Team No. 15

Case No. C.A. 13-1246

IN THE DISTRICT 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
Appellee.

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

INITIAL BRIEF OF APPELLEE

QUESTIONS PRESENTED

1. Whether the trial court properly held that the Appellant, New Union Wildlife Federation ("NUWF"), had no standing to sue the Appellee, Jim Bob Bowman ("Bowman"), for violating the Clean Water Act, because no injury or causal link thereof could be established.

2. Whether the trial court properly held that no continuing violation or ongoing violation was being committed by Bowman, as required by § 505(a) of the Clean Water Act, since all activities on the subject property ceased well prior to the filing of NUWF's action on August 30, 2011.

3. Whether the trial court properly held that the execution of a settlement agreement between the New Union Department of Environmental Protection ("NUDEP") and Bowman satisfied the diligent prosecution requirements of § 505(b) of the Clean Water Act, thus barring NUWF's citizen suit.

4. Whether the trial court properly held that the discharge of materials on Jim Bob Bowman's property did not result in the "addition" of pollutants, and therefore, did not amount to a violation of § 404 of the Clean Water Act.

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STANDARD OF REVIEW

As this appeal is from the District Court's grant of summary judgment, the standard of review is *de novo*. *New York Dep't. of Soc. Servs. V. Shelala*, 21 F.3d 485, 491 (2d Cir. 1994). On appeal, the evidence and its reasonable inferences must be viewed in the light most favorable to the non-moving party. *Jones v. University of Texas Medical*, 237 F.3d 632 (5th Cir. 2000). However, where the non-moving party will bear the burden of proof at trial, the moving party may point to an absence of evidence to support an essential element of the nonmoving party's claim. *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986).

STATEMENT OF JURISDICTION

This appeal is based on the June 1, 2012 decision of the United States District Court for the District of New Union, whereby summary judgment was granted to Defendant-Appellee, Jim Bob Bowman. The District Court's jurisdiction was based upon 33 U.S.C. § 1365 (a). (R. at. 3.) Plaintiffs filed this appeal on September 14, 2012. (R. at 2.) This Court has jurisdiction based on the District Court's final decision granting summary judgment for Defendant-Appellee, regarding his alleged violation of § 404 of the CWA. Clean Water Act, 28 U.S.C. § 1291 (2000).

INTRODUCTION

Appellee, Jim Bob Bowman, was the Defendant in the trial court. Appellants, New Union Wildlife Federation and New Union Department of Environmental Protection, were the Plaintiff and Intervenor, in that order. As set forth in the section above, the parties will be referred to in this brief as "Bowman," "NUWF," and "NUDEP" respectively. The symbol "R" will constitute a reference to the trial court record.

STATEMENT OF THE CASE

On July 12, 2011, NUWF sent a notice of intent to sue Bowman under § 505 of the Clean Water Act ("CWA"), 33 U.S.C. § 1365, to the Environmental Protection Agency ("EPA") and the State of New Union/NUDEP. (R. at 4.) Shortly thereafter, Bowman was notified of the alleged violations of both state and federal law. *Id.* On August 1, 2011, NUDEP issued an administrative order containing a settlement agreement (the "Agreement") between NUDEP and Bowman. The Agreement stipulated that Bowman was not to clear any more wetlands from his property and also conveyed NUDEP a conservation easement on the untouched portion of Bowman's property adjacent to the Muddy River. *Id.* Further, NUDEP instructed Bowman to create and maintain a year-round wetland on the 75-foot buffer zone between the wooded area and the new field. *Id.*

On August 10, 2011, after issuing the administrative order, NUDEP filed a complaint against Bowman in the United States District Court for the District of New Union, under § 505 of the CWA. 33 U.S.C §§ 1362(5), 1365(g); (R. at 5.) Subsequently, on August 30, 2011, NUWF filed an independent complaint against Bowman, seeking civil penalties, and requiring him to restore the subject wetlands. (R. at 5.)

On September 5, 2011, with terms identical to the previously issued administrative order, NUDEP, in its individual suit filed a motion to enter a decree. This motion is still pending. *Id.*

On September 15, 2011, to consolidate the NUDEP and NUWF action, NUWF filed a motion to intervene in the NUDEP's action. Further, at or about the same time, NUDEP filed its own motion to intervene in the NUWF action. The latter was granted on November 1, 2011. On this date, the District Court also announced that it would not be deciding on the remaining motions.

After discovery, both parties filed cross-motions for summary judgment. The District Court granted Bowman's motion on all grounds though the motions filed by NUDEP and NUWF were summarily denied.

STATEMENTS OF THE FACTS

Bowman owns one thousand acres of land adjacent to the Muddy River near the town of Mudflat, in the State of New Union. (R. at 3.) The Muddy River forms a border between New Union and the state of Progress for approximately 40 miles, upstream and downstream, from Bowman's property. *Id.* The river is more than five hundred feet wide and six feet deep where it borders Bowman's property. *Id.* Bowman's property is hydrologically connected to the Muddy River and is covered with trees and other vegetation commonly found in wetlands. *Id.*

On June 15, 2011, Bowman commenced land-clearing operations on the subject wetlands. These operations consisted of leveling trees, soil, and other vegetation, and pushing these cleared materials into windrows. (R. at 4.) After pushing the materials into trenches, Bowman then leveled the remaining areas by pushing soil from high portions of the field into the trenches and other low-lying portions of the field. *Id.* Moreover, immediately after providing a drainage outlet for the trenches, Bowman ceased all land-clearing activities by July 15, 2011,

leaving a strip of untouched land approximately one hundred feet wide adjacent to the Muddy River. *Id.*

Dottie Milford ("Milford"), Zeke Norton ("Norton") and Effie Lawless ("Lawless")(collectively the "Members") are all members of NUWF, and occasionally use part of Bowman's property connected to the Muddy River for recreational purposes such as boating, fishing and picnicking. (R. at 6.) In anticipation of litigation, NUWF submitted affidavits from the Members to support its claim. *Id.* The Members testified they were aware of the valuable functions that the Muddy River provides, *e.g.*, absorbing sediment and pollutants. They also testified that they were unable to see any physical changes in the property, but only that they "***felt***" a difference. *Id*.

