations of, the area sufficient to meet the three elements of standing required by *Lujan*.

Additionally, Defendant is violating CWA § 301 by discharging dredged and fill materials into navigable U.S. waters without a CWA § 404 permit. Defendant's operations, which involved the "sidecasting" and redeposit of dredged and fill material into his wetlands, are not exempted by the "incidental fallback" or Water Transfer Rule, and thus constitute the illegal discharge of dredged and fill material without a CWA § 404 permit in violation of CWA § 301(a). Further, because Defendant's CWA § 301(a) violation is ongoing, this Court has subject matter jurisdiction under CWA § 505 for two reasons: (1) the violations that have not been appropriately abated are ongoing violations; and (2) the Order fails to eliminate all risk of continuous or intermittent violations because the remedial actions were vastly inadequate.

This court also has proper subject matter jurisdiction because NUDEP failed to diligently prosecute Defendant for his CWA violation in two significant ways: (1) the Order does not meet EPA regulations for mitigation requirements because it fails to require sufficient restoration of

the polluted wetlands; and (2) by not imposing adequate statutory penalties, NUDEP failed to remove the economic benefit of non-compliance.

For the foregoing reasons, Plaintiff respectfully requests that this Court reverse the District Court's denial of summary judgment.

## ARGUMENT

### I. NUWF HAS STANDING TO MAINTAIN THIS LAWSUIT.

The district court disregarded longstanding law for CWA citizen-suit plaintiffs in holding NUWF lacked standing to maintain this lawsuit. Standing is a constitutional aspect of Article III's case-or-controversy limitation on federal judicial authority, Art. III, § 2; yet it also has a prudential aspect, "function[ing] to ensure . . . that the scarce resources of the federal courts are devoted to those disputes in which the parties have a concrete stake." *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 191 (2000). The standing inquiry ensures that a plaintiff has a sufficient personal stake in a dispute to render judicial resolution fitting, *Allen v. Wright*, 468 U.S. 737, 750-51 (1984), while simultaneously "assur[ing] that the legal questions presented to the court will be resolved . . . in a concrete factual context conducive to a realistic appreciation of the consequences of judicial action." *Valley Forge Christian Coll. v. Am. United for Separation of Church & State, Inc.*, 454 U.S. 464, 472 (1982).

In *Lujan v. Defenders of Wildlife*, the Supreme Court explained that "the irreducible constitutional minimum of standing contains three elements:" (1) an injury-in-fact that is (a) concrete and particularized and (b) actual or imminent, (2) causation, and (3) redressability. 504 U.S. 555, 560 (1992). Further, "[w]hile each of the three prongs of standing should be analyzed distinctly, their proof often overlaps." *Friends of the Earth, Inc. v. Gaston Copper Recycling Corp.*, 204 F.3d 149, 154 (4th Cir. 2000). The injury-in-fact prong requires that a plaintiff suffer

an invasion of a legally protected interest that is concrete and particularized and actual or imminent, as opposed to conjectural or hypothetical. *See id.* at 560. The causation prong means "there must be a causal connection" suggesting the injury is fairly traceable to the conduct complained of and not caused by the independent action of some third party not before the court. *See id.* Finally, the redressability prong necessitates the likelihood, and not mere speculation, that a favorable decision will remedy the injury. *See id.* at 561. Plaintiff meets these criteria, and the district court erred in granting defendant's motion for summary judgment as to NUWF's standing for three reasons: (1) Congress intended that NUWF have standing to enforce the CWA; (2) the factual record proves that NUWF has representational standing through three of its members; and (3) NUWF has organizational standing.

**A. <u>Congress intended that NUWF have standing to enforce the CWA.</u>**

NUWF—a not for profit entity organized for the primary purpose of protecting fish and wildlife habitat statewide—is the archetypal citizen-plaintiff contemplated by CWA § 505(a) and qualified to sue under Article III. 33 U.S.C. § 1365(a) (2006); R. at 4. Preserving terrestrial and aquatic habitat undoubtedly embraces protection of wetlands and waterways such as the Muddy River, and NUWF's individual members—whose membership dues and contributions fund the organization—have demonstrated use of the Muddy River on and near the affected property in a variety of ways consistent with this end. R. at 4, 6. That their recreational and aesthetic interests in the Muddy have been injured by the Defendant's destructive land-clearing activities and the lack of any commitment to mitigate that damage is illustrative of the members' individual connection to the area and their dedication to the aims exuded by NUWF. R. at 6.

### B. The factual record proves that NUWF has representational standing based on the standing of its members: Dottie Milford, Zeke Norton, and Effie Lawless.

To establish representational standing, an organization must demonstrate: (1) that one of its members would have standing; (2) that the interests to be protected are germane to the organization's purpose; and (3) that the suit does not require the member's participation. *Hunt v. Wash. State Apple Adver. Comm'n,* 432 U.S. 333, 343 (1977). To be sure,

> [t]he party invoking federal jurisdiction bears the burden of establishing these elements. . . . In response to a summary judgment motion . . . the plaintiff can no longer rest on . . . "mere allegations," but must "set forth" by affidavit or other evidence "specific facts[.]"

*Lujan*, 504 U.S. at 560-61 (internal citations omitted). NUWF has met that burden. It is self-evident that the protection of water quality and wildlife in and around the Muddy River is germane to the purpose of conservation-minded NUWF. R. at 4. Further, the issues involved in this suit—indefensible destruction of ecologically valuable wetlands absent any requisite permitting or opportunity for input—are precisely the environmental interests Plaintiff was organized to protect, and there is no need for the participation of individual NUWF members. Thus, the only issue remaining is the first criterion—whether NUWF individual members have standing. As demonstrated *infra,* the members have standing because they satisfy the three elements—injury, causation, and redressability—set forth in *Lujan*. 504 U.S. at 560.

#### 1. NUWF members have been injured by Defendant's continued discharge of pollutants into the wetland and adjacent Muddy River.

"[E]nvironmental plaintiffs adequately allege injury-in-fact when they aver that they use the affected area and are persons for whom the aesthetic and recreational values of the area will be lessened by the challenged activity." *Laidlaw,* 528 U.S. at 183 (internal quotation marks omitted); *see also Sierra Club v. Morton,* 405 U.S. 727, 734 (1972) ("Aesthetic and

environmental well-being, like economic well-being, are important ingredients of the quality of life in our society . . . deserving of legal protection through the judicial process.").

