C.A. No. 13-1246

# In the United States Court of Appeals for the Twelfth Circuit

**NEW UNION WILDLIFE FEDERATION**,

*Appellant,*

v.

**NEW UNION DEPARTMENT OF ENVIRONMENTAL CONSERVATION**,

*Intervenor-Appellant,*

v.

**JIM BOB BOWMAN,**

*Appellee.*

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

**BRIEF FOR THE NEW UNION WILDLIFE FEDERATION**
*Appellant*

## TABLE OF CONTENTS

## TABLE OF AUTHORITIES

United States Supreme Court



United States Courts of Appeal

United States District Courts

Federal Rules of Civil Procedure



Statutes

Regulations



Other Authorities

## JURISDICTIONAL STATEMENT

This case involves an appeal from a final judgment rendered by the United States District Court for the District of New Union. (R. at 1). The district court had subject matter jurisdiction over the case because the issues arise under the Clean Water Act (CWA), 33 U.S.C. § 1251 *et seq.*, a law of the United States, and 28 U.S.C. § 1331 confers federal district courts original jurisdiction over civil actions arising under the laws of the United States. The United States Court of Appeals for the Twelfth Circuit has jurisdiction to hear appeals from any final decisions of the District Court for the District of New Union. 28 U.S.C. § 1291 (2006).

## STATEMENT OF THE ISSUES

I. Whether the New Union Wildlife Federation (the Federation) has standing to sue Jim Bob Bowman for the recreational and aesthetic value the Muddy River lost to the Federation's members after Bowman dredged and filled almost all of his ecologically valuable wetland along the river.

II. Whether Bowman continues to violate the CWA when he has not removed the dredged spoil that inhibits the natural flow of sediment and nutrients between the Muddy River and his former wetland and now farms that land, as well.

III. Whether the New Union Department of Environmental Conservation (the Department) diligently prosecuted Bowman's violation of the CWA even though its settlement agreement does not require Bowman to comply with the CWA and its actions appear to be aimed at keeping the Federation from having a voice in the process.

IV. Whether the ash of wetland vegetation and dredged soil Bowman used to fill in his wetland added pollutants when the agencies charged with interpreting § 404 and the courts interpreting § 404 both conclude that redeposits of dredged spoil add pollutants.

## STATEMENT OF THE CASE

When the Federation learned that Bowman was dredging and filling his wetland, it sent a notice of intent to sue on July 1, 2011. (R. at 4). After receiving the Federation's notice, the Department negotiated a settlement agreement with Bowman that it issued as an administrative order on August 1st. (*Id.*). The Department filed suit against Bowman on August 10th.

In that case, the Department and Bowman jointly moved that the district court enter their settlement agreement as a consent decree on September 5th. (R. at 5).

The Federation filed this case against Bowman on August 30th. (*Id.*). It also moved to intervene in the Department's case and to have the district court consolidate the two cases on September 15th. (*Id.*). Around that time, the Department moved to intervene in this case. (*Id.*). On November 1st, the district court granted the Department's motion to intervene and informed the parties that it would not act on any other motions. (*Id.*).

Discovery proceeded and the Federation and Bowman each filed cross-motions for summary judgment. (*Id.*). The Department supported the Federation with respect to the arguments that the Federation has standing to sue and that Bowman had violated the CWA; it supported Bowman on the continuing violation and diligent prosecution arguments. (*Id.*). The district court granted summary judgment in Bowman's favor on each of the four issues on June 1, 2012. (R. at 11). The district court held: (1) the Federation lacked standing to bring its claim; (2) Bowman's alleged violations of the CWA were wholly past; (3) the Department's settlement agreement and suit had diligently prosecuted Bowman's alleged violation of the CWA; and (4) Bowman had not even violated the CWA because Bowman had not added anything to his land. (R. at 6-10).

The Federation and the Department each timely filed a Notice of Appeal. (R. at 1). The Federation appeals all four of the district court's holdings. (R. at 1-2). The Department appeals only the district court's holdings that the Federation lacks standing to sue and that Bowman did not violate the CWA. (*Id.*). This Court granted review on September 14th, 2012. (R. at 2).

## STATEMENT OF THE FACTS

Bowman's one thousand acres along the Muddy River were covered by trees, wetland vegetation, mud, and standing water at the beginning of June 2011. (R. at 3-4). Despite the difficulty posed by the uneven terrain, wetland vegetation, mud, and standing water, Bowman successfully transformed most of his property from an existing wetland into a wheat field just a few weeks later. (R. at 3-5).

**Bowman Literally Sends His Wetland up in Smoke**

Bowman began his month-long demolition on June 15th. (R. at 4). Bowman first leveled the trees and other wetland plants on his land. (*Id.*). Bowman then bulldozed the uprooted trees and plants into piles and set fire to them. (*Id.*). After the smoke cleared, Bowman used the same bulldozer that had uprooted the plant life to dig trenches across his property. (*Id.*). He then filled those trenches in with the ashes of the trees and plants he had incinerated. (*Id.*). After clearing nearly 998 acres of their natural vegetation, Bowman still needed a level field in order to farm. (R. at 4-5).[1] So Bowman bulldozed the soil and plant ash from the high-lying portions of his property down into the low-lying portions to fill them in. (R. at 4).

Even after digging a wide ditch that drained the remaining water from his newly formed field directly into the Muddy River, Bowman could not complete the overhaul of his property because the lowest-lying land along the river was too inundated to bulldoze. (*Id.*). Stymied, Bowman stopped demolition on July 15th so that the remaining 2.24 acres along the river could drain. (*Id.*).