Individually, Milford testified that the Muddy River "***looks***" more polluted than it did prior to Bowman's activities. (R. at 6). Additionally, Norton testified that he had frogged in the area for years, and that due to to the activities on Bowman's property, his frogging has been detrimentally affected. *Id.* However, Norton also admitted during his deposition that he "supposed he might have been trespassing" (in violation of state law) while frogging on Bowman's property, despite the clear presence of "No Trespassing" signs. *Id.* Lastly, NUDEP's biologist testified that, once fully established, the new year-round, partially inundated wetland in the buffer zone (as stipulated in the Agreement) will provide a richer wetland habitat than it did in its previous state. *Id.*

The following issues are stipulated: (1) Bowman's property is considered a wetland as determined by the United States Army Corps of Engineer's Wetlands Determination Manual (R. at 4); (2) the intent to sue letter sent by the NUWF is valid; (3) the EPA has properly delegated authority to implement the CWA to NUDEP; and (4) the subsequent activities of planting wheat

seeds and draining the property through the drainage ditch constructed prior to July 15, 2011, do not constitute addition.

This appeal follows.

SUMMARY OF THE ARGUMENTS

NUWF does not meet the Article III constitutional requirements for standing because it has not suffered an invasion of a legally protected interest that was both: 1) concrete and particularized, and 2) actual or imminent. In turn, there is no causal link between the alleged injury in fact and the activities conducted on Bowman's property. Also, there is no substantial likelihood that the requested relief will remedy the alleged injury in fact.

Next, NUWF is also unable to meet the prudential standing requirements because members of NUWF would not otherwise have standing to sue in their own right, NUWF cannot conclusively establish that the interest it seeks to protect is germane to the organization's purpose, and the claim asserted and the relief requested required the participation of the individual members of NUWF.

Furthermore, Bowman was not in violation of § 505 of the CWA when NUWF filled suit because citizens cannot maintain actions based wholly on past violations. Also, NUWF cannot establish a continuing or intermittent violation because the continued presence of "dredged" and/or "fill material" in the former wetlands does not constitute such a violation.

Moreover, NUDEP's diligent prosecution of Bowman bars NUWF's action because NUDEP entered into the Agreement with Bowman. Pursuant to Section 505(b)(1)(B) of the CWA, this satisfies with the diligent prosecution requirement and thus, bars NUWF from pursuing a cause of action against Bowman.

Lastly, both NUDEP and NUWF are unable to successfully establish that the activities conducted by Bowman on the subject wetlands constituted the "addition" of a pollutant. Since Congress has authorized the EPA to implement and enforce the CWA (through various state agencies), courts must give deference to the EPA's interpretations of this legislation. As such, when the EPA's long-settled interpretations (*i.e.*, the "outside world" and "unitary waters" interpretations) are considered, it is apparent that no "addition" has occurred.

ARGUMENTS

I. The trial court properly held that NUWF lacked standing to bring suit because it did not meet the constitutional requirements promulgated in Article III.

The trial court properly denied NUWF's motion for summary judgment because NUWF lacked standing to bring a citizen suit against Bowman for violating §§ 301(a) and 404 of the CWA. 33 U.S.C. §§ 1311(a) (1995), 1344 (1987).

To establish standing under the CWA, the Plaintiff must meet the standing requirements derived from the "case and controversy" language in Article III of the United States Constitution: (1) an injury in fact, (2) causation, and (3) redressability. U.S. Const. art. III, § 2, cl. 1.; *Lujan v. Defenders of Wildlife,* 504 U.S. 555, 560-61 (1992).

a. *Injury in fact*

The harm allegedly suffered by NUWF was not an injury in fact.

To prove an injury in fact the plaintiff must suffer an invasion of a legally protected interest that is both 1) concrete and particularized, and 2) actual or imminent. *Id*.

i. Concrete and Particularized

NUWF has not suffered a "concrete and particularized" injury because it did not directly suffer as a result of Bowman's pollution.

For an injury to be concrete, a plaintiff must personally suffer an injury as a result of the defendant's pollution, an injury solely affecting the environment will not provide a basis for standing. *Lujan*, 504 U.S. at 560-61; *Friends of the Earth, Inc. v. Laidlaw Environmental Services (TOC), Inc.*, 528 U.S. 167, 176 (2000).

Here, the Members testified that they were aware of differences in the Muddy River and "***felt***" a loss from the filling of the wetlands. (R. at 6.) The Members had previously used the banks of the Muddy River to fish and picnic. (R. at 4.) However, none were able to specify any "concrete or particularized" effects caused by the work done on Bowan's property that limited or prevented their ability to conduct said activities (*e.g.*, the river's salinity, a decrease in the number of fish, an oily sheen, etc.). *Public Interest Research Group of New Jersey v. Powell Duffryn Terminal Inc.*, 913 F.2d 64, 72 (3d Cir. 1990)(holding that knowledge that a river is polluted is an injury suffered by the public generally, and absent an actual, tangible injury, this knowledge is not a basis for standing).

Thus, since no member of the NUWF could identify any specific effect resulting from the work done on Bowman's property, a concrete or particularized injury cannot be shown.

ii. Actual and Imminent

NUWF has not suffered an "actual or imminent" injury because, again, no member directly suffered any injury as a result of Bowman's pollution.

An "actual or imminent" injury can be shown with specific evidence of a negative impact on an ecosystem. *Powell Duffryn*, 913 F.2d at 71. In the case that potential litigants are unable to pinpoint an "actual or imminent" injury, sufficient grounds for standing have not been established. *Friends of the Earth v. Gaston Copper Recycling Corp.*, 629 F.3d 387, 397(4th Cir. 2011). Further, a claim that discharged pollutants will damage the environment at a future time,

without any distinct determination as to when that damage will actually occur, does not support a finding of the "actual or imminent" injury requirement. *Lujan*, 504 U.S. at 564.

