Team 20

C.A. No. 13-1246

IN THE UNITED STATES COURT OF APPEALS

FOR THE TWELFTH CIRCUIT

New Union Wildlife Federation, *Plaintiff-Appellant*,

v.

New Union Department of Environmental Protection, *Intervenor-Appellant*,

v.

Jim Bob Bowman, *Defendant-Appellee*.

Appeal from the Judgment of the United States District Court for the District of New Union

Civ. No. 149-2012

BRIEF OF THE INTERVENOR-APPELLANT
New Union Department of Environmental Protection

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STATEMENT OF JURISDICTION

Appellant, the New Union Wildlife Federation, filed a citizen suit under the Clean Water Act (CWA) section 505, 33 U.S.C. § 1365 (2012), in the United States District Court for the District of New Union. Joint Excerpt of Record (R.) at 3. 33 U.S.C. § 1365 states "district courts shall have jurisdiction" in such citizen suits. Additionally, the district court had jurisdiction over this case pursuant to 28 U.S.C. § 1331 (2012).

On June 1, 2012, the District Court issued its final order granting Mr. Bowman's motion for summary judgment on all counts and denying the Wildlife Federation's motion for summary judgment on all counts. R. at 11.

Following the issuance of this order, the Wildlife Federation and the New Union Department of Environmental Protection each timely filed a Notice of Appeal. R. at 1. Appellate jurisdiction is appropriate under 28 U.S.C. §1291 (2012).

STATEMENT OF THE ISSUES

1. Does the Wildlife Federation have associational standing to sue Mr. Bowman when Mr. Bowman cleared his wetland property along the Muddy River, harming the Wildlife Federation members' ability to boat, fish, picnic, and hunt in the area, and when the Wildlife Federation requests the remedy of civil penalties and wetland restoration?
2. Does this court lack subject matter jurisdiction under the Citizen Suit Provision's continuous violation requirement when Mr. Bowman completed his land-clearing activities on July 15, 2011, the Wildlife Federation has not alleged a continuous or intermittent violation, and the mere presence of the material is not a discharge from a point source?

3. Is the Wildlife Federation's citizen suit against Mr. Bowman barred by an agency's diligent prosecution where the New Union Department of Environmental Protection (New Union DEP) has commenced an action prior to the Wildlife Federation filing its action and has moved to enter a judicial consent decree in that action requiring Mr. Bowman to cease all clearing of the wetland, convey a conservation easement to New Union, and construct and maintain an artificial wetland at his own expense?
4. Did Mr. Bowman violate the Effluent Limitations and Dredge Fill Permit requirements of the Clean Water Act when he bulldozed, excavated, burned, filled, and leveled nearly one thousand acres of natural wetlands?

STATEMENT OF THE CASE

This case arises out of a citizen suit under the Clean Water Act (CWA), section 505, 33 U.S.C. § 1365 (2012) [hereinafter Citizen Suit Provision] brought by the New Union Wildlife Federation against Jim Bob Bowman for filling wetlands without a permit for dredged or fill material under CWA section 404, 33 U.S.C. § 1344 (2012) [hereinafter Dredge Fill Permit Provision].

On July 1, 2011, the Wildlife Federation sent notice of its intent to sue to Mr. Bowman, the Environmental Protection Agency, and the New Union Department of Environmental Protection (New Union DEP). R. at 4. Soon after, the New Union DEP contacted Mr. Bowman and sent him a notice of violation. *Id.* Mr. Bowman entered into a settlement agreement with New Union DEP. *Id.* The parties incorporated the agreement into an administrative order authorized by a state statute virtually identical to CWA section 309, 33 U.S.C. § 1319(a), (g) (2012). *Id.* Mr. Bowman consented to the order on August 1, 2011. *Id.*

The New Union DEP filed a complaint on August 10, 2011 against Bowman in the United States District Court for the District of New Union under the Citizen Suit Provision of the CWA. R. at 5; *see* 33 U.S.C. § 1365 (2012). On August 30, 2011, after the sixty-day notice period passed, the Wildlife Federation filed its own citizen suit against Mr. Bowman in the same court. R. at 5.

On September 5, 2011, The New Union DEP filed a motion to enter a decree with terms parallel to the administrative order. R. at 5. Mr. Bowman consented to the motion and decree. *Id.* On September 15, 2011, the Wildlife Federation filed several motions: (1) to intervene in the New Union DEP action; (2) to consolidate the New Union DEP and Wildlife Federation actions; and (3) to oppose the entry of the consent decree. *Id.* At about the same time, New Union DEP filed its own motion to intervene in the Wildlife Federation case. *Id.*

On November 1, 2011, the District Court notified both parties that only the New Union DEP's motion to intervene in the Wildlife Federation case would be granted. R. at 5. All other motions were not acted upon without prejudice to the New Union DEP's right to enforce violations of its proposed decree or the Wildlife Federation's rights to continue with its cause of action. *Id.*

After discovery, the Wildlife Federation and Mr. Bowman filed cross-motions for summary judgment. R. at 5. Mr. Bowman has moved for summary judgment on the grounds that (1) the Wildlife Federation lacks standing, (2) the court lacks subject matter jurisdiction because all violations are wholly past, (3) the court lacks subject matter jurisdiction due to the New Union DEP's diligent prosecution, and (4) Mr. Bowman did not violate the CWA. *Id.* The Wildlife Federation moved for summary judgment on the ground that Mr. Bowman violated the

CWA by adding dredge and fill material to navigable waters from a point source without a Dredge Fill Permit. *Id.* The New Union DEP joined Mr. Bowman's motion for summary judgment on the single ground that the violation was wholly past and the violation was diligently prosecuted. *Id.* The New Union DEP joined the Wildlife Federation's motion for summary judgment on the grounds that the Wildlife Federation has standing and that Mr. Bowman violated the CWA. *Id.* The District Court granted Mr. Bowman's motion for summary judgment on all counts and denied the Wildlife Federation's motion for summary judgment. R. at 11. The order was entered on June 1, 2012. *Id.*

Following the order, the Wildlife Federation and the New Union DEP filed Notices of Appeal. R. at 1.

STATEMENT OF THE FACTS

The New Union DEP is the state authority properly authorized by the EPA to implement the CWA in New Union. *Id.*

Jim Bob Bowman is the owner of what once was a thousand-acre swath of untouched wetlands naturally rich with trees and other wetland vegetation. R. at 3. After Mr. Bowman bulldozed, excavated, burned, and leveled nearly all of the vegetation on his property, only a thin strip of the natural wetland remains. R. at 4.

The Wildlife Federation is a nonprofit corporation dedicated to the protection of the fish and wildlife of New Union. R. at 4. As part of its environmental mission, the Wildlife Federation strongly advocates for habitat protection. *Id.* Ms. Milford, Mr. Norton, and Mr. Lawless are members of the Wildlife Federation who use the Muddy and the surrounding areas for recreational purposes. R. at 6.

The wetland at issue borders 650 feet of the Muddy River, and forms part of the Muddy's hundred-year floodplain. R. at 3. The wetland and the Muddy River are hydrologically connected, and every year, when water levels are high, the Muddy inundates parts of the property. *Id.* Where it borders the property, the Muddy is more than 500 feet wide and more than six feet deep. *Id.* At trial, members of the Wildlife Federation testified that wetlands serve valuable functions in maintaining the integrity of rivers like the Muddy by absorbing sediment and pollutants from them and serving as buffers against flooding. *Id.* at 6.