**a. Member testimony of repeated and desired future use of the area indicates actual injury.**

The Fifth Circuit previously held that neighboring citizens' concern about water quality in Galveston Bay sufficed as injury-in-fact where "[t]wo of the affiants live near Galveston Bay and all of them use the bay for recreational activities." *Sierra Club, Lone Star Chapter v. Cedar Point Oil Co. Inc.*, 73 F.3d 546, 556 (5th Cir. 1996). It was enough that "the affiants expressed fear that the discharge . . . will impair their enjoyment of these activities because these activities are dependent upon good water quality." *Id.* Importantly, a number of circuits have accepted that physical proximity is not a prerequisite to standing. The Ninth Circuit has recognized that "[r]epeated recreational use itself, accompanied by a credible allegation of desired future use, can be sufficient, even if relatively infrequent, to demonstrate that environmental degradation of the area is injurious to that person." *Ecological Rights Found. v. Pac. Lumber Co.*, 230 F.3d 1141, 1149 (9th Cir. 2000). Likewise, the Second Circuit found that citizen affidavits "quite adequately satisf[ied] the standing threshold," where (1) a citizen stated that "he passes the Hudson [River] regularly and find[s] the pollution in the river offensive to [his] aesthetic values," and (2) a father "averred that his children swim in the river, his son occasionally fishes in the river and his family has and will continue to picnic along the river." *Friends of the Earth v. Consol. Rail Corp.*, 768 F.2d 57, 61 (2d Cir. 1985). And the Eighth Circuit approved a citizens' group's standing whose members alleged that they "visit, cross, and frequently observe" the Mississippi River and "from time to time . . . use these waters for recreational purposes." *United States v. Metro. St. Louis Sewer Dist.*, 883 F.2d 54, 56 (8th Cir. 1989). Notably, these cases demonstrate that continued use of an area does not nullify the injury to one's interest in that area.

Similarly, Ms. Milford, Mr. Norton, and Ms. Lawless all testified "that they use the Muddy for recreational boating and fishing, *often* picnicking on its banks, on or in the vicinity of Bowman's property." R. at 6 (emphasis added). And, as the *Cedar Point Oil Co.* court noted, these types of activities are implicitly dependent on good water quality. 73 F.3d at 556. Further, the members averred that "they feel a loss from the destruction of the wetlands, fearing the Muddy is more polluted as a result." R. at 6. These aesthetic, environmental, and recreational injuries are actual and ongoing. There is nothing conjectural or hypothetical about (1) a pollutant-filled ditch seeping into former wetlands and draining into a river, (2) the members' awareness of such contamination when they frequent the area, or (3) the harm caused to their aesthetic and recreational interests. Furthermore, these injuries are by no means purely psychological: as addressed in Part IV, *infra*, the destruction of wetlands demonstrably results in enormous ecological impacts.

**b. Member testimony of observable impact on recreational and aesthetic interests indicates concrete and particularized injury.**

This case is distinguishable from those like *Public Interest Research Group, Inc. v. Magnesium Elektron, Inc.*, where the Third Circuit found no injury because the defendant's permit violations posed no threat to the aquatic ecosystem and plaintiffs failed to allege as much. 123 F.3d 111, 122-23 (3d Cir. 1997); *see also Friends of the Earth. Inc. v. Gaston Copper Recycling Corp.*, 179 F.3d 107, 114 (4th Cir. 1999) (finding no injury-in-fact where "none of the members even testified that there was an observable negative impact on the waters that they used or the surrounding ecosystem of such water"). In those cases, the plaintiffs could point to no observable impact on their interests. By contrast, Ms. Milford testified she has noticed the increasingly polluted waters of the Muddy, and Mr. Norton testified his enjoyment has been limited by the onset scarcity of frogs after years of demonstrated success frogging the area. R. at

6. Even if this court finds that Ms. Lawless has failed to allege the requisite observable impact on her interests, the associational standing standard requires only that NUWF demonstrate "*one* of its members would have standing." *Hunt*, 432 U.S. at 343 (emphasis added).

The district court dismissed these injuries as "speculative" because the members conceded that—from the water and shore—they perceived no difference in the land's appearance. R. at 6. In doing so, the court patently disregarded Ms. Milford's observations that the Muddy appeared more polluted since Defendant's wetland excavation and Mr. Norton's accounts of the impaired frog populations in the vicinity. *Id*. Notably, the Supreme Court has indicated that even "an identifiable trifle is enough for standing to fight out a question of principle . . . ." *United States v. Students Challenging Regulatory Agency Procedures ("SCRAP")*, 412 U.S. 669, 689 n. 14 (1973); *see also LaFleur v. Whitman*, 300 F.3d 256, 270 (2d Cir. 2002) (explaining the "injury-in-fact necessary for standing need not be large, an identifiable trifle will suffice"), *and Sierra Club v. Franklin Cty Power of Ill., LLC*, 546 F.3d 918, 925 (7th Cir. 2008) (same). The injuries described herein certainly surpass this standard.

**c. Members' right of access to Defendant's property is immaterial because their interests can be sated from nearby sites.**

Although the Supreme Court is silent on the issue of how right of access to a given area factors into the standing inquiry for injuries occurring thereon, the Ninth Circuit's *Cantrell v. City of Long Beach* is instructive in its explanation of why such access is immaterial to the standing inquiry. 241 F.3d 674, 680-81 (9th Cir. 2001). *Cantrell* involved association members whose interest in bird watching on and around a closed naval station was injured by the Navy's allegedly insufficient environmental impact statement. *Id*. at 676-78. Citing the Supreme Court's *Lujan* statement that the asserted injury must be an invasion of a "legally protected interest," the Navy contended that the birdwatchers could not establish standing because they lacked a legal

right to enter the closed station or to stand adjacent to the station and gaze over the property line at the birds and their habitat. *Id*. at 680 (internal citations omitted). The Ninth Circuit disagreed, explaining that it "need not decide whether the birdwatchers have a legal right of access . . . because their desire to view the birds . . . from publicly accessible locations outside the station is an interest sufficient to confer standing." *Id*. at 680-81. The court continued, stating

> [it] ha[s] never required a plaintiff to show that he has a right of access to the site on which the challenged activity is occurring, or that he has an absolute right to enjoy the aesthetic or recreational activities that form the basis of his concrete interest. If an area can be observed and enjoyed from adjacent land, plaintiffs need not physically enter the affected area to establish an injury in fact. . . . The injury in fact requirement is designed to ensure that the litigant has a concrete and particularized interest distinct from the interest held by the public at large. That the litigant's interest must be greater than that of the public at large does not imply that the interest must be a substantive right sounding in property or contract.

*Id*. at 681 (internal citations omitted).

The district court obfuscated Mr. Norton's legally cognizable interest in recreational and subsistence frogging with an interest in an illegal act of trespass when it stated, "[t]he inability to continue illegal activities cannot give rise to an injury to support standing." R. at 6. To be sure, if his interest were in frogging off-season or without a license, there might be some merit to that approach; however, the absence of any such allegations in the record strongly suggests that is not the case. Instead—like the birds in *Cantrell*—frogs can still be appreciated from adjacent land. Though Defendant's wetland was admittedly Mr. Norton's most fruitful frogging spot, frogs are mobile creatures and the absolute annihilation of a specific habitat surely impacts the overall health of the species' general population. Further, court approval of the Decree—permitting day-use only of the 3.36-acre easement—could not possibly remedy an injury to a recreational interest that ordinarily occurs at night. Thus, that Mr. Norton has been and will continue to be foreclosed from his longstanding tradition of frogging in the area supports a finding of injury.

**2. Defendant's clearing activities caused NUWF's members' injuries.**

To establish causation, the members' burden is to show that their injuries are "fairly traceable" to Defendant's illegal conduct; they are not required to show with scientific certainty that Defendant's conduct caused their injuries. *Public Interest Research Group, Inc. v. Powell Duffryn Terminals*, 913 F.2d 64, 72 (3d Cir. 1990). It is enough to show a "substantial likelihood" that Defendant's conduct caused the injuries. *Id*.