Here, Norton testified that he had previously used Bowman's property to frog illegally. (R. at 4.) Since the frogging activities conducted by Norton were illegal, NUWF is thereby unable to cite a decrease in those activities as an "actual or imminent" injury. *See Lujan*, 504 U.S. 555 (holding that standing is only available when a plaintiff has a "***legally*** protected interest")(emphasis added); *see also Gaston*, 629 F.3d at 397 (holding that actual injury was present when, over the course of at least 20 years, plaintiff's conducted canoe and kayak (*i.e.*, legal activities) trips but, due to contamination, decreased the number of trips); *Interest Research Group of N.J., Inc. v. Magnesium Elektron*, Inc., 123 F.3d 111, 117 (3d Cir. 1997)(holding that an environmental group lacked standing to sue for illegal discharges because the plaintiff failed to produce evidence of demonstrable harm to the water body).

In addition, the conservation easement created for public use in the Agreement, now affords Norton the opportunity to continue his frogging activities legally. (R. at 4) Moreover, Bowman's construction and maintenance of the partially-inundated buffer zone will provide a richer wetland as well as a higher quality habitat for wildlife. (R. at 6.) Therefore, placing Norton (and any other similarly situated citizens) in the same position as he was before Bowman had done any work on the subject wetlands.

Likewise, NUWF members, Milford and Lawless will not have to discontinue or alter any of their recreational activities on the banks of the Muddy River.

In light of their inability to establish a legally protected interest that is "concrete and particularized," as well as "actual and imminent," it is evident that NUWF has not suffered an injury in fact.

b. *Causation*

There is no causal link between the alleged injury in fact and the activities conducted on Bowman's property.

To establish causation, the plaintiff must prove that there is a fairly traceable connection between the alleged injury in fact and the conduct of the defendant. *Gaston*, 629 F.3d at 115.

The members of NUWF did not suffer any injury in fact. Absent a legally protected interest that is both "concrete and particularized" and "actual and imminent" Bowman's acts cannot be the causal link to the alleged harm suffered by the Members. *Friends of the Earth, Inc. v. Crown Cent. Petroleum Corp.*, 95 F.3d 358, 361-62 (5th Cir. 1996) (holding that an organization whose membership includes individuals who bird watch and fish at a lake lacked standing by failing to show that their injury was "fairly traceable" to an oil refinery's unlawful water pollution "solely on the truism that water flows downstream").

Consequently, because NUWF is unable to prove an alleged injury in fact, it therefore cannot prove that any causal link between Bowman's activities and said injury exists.

c. *Redressability*

Lastly, the Article III "case or controversy" limitation of the United States Constitution requires that a federal court act only to redress injury that fairly can be traced to the challenged action of a defendant, and not solely to some third party. *Simon v. Eastern Kentucky Welfare Rights Organization*, 426 U.S. 26, 41-42 (1976). There must be a substantial likelihood that the requested relief will remedy the alleged injury in fact. *Id.* at 46. Further, citizens may never have standing to pursue litigation seeking civil penalties when the penalties are paid directly to the government and not the citizen. *Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83, 106 (1998).

Here, NUDEP was authorized to include an administrative penalty in the Agreement with Bowman, however, elected not to do so. Therefore, because of NUDEP's failure to issue a penalty, NUWF's members have not demonstrated a cognizable, redressable injury. *Informed Citizens United v. USX Corporation*, 36 F. Supp. 2d 375, 378 (1999)(holding that no redressable injury to confer standing was found when affidavits from a nonprofit organization made vague conclusions about the negative impact from filling activity coupled with an alleged diminished ability to watch wildlife).

Beyond the constitutional requirements, the federal judiciary has also adhered to a set of prudential principles that bear on the question of standing. *Hunt v. Washington State Apple Advertising Commission,* 432 U.S. 333 (1977). An environmental organization's standing to represent the interests of its membership is based on representational capacity. *Id.* An association has standing to bring suit on behalf of its members when: (a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted, nor the relief requested, required the participation of individual members in the lawsuit." *Id.*; *see also Powell Duffryn Terminals, Inc.*, 913 F.2d at 70. This test is not satisfied.

d. No member of NUWF has standing to sue in his or her individual capacity.

To satisfy the first prong of this test, *Hunt* required that there be at least one member of the plaintiff organization who would have standing to present, in his or her own right, the claim, or the type of claim, pleaded by the association. *Hunt,* 432 U.S. at 343. Here, any "citizen" may bring suit under the CWA for a potential violation. However, as distinguished above, no injury was found to any individual member of NUWF which was both 1) concrete and particularized,

and 2) actual or imminent. Thus, this requirement is not met because no member of NUWF, in his or her individual capacity, would have standing to present his own claim.

e. NUWF has not successfully asserted that the interest it's trying to protect is germane to its purpose.

Second, there must be a formal nexus between the NUWF members' interests and the organization's authority to represent them. *Health Research Group v. Kennedy,* 82 F.R.D. 21 (D.D.C.1979). More specifically, NUWF's litigation objectives must match both the strategy and goals of the individual members. *NCAA v Califano*, 622 F.2d 1382, 1391 (10th Cir. 1980) (holding, "what the association wants to achieve in the lawsuit is unquestionably what it's members want."). Here, it is uncertain if any environmental, aesthetic, or recreational benefits would stem from the removal or discontinuance Bowman's land cleaning operations.

The civil penalties sought are not germane to NUWF's purpose of improving quality of habitat.

f. Neither the claim asserted, nor the relief requested, required the participation of individual members of NUWF in this lawsuit.

The last prong is designed to ensure that the association will be a better representative than individual members would be in pursuing litigation. *Hunt*, 432 US at 344; *Warth v. Seldin*, 422 U.S. 490, 515-16 (1975).