Mr. Bowman systematically bulldozed and leveled all but 3.4 acres of the thousand-acre wetland in a single month. R. at 4. Starting on June 15, 2011, Mr. Bowman began bulldozing the wetland, tearing down and burning all of the trees and vegetation inhabiting those 996 acres. *Id.* Mr. Bowman then proceeded to gouge trenches into the razed wetland and used a bulldozer to fill these trenches with the burned vegetative remains. *Id.* After this, Mr. Bowman leveled what was left of the wetland into a field, pushing soil from the high portions of the former wetland into the trenches and low-lying areas of the property with a bulldozer. *Id.* To drain the resulting field into the Muddy River, Mr. Bowman then shaped part of the field into a wide swale that ran the length of the former wetland and into the Muddy. *Id.* By July 15, 2011, Mr. Bowman's efforts were complete. *Id.* All that survived of the original wetland was a 225 foot-wide strip along the Muddy River shoreline. *Id.* Bowman fully intended to clear this land, as well, once it had sufficiently drained. *Id.*

The Wildlife Federation became aware of Mr. Bowman's wetland-clearing activities in late June 2011, and promptly sent a notice of its intent to sue Mr. Bowman under the Citizen Suit Provision of the CWA to Mr. Bowman, the Environmental Protection Agency (EPA), and the New Union DEP. R. at 4. Shortly after receiving the Wildlife Federation's notice, the New

Union DEP sent Mr. Bowman its own notice informing Mr. Bowman that his wetland destruction violated both state and federal law. *Id.*

Unfazed by Mr. Bowman's protestations of innocence, the New Union DEP managed to extract a settlement agreement out of Mr. Bowman that same month. R. at 4. In this settlement agreement, Mr. Bowman agreed to surrender his plans to drain and develop the surviving 225-foot wide strip of shoreline, convey to the New Union DEP a conservation easement on the 150-foot wide part of strip directly bordering the Muddy, transform the remaining 75-foot part of the strip into an artificial wetland "buffer," and maintain this artificial wetland at his own expense. *Id.* Mr. Bowman also agreed, as part of the conservation easement grant, to keep the 225-foot strip in its natural state and allow public entry onto it for appropriate, day-use only recreational purposes. *Id.* This public access will allow Mr. Norton to legally frog in the area. R. at 7. On August 1, 2011, Mr. Bowman consented to an administrative order issued by the New Union DEP incorporating his concessions. R. at 4. Although allowed to assess penalties up to $125,000, the New Union DEP declined to administer further penalties. *Id.*

Less than two weeks later, on August 10, 2011, the New Union DEP took Mr. Bowman to court, alleging a violation of effluent limitations under CWA section 301, 33 U.S.C. § 1311 (2012) [hereinafter Effluent Limitations Standard] . R. at 5. On September 5, 2011, the New Union DEP filed a motion in this case to finalize its order to Bowman in a decree. *Id.* Mr. Bowman consented to both the motion and decree. *Id.* Mr. Bowman has complied with the decree's terms while the decree is pending in court, and has sown winter wheat only in the areas of his property not designated as a conversation easement or future artificial wetlands. *Id.*

Twenty days after the New Union DEP filed its complaint, the Wildlife Federation filed its own complaint seeking civil penalties and an order for Mr. Bowman to remove the fill material and restore the wetlands in their entirety. R. at 5. Wildlife Federation members Dottie Milford, Zeke Norton, and Effie Lawless testified regarding the detrimental effects of Mr. Bowman's land-clearing action. R. at 6. All three members, who testified that they use the Muddy for recreational boating and fishing, and used the banks of the Muddy on or near Mr. Bowman's property for picnicking, stated that they were aware of and felt a loss from the environmental differences Mr. Bowman's destruction of the wetland brought. *Id.* Ms. Milford testified that the Muddy itself looks more polluted to her now than it did prior to Mr. Bowman's destructive activities, although none of the members could see a difference in the land from the Muddy River or its banks. *Id.* Mr. Norton further testified that he had hunted frogs on and around Mr. Bowman's property for years, which Mr. Norton acknowledged could have been trespassing. *Id.* Mr. Norton also testified that the number of frogs on Mr. Bowman's property decreased dramatically after Mr. Bowman's activities, completely disappearing from the cleared portions of the wetland and dropping from a dozen per season to two or three in the remaining wooded strip. *Id.*

SUMMARY OF THE ARGUMENT

This court should grant summary judgment in favor of the New Union DEP to hold that although Mr. Bowman violated the CWA and the Wildlife Federation has standing to bring a citizen-suit, the court is deprived of subject matter jurisdiction because the violation is wholly past and the New Union DEP diligently prosecuted the violation.

First, the Wildlife Federation has associational standing to sue Mr. Bowman because Mr. Bowman's destruction of the Muddy wetlands caused an injury in fact to the Wildlife Federation's members' legally cognizable aesthetic and economic interests, and the court may redress this injury with restoration of the wetlands. Consequently, this court should reverse the district court's grant of summary judgment in favor of Mr. Bowman on the issue of standing.

Second, this court lacks subject matter jurisdiction under the Citizen Suit Provision's continuing violation requirement because the Wildlife Federation failed to allege that Mr. Bowman's violation was continuous or intermittent, and the mere presence of dredged and fill material on the ground does not amount to a continuing violation. Thus, this court should affirm the district court's grant of summary judgment in favor of Mr. Bowman holding that Mr. Bowman's violation is wholly past.

Third, this court lacks subject matter jurisdiction over the Wildlife Federation citizen suit. The New Union DEP timely commenced and is diligently prosecuting a civil action against Mr. Bowman by filing an action in district court before the Wildlife Federation and reaching a consent decree aimed at eliminating Effluent Limitation violations. Therefore, the court should affirm the district court's grant of summary judgment in favor of Mr. Bowman holding that the action is barred by diligent prosecution.

Finally, Mr. Bowman violated both the prohibition on illegal effluent pollutions and the Dredge Fill Permit requirements of the CWA when he bulldozed, burned, filled, and leveled the Muddy wetlands. Consequently, this court should reserve the district court's grant of summary judgment in favor of Mr. Bowman on the issue of CWA violations.

ARGUMENT

This court should affirm the district court's grant of summary judgment in favor of Mr. Bowman holding that Mr. Bowman's violation was wholly past and the New Union D.E.P. diligently prosecuted the violation. This court should reverse the district court's grant of summary judgment holding that the Wildlife Federation does not have standing and that Mr. Bowman did not violate the Clean Water Act (CWA). "The court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and that the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56. On the issues of continuing violation and diligent prosecution, the district court correctly held that there was no issue of material fact and that Mr. Bowman was entitled to a judgment as a matter of law. However, on the issues of standing and CWA compliance, the district court incorrectly held that there was no issue of material fact and that Mr. Bowman was entitled to a judgment as a matter of law.

"The district court's grant of summary judgment … is reviewed *de novo*, under the same standards applied by the district court." *Northrop Grumman Corp. v. Factory Mut. Ins. Co.,* 538 F.3d 1090, 1094 (9th Cir. 2008). The court "must determine whether, viewing the evidence in the light most favorable to the nonmoving party, any genuine issues of material fact exist, and whether the district court correctly applied the relevant substantive law." *Fazio v. San Francisco*, 125 F.3d 1328, 1331 (9th Cir.1997)."

I. THE WILDLIFE FEDERATION HAS STANDING BECAUSE IT HAS ALLEGED THAT MR. BOWMAN'S ACTION CAUSED ITS MEMBERS ECONOMIC, RECREATIONAL, AND AESTHETIC INJURY BY BULLDOZING THE LAND ALONG THE MUDDY RIVER, AND THAT HIS INJURY CAN BE REDRESSED BY JUDICIAL ENFORCEMENT.