> In a [CWA] case, this likelihood may be established by showing that a defendant has 1) discharged some pollutant in concentrations greater than allowed by its permit 2) into a waterway in which the plaintiffs have an interest that is or may be adversely affected by the pollutant and that 3) this pollutant causes or contributes to the kinds of injuries alleged by the plaintiffs.

*Id*.

Defendant's illegal actions undeniably caused the pollution whose runoff Ms. Milford finds aesthetically injurious and that is responsible for destroying the frog habitat in which Mr. Norton has an interest. Furthermore, "[w]here a plaintiff has pointed to a polluting source as the seed of his injury, and the owner of the polluting source has supplied no alternative culprit, the 'fairly traceable' requirement can be said to be fairly met." *Gaston Copper*, 204 F.3d at 162. Here, Defendant points to no other polluting source that could be the cause of the members' injuries. Article III does not require more to demonstrate causation.

**3. Requiring Defendant to remove the dredged and fill material and restore the wetlands would likely redress the injuries.**

The *Lujan* redressability prong necessitates that a favorable decision would likely—as opposed to speculatively—remedy the members' injury. 504 U.S. at 561. Notably, Article III does not require remedies that would return sites to pristine condition. *Powell Duffryn Terminals*, 913 F.2d at 73. As established *supra*, NUWF has produced sufficient evidence that Defendant's illegal activities externalized aesthetic and recreational injuries to Ms. Milford, Mr. Norton, and

Ms. Lawless. The relief sought—civil penalties and an order compelling removal of dredged and fill material and restoration of the wetlands—would likely redress the injuries to the members in three important ways: (1) mitigating the pollution resulting from the addition; (2) alleviating the collective concerns that encumber the members' aesthetic and recreational interests in the Muddy River and its vicinity; and (3) restoring the wildlife populations typically expected and enjoyed by the members in this habitat. Such steps to reverse the Defendant's widespread destruction of wetlands and improve the property as habitat for wildlife in the area would likely redress the harms caused to Ms. Milford, Mr. Norton, Ms. Lawless, and—by extension—NUWF.

### C. NUWF has organizational standing.

The district court did not rule on whether NUWF has organizational standing. Organizational standing, however, provides an independent basis for standing in this case. Plaintiff's organizational standing is based on the same criteria used to establish standing for individual plaintiffs: injury, causation, and redressability. *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 378-79 (1982). NUWF readily meets these criteria.

#### 1. NUWF has suffered an injury-in-fact.

The Supreme Court has consistently held that an organization suffers injury if the defendant's actions undermine or threaten to undermine the organization's activities or programs. For example, in *Metropolitan Washington Airports Authority v. Citizens for the Abatement of Aircraft Noise, Inc.*, the Supreme Court held that a citizen group—whose goal was to reduce airport operations to alleviate noise and safety pollution—had standing to challenge a proposal making it more difficult to achieve that goal. 501 U.S. 252, 265 (1991). Likewise, NUWF was established to safeguard fish and wildlife habitat, a goal that Defendant's illegal activities have undermined in two significant ways. R. at 4. First, Defendant's dredging and filling has directly

frustrated NUWF's protective function by reducing and degrading wetland habitat and water quality; further, new wetland developments in the area—pursuant to the pending Decree—will only restore a mere fraction of the now-degraded wetland habitat, not expand it. R. at 4-6. Second, Defendant's failure to obtain the required permits for his illegal discharges eliminated any opportunity for NUWF to take earlier legal and political action to prevent the ensuing degradation of habitat. In light of these repercussions, NUWF meets the injury threshold.

**2. The injury is traceable to Defendant's dredging and filling of the wetlands.**

Defendant's illegal activities have directly injured NUWF. It is because Defendant leveled 997.76 acres of wetlands by filling them with pollutants and is now draining those pollutants into the Muddy without a permit that (1) NUWF's protective aims have been thwarted and (2) it was unable to prevent Defendant's actions so as to fulfill its organizational goals.

**3. The injury to NUWF is likely redressable by the relief sought.**

Finally, the redressability criterion is easily met. The requested relief—civil penalties and restoration of the wetlands—will ensure that Defendant will cease his illegal activities and take steps to mitigate the environmental harms he has caused and continues to cause. With these mitigation measures in place, the ongoing pollution to the Muddy will cease and the river quality and wetland habitat will be restored. These consequences directly remedy the injury to NUWF's interests in preserving the wetland as a habitat for fish and wildlife and, by extension, protecting the Muddy River from further degradation of water quality.

As articulated by the Supreme Court, "[s]tanding doctrine functions to ensure, among other things, that the scarce resources of the federal courts are devoted to those disputes in which the parties have a concrete stake." *Laidlaw*, 528 U.S. at 191. As demonstrated *supra*, NUWF—through its members and standing alone—indeed has "'such a personal stake in the outcome of

the controversy as to assure that concrete adverseness which sharpens the presentation of issues." *Duke Power Co. v. Carolina Envtl. Study Grp., Inc.*, 438 U.S. 59, 72 (1978).

## II. DEFENDANT IS VIOLATING CWA § 301(a) BY DISCHARGING DREDGED AND FILL MATERIAL INTO NAVIGABLE WATERS OF THE UNITED STATES WITHOUT A CWA § 404 PERMIT.

Congress enacted the CWA "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a) (2006). To achieve this goal, the CWA provides, "[e]xcept as in compliance with this section and sections . . . 1342 and 1344 of this title, the discharge of any pollutant by any person shall be unlawful," and further defines the "discharge of a pollutant" as "any addition of any pollutant to navigable waters from any point source." 33 U.S.C. §§ 1311(a), 1362(a) (2012).

Under CWA § 301(a), a person may lawfully discharge dredged and fill material if, in doing so, they are complying with proper permitting provisions of the CWA. *See* 33 U.S.C. § 1311(a) (2006). Two CWA provisions establish separate permitting systems for pollutant discharges under specific circumstances: §§ 402 and 404. *See* 33 U.S.C. §§ 1342, 1344 (2006). "[T]o avoid liability under the CWA, a defendant who wishes to discharge a pollutant must first obtain a permit either under § 1344 (a § 404 permit) for the discharge of dredged or fill material, or under § 1342 (a § 402 permit) for other pollutants." *Greenfield Mills, Inc. v. Macklin*, 361 F.3d 934, 946 (7th Cir. 2004). Permits for discharges of "dredged or fill material" are issued under § 404 by the United States Army Corps of Engineers ("the Corps"), while the Environmental Protection Agency (EPA) issues permits for discharges of pollutants other than "dredged or fill material" under § 402. Both permits may also be issued by an authorized State. *See* 33 U.S.C. §§ 1342, 1344 (2006). CWA § 404(a) specifically prohibits discharges of

"dredged and fill material" from a point source into navigable waters of the United States without a proper permit. 33 U.S.C. § 1344(a) (2012).

Here, the Defendant is violating CWA § 301(a) because he is discharging dredged and fill material from a point source into a navigable water of the United States without a CWA § 404 permit. *See* 33 U.S.C. §§ 1311(a), 1344 (2006).