In support of standing, NUWF submitted affidavits from three of its members: Milford, Norton, and Lawless. (R. at 6.) The injury suffered is unique to the NUWF members concerned, and the extent of their injuries would require individualized proof. Without their participation, NUWF would have no basis for their claim.

Courts have typically denied associational standing when the remedy requested includes damages because individual participation is necessary in identifying the appropriate levels of

individual damages. *Telecommunications Research & Action Center v Allnet Communication Services, Inc,* 806 F.2d 1093, 1094-95 (D.C. Cir. 1986)(holding that, "Lower federal courts have consistently rejected association assertions of standing to seek monetary, as distinguished from injunctive or declaratory, relief on behalf of the organization's members."). Here, NUWF sought civil penalties as an organization. Although they did not specify the amount to be awarded to each member, they based their claim solely on the injury suffered by each individual member.

To assert the relief requested, NUWF would need the participation of its individual members, and because they do not, the Appellant, NUWF, does not have standing to represent the interests of its individual members.

In conclusion, because NUWF is unable to meet any of the required elements to establish standing, the trial court ruling must be affirmed.

II. The lower court properly granted summary judgment on the grounds that it lacked subject matter jurisdiction because NUWF failed to make a good faith allegation of an intermittent or continuing violation.

The trial court properly concluded that Bowman was not in violation of § 505 of the CWA when NUWF filled suit.

Section 505(a) of the CWA provides: "any citizen may commence a civil action on his own behalf…against any person…who is alleged 'to be in violation.'" 33 U.S.C. § 1365(a). The phrase 'to be in violation' requires that there be an intermittent or continuing violation for the suit to be brought. *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Foundation, Inc*., 484 U.S. 49, 57 (1987) ("*Gwaltney I"*). The Court in *Gwaltney I* determined that the "most natural reading of 'to be in violation' is a requirement that citizen-plaintiff allege a state of either continuous or intermittent violation, that is, a reasonable likelihood that a past polluter will

continue to pollute in the future." *Id*. at 57. The Court held that citizens cannot maintain actions based wholly on past violations. *Id*. at 64. Without a continuing violation or intermittent violation, the court does not have subject matter jurisdiction. *Id*.

In order to establish jurisdiction, the plaintiff must make a good faith allegation of a continuing or intermittent violation and demonstrate its existence by presenting sufficient allegations of fact. *Id*. at 64, 66. Once a violation ceases to be intermittent, there must be no likelihood of repetition. *Chesapeake Bay Found. v. Gwaltney of Smithfield*, 844 F.2d 170, 172 (4th Cir. 1988) *("Gwaltney II")*. Further, once the defendant presents evidence that no factual dispute exists that the defendant will continue the violation, the plaintiff must then demonstrate more than just a good faith allegation. *Connecticut Coastal Fishermen's Assoc. v. Remington Arms Co.*, 989 F.2d 1305, 1312 (2d Cir. 1993).

Accordingly, NUWF can establish the court's jurisdiction by showing one of the following: (1) a violation continued on or after the date the complaint was filed; or (2) evidence from which a reasonable trier of fact could find a continuing likelihood of a repetition of violation. *Gwaltney II*, at 171; *Natural Res. Def. Council v. Texaco Corp*., 2 F.3d 493, 501 (3d Cir. 1993).

Bowman stopped all land clearing activities by July 15, 2011 and subsequently entered into an administrative order with NUDEP to cease all activity on the land on August 1, 2011. (R. at 4.) Bowman has not given any indication that he will resume any such activities considering the remaining land he owns has been granted as a conversation easement. The only further activity in which Bowman has engaged includes planting wheat seeds and draining the property through the drainage ditch he constructed prior to the Agreement. These activities do constitute adding dredged spoil or fill to the property and are consistent with the Agreement.

Therefore, NUWF violations are wholly past and the Court lacks subject matter jurisdiction.

a. While pollutants discharged without a § 404 permit are generally a continuous violation of the CWA, this view is inapplicable here because the continuing activities do not meet the § 404 definitions of "fill" or "dredged material."

Plaintiffs allege that the continued presence of "dredged" and/or "fill material" in the former wetlands constitutes a continuing or ongoing violation. The District Court cited *Sasser v. Adminstrator*, 990 F.2d 127 (4th Cir. 1993), which held that such continued presence constituted a violation, however, this case is distinguishable from the facts at hand. In *Sasser*, the EPA issued an administrative order requiring Dr. Sasser to cease and desist his activities and to submit to the restoration plan, which Dr. Sasser failed to comply with. *Id*. at 128. Dr. Sasser's refusal to comply with these orders led to issuance of a complaint charging a violation of 33 U.S.C. § 1311 for the discharge of a pollutant into a tributary of the Pee Dee River. *Id*. The Court in *Sasser* held, that "[i]f the only violation of the Act had occurred in December 1986, Dr. Sasser would have at least a colorable argument…. Dr. Sasser's violation of the Act is a continuing one. Each day the pollutant remains in the wetlands without a permit constitutes an additional day of violation." *Id*. at 129. The same cannot be said in this case because Bowman, unlike Dr. Sasser, voluntarily ceased activities on the subject wetlands, complied with the NUDEP administrative order and, most importantly, was never presented with an order requiring him to cease activities on his land.

Further, the only continuing activity in which Bowman is engaged is the maintenance of a year-round wetland on the 75-foot buffer zone. This activity is in furtherance of the Agreement with NUDEP, and thus, cannot be considered a continuing violation.

III. The lower court's decision should be affirmed because NUWF's action is barred by NUDEP's diligent prosecution of Bowman and allowing suits that are duplicative of the state's enforcement actions is against the statutory goals and policy of the CWA.

The trial court properly concluded that NUDEP's diligent prosecution of Bowman bars NUWF action.