The Wildlife Federation has standing to sue because Mr. Bowman caused its members to suffer an injury in fact to their economic, recreational, and aesthetic interests, which this court can redress by ordering Mr. Bowman to restore the wetlands. To establish standing, (1) the plaintiff must have suffered an injury in fact, (2) there must be a causal connection between the injury and the defendant's conduct, and (3) it must be likely that a favorable decision will redress the injury. *Lujan v. Defenders of Wildlife,* 504 U.S. 555, 560-61 (1992). In an environmental case, an aesthetic injury is a sufficient injury in fact; however, the injury must be particularized to an individual plaintiff. *United States v. Students Challenging Regulatory Agency Procedures*, 412 U.S. 669, 686 (1973). An association has standing to sue as the representative of its members when at least one member suffers an injury, the interests at issue are germane to the organization's purpose, and the participation of the plaintiffs is not required. *Hunt v. Wash. State Apple Advertising Comm'n,* 432 U.S. 333, 342-43 (1977). The Wildlife Federation satisfies the elements of associational standing, and thus this court should reverse the district court's holding that the Wildlife Federation lacks standing.

A. THE WILDLIFE FEDERATION HAS ASSOCIATIONAL STANDING BECAUSE THREE OF ITS MEMBERS SUFFERED AN INJURY, PRESERVATION OF NEW UNION WILDLIFE IS GERMANE TO THE WILDLIFE FEDERATION'S PURPOSE, AND THE DISPOSITION DOES NOT REQUIRE THE PARTICIPATION OF THE INDIVIDUAL PLAINTIFFS.

The Wildlife Federation has associational standing to sue at the representative of its members. An association has standing to bring its own suit on behalf of its members when (1) its members would otherwise have standing to sue in their own right, (2) the interest it seeks to

protect are germane to the organization's purpose, and (3) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit. *Hunt,* 432 U.S. at 342-43. The standard for germaneness is undemanding; it only requires that an organization's litigation goals are "pertinent to its special expertise" and grounds for membership. *Cal. Sportfishing Protection Alliance v. Diablo Grande Inc*., 209 F. Supp. 2d 1059, 1066 (E.D. Cal 2002) (quoting *Humane Soc'y v. Hodel,* 840 F.2d 45, 56 (D.C. Cir. 1998)). The third prong guarantees that the association achieves a remedy that will benefit the injured individuals. *United Food and Commercial Workers Union Local 751 v. Brown Group, Inc.,* 517 U.S. 544, 553-54 (1996). In addition, it bars associational standing when the association and the individuals have conflicting interests. *Harris v. McRae,* 448 U.S. 297, 320-21 (1980).

The Wildlife Federation has associational standing to sue on behalf of its members, Ms. Milford, Mr. Norton, and Ms. Lawless. If this court finds that any one member suffered an injury in fact, the association has standing to bring suit. *Hunt,* 432 U.S. at 343. Thus, the harm suffered by any of these individual members confers standing to the Wildlife Federation.

Additionally, the interests at issue are germane to the Wildlife Federation's purpose of protecting the fish and wildlife of New Union. R. at 4. The issue of whether Mr. Bowman violated the CWA and should restore the wetlands to remedy this violation is inextricably linked with the Wildlife Federation's interest in protecting New Union's fish and wildlife.

Further, the case and disposition do not require the participation of the individual plaintiffs. The Wildlife Federation and its individual members have a unitary goal in preserving the wetlands, so there is no threat of inconsistent interests. In addition, the Wildlife Federation seeks removal of the fill material and restoration of the wetlands, a remedy that is achievable

without the involvement of the individual members. R. at 5. The Wildlife Federation also seeks civil penalties. R. at 5. An association may seek civil penalties without the participation of the individuals it represents. *Int'l Union, United Auto., Aerospace and Agr. Implement Workers of America v. Brock,* 477 U.S. 274, 288 (1986). Thus, the Wildlife Federation has associational standing as the representative of Ms. Milford, Mr. Norton, and Ms. Lawless.

B. THE WILDLIFE FEDERATION MEMBERS MET THE THREE ELEMENTS OF STANDING BY DEMONSTRATING (1) AN INJURY IN FACT TO THEIR INTERESTS, (2) CAUSATION BETWEEN MR. BOWMAN'S CONDUCT AND THEIR INJURY, AND (3) LIKELIHOOD THAT A FAVORABLE DECISION WILL REDRESS THE INJURY.

All three members of the Wildlife Federation present in this case have established standing. A plaintiff has standing when (1) the plaintiff has suffered a concrete and individualized injury in fact, (2) there is a causal connection between the injury and the conduct, and (3) it is likely that a favorable decision will redress the injury. *Lujan,* 504 U.S. at 560-61. The burden of establishing these elements falls on the party invoking federal jurisdiction. *Id.* at 560. An injury in fact is "an invasion of a legally protected interest which is (a) concrete and particularized . . . and (b) actual or imminent." *Id.* The causation prong requires that the cause of the plaintiff's injury is traceable to the challenged action of the defendant. *Id.* at 561. The redressability prong requires a likelihood that a favorable decision will redress the plaintiff's injury. *Id.* at 561.

Here, the Wildlife Federation meets the element of causation. Mr. Bowman bulldozed and leveled his land, causing damage along the Muddy. R. at 4. The swale he constructed allows for the flow of pollutants directly into the Muddy. R. at 4. The record provides no alternative conclusion as to why the area surrounding Mr. Bowman's property now has fewer frogs and appears more polluted. R. at 6.

The Wildlife Federation also meets the element of redressability. A favorable decision would redress the harm by ordering Mr. Bowman to remove the fill material and restore the wetlands. R. at 5. The restoration of the property would likely prevent pollution from entering the river through the swale and would allow for the frog population to return to its former home.

This case is factually similar to *Friends of the Earth v. Laidlaw Envt'l Servs., Inc.*, 528 U.S. 167 (2000). There, the plaintiffs met the elements of standing where the defendant exceeded the limitations of its CWA permit by discharging several pollutants into the North Tyger River and preventing individual plaintiffs from partaking in recreational activities along the river. *Id.* at 180-81. Similarly, here, the plaintiffs meet the elements of standing because Mr. Bowman violated the CWA permitting requirements by discharging pollutants into the Muddy wetlands and preventing individual members of the Wildlife Federation from enjoying recreational activities along the Muddy. Therefore, this court should reverse the district court's ruling that the Wildlife Federation does not have standing.

1. THE WILDLIFE FEDERATION MEMBERS HAVE SATISFIED THE INJURY IN FACT REQUIREMENT BY SHOWING THAT CHANGES TO THE MUDDY HAVE RESULTED IN AESTHETIC AND RECRETIONAL INJURY.

The aesthetic injuries suffered by all three plaintiffs satisfy the injury in fact requirement for standing. Environmental cases satisfy the injury in fact requirement when the defendant's actions harm the plaintiff's aesthetic and recreational interests. *Sierra Club v. Morton,* 405 U.S. 727, 735 (1972); *Laidlaw ,* 528 U.S. at 173. Aesthetic and environmental wellbeing deserves the same legal protection as economic wellbeing. *Students Challenging Regulatory Agency Procedures*, 412 U.S. at 686. Allegations of harm to a plaintiff's aesthetic and recreational

values are a sufficient injury in fact. *Laidlaw,* 528 U.S. at 183; *Lujan,* 504 U.S. at 562-563; *Morton,* 405 U.S. at 735.

Standing is conferred when the plaintiff alleges an individual injury, particular to that plaintiff. *Id.* For instance, the Court denied Sierra Club standing to enjoin the construction of a Disney park in a national game refuge on the narrow grounds that Sierra Club failed to allege that the development would specifically affect its members. *Morton,* 405 U.S. at 728, 735.

