Team No. 16

IN THE
UNITED STATES COURT OF APPEALS FOR THE TWELFTH CIRCUIT

C.A. No. 13-1246

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 Order of the United States District Court for the District of New Union

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BRIEF FOR THE DEFENDANT-APPELLEE

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JURISDICTIONAL STATEMENT

The United States District Court for the District of New Union had proper subject matter jurisdiction over this case pursuant to 28 U.S.C. § 1331 (2006) as the issues in this case arise under the Clean Water Act (CWA), 33 U.S.C. §§ 1311(a), 1344, 1365 (2006), which are laws of the United States. On June 1, 2012, the district court granted defendant Jim Bob Bowman's (Bowman) motion for summary judgment on all counts. This was a final order that was timely appealed by both the New Union Wildlife Federation (NUWF) and the New Union Department of Environmental Protection (NUDEP), and this Court has jurisdiction pursuant to 28 U.S.C. § 1291 (2006).

STATEMENT OF THE ISSUES

I. Whether NUWF has representational standing through three of the organization's individual members to bring suit against Bowman.

II. Whether Bowman's land clearing activities, which ceased on or about July 15, 2011, and their effects, constitute an ongoing violation, in light of the applicable statute of limitations and Congress's creation of the subject matter jurisdictional requirement under CWA § 505(a).

III. Whether NUDEP's prior federal court action against Bowman, and agreements with him for remedial measures, satisfy the diligent prosecution requirements of § 505(b) of the CWA, for purposes of subject matter jurisdiction.

IV. Whether Bowman "added" pollutants to his wetland, in violation of CWA § 404, when he relocated various naturally occurring materials from one area of the wetland to another during land clearing operations.

STATEMENT OF THE CASE

NUWF filed this action in the district court for the District of New Union, pursuant to 33 U.S.C § 1365 (2006), alleging that Defendant Jim Bob Bowman violated §§ 301(a) and 404 of the CWA by filling his wetlands without having first acquired a permit. R. at 3. NUDEP subsequently intervened on behalf of NUWF with respect to two conditions: (1) that NUWF has standing to bring a citizen suit, and (2) that Bowman violated § 404 of the CWA. R. at 1, 2.

Following discovery, all parties (NUWF, NUDEP, and Bowman) cross-filed motions for summary judgment. R. at 3. The District Court, on June 1, 2012, granted summary judgment for Bowman on all issues, stating that: (1) NUWF lacked standing to bring a citizen suit against Bowman pursuant to CWA § 505, (2) there is no continuing violation of §§ 301(a) and 404, therefore, the court lacked subject matter jurisdiction under § 505(a), (3) NUWF's citizen suit is barred by NUDEP's diligent prosecution of Bowman under CWA § 505(b), and 4) Bowman did not violate § 404 of the CWA. R. at 6–10. Following the District Court's order, NUWF and NUDEP filed a timely Notice of Appeal with the Court, and this Court granted review on September 14, 2012. R. at 1, 2. NUWF takes issue with all aspects of the district court's order, while NUDEP argues that the district court erred when it held that NUWF lacked standing to bring a citizen suit, and that Bowman did not violate § 404 of the CWA. R. 1, 2. Bowman seeks to have this Court affirm the ruling delivered by the district court. R. at 2.

STATEMENT OF THE FACTS

Jim Bob Bowman is the owner of one thousand acres of land near the Muddy River in the State of New Union. R. at 3. Bowman's property is hydrologically connected to the Muddy and is classified as a wetland. R. at 3, 4. In order to bring the land into more productive use, Bowman commenced land clearing operations on June 15, 2011. R. at 4. During these operations, Bowman dug trenches, leveled vegetation, redistributed soil, and dug a ditch to drain the resulting field into the Muddy. R. at 4. Shortly after NUWF members learned of Bowman's actions, they sent notices of intent to sue under §505 of the CWA to Bowman, the Environmental Protection Agency (EPA), and NUDEP. R. at 4. After receiving NUWF's notice of its intent to sue Bowman, under the citizen suit provision of the CWA, NUDEP promptly notified Bowman that his land-clearing actions had alleged violated state and federal law. Bowman subsequently

ceased land clearing operations on July 15, 2011. R. at 4. Using its state governmental authority to implement the CWA, NUDEP devised a settlement agreement in which Bowman would stop clearing any remaining land and would undertake costly measures to build and maintain an artificial wetland. R. at 4. Bowman willingly agreed to the settlement, which was incorporated into an administrative order on August 1, 2011. R. at 4. He has complied with its terms by terminating all land clearing activities and conveying all remaining un-cleared land to NUDEP in a conservation easement for use in public recreational purposes, including a 75-foot buffer zone which will contain an artificial wetland. R. at 4, 7. NUDEP also promptly took court action against Bowman by filing suit in federal district court only forty days after receiving NUWF's notice of intent to sue. R. at 4, 5. NUDEP then filed a motion for the court to enter a consent decree embodying the terms of the settlement agreement. R. at 5. NUDEP has obtained Bowman's consent to all agreements. R. at 4, 5. Although NUDEP did not pursue enforcing penalties against Bowman, they did impose considerable initial cost on him with the order to construct the artificial wetland and potentially great expense with future maintenance of the wetland. R. at 7, 8. Bowman's only continuing activity has been to drain the field through his already constructed swale and to plant wheat on his already constructed field, neither of which violate the terms of the agreements with NUDEP. R. at 7.

SUMMARY OF THE ARGUMENT

This Court should affirm the district court's grant of summary judgment in favor of defendant Bowman on all counts.

As a threshold issue, NUWF lacks standing to sue defendant Bowman. No individual member of NUWF has suffered an injury in fact that is fairly traceable to Bowman's alleged violations. The members of NUWF merely allege general grievances common to the public as

well as speculative claims that do not arise to the level of actual injuries. Any judicially recognized aesthetic injury claimed cannot be fairly traced to Bowman due to the irrational correlation linking an immense waterway and generic allegation of harm to a specific and isolated occurrence.

Additionally, the district court correctly held that it lacked subject matter jurisdiction over NUWF's citizen suit. As interpreted by the Supreme Court, § 505(a) of the CWA does not allow citizen suits for wholly past violations. Instead, the citizen suit provision only applies to present and future violations, as Congress intended. Under the *Gwaltney* standard, and according to the holdings of subsequent lower court cases that have interpreted its meaning in the context of a violation's effects, the past nature of Bowman's actions make them wholly past, and the presence of remaining fill in the former wetland is immaterial. The holding that Bowman's alleged violations are wholly past also maintains the Congressional intent and significance of the CWA jurisdictional requirement and relevant statute of limitations.

Further, the district court was correct in holding that NUDEP's prior actions against Bowman satisfied the diligent prosecution bar to NUWF's suit under § 505(b). Congress intended for federal and state environmental agencies to have primary authority over the enforcement of CWA violation, as evidenced by the statutory requirement that citizens provide notice to the agencies and violators, followed by a waiting period, prior to filing their suit. NUDEP's timely federal court action against Bowman, and its thorough formation of a remedial agreement with him, satisfy the statutory bar and preclude NUWF from seeking any additional sanctions.

Finally, Bowman's land clearing activities did not constitute the "addition" of pollutants under either the EPA's "outside world" or "unitary navigable waters theory", and consequently,

failed to meet a crucial element for finding "discharge of a pollutant." Since Bowman did not add pollutants to his wetland when he relocated various materials around his property, he did was not "discharg[ing] a pollutant" and therefore was not required to seek a permit under § 404. If no permit was required then Bowman's actions did not violate §§ 301(a) and 404 of the CWA.

STANDARD OF REVIEW

Appellate courts review a district court's grant of summary judgment *de novo*. *Applied Genetics Int'l, Inc. v. First Affiliated Sec., Inc.*, 912 F.2d 1238, 1241 (10th Cir. 1990). Summary judgment shall be granted if "there is no genuine issue as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). Therefore, in this Court, "[a]s with all summary judgment motions, the evidence should be viewed in the light most favorable to . . . the nonmoving party." *Hunter v. Bryant*, 502 U.S. 224, 233 (1991).