Section 505(b)(1)(B) of the CWA bars a citizen from bringing a suit if the "State has commenced and is diligently prosecuting a civil…action in a court of the United States…to require compliance…" 33 U.S.C. §1365(b)(1)(B) (1987). The legislative history of the citizen suit provision of the Act indicates that Congress intended only to allow a citizen suit if the state enforcement action is inadequate. *Federal Water Pollution Conrtol Amends. of 1972*, S.Rep. No. 414, 92d Cong., 1st Sess., reprinted in 1972 U.S.C.C.A.N, 3668, 3746.[1] Courts have consistently weighed the circumstances of a case against congressional intent and concluded that only if "the government cannot or will not command compliance" then a citizen suit will be allowed to proceed. *Gwaltney I*, 484 U.S at 62. Thus, the role of the citizen suit should only serve as an "interstitial" role to a government action, not a "potentially intrusive" one. *Id*. at 60-61; *North & South River Watershed Ass'n., v. Town of Scituate*, 949 F.2d 552, 556 (1st Cir. 1991). Further, the states are allowed "some latitude in selecting the specific mechanisms of their enforcement programs" and the remedies to pursue. *Arkansas Wildlife Fed'n. v. ICI Americas Inc*., 29 F.3d 376, 381 (8th Cir. 1994); *Gwaltney I*, 484 U.S. at 60-61; 33 U.S.C §§ 1319(g)(6)(A) (1990) and 1365(b)(1)(B) (1987).

[1] The *Gwaltney* Court also rejected the argument that Congress's use of the phrase "is in violation" in section 309(a) of the CWA shows a legislative intent for citizens to be able to sue for past violations under section 505(a) of the CWA. Instead, its held that the comparison between section 309 and section 505 bolsters the its conclusion that Congress only authorized citizen suits for ongoing violations of the CWA. *Gwaltney I*, 484 U.S. at 58-59.

NUDEP commenced a civil action in a United States court by filing a complaint in the United States District Court for the District of New Union. (R. at 5). NUDEP diligently prosecuted the action against Bowman by entering into the Agreement, in which Bowman agreed not to clear more wetlands from his property in lieu of a penalty. (R. at 4.) Bowman also conveyed a conservation easement on the portion of his property that had not yet been cleared, plus an additional 75-foot buffer zone between that wooded area and the new field. (R. at 4.) The Agreement was issued by NUDEP on August 1, 2012, and pursuant to New Union's statute, was virtually identical to 33 U.S.C. §§ 1319 (a)-(g) (1990) in relevant parts.

NUWF cannot claim that, because NUDEP did not impose monetary penalties against Bowman, it did not pursue the action diligently. *See Friends of the Earth v. Laidlaw Envtl. Servs*., 890 F. Supp. 470, 486-87 (D.S.C. 1995)(holding that it is not enough for citizens to claim that the state is not pursuing the actions desired by the citizens); *see also North & South Rivers Watershed Ass'n* 949 F.2d at 556-57 (holding that there was no point in allowing a suit to go forward if the court could not provide meaningful relief because the remedy was already being diligently pursued); *see also Connecticut Fund for the Env't v. Contract Plating Co*., 631 F. Supp. 1291, 1294 (D. Conn. 1986)(stating that it would be unreasonable and inappropriate to find a failure to diligently prosecute simply because restoration efforts failed when a compromise was reached).

Therefore, NUDEP's measures constitute a diligent prosecution under the requirements of §505 of the CWA and bar NUWF from taking any additional action.

IV. The trial court properly held that the material resulting from Bowman's land clearing activities did not constitute an "addition," as promulgated by CWA.

The trial court properly held that the material resulting from Bowman's land-clearing activities on the subject wetlands did not constitute an "addition," and consequently, NUWF is unable to prove a violation of § 404 of the CWA.

Section 301(a) of the CWA asserts, "the discharge of any pollutant by any person shall be unlawful." 33 U.S.C. § 1311(a). Section 502 of the CWA defines the term "discharge of any pollutant" as "any addition of any pollutant to navigable waters from any point source." 33 U.S.C. § 1362(12)(1996). However, permits may be issued under certain sections of the CWA, including §§ 402 and 404, which render such activities lawful, in compliance with § 301(a). *See* 33 U.S.C. § 1311(a).

More specifically, § 404(a) states that permits may be issued "after notice and opportunity for public hearings for the discharge of dredged or fill material into the navigable waters at specified disposal sites." 33 U.S.C. § 1344(a). Section 502 of the CWA defines the terms "pollutant," "navigable waters," and "point source," but does not define the term "addition." 33 U.S.C. § 1362. The three defined elements of the alleged offense have been stipulated, though the element of "addition" has not been satisfied. Accordingly, the appellants have failed to successfully demonstrate a § 404 violation.

a. Pollutant

Section 502(6) of the CWA defines the term "pollutant" as "dredged spoil, solid waste, incinerator waste, 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). The activities executed by Mr. Bowman included land clearing activities, which resulted in "fill

material." (R. at 8.) Section 502 of the CWA does not define "fill material," though because that material was composed of trees and other vegetation, it is classified as "biological material" as defined by that same section. *Id.*; 33 U.S.C. § 1362(6). The element of pollutant is thereby satisfied.

b. *Point Source*

Section 502(14) of the CWA defines the term "point source" as "any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation, or vessel or other floating craft, from which pollutants are or may be discharged." 33 U.S.C. § 1362(14) (2008). The "conveyances" in question are the bulldozers used to perform the work on the subject wetlands. The Fifth Circuit Court of Appeals held in *Avoyelles Sportsmen's League, Inc. v. Marsh* that machinery, including bulldozers, used to convey dirt and other material are considered "point sources" for the purpose of the CWA. *Avoyelles Sportsmen's League, Inc. v. Marsh*, 715 F.2d 897, 927 (5th Cir. 1983). This element is satisfied.

c. *Navigable Waters*

Section 502(7) of the CWA defines the term "navigable waters" as "waters of the United States, including the territorial seas." 33 U.S.C. § 1362(7) (2008). Additionally, the Supreme Court has held that wetlands adjacent to navigable waters are themselves considered navigable waters. *See United States v. Riverside Bayview Homes*, 474 U.S. 121, 139 (1985). There was no contention by any of the parties at trial that the Muddy River was not a navigable water, and because the subject wetlands are adjacent to the Muddy River, they too, are considered navigable waters. *See Id.* This element is satisfied.

d. *Addition*

i. The dictionary definition of the term "addition" does not provide a basis for a § 404 violation.