Here, Mr. Bowman's destruction of the wetlands harms each individual's ability to enjoy recreational activities on the Muddy, either near or on Mr. Bowman's Property, including boating, fishing, and picnicking. R. at 6. Although the changes to Mr. Bowman's property itself are not visible from the Muddy, the destruction of the wetlands is a tangible harm to the members because of the changes along the Muddy. *Id*. Ms. Milford testified that after Bowman bulldozed the wetlands, the Muddy looked more polluted. *Id.*

Similarly, in *Laidlaw*, the plaintiffs suffered an injury in fact when their concerns about water pollution prevented them from boating, fishing, picnicking, and observing animal life. 526 U.S. at 183. Here, it is reasonable to assume the plaintiff's fear about the water pollution will harm their recreational interest in the Muddy. Thus, the injury here is indistinguishable from the injury in *Laidlaw* and the members of the Wildlife Federation have alleged a sufficient injury in fact to satisfy standing.

This court should reverse the district court's holding that no members of the Wildlife Federation suffered an injury in fact. The aesthetic and economic injuries suffered by the members of the Wildlife Federation are sufficient to satisfy standing because the injuries averred are specific to the individual plaintiffs.

2. MR. NORTON SUFFERED A RECREATIONAL AND ECONOMIC INJURY IN FACT BECAUSE HE HAS BEEN UNABLE TO CATCH FROGS NEAR AND ON MR. BOWMAN'S PROPERTY.

Mr. Norton has suffered a particularized injury in reduced frogging yields. The loss of pleasure from observing wildlife is a sufficient injury for the purposes of standing. *American Bottom Conservancy v. Army Corps of Eng'rs*, 650 F.3d 652, 656 (7th Cir. 2011). An individual suffers loss of pleasure from observing wildlife regardless of the magnitude of this loss or the actual impact the aesthetic changes have on the environment. *Id.* The fact that the changes may be a boon for the environment does not detract from the injuries alleged by the plaintiffs. *Id.* at 660.

When reduction in wildlife populations injures a plaintiff's ability to hunt, the court measures the injury in both economic and non-economic terms. *Alaska Fish and Wildlife and Outdoor Council, Inc. v. Dunkle,* 829 F.2d 933, 937 (9th Cir. 1986). An economic interest in the preservation of a species is clearly a legally protected interest sufficient for standing. *Lujan,* 504 U.S. at 582.

Mr. Bowman's activities reduced the frog population in the area, harming Mr. Norton's ability to go frogging for both recreational and subsistence purposes. R. at 6. Before Mr. Bowman cleared his land, Mr. Norton could count on finding at least a dozen frogs in the right season. R. at 6. Now, due to Mr. Bowman's activities, there are no frogs in the former wetlands. R. at 6. There are a small number of frogs in the remaining woods and buffer area, reducing Mr. Norton's catch to, at most, two or three frogs. R. at 6. Thus, Mr. Bowman caused a substantial loss in the number of frogs that Mr. Norton can catch, harming Mr. Norton's recreational and economic interests, an injury in fact establishing Mr. Norton and the Wildlife Federation's standing.

The district court supports its holding with the fact that Mr. Bowman's land clearing activities may benefit the environment. However, the relevant showing for purposes of standing "is not injury to the environment but injury to the plaintiff." *Laidlaw*, 528 U.S. at 181. Further, an increase in wildlife could have a harmful effect such as crowding an area to the point where it can no longer support that population. *American Bottom Conservancy*, 650 F.3d at 660. Thus, the possibility that Mr. Bowman's activities may benefit the environment and increase the number of frogs supports Mr. Norton's recreational and economic injuries.

The analysis is not altered by the fact that Mr. Norton may have previously been trespassing when he frogged on Mr. Bowman's property. Aesthetic standing requires the possibility the plaintiff will continue to use the land in the future. *See Conservation Council of N.C. v. Costanzo,* 505 F.2d 498, 501 (4th Cir. 1974). In *Costanzo,* the court held a citizen-plaintiff could not have standing to challenge actions on privately-owned area because the plaintiff acquired his enjoyment as a trespasser and there was no indication the defendant would permit continued use of the land. *Id.* at 501-502. Although *Costanzo* held that standing based on an injury stemming from use of private land was improper, the court remanded the determination of standing, instructing the district court that the plaintiff would have standing if they demonstrated how the defendant's actions would injure his continued enjoyment of public areas. *Id.*

Here, the district court erred when it held that Mr. Norton's inability to go frogging near and on Mr. Bowman's property could not give rise to an injury in fact when Mr. Bowman's property was posted against trespassing. Here, unlike in *Costanzo,* Mr. Bowman will permit Mr. Norton to continue his use of the land for frogging. The settlement agreement between the New Union DEP and Mr. Bowman opens the land to public use and permits Mr. Norton to legally frog

in the area. R. at 7-8. Thus, Mr. Norton will continue to use the land in the future, and his status as a trespasser is irrelevant.

For the reasons above, the Wildlife Federation has associational standing to sue Mr. Bowman because Mr. Bowman caused its members to suffer an injury in fact. Therefore, the New Union DEP requests for this court to affirm the district court's grant of Mr. Bowman's motion for summary judgment on the issue of standing.

II. THIS COURT LACKS SUBJECT MATTER JURISDICTION BECAUSE MR. BOWMAN'S VIOLATION OCCURRED IN THE PAST, THE WILDLIFE FEDERATION HAS NOT ALLEGED A LIKELIHOOD OF ONGOING VIOLATIONS, AND THE PRESENCE OF FILL MATERIAL IS NOT A CONTINUING VIOLATION UNDER THE CWA.

The district court correctly denied subject matter jurisdiction because the Wildlife Federation has not made a good faith allegation that Mr. Bowman's discharges will continue and here the presence of fill material does not amount to a continuing violation under the CWA. The Citizen Suit Provision of the CWA permits a citizen to commence a civil action against any person "*alleged to be in violation of* [] an effluent standard or limitation." CWA section 505, 33 U.S.C. §1365 (emphasis added). The Supreme Court interpreted this to mean that the alleged violations must be continuous for the citizen-plaintiff to invoke subject matter jurisdiction. *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Found.*, 484 U.S. 49, 56 (1987). Thus, federal courts lack subject matter jurisdiction over "wholly past violations" under the CWA. *Id. at 57.* This court should affirm the district court's denial of subject matter jurisdiction because Mr. Bowman's activities are wholly in the past, the plaintiffs did not allege that Mr. Bowman may continue his activities, and the mere presence of dredged and fill material on Mr. Bowman's land does not amount to a continuing violation of the CWA.

A. THIS COURT LACKS SUBJECT MATTER JURISDICTION BECAUSE IT IS UNLIKELY THAT MR. BOWMAN WILL CONTINUE HIS LAND CLEARING ACTIVITIES, AND THE WILDLIFE FEDERATION HAS NOT ALLEGED THAT MR. BOWMAN'S VIOLATIONS WERE CONTINUOUS OR INTERMITTENT.