ARGUMENT

I. THE DISTRICT COURT PROPERLY HELD THAT NUWF LACKED STANDING TO SUE BOWMAN BECAUSE NEITHER THE ORGANIZATION, NOR ANY OF ITS INDIVIDUAL MEMBERS, SUFFERED AN INJURY IN FACT FAIRLY TRACEABLE TO BOWMAN'S ALLEGED VIOLATIONS

NUWF has not established standing under U.S. Const. art. III, § 2 (Article III) and 33 U.S.C. § 1365 (2006) to bring a citizen suit against Bowman. Under Article III, federal courts may only hear "cases" or "controversies" where the plaintiff can show "(1) it has suffered an 'injury in fact' that is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical; (2) the injury is fairly traceable to the challenged action of the defendant; and (3) it is likely, as opposed to merely speculative, that injury will be redressed by a favorable decision." *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 180–81 (2000) (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560–61 (1992)). This suit has been brought under the citizen suit provision of the CWA. 33 U.S.C. § 1365 (2006). The citizen

suit provision has been viewed to extend standing to the limits of Article III of the Constitution. *Ecological Rights Found. v. Pac. Lumber Co.*, 230 F.3d 1141, 1147 (9th Cir. 2000) (citing *Middlesex Cnty. Sewerage Auth. v. Nat'l Sea Clammers Ass'n.*, 453 U.S. 1, 16 (1981)).

NUWF has not alleged that the organization itself has been harmed and does not allege standing in its own right. As an environmental group seeking to protect wildlife and habitats, NUWF may have an interest in environmental litigation, but a "mere interest in a problem" does not suffice to demonstrate standing. *Sierra Club v. Morton*, 405 U.S. 727, 739 (1972). NUWF instead seeks to represent its members' interests. R. at 6. This is proper 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 purposes; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit." *Hunt v. Wash. State Apple Adver. Comm'n*, 432 U.S. 333, 343 (1977).

Examining the individual members of NUWF, it is clear that first, Effie Lawless (Lawless) cannot show that she has suffered an injury in fact, nor can any member of the group properly demonstrate standing from the general allegations of injury common to all members. Second, Zeke Norton (Norton) also cannot demonstrate an injury in fact that is actual and not merely conjectural or hypothetical. Third, Dottie Milford (Milford) cannot show that any actual injury she may have is fairly traceable to the defendant's alleged violation. No individual member of NUWF can satisfy all criteria for Article III standing; therefore NUWF fails to meet its burden of proving it has standing to bring suit against the defendant.

A. Effie Lawless and the Other Individual Members of NUWF Cannot Demonstrate an Injury in Fact from the Commonly Stated Claims for Standing.

In order to demonstrate an injury in fact, Lawless, or any member of NUWF would have to show a direct injury to him or herself that is perceptible. *Defenders of Wildlife*, 504 U.S at

565. These perceptible injuries may be "aesthetic, conservational, and recreational as well as economic." *Morton*, 405 U.S. at 738 (quoting *Ass'n of Data Processing Serv. Orgs., Inc. v. Camp*, 397 U.S. 150, 154 (1970)). However broad these categories may be, it does not eliminate the requirement that the party seeking standing must himself have been injured. *Id.* Lawless has not suffered any such direct and perceptible injury.

Lawless, as well as the other members of NUWF, generally alleges by deposition that she uses the Muddy for recreational purposes such as boating, fishing, and picnicking. R. at 6. Nowhere in the record does Lawless or any member of NUWF claim that recreational activities have been curtailed, less enjoyable, or otherwise affected in any way since the alleged violation. The United States Supreme Court has long held that alleged environmental harm must *affect* the recreational interests of plaintiffs. *Summers v. Earth Island Inst.*, 555 U.S. 488, 494 (2009) (citing *Morton*, 405 U.S. at 734–36) (emphasis added). In *Summers v. Earth Island Inst.*, 555 U.S. 488, 496 (2009), the plaintiffs' failure to allege how the U.S. government's exemption for notice, comment, and appeal on the sale of fire-damaged timber on federal land would "impede a specific and concrete plan" for the individual members of the plaintiff organizations to enjoy the national forests was a failure to allege any actual injury as required for standing. In *Sierra Club v. Morton*, 405 U.S. 727, 735 (1972), the plaintiffs alleged generic environmental harm to a national forest by the building of a ski resort, but the plaintiffs did not allege that it would affect their individual activities.

The failure of the plaintiffs in *Summers* and *Morton* is the same as the failure of Lawless and the other NUWF members who did not allege any actual harm to the recreational activities they continue to enjoy regardless of Bowman's alleged violation. This Court should hold that

Lawless and the other members of NUWF have failed to allege degradation of recreational interests in order to demonstrate standing to bring suit against Bowman.

Lawless and the other members also generally allege a fear of pollution of the Muddy and have an "awareness" and "feel a loss" as a result of Bowman's actions. R. at 6. The individual members also admit that they cannot see a difference in Bowman's land. R. at 6. As previously stated, standing requires a perceptible injury. *Defenders of Wildlife*, 504 U.S. at 565. In addition to the accepted categories of injury such as recreational and economic, courts recognize aesthetic harms. *Morton*, 405 U.S. at 734. However, what Lawless alleges is an ethereal feeling of loss that cannot be recognized as a perceptible aesthetic loss. This feeling and awareness of an alleged difference in the environment, without more, is merely knowledge of an alleged violation, which is not recognized as grounds to confer standing. *See Pub. Interest Research Grp. of N.J., Inc. v. Magnesium Elektron, Inc.*, 123 F.3d 111, 120–21 (3d. Cir. 1997).

In *Public Interest Research Group of New Jersey, Inc. v. Magnesium Elektron, Inc.*, 123 F.3d 111, 120–21 (3d. Cir. 1997), the members of the plaintiff environmental organization attempted to show standing by stating their enjoyment of a river was lessened because of their knowledge that a company violated the conditions of its discharge permit. *Id.* The court held that knowledge of a violation is no more of an injury to these specific plaintiffs than it is to the public at large, which makes it a generalized grievance. *Id.* That court, as well as the Supreme Court has consistently in the past, held that generalized grievances shared by members of the public do not amount to standing. *Id*. (citing *Valley Forge Christian Coll. v. Ams. United for Separation of Church and State*, 454 U.S. 464, 475 (1982); *Warth v. Seldin*, 422 U.S. 490, 500 (1975)). To allege that knowledge of an alleged violation should give standing is to say that merely the violation itself should give standing to members of the public. *See Magnesium*, 123

F.3d at 121. But as stated by the court in *Magnesium*, plaintiffs must demonstrate more than a "'mere exceedance of a permit limit'" to prove a recognizable injury for standing. *Id*. (quoting *Pub. Interest Research Grp. of N.J., Inc. v. Powell Duffryn Terminals, Inc.*, 913 F.2d 64, 72 (3d Cir. 1990)). "The relevant showing for purposes of Article III standing . . . is not injury to the environment but injury to the plaintiff." *Laidlaw*, 528 U.S. at 181. To allow for more attenuated grounds for standing would be to change the well-accepted standard of requiring the plaintiff to show that he is among the injured. *Morton*, 405 U.S. at 735.

What NUWF seeks to do through Lawless is indistinguishable from the plaintiffs who failed to demonstrate standing in *Magnesium*. Lawless and the other plaintiffs who claim standing as a result of the feeling of loss from their awareness of an alleged violation have not alleged a judicially cognizable perceptible injury. The claimed injury is not aesthetic, nor is it any other kind of recognized injury. In addition, no aesthetic injury has been claimed relating to Bowman's land since there is no perceptible difference. The claimed injury amounts to nothing more than knowledge of an alleged violation that gives these plaintiffs no personal stake in the matter. For these reasons, this Court should find that the stated general grievances are insufficient to demonstrate standing to bring suit against Bowman.