**A. <u>Defendant's wetlands constitute a navigable water of the United States.</u>**

The CWA defines "navigable waters of the United States" as "the waters of the United States, including the territorial seas." 33 U.S.C. § 1362(7) (2006). The Supreme Court has recognized that "the Act's term 'navigable waters' includes something more than traditional navigable waters." *Rapanos v. United* States, 547 U.S. 715, 731 (2006) (plurality opinion).

Both the Corps and the Supreme Court have construed "navigable waters of the United States" to include wetlands adjacent to navigable waters of the United States. 33 C.F.R. § 328.2(a)(7) (2006); *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121 (1985). The Corps defines "wetlands adjacent to navigable waters" as those areas both "saturated by surface or ground water at a frequency and duration sufficient to support, and that [normally] support, a prevalence of vegetation typically adapted for life in saturated soil conditions," and "bordering, contiguous, or neighboring" navigable waters of the United States or "separated from [those waters] by man-made dikes or barriers . . . the like." 33 C.F.R. § 328.3 (b), (c).

The Supreme Court's holdings in *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers*, 531 U.S. 159 (2001) ("*SWANCC*") and *Rapanos* do nothing to undermine this jurisdiction. "*SWANCC* did not involve wetlands but held that nonnavigable, isolated, intrastate waters such as an abandoned sand and gravel pit were not waters of the

United States." *United States v. Lucas*, 516 F.3d 316, 326 (5th Cir. 2008) (internal quotations omitted). The *Rapanos* plurality held for wetlands to be covered, two findings must be made:

> First, that the adjacent channel contains a "wate[r] of the United States," (*i.e.*, a relatively permanent body of water connected to traditional interstate navigable waters); and second, that the wetland has a continuous surface connection with that water, making it difficult to determine where the "water" ends and the "wetland" begins.

*Rapanos*, 547 U.S. at 742 (plurality opinion). In his concurrence, Justice Kennedy forewent the plurality's test and instead proffered the "significant nexus" test for determining whether an "adjacent wetland" comes within the Corps' jurisdiction. Under the "significant nexus test," "the Corps' jurisdiction over wetlands depends upon the existence of a significant nexus between the wetlands in question and navigable waters in the traditional sense[;]" "wetlands possess the requisite nexus . . . if the wetlands, either alone or in combination with similarly situated lands in the region, significantly affect the chemical, physical, and biological integrity of other covered waters more readily understood as navigable." *Id*. at 779-80 (Kennedy, J., concurring).

Under both tests, the Defendant's property is wetlands and is within the Corps' CWA jurisdiction. Initially, Bowman's property constitutes wetlands because it becomes inundated annually when the Muddy River is high and supports vegetation that is adapted for wetlands growth. R. at 3; *see also* 33 C.F.R. § 328.3(b) (2006). Defendant's wetlands also fall within the Corps' jurisdiction because the wetlands are adjacent to a navigable water of the United States, as defined by the Corps and the Supreme Court. First, all parties to this action have stipulated that the Muddy River is a navigable water of the United States. R. at 9. Further, Defendant's property borders the Muddy, is wholly within the Muddy's 100-year flood plain, and is "hydrologically connected to the Muddy." R. at 3. Thus, under both the *Rapanos* plurality's test and Justice Kennedy's "significant nexus" test, Defendant's wetlands fall within the Corps'

"adjacent wetlands" jurisdiction because they have a "continuous surface connection" with the Muddy and, due to this hydrological connection, "significantly affect" the River's integrity. *See Rapanos*, 547 U.S. at 742, 779-80 (plurality opinion), (Kennedy, J., concurring).

### B. The dredged and fill material produced by Defendant's land-clearing operation is a CWA pollutant.

The CWA defines pollutant as "dredged spoil, solid waste, incinerator residue, sewage, garbage, sewage sludge, munitions, chemical wastes, biological materials, radioactive materials, heat, wrecked or discarded equipment, rock, sand, cellar dirt and industrial, municipal, and agricultural waste discharged into water." 33 U.S.C. § 1362(6) (2006). Although "dredged and fill material" are notably absent from this list, as the district court acknowledged, "dredged and fill material" may be comprised of other pollutants that are listed. R. at 8.

#### 1. Defendant's land-clearing operations produced dredged and fill material.

Although the term is left undefined in the CWA, the Corps has issued regulations defining "dredged material" to mean "material that is excavated or dredged from waters of the United States," and courts across the country have consistently applied this definition in CWA cases. 33 C.F.R. § 323.2(c) (2012); *see also Avoyelles Sportsmen's League, Inc. v. Marsh*, 715 F.2d 897, 925 (5th Cir. 1983); *United States v. Deaton*, 209 F.3d 331, 335 (4th Cir. 2000). Further, many of these same courts have found that the product of ditch digging, under circumstances similar to Defendant's, was dredged material. For example, the *Avoyelles* court also found that the defendant's "digging of ditches and holes" constituted dredging under the Corps' definition. *Avoyelles*, 715 F.2d at 925. Similarly, the defendant in *Deaton*—a contractor—dug a ditch across the wetland property in question, removing "earth and vegetable matter from the wetland" as he did so. 209 F.3d at 335. The *Deaton* court held that, "[o]nce it

was removed, that material became 'dredged spoil,' a statutory pollutant and a *type* of material that up until then was not present on the . . . property." *Id*. at 336 (emphasis in original).

Thus, contrary to the district court's conclusion, Defendant's land clearing activities *did* produce material that was "excavated or dredged from waters of the United States." *Id*. Defendant dug several trenches on his property, both for disposal and drainage purposes. R. at 4. In doing so, Defendant excavated material from waters of the United States, which material then constituted "dredged material" under the Corps' definition. *See* 33 C.F.R. § 323.2(c) (2012).

NUWF further agrees with the district court that Defendant's clearing activities also produced "fill material." The Corps defines "fill material" to mean "material placed in waters of the United States where the material has the effect of: (i) Replacing any portion of a water of the United States with dry land; or (ii) Changing the bottom elevation of any portion of a water of the United States." 33 C.F.R. § 323.2(e)(1) (2012). The regulations also proffer "[e]xamples of such fill material[, as] includ[ing], but . . . not limited to: rock, sand, soil, clay, . . . construction debris, wood chips, overburden from mining or other excavation activities, and materials used to create any structure or infrastructure in the waters of the United States." *Id*. at § 323.2(e)(2)-(3). And, the *Avoyelles* court found that where "the burying of the unburned material . . . had the effect of filling in the sloughs on the tract and leveling the land . . . the landowners [had] discharg[ed] '*fill material*' into the wetlands." 715 F.2d at 924-25 (emphasis added).

Here, the district court found that Defendant "pushed the trees and vegetation into windrows," "burned the windrows," and then "[dug] trenches and pushed the trees and leveled vegetation remains and ashes into them." R. at 4. In doing so, Defendant replaced a portion of his wetlands with dry materials, simultaneously filling in and changing the wetlands' elevation. Because the trees, vegetation remains, and ashes Defendant placed in his wetlands had the effect

of replacing a portion of the wetlands with dry land and changing their elevation entirely, they constitute fill material under the Corps' definition. *See* 33 C.F.R. 323.2(e)(1) (2012).