The Wildlife Federation has failed to allege that Mr. Bowman's Effluent Limitation violation is ongoing. A citizen-plaintiff proves a violation is ongoing by demonstrating (1) the continuance of violations after the date the plaintiff files the complaint, or (2) evidence that a reasonable trier of fact could find a likelihood of the recurrence in intermittent or sporadic violations. *Cal. Sportfishing Protection Alliance,* 209 F. Supp. 2d at 1070. Subject matter jurisdiction is proper only if the plaintiff makes a good faith allegation of continuous or intermittent violations. *Id.* at 64. If there is no likelihood of repetition, intermittent or sporadic violations cease to be ongoing. *Id.*

When there is no likelihood that the defendant will violate the CWA in the future, the court should deny subject matter jurisdiction. *Conn. Coastal Fishermen's Ass'n v. Remington Arms Co.,* 989 F.2d 1305, 1313 (2d Cir. 1993). The Second Circuit dismissed a citizen suit holding that the continued presence of clay target fragments and lead shot did not amount to a continued violation under the citizen suit provision because there was no likelihood that the defendant would discharge these materials in the future. *Id.* The First Circuit denied subject matter jurisdiction when the defendant ceased operating under his permit, thus there was no reasonable likelihood the defendant would violate the permit conditions again, and no continuing violation under the Citizen Suit Provision. *Pawtuxet Cove Marina, Inc. v. Ciba-Geigy Corp.* 807 F.2d 1089, 1094 (1st Cir. 1986). The Fifth Circuit held that the continued presence of petroleum in a creek did not amount to a continued violation despite the allegations of continued effects because

the complaint only alleges one discharge, not continuing discharges. *Hamker v. Diamond Shamrock Chemical Co.,* 756 F.2d 392, 397 (5th Cir. 1985).

Here, this court should affirm the district court's holding that the court lacks subject matter jurisdiction because it is unlikely that Mr. Bowman will continue to pollute in the future. First, Mr. Bowman agreed that he would not clear more wetlands on his property in the settlement agreement with the New Union DEP. R. at 4. A continuing violation of the Effluent Limitations Standard requires continuous or intermittent violations, so a single past violation is insufficient to confer jurisdiction. *Gwaltney*, 484 U.S. at 64. Second, the conservation easement bars Mr. Bowman from conducting any activities outside of wetland construction and maintenance. R. at 4. Third, since the land clearing activities ceased on July 15, 2011, Mr. Bowman has only planted wheat seeds and allowed the swale to drain the property, projects which do not add dredged spoil or fill to the wetlands. R. at 7.

In addition, subject matter jurisdiction is absent unless the plaintiff alleges a likelihood that the polluter will continue to pollute in the future. *Gwaltney,* 484 at 57; *Conn. Coastal,* 989 F.2d at 1310. Here, the Wildlife Federation has not alleged that Mr. Bowman will pollute in the future. The Wildlife Federation did not allege that Mr. Bowman's subsequent activities constitute a continued violation of the Dredge Fill Permit Provision. R. at 7. The Wildlife Federation *only* alleged one past violation and that the continued presence of the pollutants amounts to a continued violation. R. at 7. Thus, this court lacks subject matter jurisdiction.

B. THE PRESENCE OF DREDGED OR FILL MATERIAL ON MR. BOWMAN'S PROPERTY DOES NOT AMOUNT TO AN ONGOING VIOLATION BECAUSE IT IS NOT PRESENTLY DISCHARGED FROM A POINT SOURCE.

There is a circuit split in favor of holding the presence of fill or dredge material in a waterway does not constitute an ongoing violation. *Mountain Park,* 560 F. Supp. 2d at 1293. The determination of whether a violation is wholly past is factually driven. *Sierra Club v. El Paso Gold Mines,* 421 F.3d 1133, 1141 (10th Cir. 2005). However, the circuit courts of appeals are split in favor of defining "continuing violation" narrowly to exclude the presence of fill or dredged material in a waterway. *Mountain Park, Ga. v. Lakeside at Ansley,* 560 F. Supp. 2d 1288, 1293 (N.D. Ga. 2008). The First, Second, and Fifth Circuits interpret a wholly past violation narrowly to find that the continued presence of material does not amount to a continued discharge. *Wilson v. Amoco,* 33 F. Supp. 2d 969, 975 (D. Wyo. 1998); *see Conn. Coastal,* 989 F.2d at 1313; *Pawtuxet,* F.2d at 1094; *Hamker,* 756 F.2d at 397. The Fourth and Ninth Circuits take an expansive interpretation of a wholly past violation, holding a violation is ongoing until the defendant completely eradicates any risk. *Wilson,* 33 F. Supp. 2d at 975; *see Sasser v. EPA.,* 990 F.2d 127, 129 (4th Cir. 1993); *Sierra Club v. Union Oil Co.,* 853 F.2d 375, 377-78 (9th Cir. 1988).

The primary factor in determining whether the court has subject matter jurisdiction under the Citizen Suit Provision is whether the plaintiff alleges a continuous violation. *See Hamker,* 756 F.2d at 395. Even when the plaintiff alleges continuing negative effects, the complaint may not satisfy the Citizen Suit Provision's continuing violation standard due to other factors. *Id.* at 394-95. The continuing violation must also satisfy the "point source" requirement of the Effluent Limitations Standard. *Id.* at 397. The CWA defines a point source is defined as "any discernible, confined and discrete conveyance." 33 U.S.C. § 1362(14). After a discharged has

ceased, the residual effects of the pollutant in a waterway is not a point source. *Hamker,*756 F.2d at 397; *see* 33 U.S.C. § 1362 (12). Policy considerations weigh on the determination as well. *See Conn. Coastal,* 989 F.2d at 1313*; Informed Citizens United, Inc. v. USX Corp.,* 36 F. Supp. 2d 375, 378 (S.D. Tex. 1999).

This court should affirm the district court's holding that the continued presence of dredged and fill material on Mr. Bowman's property does not amount to a continuing violation. Mr. Bowman completed his work on July 15, 2011, leaving vegetation, ashes, and dirt all over his 1,000 acres of wetland property. R. at 4. The only possible source of pollution is from migration or decomposition. A point source must be discernible, confined, and discrete. 33 U.S.C. §1362 (14). It would be unreasonable to call 1,000 acres a point source under this definition. Thus, the residual effect of a former discharge is not a current violation of the Effluent Limitations Standard. *Hamker,* 756 F.2d at 397.

The policy justification behind the broad interpretation of a continued violation is not applicable here. A broad reading is necessary to allow agencies to enforce violations that are discovered after the illegal activity is completed. *USX Corp.*, 36 F. Supp. 2d at 378. This is inapplicable here where the New Union DEP is responsible for enforcement, and the Wildlife Federation's citizen suit is supplementary. Here, the policy justification behind the narrow interpretation is more persuasive. Including the decomposition of pollutants in the definition of a continuing violation would render the present violation requirement of the CWA ineffectual. *Conn. Coastal,* 989 F.2d at 1313.

For the reasons above, Mr. Bowman's violations are not ongoing and the district court did not have subject matter jurisdiction over the case. Therefore, the New Union DEP asks that

this court reverse the district court's grant of summary judgment on the issue of wholly past violations.

III. THE COURT LACKS SUBJECT MATTER JURISDICTION OVER THE WILDLIFE FEDERATION'S CITIZEN SUIT BECAUSE THE NEW UNION DEP COMMENCED AND IS DILIGENTLY PROSECUTING A CIVIL ACTION AGAINST MR. BOWMAN.

The Wildlife Federation is barred from bringing a citizen suit under the Citizen Suit Provision of the CWA because the New Union DEP commenced a civil action against Mr. Bowman before the Wildlife Federation did, and because the New Union DEP is diligently prosecuting the action through a judicial consent decree. The primary function of the Citizen Suit Provision is to enable private parties to assist in enforcement when federal and state authorities appear unwilling to act. *See Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Found., Inc.*, 484 U.S. 49, 60 (1987); *N. and S. Rivers Watershed Assoc. v. Town of Scituate*, 949 F.2d 552, 555 (1st Cir. 1991). Therefore, a citizen suit may not be commenced if "the State has commenced and is diligently prosecuting a civil . . . action in a court of the United States . . . to require compliance" with the CWA. 33 U.S.C. § 1365(b)(1)(B) (2012).