The common injury allegations of Lawless and the other individual members of NUWF incorporating their recreational interests fall short of anything recognized by a court to demonstrate standing. No loss of use or enjoyment of their recreational activities has been alleged. Also, the awareness of an alleged violation that causes the members to feel loss, which is commonly stated by all members of NUWF, is not just common to these members; it is common to all members of society. Generalized grievances of those who feel upset after learning of an alleged violation are insufficient to demonstrate standing. For these reasons, this

Court should hold that these common allegations of injury held among the individual members of NUWF do not show standing to bring suit against the defendant.

B. Zeke Norton, an Individual Member of NUWF, Cannot Demonstrate a Viable Injury in Fact that is Actual and not Merely Conjectural.

NUWF alleges that Norton's frogging activities on and around Bowman's property should give him standing to bring suit against the defendant. R. at 6. It is alleged that the number of frogs Norton catches as of late has diminished. R. at 6. This fails to prove standing because Norton, who was trespassing on the defendant's land prior to the conservation easement, had no right to collect frogs before the easement, so any interest Norton claims, only applies to the land affected by the easement since the date the easement was granted, and since that date, a change in the number of frogs is merely conjectural.

It is well-settled law that an injury in fact is "an invasion of a legally protected interest." *Defenders of Wildlife*, 504 U.S. at 560. This principle of judicial standing is reiterated in the citizen suit provision of the CWA that says a citizen bringing suit is one "*having* an interest" that is or may be harmed. 33 U.S.C. § 1365(g) (2006) (emphasis added). As this language requires a plaintiff to have a current interest at the time of the alleged violation, in Norton's case, it must be asked what legally protected interest he had at the time the field was drained and before the conservation easement was granted. The answer is simply that prior to the easement, Norton was trespassing on Bowman's land, and therefore, had no legally protected interest in any of Bowman's property or the frogs thereon. Norton's interest in Bowman's land and the frogs thereon started at the date of the easement, which was August 1, 2011, so whatever frogs existed on Bowman's property subject to the easement at the date of the easement should be the frogs to which he can claim an interest. The cleared field is still Bowman's property and not included in the easement. R. at 4. Norton's interest, and the only relevant inquiry, relates to the frogs in the

wooded area adjacent to the river and the buffer zone between the wooded area and Bowman's field after August 1, 2011.

As discussed, the Supreme Court has stated that Article III standing requires an injury to be actual, not conjectural or hypothetical. *Defenders of Wildlife*, 504 U.S. at 560. The Court in *Defenders of Wildlife*, dealt with an environmental group seeking to protect endangered species in foreign nations from actions taken by the U.S. government. *Id.* at 558. The Court noted that to survive a summary judgment motion on standing, the environmental group would have to show specific facts that the species in question were in fact being threatened. *Id.* at 563. In the case at bar, Norton only alleges that he could yield a dozen frogs assuming he was frogging during the right season. R. at 6. Norton has not alleged that frogging after August 1, the date of the easement, is the ideal season for a frog population to be collected, and that any frogs are actually missing. In essence, Norton has not alleged that the number of frogs occupying the easement zone on Bowman's property after Bowman's alleged violations was any different than the number of frogs that would normally occupy the land at that time of year had no action been taken by Bowman. The allegation by Norton does not state an injury because it is merely conjectural that the number of frogs has changed at all compared to the same season in other years.

NUWF fails to allege standing through its member, Zeke Norton. Because Norton's legal interest in Bowman's property did not begin until the easement was granted, Norton cannot claim an injury before that date. After the date of the easement, Norton claims a change in the number of frogs available but fails to allege that the season in which he visited the land was the ideal time in which to collect the maximum number of frogs. For these reasons, the Court should hold that NUWF fails to demonstrate standing through its member, Norton.

C. Dottie Milford, an Individual Member of NUWF, Cannot Demonstrate an Injury in Fact that is Fairly Traceable to the Alleged Violations of Bowman.

NUWF, through Milford, seeks to show standing by Milford's testimony that "the Muddy looks more polluted to her than it did prior to Bowman's activities." R. at 6. This allegation is insufficient to demonstrate standing, as it is not fairly traceable to Bowman's actions for two reasons. First, it can reasonably be inferred that Bowman's acts are so greatly attenuated by the river's sheer size that any change in the river's appearance could not be fairly traced to the defendant since Bowman's actions could not have changed the river's appearance for Milford to have noticed. Second, a general averment of a polluted look to the river is far too expansive of a term to be fairly traceable to the actions of the defendant. Considering these factors together, the generality of the allegations by NUWF and Milford can be discredited as irrational and do not demonstrate standing.

It has been previously ruled that the desire to observe the environment for aesthetic purposes is an interest in determining standing; therefore it is conceded that a negative change in the appearance of the Muddy River would be an injury in fact suffered by NUWF member, Dottie Milford. *Defenders of Wildlife*, 504 U.S. at 562–63. In order to prove causation for standing purposes, a plaintiff must show there is a "substantial likelihood" that the defendant's alleged violation caused the harm. *Powell Duffryn*, 913 F.2d at 72 (quoting *Duke Power Co. v. Carolina Envtl. Study Grp., Inc.*, 438 U.S. 59, 75 n.20 (1978)). In the context of a CWA case, this substantial likelihood can be established by showing the defendant:

> (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.

Powell Duffryn, 913 F.2d at 72. However, "an overly broad application of this test may be problematic." *Sierra Club, Lone Star Chapter v. Cedar Point Oil Co.*, 73 F.3d 546, 558 n.24 (5th Cir. 1996). The Fifth Circuit noted that to read this test too literally would lead to results inconsistent with traditional standing requirements, and that certain waterways are large enough to require plaintiffs to show a more "specific geographic or other causative nexus" between the defendant's actions and the alleged harm. *Id*. Although the Fifth Circuit held that there was sufficient causation between the alleged harm and the defendant's actions, the defendants in that case were discharging between 500 and 1200 barrels of oil and gas by-product into Galveston Bay for almost three years. *Id.* at 551. Another court, without qualifying the size of the waterway, noted that the alleged injuries are to be shown in a "specific area of concern." *Friends of the Earth, Inc. v. Gaston Copper Recycling Corp.*, 204 F.3d 149, 161 (4th Cir. 2000). Also, in determining whether there was an injury in fact, the Supreme Court has said subjective apprehensions do not demonstrate standing where there is no reasonableness of fear. *Laidlaw*, 528 U.S. at 184. And such an irrational fear can "simply be discredited." *Sierra Club v. Franklin Cnty. Power of Ill., LLC*, 546 F.3d 918, 927 (2008). This same standard should apply to whether the injury is fairly traceable to the defendant's actions.