**2. The dredged and fill material Defendant produced is a CWA pollutant.**

The "trees and leveled vegetation remains and ashes" Defendant placed in the wetlands is also a CWA pollutant. R. at 4. While "dredged and fill material" is not a listed pollutant in the CWA, the district court correctly noted that "dredged and fill material" "may be composed of other pollutants," and "[t]he tree and leveled vegetation remains" that resulted from the Defendant's activities are "biological material[s]," a listed pollutant. R. at 8; 33 U.S.C. § 1362(6) (2006). Courts have also held dirt piles and material resulting from dredging is "dredged spoil," another CWA pollutant. *See United States v. Cundiff*, 555 F.3d 200, 213-14 (6th Cir. 2009) ("[O]nce you have dug up something, it becomes 'dredged spoil,' a statutory pollutant and a type of material that up until then was not present [in the wetlands]."). Thus, because the "dredged and fill material" that resulted from Defendant's land clearing operations was both "biological material" and "dredged spoil," and "[n]o party contests that the material Bowman moved about the property included pollutants," it is a CWA pollutant. *See* 33 U.S.C. § 1362(6) (2012); R. at 8.

**C. <u>Defendant's bulldozers are point sources.</u>**

The term "point source" is defined broadly in the CWA to mean "any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well . . . or other floating craft, from which pollutants are or may be discharged." 33 U.S.C. § 1362(14) (2012); *see also Borden Ranch P'ship v. U.S. Army Corps of Eng'rs*, 261 F.3d 810, 815 (9th Cir. 2001) ("The statutory definition of 'point source' . . . is extremely broad."). And, courts have consistently interpreted mechanized land clearing equipment to constitute a

point source for the purposes of the CWA. *See Avoyelles*, 715 F.2d 922 (finding that "the bulldozers and backhoes [used for dredging the wetlands] were 'point sources'").

Here, the district court found

> [Defendant] *used bulldozers* to knock down trees, level other vegetation, and push the trees and vegetation into windrows. [The Defendant] then burned the windrows. Next, he *used a bulldozer* to dig trenches and pushed the trees and leveled vegetation remains and ashes into them. [Presumably using the bulldozer,] he leveled the resulting field, again pushing soil from high portions of the field into the trenches and low lying portions of the field.

R. at 4 (emphasis added). The district court also noted, "[n]o party contests that the bulldozers [are] point sources," R. at 8, and proceeded to hold the same. *Id*. For these reasons, NUWF agrees with the district court's conclusion that Defendant's bulldozers constitute point sources.

### D. Defendant commenced an ongoing discharge of pollutants into his wetlands by inserting "dredged and fill material" into them.

#### 1. Defendant's discharge of "dredged and fill material" into his wetlands does not fall within the "incidental fallback" exception.

Although not defined in the CWA, the Corps has defined the "discharge of dredged material" to mean "any addition of dredged material into, including redeposit of dredged material other than incidental fallback within, the waters of the United States." 33 C.F.R. § 323.2(d)(1) (2012). The Corps' regulations further state:

> The term includes, but is not limited to, the following:
>
> > (i) The addition of dredged material to a specified discharge site located in waters of the United States; . . .
> > (iii) Any addition, including redeposit other than incidental fallback, of dredged material, including excavated material, into waters of the United States which is incidental to any activity, including mechanized land clearing, ditching, channelization, or other excavation.

*Id*. These same regulations expressly exempt "incidental fallback" from this definition but conversely make clear that activities "involv[ing] mechanized pushing, dragging, or other similar

activities that redeposit excavated soil material" constitute a discharge of dredged material. 33 C.F.R. §§ 323(d)(2)(ii), 323(d) (2012). The Corps has also defined the "discharge of fill material" to mean "the addition of fill material into waters of the United States," and has stated, "[t]he term generally includes, without limitation, the following activities: . . . site-development fills for recreational, industrial, . . . residential, or other uses." 33 C.F.R. § 323.2(f) (2012).

Courts have also dealt with the issue of pinpointing when a "discharge of dredged and fill material" has occurred. Courts have limited the "incidental fallback" exception to "material that is returned *substantially* to the same spot as the removal," and "soil that is disturbed when dirt is shoveled, or the back spill that . . . falls back into the same place from which it was removed." *Am. Mining Congress v. U.S. Army Corp of Engineers*, 120 F.Supp.2d 23, 30 (D.D.C. 2000) ("*AMC I*") (emphasis in original); *United States v. Bay-Houston Towing Co., Inc.*, 33 F.Supp.2d 596, 605 (E.D. Mich. 1999). The *AMC I* court also verified that, while the Corps may not regulate "incidental fallback" discharges, it may "assert[] jurisdiction over ditching to the extent it involves redeposit otherwise regulable under [CWA §] 404." 120 F.Supp.2d at 32.

Similarly, the *Bay-Houston* court found the defendant's conduct at issue did not implicate the "incidental feedback" exception because, "[i]n excavating the ditches, [the defendant] used backhoes, excavators and . . . ditching machines to dig into the peat and clay layers of the [wetlands]," and "the excavated peat and clay were deposited onto the side of the ditches." 33 F.Supp.2d at 599, 605. The court held these activities constituted "sidecasting" and were "very different from incidental fallback" because, "[u]nlike incidental fallback, [they] involved purposeful relocation." *Id*. at 605. In holding that "sidecasting" constitutes an "addition," the *Bay-Houston* court explained that "'[s]idecasting' involves placing removed soil in a wetland but at some distance from the point of removal (e.g., by the side of an excavated ditch)," and such

activities have been consistently regulated under CWA § 404. *Id*. *See also Deaton*, 209 F.3d at 334 (holding that "sidecasting" is the discharge of a pollutant that violates the CWA).

Here, Defendant discharged dredged and fill material into his wetlands in two ways. First, Defendant "sidecasted" his dredged and fill material when he used bulldozers to excavate dirt and earth materials from his wetlands and cast them aside in a different part of the same, re-depositing the pollutant on his wetlands in violation of § 301(a). R. at 4; *see generally Bay-Houston*, 33 F.Supp.2d at 605; *Deaton*, 209 F.3d at 334. He also "discharge[d] a pollutant" into his wetlands when he redeposited this "dredged and fill material" into the trenches he had dug in his wetlands to level the elevation of the same. *See* R at 4; *Avoyelles*, 715 F.2d at 929-30.

**2. Defendant's redeposit of "dredged and fill material" into his wetlands constitutes a "discharge of dredged and fill material."**

The district court made much of the EPA's 1982 definition of "addition" as "from the outside world," as described in *National Wildlife Federation v. Gorsuch*, 693 F.2d 156, 174-75 (D.C. Cir. 1982) ("EPA responds that addition from a point source occurs only if the point source itself physically introduces a pollutant into water from the outside world."). R. at 9. However, this case is distinguishable from *Gorsuch*. *Gorsuch* was decided in the context of the CWA § 402 permitting program, rather than that of CWA § 404, and thus did not involve the "discharge of dredged and fill material" or the Corps' interpretation of the same. *Id*. Further, although only informal agency statements and consistent litigation positions evidenced *the EPA's* proffered interpretation of the term "addition," the *Gorsuch* court gave *the EPA's* interpretation overwhelming deference. *Id*. at 174 ("We must accept that interpretation unless it is manifestly unreasonable."). In contrast, "[r]ecent Supreme Court cases emphasize that such agency statements do not deserve broad deference of the sort accorded by the *Gorsuch* . . . court[]" and do not "come close to the sort of formal, binding articulation of an agency's views

that would justify *Chevron* deference." *Catskill Mountains Chapter of Trout Unltd., Inc. v City of New York*, 273 F.3d 481, 490-91 (2d Cir. 2001).