When the dictionary definition of the term "addition" is applied, it is evident that none of the materials discharged on Mr. Bowman's property constituted a violation of § 404 of the CWA.

The CWA does not define the term "addition." Further, neither the EPA nor the Army Corps of Engineers have promulgated a definition in any of their subsequent regulations. "An undefined statutory term is to be read in accordance with its ordinary or natural meaning. The dictionary meaning of 'addition' is 'to join, annex, or unite' so as to increase the overall number or amount of something." *Friends of Everglades v. South Florida Water Management Dist.*, 570 F.3d 1210, 1217 (11th Cir. 2009) (quoting *S.D. Warren Co. v. Me. Bd. of Envtl. Prot.*, 547 U.S. 370 (2006)).

The work conducted on the subject wetlands consisted of land clearing activities. Mr. Bowman used a bulldozer to clear trees and other vegetation, and then pushed the cleared materials into windrows. (R. at 4.) Next, Mr. Bowman dug trenches alongside the windrows and pushed said materials into them. *Id.* He subsequently leveled the resulting field by pushing soil from high portions of the field into the trenches and lower portions of the field. *Id.* Lastly, Mr. Bowman formed a ditch to drain the field into the Muddy River. *Id.* All of the discharged materials originated from the subject wetlands and, as a result, could not "increase the overall number or amount" of material that existed in the first place. *Id.* At most, the same amount of material that came out of the wetlands was discharged back into those same wetlands.

As a consequence, because there was no increase in the amount of material located within the subject wetlands, there has been no "addition," and more importantly, no violation of § 404 of the CWA.

ii. The EPA's "outside world" interpretation shows that no "addition" has taken place.

Employing the EPA's "outside world" interpretation of the term "addition," it is evident that none of the materials discharged on the subject wetlands resulted in a violation of § 404 of the CWA.

The EPA has argued in numerous legal proceedings how it interprets the term "addition" for the purposes of CWA violations wherein the "outside world" definition was established. In *Nat'l Wildlife Fed'n v. Gorsuch*, the EPA argued that "for addition of a pollutant from a point source to occur, the point source must *introduce* the pollutant into navigable water from the outside world…" *Nat'l Wildlife Fed'n v. Gorsuch*, 693 F.2d 156, 165 (D.C. Cir. 1982); *see also Nat'l Wildlife Fed'n v. Consumers Power Co.*, 862 F.2d 580, 584 (6th Cir. 1988)(EPA argued "that there can be no addition unless a source physically introduces a pollutant into water from the outside world.").

NUWF argues that the "outside world" definition as defined by the EPA was meant only to apply to violations of § 402 of the CWA, and not § 404. However, the same term used in different parts of the same statute has the same meaning, unless Congress redefines the term. *See Sorenson v. Sec'y of the Treasury*, 475 U.S. 851 (1986). Congress has made no such attempt.

1. Deference to EPA's "outside world" interpretation of "addition."

Moreover, while Congress may not have expressly addressed whether the EPA should have the discretion to define the term "addition," it did afford the agency discretion to define "point source" and "pollutant." *Gorsuch*, 693 F.2d at 175. Consequently, if Congress had

wanted to give the EPA similar discretion in defining the term "addition," they would have. *Id.* Also, in constructing the CWA legislation, Congress could easily have "chosen suitable language, *e.g.*, '***all pollution*** released through a point source,'" as opposed to the more limited "***addition of pollutants*** from a point source." *Id.* at 176 (emphasis added). "Where Congress knows how to say something but chooses not to, its silence is controlling." *DIRECTV, Inc. v. Brown*, 371 F.3d 814, 818 (11th Cir. 2004).

In light of the fact that Congress extended no express definition of the term "addition," courts must give "great deference to the interpretation given the statute by the officers or agency charged with its administration." *Gorsuch*, 693 F.2d at 166-67 (quoting *EPA v. Nat'l Crushed Stone Ass'n*, 449 U.S. 64, 83 (1980)). Here, the Court may not substitute its own construction in place of a reasonable interpretation made by the EPA. *Id.* Congress has given the EPA the authority to implement the CWA, as they are best equipped to address and minimize water pollution, and therefore, its interpretation of the term "addition" cannot be said to be manifestly unreasonable. *The Revised Definition of "Discharge of Dredged Material": Its Legality, Practicality, and Impact on Wetlands Protection*, 9 Envtl. Law. 187, 227 (2002); *Gorsuch*, 693 F.2d at 175 (holding that because the EPA's interpretation of "addition" was not "manifestly unreasonable" or inconsistent with congressional intent, it must be upheld); *Rybacheck v. U.S. EPA*, 904 F.2d 1276, 1284 (9th Cir. 1990)(holding that because the EPA is charged with administering the CWA, the court must show great deference to the Agency's interpretation of the Act).

What is more, the Supreme Court in *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.* held that,

> When a court reviews an agency's construction of the statute which it administers, it is confronted with two questions. First, always, is the question

> whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress. If, however, the court determines Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute, as would be necessary in the absence of an administrative interpretation. Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute.

Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 842-43 (1984)

The activities conducted on Mr. Bowman's property did not include the introduction of any materials from the "outside world," as defined above. Mr. Bowman merely deposited fill material[2] into the subject wetlands that were cleared from those same wetlands. (R. at 4.) There were no pollutants added from any place outside of the wetlands at any point in time. Again, taking into account that the EPA has been authorized to implement and enforce the CWA, and that Congress did not expressly define the precise question at issue (*i.e.* "addition"), the Court must defer to the Agency's interpretation of the term. *See Id.*; *Gorsuch*, 693 F.2d at 166-67; *Rybacheck*, 904 F.2d at 1284.