Milford's testimony refers to the Muddy River in its entirety. R. at 6. The area of the Muddy River in concern is eighty miles long. R. at 6. Where it borders Bowman's property, it is more than 500 feet wide and deeper than six feet. R. at 6. Milford alleges that this entire segment of the river has been aesthetically changed since Bowman formed a ditch to drain a field that is at most, 650 feet long, which has been in existence for less than a month. R. at 6. However, testimony from the members of NUWF shows that the members are aware that the wetlands absorb sediment before it reaches the river. R. at 6. Just as the *Sierra Club, Lone Star*

Chapter v. Cedar Point Oil Co., 73 F.3d 546, 557 n.24 (5th Cir. 1996) court cautions, to strictly apply the *Powell Duffryn* test would be to destabilize and alter Article III standing as courts have traditionally applied it. *Cedar Point* is factually different than the case at bar in that the court did not require a showing that the pollutant seen in Galveston Bay originated from the defendant because due to the amount of effluent emptied into the waterway over a long period of time, it was reasonable to infer that that defendant could have been the one to produce the effluent seen. *See id.* at 558. In the case at bar, it is wholly improbable to attribute an aesthetic change to such a large area with the defendant's *de minimus* actions. To do so would create an untenable standard where the smallest amount of effluent could be attributed to harm of the largest waterways. In *Friends of the Earth v. Crown Central Petroleum Corp.*, 95 F.3d 358, 361 (5th Cir. 1996), the court found that a point source eighteen miles away was too far to infer causation. In Bowman's case, NUWF and Milford seek to assert that Bowman's actions resulted in the aesthetic change to the river in general, which is not just eighteen miles long, but eighty miles long. R. at 3. The court in *Crown* went on to state that in a case where large waterways are the concern, traceability could be shown by water samples or expert testimony stating that the effluent could have a perceivable impact over a large area. *See* 95 F.3d at 362. There must be a point at which a court can no longer assign traceability based on a plaintiff's assumptions of the behavior of water and effluent. *See id.* As settled law states, it is the plaintiff who bears the burden of persuasion. *Defenders of Wildlife*, 504 U.S. at 561. Where a plaintiff alleges causation of harm that is so irrationally linked to the defendant, it should be disregarded just as it would had the plaintiff been alleging an injury in fact that was irrational. *See Laidlaw*, 528 U.S. at 184; *Franklin Cnty. Power*, 546 F.3d at 927. As it is not substantially likely that the brief actions by the defendant could cause such a widespread change in the river, the *Powell Duffryn*

test should not be strictly applied, and this Court should rule that the irrational assertions of Milford do not demonstrate standing.

Similar to the broad assertion that the defendant has aesthetically changed the entire Muddy River as a result of a short-lived and nominal act, Milford also generically states the river has a "polluted" look. R. at 6. Just as Bowman's acts should not be fairly attributed to an allegation involving the entire river, Bowman's acts should not be fairly attributed to include an all-inclusive complaint of pollution.

Where courts have found aesthetic injuries to be fairly traceable to defendants, the plaintiffs identified the effluent in the waterway as the same effluent released by the defendant, or at least described the effluent in terms that linked it to the defendant. *See Gaston Copper*, 204 F.3d at 161–62 (linking presence of metals found in lake to type of metals discharged by defendant); *Cedar Point*, 73 F.3d at 556–57 (citing the presence of oily and greasy water in the lake where the defendant dumped oil and gas by-products). Although the Supreme Court did not inquire deeply into the plaintiffs' affidavits that did not allege a specific type of pollution in *Laidlaw*, it was unnecessary because standing was found sufficient due to the narrow focus and specific allegations of injury to recreational interests. *Pac. Lumber*, 230 F.3d at 1148–49; *See Laidlaw*, 528 U.S. at 181–83.

Milford's allegation of a polluted look to the river fails to link any specific type of pollutant in the river to any specific type of pollutant discharged by Bowman. To allow such a thinly veiled general and generic grievance that lacks any connection to the defendant, to confer standing, would be to make the defendant answer for *all* aesthetic complaints regardless of the substance causing the aesthetic change.

While either Milford's allegation of river-wide contamination or her all-inclusive complaint of pollution should be enough for the court to deny standing, the combination of the expansive and all-purpose terms is wholly insufficient to demonstrate standing, as it would allow for an unprecedented form of standing where irrational claims irreverent of logical notions of area size combine with non-descript and all-encompassing expressions of injury to create an untenable standard. For these reasons, the Court should hold that NUWF lacks standing through its member, Dottie Milford.

NUWF has not demonstrated standing through any of its members. All members state a use of the waterway, but none claim an injury to that use. All members claim an awareness of loss, but knowledge of an alleged violation does not show a direct and personal injury. Norton claims a loss of the ability to collect frogs but fails to show this is an actual injury and not merely a conjecture about the natural movement and fluctuation of wildlife during different seasons. Milford states an aesthetic injury but fails to show any rational traceability between her observation of general pollution in a vast waterway and the isolated activity of Bowman. For these reasons, the Court should affirm the lower court's decision and hold that NUWF does not have standing to bring suit against Bowman.

II. BOWMAN'S WHOLLY PAST ACTIVITIES DO NOT CONSTITUTE ONGOING VIOLATIONS OF THE CWA, AND THUS, THE COURT LACKS SUBJECT MATTER JURISDICTION UNDER THE CITIZEN SUIT PROVISION.

Under the CWA citizen suit provision, a citizen or citizen group can bring a civil action against a person "alleged to be in violation" of a CWA standard or limitation. 33 U.S.C. § 1365(a) (2006). This language has been construed by the United States Supreme Court to mean that the CWA citizen suit provision is only applicable to present violations and thus precludes suits for past violations. *See Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Found.,* 484 U.S.

49, 57 (1987) (discussing Congress's decision to use the words "'to be in violation'" as opposed to "'to have violated'" as a "requirement that citizen-plaintiffs allege a state of either continuous or intermittent violation—that is, a reasonable likelihood that a polluter will continue to pollute in the future"). In this case, Bowman's actions do not constitute a continuing violation because he has ceased activities and has complied with remedial measures by placing his remaining land in a conservation easement with NUDEP and promising to construct a new wetland. R. at 7. Thus, there is no indication or likelihood that there will be any future violations. To allow NUWF's citizen suit for Bowman's past violations, because of a claim that he has not removed dredged and fill material, would frustrate the Congressional intent of requiring present or potentially future violations in order to grant subject matter jurisdiction upon the court as identified in *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Foundation*, 484 U.S. 491 (1987) (*Gwaltney I*). In addition, to allow NUWF's citizen suit for Bowman's past violations would disregard the Congressional purpose of enacting a five-year statute of limitations period because it would hold Bowman liable for a violation for each day the fill remains. 28 U.S.C. § 2462 (2006). As a result, the statute of limitations would never begin to run and Bowman would be subject to suit indefinitely. Therefore, this Court should affirm the district court's grant of summary judgment to Bowman for lack of subject matter jurisdiction under CWA § 505(a).

A. Bowman's Wholly Past Violations of the CWA Cannot be Considered Ongoing Due to the Prospective Nature of the CWA Citizen Suit Provision.

The district court's decision to grant summary judgment for lack of subject matter jurisdiction because all violations are wholly past should be upheld. To hold otherwise would flout Congress's creation of a statutory definition for citizen suit jurisdiction as found in § 505(a), and would further defy its intent for the jurisdiction to be applicable only to present and future violations. 33 U.S.C. § 1365(a) (2006). In its assessment of the congressional intent

behind the citizen suit provision, the Supreme Court not only looked to the legislative history and language of the provision, but the Court also found the construction and language of other provisions in the Act to be persuasive in considering it to be "primarily forward-looking." *Gwaltney I*, 484 U.S. at 59. The Court held that to interpret the provision any way other than that "the harm sought to be addressed by the citizen suit lies in the present or future, not in the past" would be to "render incomprehensible § 505's notice provision." *Id.* (referring to 33 U.S.C. § 1365(b)(1)(A) (2006)). The Court further held that "the purpose of notice to the alleged violator is to give it an opportunity to bring itself into complete compliance with the Act and thus . . . render unnecessary a citizen suit." *Id.* at 60. Consequently, the Supreme Court's interpretation of Congress's intent to bar wholly past violations from jurisdiction, set forth in *Gwaltney I*, has been consistently applied as the standard in subsequent cases. *See, e.g.*, *United States v. Rutherford Oil Corp.*, 756 F. Supp. 2d 782 (S.D. Tex. 2010); *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167 (2000). Since the Supreme Court established the standard, however, lower courts have struggled to uniformly determine when a violation is wholly past and the determination has ultimately turned on the facts of each individual case. *Compare, e.g.*, *Rutherford*, 756 F. Supp. 2d 782 (holding that defendant's actions did not constitute continuing violations), *with City of Mountain Park, Ga. v. Lakeside at Ansley, LLC*, 560 F. Supp. 2d 1288 (N.D. Ga. 2008) (holding that an ongoing violation existed).