Alternatively, the Corps' current regulations, which *are* a formal and binding articulation of the Corps' position and have been upheld and applied by courts across the country, define the "discharge of dredged material" to include the redeposit of dredged material. *See* 33 C.F.R. § 323.2(d)(1) (2012); *see also Borden Ranch*, 261 F.3d at 814-15 ("activities that destroy the ecology of a wetland are not immune from the [CWA] merely because they do not involve the introduction of material brought in from somewhere else"); *Avoyelles*, 715 F.2d at 929-30 ("[I]n filling in the sloughs and leveling the land, the landowners were redepositing fill material into waters of the United States, and . . . these activities constituted a 'discharge of a pollutant.'").

**3. Defendant's discharge of "dredged and fill material" into his wetlands is not exempted by the Water Transfer Rule.**

The district court also found that the EPA's interpretation of "addition" in its Water Transfer Rule—which incorporates the EPA's "'unitary navigable waters' theory, under which all navigable waters are one for the purposes of [section] 301(a) of the CWA"—was controlling and entitled to *Chevron* deference. R. at 9; *see also* 40 C.F.R. Part 122 (2012). The court applied the EPA's interpretation that "transferring pollutants from one navigable water to a second . . . does not add those pollutants to the second navigable water" to Defendant's actions and concluded that Defendant had "added nothing to his wetland when he moved material from one part of the field-in-preparation to another part of the field-in-preparation." R. at 9-10.

Although NUWF agrees with the district court that the EPA's Water Transfer Rule is entitled to *Chevron* deference, NUWF's agreement with the district court ends there because the district court's reliance on the EPA's Water Transfer Rule is misplaced in this case. *See Friends of the Everglades v. South Florida Water Management Dist.*, 570 F.3d 1210, 1228 (11th Cir.

2009). The Water Transfers Rule applies only to the CWA § 402 permitting program and does not apply to the CWA § 404 permitting program at issue in this case. This is evidenced by the EPA's regulations themselves: 40 C.F.R. § 122.3 exempts both "[d]ischarges from a water transfer" *and* "discharges of dredged and fill material into waters of the United States which are regulated under section 404 of [the] CWA" *from the NPDES permitting program*. 40 C.F.R. §§ 122.3(b), 122.3(i) (2012) (emphasis added). Thus, on its face, the EPA's Water Transfer Rule only exempts discharges from the NPDES permitting program under CWA § 402. *Id*; *see also* 33 U.S.C. § 402 (2012). And, this view is supported by the case law interpreting and applying the Water Transfer Rule. *See, for example, Friends of the Everglades*, 570 F.3d at 1217-28; *West Virginia Highlands Conservancy, Inc. v. Huffman*, 625 F.3d 159, 167 (4th Cir. 2010) ("40 C.F.R. § 122.3 sets for a list of 'exclusions' from the *NPDES permit requirement*") (emphasis added).

Therefore, because the Defendant's digging and leveling operations involved the redeposit of a pollutant into his wetlands, which *is* regulated by the Corps under 33 C.F.R. § 323.2(d)(1) and *is not* exempted under the "incidental fallback" or Water Transfer Rule permitting exceptions, the Defendant's actions constituted the "discharge of a pollutant."

## III. THIS COURT HAS SUBJECT MATTER JURISDICTION BECAUSE THE DEFENDANT'S INSUFFICIENTLY ABATED VIOLATION IS ONGOING AND THE ORDER FAILS TO ELIMINATE ALL RISK OF CONTINUING VIOLATIONS.

CWA § 505 expressly grants courts authority to hear citizen-suits to prosecute ongoing violations. "[A]ny citizen may commence a civil action . . . against any person . . . who is alleged to be in violation of [the CWA]." § 1365(a)(1). The Supreme Court has interpreted this provision as "a requirement that citizen-plaintiffs allege a state of either continuous or intermittent violation–[i.e], a reasonable likelihood that a past polluter will continue to pollute in the future." *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Found., Inc*., 484 U.S. 49, 57 (1987).

In this case, after violating CWA § 404, Defendant's failure to take adequate remedial measures is a continuing violation "because it is not the physical act of discharging dredge wastes itself that leads to the injury . . . but the consequences of the discharge in terms of lasting environmental degradation." *N.C. Wildlife Fed'n v. Woodbury*, No. 87 584 CIV 5, 1989 WL 106517, at *1, *2 (E.D.N.C. Apr. 25, 1989). Thus, subject matter jurisdiction is appropriate for two reasons: (1) Defendant's violations are ongoing because they have not been appropriately abated; and (2) the Order fails to eliminate all risk of continuous or intermittent violations.

### A. Defendant's land remains in violation because substantially all of the dredged and fill material discharged without a permit remains unabated.

The CWA characterizes the citizen-suit as "abatement." *Gwaltney*, 484 U.S. at 61. A citizen-suit is a proper measure of enforcement where activity subject to abatement is inadequately addressed by the government. *Id*. To be properly abated, dredged and fill material must be sufficiently removed to restore a wetland to its natural state. As Justice Scalia concurred in *Gwaltney*, "[w]hen a company has violated an effluent standard or limitation, it remains for purposes of [§ 1365(a)] 'in violation' of that standard or limitation so long as it has not put in place remedial measures that clearly eliminate the cause of the violation." 484 U.S. at 69.

The issue of dredged or fill material remaining in a wetland as an ongoing violation was addressed in *Sasser v. Administrator*, 990 F.2d 127 (4th Cir. 1993). Sasser discharged dredged or fill material into wetlands and refused to restore the property to its previous wetland condition. *Id*. Reasoning that "[e]ach day the pollutant remain[ed] in the wetlands without a permit constitute[d] an additional day of violation [by Sasser]," the *Sasser* court upheld the EPA's imposition of a $125,000 fine and implementation of a restoration plan as appropriate for the continuing violation at issue. *Id*. at 129 (internal citations omitted).

Like Sasser, Defendant violated CWA §§ 301 and 404 when he discharged dredged and

fill material into his wetlands. *See* Section II, *supra*. And, Defendant was never issued a CWA § 404 permit prior to or during his destruction of the wetlands. R. at 4, 9. Instead, the Order only required Defendant to create a minimal 1.12 acres of artificial wetland out of the nearly 998 acres of wetlands he destroyed. R. at 4. Thus, substantially all of Defendant's property remains in violation of CWA § 301 because the remedial measures put in place have failed to "clearly eliminate the cause of the violation." *Gwaltney*, 484 U.S. at 69 (Scalia, J., concurring)).