As such, because no materials were introduced to the subject wetlands from the "outside world," there was no addition of pollutants, as defined by the EPA. Thus, no violation of §404 of the CWA occurred.

[2] "In contrast to pollutants normally covered by the permitting requirement of § 1342(a), 'dredged or fill material,' which is typically deposited for the sole purpose of staying put, does not normally wash downstream, and thus does not normally constitute an 'addition…to navigable waters' when deposited in upstream isolated wetlands." *Rapanos v. United States*, 547 U.S. 715, 744 (2006) (Justice Scalia's plurality opinion.)

iii. The incorporation of the "unitary navigable waters" theory with the EPA's interpretation of "addition" does not classify the materials discharged on the subject wetlands to be in violation of § 404 of the CWA.

The EPA's inclusion of the "unitary navigable waters" theory in its interpretation of "addition," yet again, leaves no doubt that the material deposited within the subject wetlands did not amount to an "addition."

The EPA has also interpreted the term "addition" to incorporate its "unitary navigable waters" theory. Here, all navigable waters are considered to be one body of water in relation to § 301(a) matters. *National Pollutant Discharge Elimination System (NPDES) Water Transfer Rule*, 73 Fed. Reg. 33,697 (June 13, 2008)(to be codified at 40 C.F.R. pt. 122). Under this interpretation, the transfer of pollutants from one body of navigable water to another does not result in the addition of a pollutant to that second body. This is because they are considered one, unitary body of water, which means that the pollutants already located in that first body could not then be added to a second navigable body of water. Further, because Congress has not expressly defined "addition" and the EPA is authorized to administer the CWA, the court must give great deference to the Agency's interpretation of the legislation. *See Gorsuch*, 693 F.2d at 166-67; *Rybacheck*, 904 F.2d at 1284; *Friends of the Everglades*, 570 F.3d at 1228 (holding, "The EPA's regulation adopting the unitary waters theory is a reasonable, and therefore a permissible, construction of the language").

Here again, the facts of the instant case show that no "addition" has occurred. Bowman, through his land clearing activities, leveled trees and other vegetation that were a part of the wetlands adjacent to the Muddy River. Incorporating the EPA's "unitary navigable waters" theory shows that there could have been no "addition" of material to the wetlands because the material deposited was part of the subject wetlands to begin with. Since the pollutants were

extracted from a navigable water, re-depositing them back into a second navigable water does not generate an "addition" of pollutants. *See Friends of the Everglades*, F.3d at 1217.

Accordingly, because the pollutants discharged by Bowman originated in a navigable water, and were re-deposited into a second navigable water means that, according to the EPA's "unitary navigable waters" theory, no "addition" of pollutants could have occurred.

iv. NUWF's *United States v. Deaton* argument fails because, it too, cannot provide a means by which Bowman's activities resulted in an "addition."

NUWF also cites *United States v. Deaton*, 209 F.3d 331 (4th Cir. 2000), arguing that because Mr. Bowman deposited "dredged spoil" into the subject wetlands, it constituted an "addition" of pollutants. However, when the above-described definitions of "addition" are applied, it yields the same result yet again; that no "addition" took place.

In *Deaton*, the Fourth Circuit Court of Appeals held that soil originally removed from a wetland created a new pollutant ("dredged spoil"), which when re-deposited into the wetland, was considered the addition of a new pollutant that had not previously existed. *Id.* at 336.

However, this argument too, must fail. First, no new pollutant is created by the re-deposit of these materials. While their removal may have changed the classification of the pollutant to a "dredged spoil,"[3] it was already a pollutant in that the soil, trees, and vegetation removed were all "biological materials;" a pollutant as defined by the CWA. § 502(6), 33 U.S.C. § 1362(6). Secondly, even if there is a change in the makeup of the pollutant because the trees

[3] "While soil may be definitionally transformed, through the act of excavation, from a part of the wetland into 'dredged spoil,' a statutory pollutant, it is not *added* to the site. Were we to adopt so expansive a definition of "discharge" that any movement of soil *within* a wetland constitutes "addition," we would not only flaunt the given definition of "discharge," but we would be criminalizing every artificial disturbance of the bottom of any polluted harbor because the disturbance moved polluted material about. If Congress intended to reach such conduct, it need simply to redefine the term 'discharge.'" *United States v. Wilson*, 133 F.3d 251, 259-60 (4th Cir. 1997)(Judge Niemeyer's opinion)

and vegetation are dead when re-deposited, it still does not result in an "addition." *See Consumer's Power Co.,* 862 F.2d at 586 (holding that the re-deposit of dead materials that were living at the time of removal does not create an "addition"); *Nat'l Min. Ass'n v. U.S. Army Corps of Engineers*, 145 F.3d 1399, 1404 (D.C. Cir. 1998)(holding that, "Regardless of any legal metamorphosis that may occur at the moment of dredging, we fail to see how there can be an addition of *dredged material* when there is no addition of *material"*).

Next, when the dictionary definition is applied to this argument, no "addition" has happened because Mr. Bowman did not increase the amount of materials located within the navigable water. *See Friends of Everglades,* 570 F.3d at 1217. At most, the same amount of material was re-deposited. Also, when the EPA's "outside world" interpretation of "addition" is applied, the element is still not satisfied. The "dredged spoil" re-deposited into the subject wetlands had all been removed from that same area, and no outside materials were introduced. *See Gorsuch*, 693 F.2d at 165. Finally, viewing NUWF's argument through the lens of the EPA's "unitary waters theory," there is no "addition" of pollutants because those materials were already part of a navigable body of water, and as a consequence, could not then be added to a second body.

Thus, even when all of these interpretations of "addition" are applied, this necessary element remains unmet, and NUWF's argument fails.

e. The omission of the term "addition," and the EPA's subsequent interpretations are not inconsistent with the congressional intent of the CWA.