The Fourth Circuit's interpretation of the direction from the Supreme Court on remand gives district courts further guidance as to what constitutes a wholly past violation. *See Chesapeake Bay Found., Inc. v. Gwaltney of Smithfield, Ltd.*, 844 F.2d 170 (4th Cir. 1988). The court interpreted the Supreme Court's standard to mean that lower courts should "consider whether remedial actions were taken to cure violations, the *ex ante* probability that such remedial

measures would be effective, and any other evidence presented . . . that bears on whether the risk of continued violation had been completely eradicated when citizen-plaintiffs filed suit." *Id.* at 172. Also, the Supreme Court has held that if a defendant's voluntary actions have made it so clear that the alleged violations cannot recur, then the case against the defendant could become moot. *Laidlaw*, 528 U.S. at 189. Here, Bowman has stopped all land-clearing activity and there is no future risk of further violation because he has already given all of his remaining land over to NUDEP in the conservation easement. R. at 4. He has taken all possible remedial measures by setting aside this remaining land, including a buffer zone, for public recreational use and by agreeing to construct a year-round artificial wetland on the buffer zone. R. at 4.

Even though plaintiffs must only have a good faith allegation that violations are ongoing or intermittent at the time of filing suit in federal court for purposes of subject matter jurisdiction, defendants can challenge the validity of those claims by showing that they are wholly past. *Gwaltney I*, 484 U.S. at 65-66. The "good faith" requirement of the allegations must be "based on a good-faith belief, formed after reasonable inquiry . . . [and] 'well grounded in fact.'" *Id.* at 66 (citing Fed. R. Civ. P. 11). Since NUWF cannot even provide any facts of ongoing violations by Bowman because he has ceased all activity, they attempt to argue that the continuous presence of dredged and fill material from Bowman's past actions constitute continuing violations. R. at 7. The continued presence of illegal fill material in a wetland does not definitively constitute an ongoing violation, however.

The vast array of differing lower court opinions addressing whether the effects of past violations constitute an ongoing CWA violation highlight the difficulty and fact-dependence of such cases. *Ansley*, 560 F. Supp. 2d at 1295–96. Both courts and commentators have acknowledged that the lower courts are split on the interpretation of "whether the CWA creates a

continuing obligation to remedy the effects of violations." *Rutherford*, 756 F. Supp. 2d at 790; *see Ansley*, 560 F. Supp. 2d at 1293–96; Albert C. Lin, Comment, *Application of the Continuing Violations Doctrine to Environmental Law*, 23 Ecology L.Q., 723, 731–39 (1996). "Once the violator stops adding a pollutant in violation of a permit, the violation itself is over. What remains are the effects of the violation, but absent a continuing obligation that is itself violated, the effects are not themselves violations." *Rutherford*, 756 F. Supp. 2d at 791 (citations omitted).

The question then becomes whether the continued presence of dredged and fill material can constitute a violation of a continuing *obligation* on the part of Bowman. If the purported harm, according to NUWF, is the lack of the wetland which serves to "absorb sediments and pollutants" and to act as a flooding buffer, then the construction of a new wetland and buffer zone should suffice to fulfill Bowman's obligation. R. at 6. Also, NUDEP biologist's testimony further reinforces the sufficiency of Bowman's remedial measures because the new wetland is expected to "provide richer wetland habitat than the former." R. at 6. Thus, the effects of Bowman's past actions do not equate continuing obligations to remove fill material from the former wetland and this case can be distinguished from the cases NUWF cites for support of its continuing violation theory based on the facts.

In support of its continuing violations theory, NUWF cites cases which broadly interpret the meaning of ongoing violations, such as *Sasser v. Administrator, United States Environmental Protection Agency*, 990 F.2d 127 (4th Cir. 1993). In *Sasser*, however, the defendant "declined to restore the property to its previous condition as wetlands" after his violations had been discovered by the Corps of Engineers. *Id.* at 128. These facts are distinguishable from the present facts because Bowman has instead consented to the creation of a new, better wetland to

replace the wetland containing the fill material which he has already turned into a wheat field. R. at 6, 7. Therefore, the best remedy has already been imposed by NUDEP and there is nothing further that Bowman can reasonably do. In *United States v. Ciampitti*, 669 F. Supp. 684, 687–88 (D.N.J. 1987), the defendant was twice denied a permit from the Corps of Engineers, failed to comply with a court order to submit a revised restoration plan, and engaged in additional fill activities. Again, these facts are very different from the present case. Bowman has consented to and complied with all agreements and orders from NUDEP, and he has refrained from any additional fill activity without any likelihood, or even remote possibility, of future violations since all of his remaining land is covered by easement. R. at 4. Accordingly, this Court should affirm the lower court's grant of summary judgment for lack of subject matter jurisdiction because Bowman's cessation of all fill activities and his engagement in remedial measures require the determination that his violations are wholly past.

B. Bowman's Violations are Wholly Past and Not Ongoing, Regardless of Reversibility, Due to the Statute of Limitations Applicable to the CWA.

The CWA does not provide its own specific statute of limitations, but courts have held that the five-year statute of limitations found in 28 U.S.C. § 2462 applies to CWA citizen suits. *See Sierra Club v. Chevron U.S.A., Inc.*, 834 F.2d 1517, 1521 (9th Cir. 1987). This statute of limitations also poses a problem for NUWF's theory that Bowman's violations are continuing. To hold Bowman liable for a violation for each day the fill remains in the former wetland would defeat the purpose of the statutory limitation on actions and would result in serious inequity to Bowman. If a defendant's failure to remove fill material from a wetland automatically implied a continuing violation of the CWA in every case, then the defendant would constantly be considered "in violation" and would always be subject to a citizen suit, thus "nullif[ying] any statute of limitations defense that might be raised." David S. Foster, *The Continuing Violations*

Doctrine and the Clean Water Act: Untenable Solutions and a Need for Reform, 32 Envtl. L. 717, 729 (2002). Furthermore, each day the fill remains in the wetland would constitute a new violation and would subject the defendant to outrageous penalties. *See id.*

The lower court was correct in recognizing that Bowman's violation cannot be continuing due to the application of the statute of limitations. R. at 7. Other lower courts have also rejected the idea that the effects of a violation can make a violation ongoing because, in order to be true to the purpose of the statute of limitations, the court must differentiate between the defendant's initial act of discharge of fill material into a wetland and the continuing effects of that discharge. *See United States v. Telluride Co.*, 884 F. Supp. 404 (D. Colo. 1995), rev'd on other grounds, 146 F.3d 1241 (10th Cir. 1998). Most notably, the Tenth Circuit has held that continuing impacts of violations do not automatically make the violations themselves continuing and reasoned that "[i]f the statute of limitations were to begin to run only when the defendant has removed fill and restored the wetland, it might never begin to run at all. *Id*. at 408.

NUWF would like this court to ignore Congress's intent in establishing a statute of limitations and instead follow some lower courts that have found violations to be continuing due to public policy reasons that are not justified based on the facts in this case. In *North Carolina Wildlife Federation v. Woodbury*, No. 87–584–CIV–5, 1989 WL 106517, at *3 (E.D.N.C. Apr. 25, 1989), a district court justified a finding of an ongoing violation by holding that to bar a citizen suit when the wetland has already been drained would encourage alleged violators to hide their actions from inspection and enforcement, and thus, interfere with enforcement of the CWA. This argument holds no weight in this case, however, because Bowman's actions are already known to the public and have been subjected to government enforcement.

NUWF also argues that *Gwaltney I* only addressed claims for violations of § 402 of the CWA, which are irreversible. R. at 7. Yet, in its summary judgment order, the district court acknowledged that some § 402 violations are actually reversible because many CERCLA sites "involve removal of bottom sediment from former point sources." R. at 7. Indeed, as illustrated with the cases mentioned above, and in Part A, the possibility and sufficiency of removal and remedial measures are largely dependent upon the facts of each individual case.