It is true that some circuits have continued to follow a narrow interpretation found in the pre-*Gwaltney* case of *Hamker v. Diamond Shamrock Chemical Co.* holding that "continuing residual effects resulting from a discharge are not equivalent to a continuing discharge." 756 F.2d 392, 397 (5th Cir. 1985). *Hamker* involved a dispute between defendants, oil pipeline owners who had attempted to remediate damage caused by their pipeline's leak into a nearby creek, and plaintiffs, who were seeking a court order requiring the defendants to take precautions to prevent possible future violations. *Id*. at 394. Ultimately, the *Hanker* court dismissed the case for lack of subject matter jurisdiction because the plaintiffs had not properly asserted an ongoing violation. *Id.* at 398 (finding that "the only violation of the [CWA] which [was] alleged here [was] a single past discharge for which no prospective relief [was] possible"). *See also Conn. Coastal Fishermen's Ass'n v. Remington Arms Co*., 989 F.2d 1305, 1309-13 (2d Cir. 1993) (holding that defendant's failure to reopen his club where the illegal violations occurred and a state agency order requiring the defendant to cease all further discharges and undertake extensive cleanup had already addressed the issue by the time the plaintiff brought suit).

Conversely, in this case, Defendant's violation could have been, but was not, abated. Therefore, it is still an ongoing violation. Defendant's violation is more comparable to that of the defendant's in *Benjamin v. Douglas Ridge Rifle Club*, 672 F.Supp.2d 1210, 1222-23 (D. Or.

2009). In *Benjamin*, the rifle club had filled wetlands in violation of Oregon law, and the club and the state of Oregon had subsequently entered into a consent agreement requiring the club to prepare new wetlands, restore some of the illegally-filled wetlands, and satisfy a civil penalty. *Id*. However, because the agreement left some of the damaged wetlands unrepaired, the *Benjamin* court held that the club's violation remained ongoing, and that the plaintiff was not awarded the relief requested with regard to those unrepaired wetlands. *Id*. Likewise, here Defendant entered into an agreement that required mitigation in the form of creating a new wetland area, but that still leaves more than ninety-nine percent of the destroyed wetlands unaddressed and unrepaired. R. at 4-5. Also like the *Benjamin* plaintiffs, NUWF has not received the remedy it has requested because the mitigation measures fail to restore the Defendant's field to a wetland by removing the dredged and fill material. *See Benjamin*, 627 F.Supp.2d at 1210. Therefore, this Court has subject matter jurisdiction.

**B. The Order fails to eliminate all risk of continuous or intermittent violations.**

On rehearing of *Gwaltney*, the Fourth Circuit outlined two factors for determining whether there was an ongoing violation: 1) whether curative remedial actions were taken, and whether those remedial measures would be effective, or 2) any other evidence that the risk of continued violation by the defendant had been completely eradicated at the time the citizen-suit was filed. *Chesapeake Bay Found. v. Gwaltney of Smithfield, Ltd.*, 844 F.2d 170, 172 (4th Cir. 1988). Under this test, subject matter is proper because the remedial actions taken were not adequate, and the agreement does not completely eliminate the risk of continued violations.

NUDEP properly charged Defendant with a CWA violation and entered the Order requiring him to refrain from clearing any additional wetlands, grant New Union a conservation easement, and create an artificial wetland in a buffer zone between the easement and his new

wheat field. R. at 4. However, because the Order did not require Defendant to remove any of the dredged or fill material from the damaged wetlands, the pollutants remain therein without a CWA § 404 permit. Furthermore, even though the agreement forbids Defendant from clearing additional wetlands, there are only 3.36 acres—out of 1000—remaining. This vast disparity between the 996 acres of wetlands lost and the minimal 3.36 acres set aside has not "clearly eliminate[d] the cause of the violation." *Gwaltney,* 484 U.S. at 69 (Scalia, J., concurring)).

That Defendant's property lost its wetlands character due to his illegal activities is comparable to the *Woodbury* case. 1989 WL 106517, at *1. The *Woodbury* plaintiffs sought an injunction requiring the defendants to restore ditched and drained areas to their natural state because the lost wetlands could no longer serve their necessary ecological functions. *Id.* Even though the defendants had not discharged dredged or fill materials for the six years preceding suit's commencement, they had not taken any actions to restore the ecological functions of the lost wetlands. *Id.* The court held that "[t]reating the failure to take remedial measures as an ongoing violation is eminently reasonable[,]" using Justice Scalia's reasoning in *Gwaltney* that the phrase "'to be in violation,' . . . suggests a 'state rather than an act-the opposite of state of compliance . . . ." *Id.* at *2 (quoting *Gwaltney*, 484 U.S. at 69 (Scalia, J., concurring)).

The reasonableness of this approach was more recently upheld in *City of Mountain Park, GA v. Lakeside at Ansley, LLC,* 500 F.Supp.2d 1288, 1296 (N.D. Ga. 2008). After reviewing the various court holdings, the court selected the *Woodbury* approach because of the nature of the alleged pollution in both cases—deposited sediment and fill material. *Id.* Deposited fill materials "do not significantly dissipate or dissolve over time," in contrast to the pollutants at issue in other court cases that have more narrowly applied the ongoing violation standard. *Id.* (distinguishing leachate plume in *Aiello v. Town of Brookhaven*, 136 F.Supp.2d 81 (E.D.N.Y.

2001), and petroleum products in *Wilson v. Amoco Corp*., 33 F.Supp.2d 969 (D. Wyo. 1988)). Similarly, because NUDEP's Decree neither requires Defendant to restore his polluted wetlands to their natural state nor to remove the dredged and fill material from them, the risk of continuing violations has not been eliminated. Therefore, subject matter jurisdiction is proper.

## IV. THIS COURT HAS SUBJECT MATTER JURISDICTION BECAUSE NUDEP DID NOT DILIGENTLY PROSECUTE DEFENDANT FOR HIS CWA VIOLATION.

The citizen-suit provision of CWA authorizes citizens to bring suit as a check to ensure the state and federal governments are diligently prosecuting violators. *Sierra Club v. Hamilton Cnty. Bd. of Cnty. Comm'rs,* 504 F.3d 634, 637 (6th Cir. 2007). A government enforcement action is presumed diligent when it "is capable of requiring compliance with the [CWA] and is in good faith calculated to do so." *Friends of Milwaukee's Rivers v. Milwaukee Metropolitan Sewerage Dist.*, 382 F.3d 743, 760 (7th Cir. 2004), *reh'g denied* (2004). However, courts must do more than "mere[ly] accept[] at face value the potentially self-serving statements of a state agency and the violator." *Id*. Rather, "[a]n evaluation of 'diligence' measures comprehensively the process and effects of agency prosecution." *Student Pub. Interest Research Group, Inc. v. Fritzsche, Dodge, & Olcott, Inc.*, 579 F.Supp. 1528, 1535 (D.N.J. 1984). Looking to the context of the State's prosecution, NUDEP failed to diligently prosecute for two reasons: (1) the Decree does not meet the EPA regulations for mitigation because it does not require any restoration of the polluted wetlands, 40 C.F.R. § 230.93(a)(1) (West 2008); and (2) NUDEP failed to "remove the economic benefit of non-compliance," by not imposing any statutory penalties. *Ohio Valley Envtl. Coal., Inc. v. Hobet Min., LLC*, 723 F.Supp.2d 886, 908 (S.D.W. Va. 2010).