In other words, when government agencies are willing to act, citizen suits are barred. *See Gwaltney*, 484 U.S. at 60. An agency bars a citizen suit when it has (1) commenced an action, and (2) is diligently prosecuting that action. *See Karr v. Hefner*, 475 F.3d 1192, 1197 (10th Cir. 2007) (citing *Ellis v. Gallatin Steel Co.*, 390 F.3d 461, 477 (6th Cir. 2004)). Here, the Wildlife Federation's citizen suit is barred because the New Union DEP's civil action and consent decree fulfill these two criteria.

A. THE NEW UNION DEP TIMELY COMMENCED ITS ACTION BECAUSE IT FILED ITS COMPLAINT PRIOR TO THE WILDLIFE FEDERATION FILING ITS CITIZEN SUIT COMPLAINT.

The first prong of the citizen suit bar is satisfied because the New Union DEP commenced its action against Mr. Bowman before the Wildlife Federation commenced its citizen suit. In federal court, a party commences a civil action by filing a complaint with the court. Fed. R. Civ. P. 3; *Chesapeake Bay Found. v. American Recovery Co.*, 769 F.2d 207, 208 (4th Cir. 1985). Under the Citizen Suit Provision, if the agency files a complaint before the citizen-plaintiff does, the action has been timely commenced. *See Conn. Fund for the Environment, Inc. v. Upjohn Co.*, 660 F. Supp. 1397, 1404 (D. Conn. 1987) ("[T]he court must apply an inflexible rule which determines jurisdiction from the time of filing the complaint.")).

The New Union DEP timely commenced its action because it filed its complaint in court before the Wildlife Federation filed its own complaint. After it received the Wildlife Federation's July 1, 2011 notice of its intent to sue Mr. Bowman, the New Union DEP quickly sent a notice of violation to Mr. Bowman, issued an administrative order to Mr. Bowman, and filed a complaint against Mr. Bowman in the lower court on August 10, 2011. R. at 4-5. The New Union DEP's filing was within the sixty-day window provided by the Citizen Suit Provision in which the Wildlife Federation may not file suit. *See* 33 U.S.C. § 1365(b)(1) (1987). The Wildlife Federation filed its own complaint twenty days later, on August 30, 2011. R. at 5. Because the filing of the New Union DEP's lawsuit preceded the Wildlife Federation's complaint, the New Union DEP's action was timely commenced.

B. THE WILDLIFE FEDERATION'S CITIZEN SUIT IS BARRED BECAUSE THE NEW UNION DEP IS DILIGENTLY PROSECUTING MR. BOWMAN THROUGH A CONSENT DECREE CALCULATED TO ELIMINATE MR. BOWMAN'S ALLEGED VIOLATIONS.

The Wildlife Federation's citizen suit is barred because the New Union DEP is currently diligently prosecuting its timely-commenced action. A CWA enforcement action is "diligent" if the judicial action is capable of requiring compliance with the act and is in good faith calculated to do so. *Piney Run Pres. Ass'n v. Cnty. Comm'rs*, 523 F.3d 453, 459 (4th Cir. 2008) (citing *Friends of Milwaukee's Rivers v. Milwaukee Metro. Sewerage Dist.*, 382 F.3d 743, 760 (7th Cir. 2004)). The focus of the diligent prosecution inquiry is on whether the actions are calculated to eliminate the cause of the violations. *Friends of Milwaukee's Rivers*, 382 F.3d at 760.

Diligence on the part of the state is presumed; the heavy burden of proving non-diligence rests on the citizen-plaintiff. *Piney Run*, 523 F.3d at 459 (quoting *Karr*, 475 F.3d at 1198); *see also Conn. Coastal Fishermen's Ass'n v. Remington Arms Co.*, 777 F.Supp. 173, 183 (D. Conn. 1991) (quoting *Conn.Fund for the Environment v. Contract Plating Co.*, 631 F. Supp. 1291, 1293 (D. Conn. 1986)) ("[The] court must presume the diligence of a [government] prosecution in absence of persuasive evidence that the government has engaged in a pattern of conduct that could be considered dilatory, collusive, or otherwise in bad faith."), *aff'd in part, rev'd in part* 989 F.2d 1305 (2d Cir. 1993).

This presumption of diligence is further elevated when the agency is entering a judicial consent decree with the defendant. *See Karr*, 475 F.3d at 1197. If a defendant is exposed to a citizen suit whenever an agency grants it a concession, defendants will have little incentive to negotiate consent decrees and agency strategy would be undermined. *Id.* (citing *Gwaltney*, 484 U.S. at 60-61). The analysis of whether the prosecution is diligent is unaffected by the fact that

parties have agreed upon a consent decree but a court has yet to approve of it. *See Sierra Club v. ICG Eastern, LLC*, 833 F. Supp. 2d 571, 578 (N.D. W. Va. 2011) (holding agency action diligent where agency filed suit three days before expiration of citizen suit notice waiting period, proposed a consent decree six months later setting forth a schedule of tiered discharge limitations and penalty for past violations).

In this case, because the terms of the consent decree are calculated to eliminate the cause of Mr. Bowman's violation, the action is diligent and the Wildlife Federation's citizen suit is barred. The cause of Mr. Bowman's alleged violation was his use of a bulldozer to level vegetation on his wetland. R. at 4. Mr. Bowman has not cleared the wetland since, and under the consent decree, Mr. Bowman agrees to never do so again. R. at 4. Mr. Bowman will convey to the New Union DEP a conservation easement for all of his property, which he did not clear, plus a seventy-five-foot buffer zone. R. at 4. Further, Mr. Bowman will construct and maintain a year-round artificial wetland on the buffer zone at his own expense. R. at 4. The consent decree entirely forbids Mr. Bowman from developing on this strip of land in any way other than maintaining the artificial wetland. R. at 4.

Additionally, the presumption weighs further in favor of diligence because the Wildlife Federation had the opportunity to participate in the New Union DEP's enforcement action. A second factor to consider in the diligence analysis is whether the plaintiff has the ability to participate in the enforcement proceedings. *Friends of the Earth v. Laidlaw Envt'l Servs.*, 890 F. Supp. 470, 490 (D.S.C. 1995). Here, the New Union DEP's decision to file the action under the Citizen Suit Provision of the CWA allows the Wildlife Federation to intervene in the action. The New Union DEP filed its complaint under the Citizen Suit Provision of the CWA. R. at 5. *See* 33 U.S.C. § 1365. A state is a "citizen" under the CWA and is thus entitled to sue under the

Citizen Suit Provision of the Act. *U.S. Dep't of Energy v. Ohio*, 503 U.S. 607, 616 (1992). The Wildlife Federation indeed has filed motions to intervene in the action, and has filed a motion opposing the consent decree. R. at 5. Because the Wildlife Federation has an opportunity to participate in the government action, the presumption that the New Union DEP is diligently prosecuting the action in good faith is substantiated.

The complaint filed by the New Union DEP and the consent decree agreed upon in that action surpasses the deferential requirement to show diligence. The Wildlife Federation would ask for two additional remedies, but New Union DEP's decision not to pursue these remedies fails to undermine the New Union DEP's diligence. First, the Wildlife Federation seeks to have Mr. Bowman restore the wetlands in its entirety rather than the 225-foot-wide patch along the Muddy River. R. at 5. Essentially, the Wildlife Federation believes the New Union DEP's remedy is not aggressive enough. But authorization of a citizen suit does not turn on a citizen's belief that the agency has not acted aggressively enough. *See Karr*, 475 F.3d at 1197 (citing *Ellis*, 390 F.3d at 477). The concern with diligent enforcement "is *whether* violations are prosecuted, not *how* they are prosecuted." *Friends of Milwaukee's Rivers,* 382, F.3d at 763 (emphasis in original), *cert. denied*, 544 U.S. 913 (2005); *see also Ark. Wildlife Fed. v. ICI Americas, Inc.*, 29 F.3d 376, 380 (8th Cir. 1994) ("It would be unreasonable and inappropriate to find failure to diligently prosecute simply because [the defendant] prevailed in some fashion or because a compromise was reached."). While the New Union DEP's remedy will not require complete restoration, the New Union DEP's remedy does act to eliminate further damage and provides for restoration at Mr. Bowman's expense. As a result, the Wildlife Federation's request for further restoration fails to undermine the New Union DEP's diligence.