The court in *North Carolina Wildlife Federation* focused on this removability of fill material and held that "only violations having persistent effects that are amenable to correction would constitute continuing violations until remedied." 1989 WL 106517, at *3. Commentators have discussed that court's view on finding ongoing violations based on this reversible/irreversible classification. *See* Lin, *supra*, at 738; Foster, *supra*, at 735–37 (2002). As one of those commentators pointed out, the *North Carolina Wildlife Federation* court's focus on the effects of the past violation rather than on the remedial measures taken to prevent future violations is not supported by the *Gwaltney I* standard. Foster, *supra*, at 735–36 (2002).

Furthermore, even though some of the lower courts have held that a continuous violation exists for § 404 violations, they have still applied the *Gwaltney I* standard to the particular facts of those cases which confirms the district court's determination that reversibility of violations and the application of the *Gwaltney I* doctrine are fact-dependent. *Ciampitti*, 669 F. Supp. at 687–88 (D.N.J. 1987). Even if this Court were to apply the reversible/irreversible distinction to the facts of this case, the result would remain unchanged. As already discussed, Bowman's past actions cannot be so easily undone as to simply restore the former wetland and so the best remedy was, and still is, to build an enhanced wetland to take the place of the previous one.

Thus, in order to preserve the integrity of the subject matter jurisdiction requirement and for meaningful application of a statute of limitations to CWA actions, this Court should affirm the lower court's grant of summary judgment because Bowman's violations are wholly past.

III. THIS COURT LACKS SUBJECT MATTER JURISDICTION BECAUSE NUDEP'S TIMELY ACTION AGAINST BOWMAN, AND DILIGENT PROSECUTION OF HIS ALLEGED VIOLATIONS, PRECLUDES A CITIZEN SUIT UNDER THE CWA.

The CWA specifically limits the opportunity to bring a citizen suit against an alleged violator when a State has commenced and is diligently prosecuting an enforcement action. 33 U.S.C. § 1365(b)(1)(B) (2006). With § 1365, Congress intended to allow the government "to act first and to control the litigation if it acts within" the required sixty-day waiting period. *Chesapeake Bay Found. v. Am. Recovery Co.*, 769 F.2d 207, 208 (4th Cir. 1985); 33 U.S.C. § 1365(b)(1)(A) (2006). If the government proceeds to timely commence and diligently prosecute an action against the violator, then subsection (b) of § 1365 provides a statutory bar to the jurisdiction authorized by subsection (a) of the same statute. 33 U.S.C. §§ 1365(a), 1365(b)(1)(B) (2006). Thus, this Court must only answer two questions when determining whether NUDEP's action bars NUWF's citizen suit: (1) whether NUDEP already had a suit pending in federal court "to enforce the same 'standard, order, or limitation'" and (2) "whether the prior pending action was being 'diligently prosecuted' by the state at the time the citizens' suit was filed." *Conn. Fund for Env't v. Contract Plating Co.*, 631 F. Supp. 1291, 1293 (D. Conn. 1986) (quoting 33 U.S.C. § 1365(b)(1)(B) (2006)). When a court determines whether a state's prosecution is diligent, it will consider the "objective evidence from the court files with respect to the status of the state's suit at the time that the citizens' suit commenced and the prospects that the state suit would proceed expeditiously to a final resolution." *Id.* at 1293.

The legislative history supports the interpretation that Congress intended citizen suits under this section to serve a supplementary role in enforcement of compliance with the Clean Water Act. *Gwaltney I*, 489 U.S. at 60 (holding that "the citizen suit is meant to supplement rather than supplant governmental action"). The government then, through federal, state, and local agencies, is intended to serve as the primary source of enforcement actions and the main prosecutor of violations. *Id.* As a state agency, NUDEP first served its duty as the principal enforcement officer when it took action to form a settlement agreement with Bowman, which was later turned into an administrative consent order. *See* R. at 5. Additionally, NUDEP's thorough prosecution of Bowman satisfies the requirements for the statutory bar against a citizen suit because it brought an action against Bowman in the federal district court and moved to enter a decree to which Bowman has already agreed. *See* R. at. 5. Thus, this Court should affirm the district court's decision and hold that NUWF's citizen suit is barred by NUDEP's diligent prosecution of Bowman under the CWA.

A. NUDEP's Timely Prosecution of Bowman's Alleged Violations Serves as a Statutory Bar to NUWF's Citizen Suit.

As a state enforcement agency, NUDEP is given "primary enforcement authority" and its diligent prosecution of Bowman's alleged CWA violations precludes the citizen suit brought by NUWF. *See Karr v. Hefner*, 475 F.3d 1192, 1197 (10th Cir. 2007). Under CWA § 505(b)(1)(A), the citizen-plaintiff must wait sixty days after giving notice of the alleged violation to the alleged violator and the appropriate government enforcement agencies. 33 U.S.C. § 1365(b)(1)(A) (2006). This language intended to allow the government the opportunity to serve its role as the primary enforcement authority. Thus, "[c]itizen lawsuits have a merely 'interstitial role'; Congress did not intend for them to be even 'potentially intrusive' on agency discretion." *Karr*, 475 F.3d at 1197 (citing *Gwaltney I*, 484 U.S. at 61). The purpose of the statute was

properly carried out in this case. NUWF provided notice of its intent to sue Bowman for CWA violations, and shortly thereafter, NUDEP, as the primary enforcement authority, notified Bowman of his violations and produced a settlement agreement and subsequent administrative order. R. at 4. This timely and diligent prosecution was complete when NUDEP brought suit against Bowman in federal district court and sought to embody the settlement agreement and administrative order in a consent decree. R. at 5. All of these actions took place within the statutory sixty-day period, thus satisfying the statutory requirement.

B. NUDEP's Enforcement Actions Against Bowman Constitute Diligent Prosecution under the CWA and Bar NUWF's Claims for Additional Punishment.

The statute does not "require government prosecution to be far-reaching or zealous" nor does it require it to match the remedies of the citizen-plaintiff, but rather it must only be "diligent." *Karr*, 475 F.3d at 1197. NUWF seeks its remedy through civil penalties as well as an injunction, neither of which are necessary in light of NUDEP's diligent prosecution. R. at 4, 5. Citizen suits are only appropriate when the EPA (or authorized state agency) has "failed" to act and to question whether the agency's enforcement was appropriate when it did act "fails to respect the statute's careful distribution of enforcement authority." *Ellis v. Gallatin Steel Co.*, 390 F.3d 461, 477 (6th Cir. 2004) (citing *Gwaltney I*, 484 U.S. at 61). As previously stated, NUDEP's enforcement order and subsequent suit in federal court certainly nullify any charge of failure to act, and NUWF is doing nothing more than questioning the appropriateness of NUDEP's action. In *Gwaltney I*, the Supreme Court gave a compelling reason for lower courts to give deference to the diligent actions taken by government enforcement agencies by referring to the essential purpose of the government's power to negotiate with violators. *Gwaltney I*, 484 U.S. at 60–61. If the enforcement agency "agreed not to . . . seek civil penalties on the condition that the violator take some extreme corrective action, such as to install particularly effective but

expensive machinery, that it otherwise would not be obliged to take," but then citizen-plaintiffs were allowed to sue much later for those civil penalties, it would harm the "public interest" that had been advanced by the agency's action. *Id.*

Consequently, NUWF cannot sue for more stringent civil penalties and an injunction simply because NUDEP chose to pursue a costly remedial settlement in lieu of a monetary penalty. *See* R. at 4, 5. Further, that the remedy imposed by NUDEP does not include the specific removal of fill material sought by NUWF is irrelevant. The settlement agreement, administrative order, and consent decree, all of which Bowman has willingly agreed to, require him to build and maintain a year-round wetland "at considerable initial expense and an indeterminable future expense." R. at 7, 8. Bowman is by no means being treated lightly by NUDEP, but is instead being spared unnecessary penalties by compromising and complying with a costly remedial effort, for the overall public benefit, resulting in a new and better wetland. To subject him to further monetary civil penalties, and costly and unnecessary fill removal, only acts to deter future violators from readily working with government agencies for the overall good. As one court has keenly recognized, the public interest is better served by a defendant, such as Bowman, using his limited resources to carry out remedial measures than to pay costly monetary penalties. *See Ciampitti*, 669 F. Supp. at 699 (quoting *United States v. Ciampitti*, 615 F. Supp. 116, 124–25 (1984)). By giving deference to NUDEP to use its power to negotiate with alleged violators such as Bowman, this Court will respect the Supreme Court's precedent to use cooperation and compromise to serve the general interest of the public.