### A. <u>The Order does not meet the EPA regulations for mitigation because it does not require sufficient restoration of the polluted wetlands.</u>

Congress has expressly prohibited the discharge of dredged and fill material into

wetlands without a permit because of the crucial functions wetlands serve to the waters of the United States. *See Woodbury,* 1989 WL 106517 at*1. The EPA recognized Congress' goal of protecting vital wetlands, but also the reality that it may not be possible to adequately restore wetlands that are harmed under permitted activities. § 230.93(a)(1) (2008). Thus, when a permitted activity cannot be restored, the EPA requires the permit to include compensatory mitigation such as the creation or set-aside of equivalent wetlands. *Id.*

The EPA established General Compensatory Mitigation Requirements ("Mitigation Requirements") to "offset environmental losses resulting from unavoidable impacts to waters of the United States authorized by DA permits." § 230.93(a)(1). The Mitigation Requirements mandate mitigation be "relative to the impact site and their significance within the watershed" that would have been subject to a CWA permit. *Id*. Additionally, restoration should be the first option "because the likelihood of success is greater and the impacts to potentially ecologically important uplands are reduced compared to establishment, and the potential gains in terms of aquatic resource functions are greater, compared to enhancement and preservation." § 230.93(a)(1), (2). "The ultimate goal of a watershed approach is to maintain and improve the quality and quantity of aquatic resources within watersheds . . . ." § 230.93(c)(1).

In this case, not only did Defendant fail to obtain a permit, but, after NUDEP's discovery of Defendant's illegal discharge, he was not required to sufficiently restore the polluted wetlands. Instead, Defendant's only compensatory mitigation was to set aside a measly 3.36 acres for a conservation easement and an artificial wetland. R. at 4. This mitigation was in contravention of the Mitigation Requirements because it did not adequately compensate for the loss of the nearly 1000 acres of wetlands. "Wetlands serve ecologically valuable purposes by acting as natural flood control mechanisms by slowing and storing storm water runoff, by

recharging groundwater supplies, by biologically filtering and purifying water, and by providing habitat for many forms of terrestrial and aquatic wildlife." *Woodbury*, 1989 WL 106517 at *1. It would defy reason to presume that 3.36 acres will adequately "maintain and improve the quality and quantity of the [Muddy River]" as did the former 1000 acres of wetlands. *Id*.

Furthermore, there is no evidence the public had any input in these mitigation measures, also in direct contravention of the Mitigation Requirements. § 230.94(b)(2). Had Defendant legally applied for a CWA permit, there would have been an opportunity for public input before NUDEP decided whether to grant the permit. Thus, in failing to provide for public comment periods or require Defendant's wetlands to be significantly restored, the Decree does not meet the Mitigation Requirements and is not a diligent prosecution of Defendant for his violation.

**B. The set-aside of 3.36 acres in lieu of imposing statutory penalties is not diligent prosecution because it failed to remove the economic benefit of non-compliance.**

Ultimately, if such meager mitigation measures were considered adequate, and thus barred citizen-suits, "violators would have a powerful incentive to conceal their activities from public and private scrutiny," leading "to serious problems in public and private enforcement of the [CWA]." *Woodbury*, 1989 WL 106517 at *2. Though Defendant claims a wholly past violation under *Gwaltney*, that case did not address whether citizens are entitled to a resolution regarding penalties. Charles N. Nauen, *Citizen Environmental Lawsuits After Gwaltney: The Thrill of Victory or the Agony of Defeat?*, 15 Wm. Mitchell L. Rev. 327, 350-51 (1989).

The district court acknowledged, "[a]lthough the statute authorizes NUDEP to include an administrative penalty of up to $125,000 in such orders, NUDEP included no penalty i[n] the order to [Defendant]." R. at 4. Even if Defendant convinces the court he is unlikely to violate the CWA in the future, the court should distinguish between citizen-suits intended to prosecute only wholly past violations and citizen-suits brought to rectify inadequate penalties. Nauen,

*supra*, at 350-51. "A lenient penalty that is far less than the maximum penalty may provide evidence of non-diligent prosecution." *Friends of the Earth, Inc. v. Laidlaw Envtl. Serv. (TOC), Inc.*, 890 F.Supp. 470, 491 (D.S.C. 1995), *recons. and cert. den'd* (1995). CWA § 309(g) provides specific statutory factors to consider when determining the appropriate penalty amount: the nature, circumstances, extent and gravity of the violation(s), and the violator's ability to pay, prior history of violations, degree of culpability, economic benefit or savings resulting from the violation, and such other matters as justice may require. 33 U.S.C. § 1319(g)(3) (2006); R. at 4. Based on these factors, the Decree fails to diligently prosecute Defendant because it imposes an inadequate penalty and fails to remove the economic benefit of non-compliance.

Initially, with regard to the nature, circumstances, and gravity of the violation, Defendant's illegal, permit-less discharges destroyed 996 acres of wetlands and the significant loss of the "valuable functions in maintaining the integrity of rivers, including the Muddy, both acting to absorb sediment and pollutants and serve as buffers for flooding." R. at 6. The Mitigation Requirements state that if compensatory mitigation is necessary, "the amount of required compensatory mitigation must be, to the extent practicable, sufficient to replace lost aquatic resource functions." 40 C.F.R. § 230.93(f)(1). Yet, the 3.36 acres cannot sufficiently provide "aquatic resource functions" equivalent to that provided by the lost 996 acres. *Id*.

Second, although the record does not disclose whether Defendant has a history of past violations or failed to comply with the Order, Defendant's costs are still particularly minimal compared to the $125,000 that NUDEP could have assessed. Defendant's economic losses include only the cost of creating barely one acre of wetland and the provision of 2.26 acres for a conservation easement. R. at 4. But, because "[he had already] left a strip of land approximately 150 feet wide adjacent to the Muddy to clear after it had drained," Defendant incurred no cost for

this portion of the land, since he had not yet dredged or filled it. *Id*. Thus, Defendant's economic impact is minimal in that the land's serviceable value as a conservation easement remains the same as it was prior to his violation. Instead, Defendant received a sizeable economic gain by converting 996 acres into farmable land at the expense of the community's loss of vital ecological and recreational services that the wetlands had previously provided the Muddy River. This Court thus has subject matter jurisdiction because the mitigation's failure to eliminate the economic benefit Defendant gained through his violation is not diligent prosecution.

## V. CONCLUSION

NUWF has suffered an injury that is fairly traceable to Defendant's clearing activities and redressable by the remedies sought from this Court. That NUWF members lacked right of access to the wetland does not change the fact that they articulated individual encounters with and observations of its environs sufficient to meet the three elements of standing under *Lujan*, and thus satisfy constitutional and prudential standing requirements. Further, because Defendant produced "dredged and fill material" that was also a pollutant, which he later discharged into navigable waters of the United States without a permit, Defendant violated CWA § 301(a) in carrying out his land clearing operations. Finally, subject matter jurisdiction is proper because Defendant's discharge of dredged and fill materials into wetlands remains in violation of the CWA and NUDEP has failed to diligently prosecute him for such violation.

For the foregoing reasons, Plaintiff respectfully requests this Court reverse the judgment of the District Court and enter summary judgment for Plaintiff on all grounds.

Respectfully submitted,

_____

Counsel for New Union Wildlife Federation