Second, the Wildlife Federation seeks civil penalties on top of Mr. Bowman's expenses to remove the fill material and entirely restore the wetlands. R. at 5. However, penalties are not required for compliance to be assured. *Friends of Milwaukee*, 382 F.3d at 762. While a plaintiff may prefer more severe penalties, the state enforcement agency has the primary responsibility for enforcing the CWA. *See Comfort Lake Ass'n, Inc. v. Dressel Contracting, Inc.*, 138 F.3d 351, 357 (8th Cir. 1998); *See also N. and S. Rivers Watershed Assoc.*, 949 F.2d at 556 ("Duplicative actions aimed at exacting financial penalties . . . when remedial measures are well underway do not further [the goals of the CWA]. They are, in fact, impediments to environmental remedy efforts.").

Although New Union's consent decree did not contain penalties, the terms of the order acted as a substitute. Mr. Bowman will incur "considerable initial expense and an indeterminable future expense" in the construction and maintenance of a year-round, partially-inundated wetland. R. at 8. While it may be unhappy with this concession, the Wildlife Federation again cannot overcome the presumption of diligence by showing that the New Union DEP's prosecution strategy is less aggressive than it would like. *See Piney Run*, 523 F.3d at 459.

For the reasons above, this court lacks subject matter jurisdiction over this citizen suit brought by the Wildlife Federation. The New Union DEP has timely commenced and is diligently prosecuting an action in federal court through a consent decree, which provides for an elimination of any CWA violations. Therefore, the New Union DEP requests the court to dismiss this action.

IV. MR. BOWMAN VIOLATED THE EFFLUENT LIMITATIONS AND DREDGE FILL PERMIT REQUIREMENTS IMPOSED BY THE CLEAN WATER ACT WHEN HE BULLDOZED, BURNED, EXCAVATED, FILLED, AND LEVELED THE WETLAND.

This court should reverse the district court's grant of summary judgment to Mr. Bowman because Mr. Bowman violated the Effluent Limitations Standard and the Dredge Fill Permit Provision of the Clean Water Act when he bulldozed, burned, excavated, filled, and leveled the vast majority of the wetlands on his property. The Effluent Limitation Standard of the CWA prohibits "the discharge of any pollutant by any person" except as in compliance with law or in accordance with any applicable permit. 33 U.S.C. § 1311(a) (2012). The discharge of any pollutant by any person is defined as "any [noncompliant] addition of any pollutant to navigable waters from any point source." 33 U.S.C. § 1362(12)(A) (2012). In other words, there are four components to every Effluent Limitation violation: (1) addition (2) of a pollutant, (3) to a navigable water, and (4) from a point source.

No party contests that components (2), (3), and (4) are fulfilled. R. at 8-9. Component (2), pollutant, is fulfilled because both the dirt excavated from the wetlands – i.e. dredged spoil – and the biological materials of the charred vegetative remains Mr. Bowman used to fill the wetlands are explicitly defined as pollutants by statute. 33 U.S.C § 1362(6); *United States v. Deaton*, 209 F.3d 331, 336 (4th Cir. 2000). Component (3), navigable water, is fulfilled because the wetland shares 650 feet of shoreline and is hydrologically intertwined with the Muddy River. R. at 3. Wetlands that have such a continuous surface connection and significant nexus with a permanent flow of a traditionally navigable water such as the Muddy, which supports year-round recreational navigation, qualify as "navigable waters" under both the standard dictated by the *Rapanos* majority and that advocated by Justice Kennedy in his concurrence. *Rapanos v. United States*, 547 U.S. 715, 757 (2006); *Rapanos,* 547 U.S. at 759 (Kennedy, J. concurring); *United*

States v. Johnson, 467 F.3d 56, 66 (1st Cir. 2006). As Mr. Bowman's wetland is directly adjacent to the Muddy River and is hydrologically intertwined with the Muddy River via its surface connection, yearly flooding, and the draining of water from the wetland into the Muddy, Mr. Bowman's wetland qualifies as a navigable body of water. R. at 3. *See United States v. Cundiff*, 555 F.3d 200, 212 (6th Cir. 2009) (holding that a wetland adjacent to a traditionally navigable river, which occasionally flooded into that river, and which filtered sediment, stored water, and provided a habitat for plants and wildlife for that river was a navigable water subject to the CWA.).

Finally, component (4), point source, is fulfilled because Mr. Bowman does not contest that he used a point source on the wetland when he used a bulldozer to fill and level the wetland. R. at 8. A point source is defined as "any discernible, confined, and discrete conveyance . . . from which pollutants are or may be discharged." 33 U.S.C. § 1362(14). Courts consistently hold that bulldozers and other heavy machinery are point sources when they are used to relocate or reintroduce pollutants into wetlands. *Avoyelles Sportsmen's League, Inc. v. Marsh*, 715 F.2d 897, 922 (5th Cir. 1983); *Deaton*, 209 F.3d at 336 (4th Cir. 2000).

Because Mr. Bowman does not contest the CWA's applicability on these terms, the only issues he contests on appeal are (1) whether Mr. Bowman's reintroduction of pollutants to the wetland constitutes an "addition" under the CWA, and (2) whether Mr. Bowman nevertheless fell into an exception to the CWA's broad effluent limitations.

A. MR. BOWMAN ADDED POLLUTANTS INTO THE WETLAND WHEN HE FILLED AND LEVELED THE WETLAND WITH SOIL AND BURNED VEGETATIVE REMAINS ORIGINATING FROM THAT WETLAND.

This court should reverse the district court's grant of summary judgment to Mr. Bowman because Mr. Bowman's filling and leveling of the wetland with ash, biological material, and excavated soil constituted an addition of pollutants to the wetland under the Effluent Limitations Standard and the Dredge Fill Permit Provision of the CWA. Although the CWA does not define "addition," *see Friends of Everglades v. S. Florida Water Mgmt. Dist.*, 570 F.3d 1210, 1217 (11th Cir. 2009), the majority of the federal circuit courts which have addressed the issue agree that "addition" under the CWA necessarily includes redeposit. *Avoyelles Sportsmen's League, Inc. v. Marsh*, 715 F.2d 897, 923 (5th Cir. 1983); *Greenfield Mills, Inc. v. Mackli*n, 361 F.3d 934, 949 (7th Cir. 2004); *United States v. Deaton*, 209 F.3d 331, 335 (4th Cir. 2000); *United States v. Moses*, 496 F.3d 984, 993 (9th Cir. 2007); *United States v. Cundiff*, 555 F.3d 200, 214 (6th Cir. 2009). The redeposit of pollutants is included in the definition of "addition" because its exclusion would be inconsistent with (1) the classification of "dredged material" as a pollutant and (2) the stated purpose of and the public policy behind the CWA. *Avoyelles*, 715 F.2d at 923; *Deaton*, 209 F.3d at 337.