Moreover, the terms of the settlement agreement, enforcement order, and consent decree do, in fact, serve the best interests of the public. The preservation of Bowman's remaining land in its natural state for public use and enjoyment serves the interests of NUWF and the general

public. R. at 7, 8. The new wetland that Bowman is required to construct and maintain will enhance the aesthetic benefits of the Muddy River and increase the frogging potential for citizens such as Mr. Norton. R. at 7, 8.

The citizen suit provision of the CWA serves a valuable purpose in appropriate circumstances as the Fourth Circuit recently recognized. *Piney Run Pres. Ass'n v. Cnty. Comm'rs of Carroll Cnty., Md.*, 523 F.3d 453, 456 (4th Cir. 2008). In that case, the court held, however, that it was not appropriate for a citizen suit for reasons already discussed. Likewise, this Court should recognize that while a citizen suit can be an effective enforcement tool when necessary, it is completely unnecessary when the violations have already been diligently prosecuted by the government and the citizen-plaintiffs fail to show otherwise. *Id.* at 460. Therefore, this Court should affirm the district court's holding that NUDEP fulfilled all of the statutory requirements for diligent prosecution of Bowman's violations to effectively bar NUWF's citizen suit.

IV. THE DISTRICT COURT CORRECTLY HELD THAT BOWMAN DID NOT VIOLATE § 404 OF THE CWA BECAUSE HE DID NOT "ADD" POLLUTANTS TO THE WETLAND WHEN HE RELOCATED NATURALLY OCCURING MATERIALS WITHIN THE SAME WETLAND.

Section 301(a) of the CWA prohibits "the discharge of any pollutant by any person," without having obtained a permit under § 402 or § 404 of the CWA. 33 U.S.C. § 1311(a) (2006). Under § 404 of the CWA, the U.S. Army Corp of Engineers is empowered to issue permits for the discharge of dredged and fill materials into navigable waters of the United States. *Id.* § 1344. The CWA defines "discharge of a pollutant," in § 502(12), as "any addition of any pollutant to navigable waters from any point source." *Id.* § 1362(12) (2006). The District of Columbia Court of Appeals has held that a National Pollutant Discharge Elimination System (NPDES) permit is required when five elements are present: "(1) a *pollutant* must be (2) *added* (3) *to*

navigable waters (4) *from* (5) *a point source*." *Nat'l Wildlife Fed'n v. Gorsuch*, 693 F.2d 156, 165 (D.C. Cir. 1982). Section 502 of the CWA contains definitions for "pollutant," "navigable waters," and "point source," but has no equivalent definition for "addition." *Id*. § 1362 (2006).

Addition is the only element disputed by the parties. R. at 9. All parties agree that the material Bowman relocated around his property contained pollutants. R. at 8. The various trees and vegetation moved about were "biological materials," listed in the CWA as a pollutant. 33 U.S.C. § 1362(6). Bulldozers, like the one used by Bowman, due to their ability to move materials from one place to another, are point sources. *See Avoyelles Sportsmen's League, Inc. v. Marsh*, 715 F.2d 897, 927 (5th Cir. 1983). Further, Bowman's property met the criteria necessary to classify as a wetland under the U.S Army Corp of Engineers Wetlands Delineation Manual. R. at 3, 4. Finally, wetlands adjacent to navigable bodies of water, such as the Muddy River, are navigable waters themselves according to the Supreme Court. *See United States v. Riverside Bayview Homes*, 474 U.S. 121, 139 (1985).

A. When Bowman Relocated the Naturally Occurring Material within the Wetland He Did Not Add Pollutants From the "Outside World."

The district court correctly held that Bowman did not "add" pollutants to his wetland when he moved various amounts of vegetation and soil from one location of his property to another. R. at 9. Since Congress did not define the term "addition" when adopting the CWA, the EPA has, on previous occasions, defined "addition" to mean "from the outside world." *Gorsuch*, 693 F.2d at 175. In *Nat'l Wildlife Fed'n v. Gorsuch*, 693 F.2d 156, 175 (D.C. Cir. 1982), the D.C. Court of Appeals summarized the EPA's definition as follows: "EPA responds that addition from a point source occurs only if the point source itself physically *introduces* a pollutant from the outside world. In its view, the point or nonpoint character of pollution is established when the pollutant first enters navigable water…" *Id*. (emphasis added). Since the

pollutants in Bowman's wetland were there before he began relocating the material around his property, his subsequent actions (moving of soil, etc.) did not introduce pollutants to his wetland from the "outside world."

NUWF contends that this definition of "addition" has only been previously used by the EPA in litigation involving violations of § 402 of the CWA. However, similar terms used in different parts of a statute are construed to have the same meaning unless Congress clearly provides otherwise. *See Sorenson v. Sec'y of the Treasury*, 475 U.S. 851 (1986). As noted above, Congress did not provide a definition of "addition," nor did Congress express any intent for "addition" to be defined differently under separate sections of the CWA. Contrary to NUWF and NUDEP's assertions that this reading defies Congressional intent, this more narrow interpretation of § 404 power will not effectively read the dredge and fill permit programs out of statute. In fact, this interpretation is consistent with Congress' original intent to provide a permit scheme for the relocation of dredged or fill material at a significant distance from its original source. *United States v. Bay-Houston Towing Co.*, 33 F. Supp. 2d 596, 604 (E.D. Mich. 1999). For NUWF and NUDEP to argue that a more narrow definition of "addition" would read the whole of § 404 out of the statute is disingenuous at best. Section 404 would still apply to all developmental enterprises that remove dredged or fill material from one location with the intent to deposit it in another location.

Bowman did not introduce any new pollutants to his wetland when he commenced land clearing operations. R. at 2. Any pollutants that were moved about Bowman's wetland were already in existence in the wetland before the commencement of land clearing operations. In no way can Bowman's movement of material already present on his property constitute an "addition" from "the outside world." Because the EPA has previously defined "addition" as

introducing a pollutant "from the outside world" this Court should affirm the ruling of the district court and hold that Bowman's land clearing actions did not constitute the "discharg[ing] of a pollutant." Since Bowman was not discharging a pollutant he was therefore, not required to seek a permit under § 404 of the CWA.

B. Bowman's Movement of Material Within the Wetland Did "Add" Pollutants to the Wetland Under the EPA's "Unitary Navigable Waters Theory, and that Theory is Entitled to *Chevron* Deference.