The primary goal of the Clean Water Act was to eliminate releases of high amounts of toxic substances into water and all additional water pollution by 1985. *See CWA generally.* However, "it is one thing for Congress to announce a grand goal, and quite another for it to mandate full implementation of that goal." *Gorsuch,* 693 F.3d at 178. In drafting the CWA, the

language of the statute (or omission thereof, *i.e.*, defining "addition") indicates that Congress recognized the desired provisions of the Act could very well fall short of completely achieving the proposed goals. *Id.*

On its face, it may seem inconsistent with the goals of the CWA that Congress neglected to define the term "addition," but it is no more inconsistent than Congress excluding the authority to regulate the discharge of pollutants from all non-point sources.[4] *See Friends of the Everglades*, 570 F.3d at 1227. Yet, despite the potential discharge of pollutants into navigable waters that may result from such activities, the CWA does this.[5] In doing so, Congress may have foreseen unintended consequences of implementing such broad regulatory authority, noting that it could be unduly burdensome on both landowners and the agencies charged with enforcing the legislation. Once again, if Congress had felt compelled to include language defining the term "addition," they could have. *Gorsuch*, 693 F.2d at 175.

Despite Congress' omissions, it is not the function of the Court to decide whether the EPA's interpretation of "addition" is the best one available. *See Gorsuch*, 693 F.2d at 183. It must only be determined if the EPA's interpretation is reasonable and not inconsistent with congressional intent. If so, it must be upheld. *Id.*

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[4] Nonpoint pollution sources are not defined by the CWA, though the phrase often appears in its text. Authorities often describe them as any source of water pollution that cannot be attributed to a discrete conveyance. So defined, nonpoint source pollution becomes a catch-all category that includes all pollution that does not come from a point source (the CWA's definition of a discrete conveyance). *David Zaring, Agriculture, Nonpoint Source Pollution, and Regulatory Control: The Clean Water Act's Bleak Present and Future*, 20 Harv. Envtl. L. Rev. 515, 516 (1996)

[5] Nonpoint sources have been blamed for *sixty-five to seventy-five percent of the pollution* in the nation's most polluted waters, but all the surface waters of the country have suffered from nonpoint source problems. *Id.* (emphasis added)

It is clear that the EPA's interpretation of "addition" is both reasonable, and not at all inconsistent with the intent of Congress. Consequently, Bowman's activities on the subject wetlands cannot held to be an "addition," resulting in a violation of § 404.

CONCLUSION

In conclusion, NUWF lacks standing to bring a citizen suit against Bowman, is unable to establish the existence of a continuing violation, and further, is barred from bringing suit because of NUDEP's diligent prosecution of Bowman via the Agreement. Additionally, neither NUDEP or NUWF are able to successfully establish that Bowman's activities resulted in the "addition" of a pollutant to the subject wetlands. Based on the foregoing, Appellee, Jim Bob Bowman, respectfully submits that the judgment in this case be affirmed.

Respectfully submitted,

Team No. 15

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was forwarded to: Pace University School of Law, National Environmental Law Moot Court Competition, 78 North Broadway, Preston 212, White Plains, New York, 10603.

Team No. 15

APPENDIX

Constitutional Provisions

U.S. Const. art. III § 2, cl. 1 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

Statutory Provisions

33 U.S.C. § 1311(a) (1995)

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

33 U.S.C. § 1319(g)(6)(A) (1990)

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

33 U.S.C. § 1344(a) (1987)

(a) Discharge into navigable waters at specified disposal sites The Secretary may issue permits, after notice and opportunity for public hearings for the discharge of dredged or fill material into the navigable waters at specified disposal sites. Not later than the fifteenth day after the date an applicant submits all the information required to complete an application for a permit under this subsection, the Secretary shall publish the notice required by this subsection.

33 U.S.C. § 1362(6) (1996)

(6) The term “pollutant” means dredged spoil, solid waste, incinerator residue, sewage, garbage, sewage sludge, munitions, chemical wastes, biological materials, radioactive materials, heat, wrecked or discarded equipment, rock, sand, cellar dirt and industrial, municipal, and agricultural waste discharged into water. This term does not mean (A) “sewage from vessels or a discharge incidental to the normal operation of a vessel of the Armed Forces” within the

meaning of section 1322 of this title; or (B) water, gas, or other material which is injected into a well to facilitate production of oil or gas, or water derived in association with oil or gas production and disposed of in a well, if the well used either to facilitate production or for disposal purposes is approved by authority of the State in which the well is located, and if such State determines that such injection or disposal will not result in the degradation of ground or surface water resources.

33 U.S.C. § 1362(12) (1996)

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

33 U.S.C. § 1365(a) (1987)

(a) Authorization; jurisdiction Except as provided in subsection (b) of this section and section 1319(g)(6) of this title, any citizen may commence a civil action on his own behalf--
(1) against any person (including (i) the United States, and (ii) any other governmental instrumentality or agency to the extent permitted by the eleventh amendment to the Constitution) who is alleged to be in violation of (A) an effluent standard or limitation under this chapter or (B) an order issued by the Administrator or a State with respect to such a standard or limitation, or
(2) against the Administrator where there is alleged a failure of the Administrator to perform any act or duty under this chapter which is not discretionary with the Administrator.
The district courts shall have jurisdiction, without regard to the amount in controversy or the citizenship of the parties, to enforce such an effluent standard or limitation, or such an order, or to order the Administrator to perform such act or duty, as the case may be, and to apply any appropriate civil penalties under section 1319(d) of this title.

33 U.S.C. § 1365(b)(1)(B) (1987)

(b) Notice
No action may be commenced--
(1) under subsection (a)(1) of this section--
(B) if the Administrator or State has commenced and is diligently prosecuting a civil or criminal action in a court of the United States, or a State to require compliance with the standard, limitation, or order, but in any such action in a court of the United States any citizen may intervene as a matter of right.