The term "addition" necessarily encompasses at least some redeposit because interpreting "addition" to exclude the redeposit of pollutants would both be inconsistent with the CWA definition of "dredged material" and essentially nullify the Dredge Fill Permit Provision of the CWA. *Cundiff*, 555 F.3d at 213. By definition, "dredged material" is any material that is removed from the water itself. *Greenfield Mills,* 361 F.3d at 948 (quoting *Avoyelles*, 715 F.2d at 923-24, n. 43). In the Code of Federal Regulations, the discharge of dredged material regulated by the Dredge Fill Permit Provision and therefore falling under the umbrella of "addition of a

pollutant" is explicitly defined to include the "redeposit of dredged material other than incidental fallback." 40 C.F.R. § 232.2(1) (2012). Given that the EPA itself has stated that the Dredge Fill Permit Provision encompasses non-incidental fallback redeposit as discharge, and that the very definition of "discharge" is the "addition" of pollutants to a navigable water, it would be unreasonable to assert that the discharge of dredged material somehow does not qualify as an addition of pollutants.

Interpreting "addition" to exclude redeposit would also be contrary to public policy. Wherever possible, the various components of a statute are to be construed so as not to conflict with each other. *Chickasaw Nation v. United States*, 534 U.S. 84, 93 (2001). The stated aim of the CWA is to stop pollutants from being discharged into our nation's waters. 33 U.S.C. § 1251 (2012). Dredged materials are pollutants not only by statutory definition, but also by their actual effect on this nation's waters. 33 U.S.C. § 1362; *Deaton*, 209 F.3d at 336.

Dredging dirt and sediment from a body of water and then returning that dirt and sediment to that same body of water is not the same as lifting a ladleful of soup out of a kettle and then pouring it back in. *Catskill Mountains Chapter of Trout Unlimited, Inc. v. City of New York*, 451 F.3d 77, 81 (2d Cir. 2006). When returned to a waterway in vast quantities, even plain dirt and mud can cause severe damage to water ecosystems by smothering river fish and altering the water ecosystem's temperature. *Greenfield Mills*, 361 F.3d at 943.

Wetland materials are far more vital and far more potentially damaging to the environment when dredged and redeposited than simple dirt. *Deaton*, 209 F.3d at 336 (4th Cir. 2000). Wetlands provide vital water quality maintenance functions by trapping sediment and pollutants before they reach other bodies of water. *Id.* (citing *United States v. Wilson,* 133 F.3d

251, 274 (4th Cir. 1997)). Dredging wetlands both releases these trapped pollutants and deprives the wetlands of the very means by which it filtered and absorbed these pollutants in the first place. *Id.* Given the potentially devastating effects of dredging a wetland and redepositing dredged material into that same wetland, the CWA's stated purpose to prevent pollution, and the EPA's own inclusion of redeposited material in its definition of the discharge of dredged material, the only reasonable construction of "addition" is one which incorporates redeposit.

The EPA's Water Transfer Rule does not alter this conclusion, as it is simply inapplicable to this context. The Water Transfer Rule excludes from permit requirements any water transfers that do not subject the transferred water to any specified intervening use by defining water transfers as outside of the scope of the term "addition." *Friends of Everglades*, 570 F.3d at 1228. First, the Water Transfer Rule defines "addition" with respect to the CWA's National Pollutant Discharge Elimination System (NPDES) permitting system. National Pollutant Discharge Elimination System Water Transfers Rule, 73 Fed. Reg. 115, 33698 (codified at 40 C.F.R. § 122.3(i)) (2012). This system is wholly separate from the Dredge Fill permitting system. 40 C.F.R. § 122.3(b). Accordingly, and by the EPA's own admission, the Water Transfer Rule does not have any impact on the Dredge Fill Permit requirements. 73 Fed. Reg. 115, 33698. Second, the Water Transfer Rule only defines "addition" with respect to the transfer of water from one body of water to another. *Id.* Dredging and filling activities such as the ones that Mr. Bowman pursued on the wetlands involve neither the transfer of water nor the transfer of materials between distinct bodies of water. At stake here, instead, is the redepositing and redistribution of pollutants into and about a single navigable water system. Therefore, even if the Water Transfer Rule's redefinition of "addition" was applicable to the dredge-fill permit requirements, it is not applicable to the facts in this case.

Here, Mr. Bowman not only razed the majority of the wetland, he dug trenches and filled them with the burned and excavated remains of that wetland and pushed the dislodged soil and wetland material all about the wetland as he attempted to level the land. R. at 4. He even encouraged these pollutants to drain into the Muddy River by constructing a long swale feeding into the Muddy for that very purpose. *Id.* Despite the 225-foot wetland barrier between Mr. Bowman's pollutant-filled field and the Muddy, this pollution has already begun to yield palpable results. *Id.* There are far fewer frogs inhabiting that stretch of the Muddy, and the appearance of the river has changed. *Id.* at 6. Given his intentional destruction and pollution of the wetland, Mr. Bowman cannot countenance a claim that his actions do not constitute an "addition of pollutants to a navigable water via a point source."

B. MR. BOWMAN DOES NOT FALL INTO ANY OF THE EFFLUENT LIMITATION EXCEPTIONS BECAUSE HE INTENTIONALLY REDEPOSITED ALL OF THE DREDGED SPOIL HE REMOVED FROM THE WETLAND BACK INTO THE WETLAND AND HIS BULLDOZING RADICALLY ALTERED THE NATURE OF THE WETLAND ITSELF.

Although exceptions to the CWA effluent limitations exist, Mr. Bowman's actions do not fall within the purview of any of them. The federal courts and the EPA agree that prohibiting all redeposit would be unconstitutional. *United States v. Bay-Houston Towing Co., Inc.,* 33 F. Supp. 2d 596, 606 (E.D. Mich. 1999); *see* 33 C.F.R. § 323.2 (2012); *see also Wilso*n*,* 133 F.3d at 271. However, the courts and the EPA also agree that both the movement of materials affecting the discharge as well as the discharge itself must be negligible and inconsequential—*de minimis*—to escape regulation. *Cundiff*, 555 F.3d 200, 214 (6th Cir. 2009). For example, actively filling and leveling even 5.3 acres of wetlands with dredged soil goes far beyond being *de minimis*. *Id.* Because Mr. Bowman redeposited all of the material he dredged from the wetland back into the

wetland, and did so intentionally, his actions do not qualify him for the incidental fallback exception.

Mr. Bowman's actions do not fall under the purview of the section 404(f) exceptions to the CWA's Dredge Fill Permit requirements either. Although section 404(f) does exempt "normal farming activities" and maintenance of current structures from the CWA's Dredge Fill Permit requirements, 33 U.S.C. § 1344, this exemption applies only to already established farming activities and existing structures. *Id.*, 33 C.F.R. § 323.4(a)(1)(ii) (2012). As Mr. Bowman's actions actively destroyed a natural wetland in order to convert it into an agricultural field, section 404(f)'s exemptions are unavailable to Mr. Bowman.

In sum, this court should reverse the district court's grant of summary judgment to Mr. Bowman because his bulldozing, dredging, filling, and leveling activities constituted an addition of pollutants to a navigable water, and therefore violated both the Effluent Limitations Provision and Dredge Fill Permit requirements of the Clean Water Act.

CONCLUSION

For the reasons stated above, this court should partially reverse and partially affirm the ruling of the district court.

First, this court should reverse the district court's grant of Mr. Bowman's motion for summary judgment on the issue of standing because the Wildlife Federation has standing to sue Mr. Bowman under the CWA.

Next, this court should affirm the district court's grant of Mr. Bowman's motion for summary judgment on the issue of whether there is an ongoing violation because the violations became wholly past after Mr. Bowman ceased his activities.

Further, this court should affirm the district court's grant of Mr. Bowman's motion for summary judgment on the issue of diligent prosecution because the diligently prosecuted New Union DEP action bars the Wildlife Federation's citizen suit.

Finally, this court should reverse the district court's grant of Mr. Bowman's motion for summary judgment and instead grant the Wildlife Federation's motion for summary judgment to hold that Mr. Bowman violated the CWA when he added dredge and fill material to his wetland.