Bowman's movement of material from one part of his property to another did not constitute an "addition" of pollutants under the EPA's Water Transfer Rule, and therefore, he was not required to seek a permit for his activities under § 404. In the Water Transfer Rule the EPA lays forth its rationale for the Unitary Navigable Waters Theory (UNWT) in which all navigable waters are consider one water for purposes of CWA § 301(a). NPDES Water Transfers Rule, 40 C.F.R § 122 (2008). The transfer of pollutants from one body of water to another distinct body of water will not constitute an "addition" of pollutants since those bodies of water are interconnected. Since the pollutants were already in one body of water they cannot be "added" to another water. The Supreme Court summarizes this theory as such, "If one takes a ladle of soup from a pot, lifts it above the pot, and pours it back into the pot, one has not "added" soup or anything else to the pot." *S. Fla. Water Mgmt. Dist. v. Miccosukee Tribe*, 541 U.S. 95, 110 (2004). As the Eleventh Circuit noted, "Under [this] metaphor the navigable waters of the United States are not a multitude of different pots, but *one* pot. Ladling pollution from one navigable water to another does not add anything to the pot. So no NDPES permit is required…" *Friends of the Everglades v. S. Fla. Water Mgmt. Dist.*, 570 F.3d 1210, 1217 (2009).

Appellants contend that Congress, by including dredged spoil in the list of "pollutants" in § 502 of the CWA, meant to explicitly forbid the discharge of dredged material except as in

compliance with a § 404 permit. Indeed, the EPA does state in the NPDES Water Transfer Rule that, "…today's rule has no effect on the 404 permit program…" NPDES Water Transfers Rule, 73 Fed. Reg. 33,697, 33,703 (June 13, 2008). However, as the district court noted, the inclusion of dredged material in the list of pollutants only provides an answer to one of the elements (pollutant) necessary to determine if there has been a "discharge of a pollutant" in this case. R. at 10. It does not provide any answer as to whether the dredged material removed from Mr. Bowman's wetland, and subsequently relocated to another area in his wetland, constitutes an "addition." Without an explicit Congressional intent to the contrary, the same term used in different parts of the same statute must be interpreted as have the same definition throughout. *See Sorenson,* 475 U.S. 851 (1986).

This Court should therefore grant *Chevron* deference to the EPA's interpretation of "addition" under the UNWT. The Supreme Court in *Chevron U.S.A., Inc. v. Natural Resource Defense Council, Inc.*, 467 U.S. 837, 844 (1984), emphasized that, "… [a] court may not substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator of an agency." Appellants will argue that the EPA's Water Transfer Rule does not contain a definition for "addition" and was therefore, not an interpretation of the CWA made in a formal administrative proceeding which would merit *Chevron* treatment. *See United States v. Mead Corp.*, 533 U.S. 218 (2000). Though the term "addition" is not defined, the EPA regulation did provide guidance on when transfer of pollutants between waters would *not constitute* an "addition."

> Given the broad definition of "pollutant," transferred (and receiving) water will always contain intrinsic pollutants, but the pollutants in transferred water are in 'the waters of the United States' before, during, and after the water transfer. Thus, there is no 'addition'; *nothing is being added* 'to' 'the waters of the United States by virtue of the water transfer, because the pollutant is already part of 'the waters of the United States' to begin with.

NPDES Water Transfers Rule, 73 Fed. Reg. at 33,701 (emphasis added). In fact, the EPA states unequivocally in Part II (Background and Definition of Water Transfers) that "[t]he principal legal question addressed in this…memorandum was whether the movement of pollutants from one water of the U.S. to another by water transfer is the 'addition' of a pollutant…" *Id.* at 33,699. Further, the public made comments on the proposed rule, a strong indicator that the EPA's rule interpretation merits *Chevron* treatment. *See Mead Corp.*, 533 U.S. at 230 ("Thus, the overwhelming number of our cases applying *Chevron* deference have reviewed the fruits of notice-and-comment rule making…").

The Eleventh Circuit recently resolved whether the EPA's interpretation of "addition" under the UNWT, promulgated in the Water Transfer Rule, was entitled to *Chevron* deference. In *Friends of the Everglades v. South Florida Water Management District*, 570 F.3d 1210, 1219 (2009), the court explained "that the EPA's regulation is entitled to *Chevron* deference if it is a reasonable construction of an ambiguous statute." After applying the normal tools of *Chevron* inquiry the court found that the statute is indeed ambiguous and open to at least two different, reasonable interpretations. *Id*. at 1227. Using an abstract hypothetical the Eleventh Circuit was able to summarize the competing reasonable interpretations,

> Two buckets sit side by side, one with four marbles in it and the other with none. There is a rule prohibiting "any addition of any marbles to buckets by any person." A person comes along, picks up two marbles from the first bucket, and drops them into the second bucket. Has the marble-mover "add[ed] any marbles to buckets"? On one hand, [one] might argue, there are now two marbles in a bucket where there were none before, so an addition of marbles has occurred. On the other hand…as the EPA would decide, there were four marbles in buckets before, and there are still four marbles in buckets, so no addition of marbles has occurred. Whatever position we might take if we had to pick one side or the other we cannot say that either side is unreasonable.

Id. at 1228. Since the EPA's interpretation of "addition" under the UNWT was a reasonable interpretation of an ambiguous statute the Eleventh Circuit held that it was not "arbitrary, capricious, or manifestly contrary to the statute," and therefore, entitled to *Chevron* deference. *Id*. at 1227–28 (citing *Chevron*, 467 U.S. at 844).

Bowman's land clearing operations did not add any pollutants to the wetlands or the Muddy River which were not already in place naturally. Further, the EPA is an administrative agency with broad interpretive and regulatory authority. Under the EPA's theory all waters are considered collectively, so that the movement of a pollutant from one water to another will not constitute the "addition" of a pollutant. Interpretations of this nature are exactly what Congress intended the EPA to do in the pursuit of their environmental protection mandate. Bowman's actions of digging up soil and vegetation from the wetland, transporting that material a short distance to another area in the wetland, and re-depositing it, added *nothing* to the wetland. As the district court insightfully noted, surreptitious arguments to the contrary may be ingenious and inventive, but they cannot withstand the fatal reality that Bowman did not add pollutants to his wetland during the commencement of his land clearing operations. R. at 10. Since Bowman's actions did not add any pollutants to any new waters under the EPA's UNWT he was not required to seek a permit under § 404 of the CWA. Additionally, since the EPA's interpretation of addition under the UNWT is reasonable, this Court should grant *Chevron* deference to the agency's interpretation.

Bowman did not add pollutants to his wetland under either the EPA's "outside world" definition of "addition", or the UNWT's interpretation of "addition." If the relocation of material around the wetland did not add pollutants then Bowman's activities failed to meet a

crucial element necessary to constitute "the discharge of a pollutant." Since there was no "discharge of a pollutant" Bowman was not required to seek a permit under § 404. Therefore, this Court should affirm the district court's grant of summary judgment and hold that Bowman did not violate §§ 301(a) and 404 of the CWA.

CONCLUSION

This Court should affirm the district court's judgment and hold that (1) NUWF lacked proper standing to sue Bowman, (2) there were no continuing or ongoing violations necessary to satisfy the subject matter jurisdiction requirements of CWA § 505(a), (3) NUDEP's diligent prosecution of Bowman bars NUWF's citizen suit under § 505(b), and (4) Bowman's actions did not constitute violations of §§ 301(a) and 404 of the CWA. NUWF lacks standing because no individual member of NUWF can demonstrate first, that he or she has suffered an actual, direct, and personal, and not merely conjectural, hypothetical, or ethereal harm or harm common to all members of society, and second, that the harm suffered was fairly traceable to Bowman's alleged violations and not merely an irrational and overly broad claim to establish causation. In addition, this Court should find that Bowman's alleged violations are wholly past, due to their cessation and remediation, and the prospective nature of the CWA citizen suit provision, and therefore, subject matter jurisdiction is lacking. This Court should further find that NUDEP satisfied the statutory requirements necessary to bar NUWF's citizen suit through its timely and diligent prosecution of Bowman in federal court. Finally, Bowman's land clearing activities did not meet the criteria necessary to constitute a "discharge of a pollutant" under either the EPA's "outside world" or UNWT interpretation of "addition." Precedent strongly supports that these interpretations merit *Chevron* deference from this Court. For these reasons, this Court should affirm the district court's grant of summary judgment in favor of Bowman on all counts.