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[1] Bowman's land borders the Muddy River for 650 feet. (R. at 3). The portion of land Bowman could not get to is 150 feet wide, and thus, that area contains 97,500 square feet. (R. at 4). There are 43,560 square feet in an acre. *See Black's Law Dictionary* 27 (9th ed. 2009). Doing the math (97,500 divided by 43,560), Bowman could not reach 2.24 acres, but could knock down, burn up, and fill in 997.76 acres. (R. at 3-4); *Black's*, *supra*, at 27.

**The Department Cuts Bowman a Deal and Tries to Lock It in**

On July 1st, the Federation sent notice of its intent to sue to Bowman and the Department. (*Id.*). After that, Bowman and the Department began negotiating. (*Id.*). The negotiations did not last long as the Department offered to let Bowman off the hook for very little in return. (*Id.*). The Department cut Bowman a deal that just made Bowman:

- Agree not to further violate the CWA by filling in the lowest-lying 2.24 acres along the Muddy River that he had not been able to fill in (R. 4-5);
- Remediate a seventy-five foot wide strip of land next to it (R. at 4); and
- Grant a conservation easement to those 3.4 acres of land, leaving the remaining 996.6 acres of filled-in wetland for Bowman to use as he saw fit. (R. at 4-5).[2]

In exchange for 3.4 out of 1000 acres of wetland, the Department declined to impose a penalty against Bowman—despite Bowman having literally sent nearly 998 acres of wetland up in smoke. (*Id.*). The Department justifies its concessions on the premise that the conservation easement will allow New Union citizens to enjoy the appearance of a wetland along the river. (R. at 6).

On August 1st, the Department issued an administrative order that contained the terms of the Department and Bowman's deal. (R. at 4). Ten days later, the Department then filed suit against Bowman in the district court. (R. at 5). In that case, the only thing that either the Department or Bowman have done is jointly move that the district court enter their agreement as a consent decree. (*Id.*).

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[2] The conservation easement is 250 feet wide along the 650-foot stretch of Bowman's land on the Muddy River. (R. at 4). Converting the total square footage to acres, Bowman will grant an easement on 3.4 acres of land. (*Id.*); *Black's*, *supra* note 1, at 27.

**The Federation Sees through the Smokescreen**

On the first day it could, August 31st, the Federation filed its own suit. (*Id.*). It prayed for an injunction that would require Bowman to restore his wetland and civil penalties to limit the economic benefit Bowman will receive from destroying nearly one thousand acres of wetland to start farming. (*Id.*). The Federation also filed a motion to intervene in the Department's suit to oppose the entry of the consent decree. (*Id.*).

After discovery, both the affidavits filed and the deposition testimony taken show that Federation's members walk, bike, frog, boat, and picnic along the Muddy River close to Bowman's land. (R. at 6). One member testified that the Muddy River now looks more polluted. (*Id.*). Another member noticed a decrease in the number of frogs in the area. (*Id.*). Their affidavits and testimony also evidence that the members fear for the health of the Muddy River after the loss of such a substantial amount of ecologically valuable wetland. (*Id.*).

**Makeup on a Black Eye**

Bowman now farms the over 996 acres of still filled-in wetland. (R. at 5). He can do so because he fortuitously was not able to clear and drain the land closest to the river. That twist of fate allowed the Department to hide the damage he had done behind a scant 3.4-acre tract of natural and artificial wetland and argue that those few acres make the Federation's members better off than they were before. (R. at 4, 6).

## STANDARD OF REVIEW

This case involves an appeal from the district court's grant of summary judgment. (R. at 11). Summary judgment is proper only if the moving party carries their burden of "show[ing] that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). As such, the issues before the Court

are questions of law and this Court should review them de novo. *Pierce v. Underwood*, 487 U.S. 552, 557 (1988). No deference should be afforded to the lower court's opinions and findings. *See id.*

## SUMMARY OF THE ARGUMENT

An environmental group has standing to sue when its members' recreational and aesthetic enjoyment of a waterway are diminished by the defendant's actions and a court can grant a remedy that redresses that injury. The Federation points to its members who use the Muddy River in the immediate vicinity of Bowman's land and already see signs that the Muddy has become more polluted. They fear it will get worse. Both injunctive relief and civil penalties can adequately redress that injury by requiring Bowman to remediate his land and deterring future violations. Accordingly, the district court erred in finding that the Federation's lacked standing because the Federation can point to specific evidence in the record that establishes each element of standing.

The district court misapplied precedent and binding interpretations of § 404 to reach its holdings that Bowman no longer violates the CWA and that Bowman never even violated the CWA in the first place. Contrary to the district court's holding, the EPA, the Army Corps of Engineers, and courts all agree that redepositing dredged spoil into a wetland adds pollutants. Additionally, because fill material does not dissipate over time and inhibits the ecological purpose of wetlands, the great weight of authority finds that fill material in a wetland continually violates the CWA. No party disputes that Bowman dredged and filled his land with plant remnants and dredged soil from the wetland itself and that the wetland remains filled in. The district court erred then when it discarded a welter of case law and agency interpretation to hold that not only does Bowman not continue to violate the CWA—but also that he never

violated it. Moreover, the district court ignored that Bowman dredged and filled his wetland to start farming, a violation of § 404's recapture provision.

The district court also erred when it found that the Department had diligently prosecuted Bowman's violations of the CWA after just a cursory analysis. That cursory analysis simply took the Department's actions as they appeared. And although they appear diligent on the surface, the Department's actions actually evidence little—if any—diligence. Instead, they show that the Department has tried to cut the Federation out of the process altogether. When that is the case, the presumption of diligence state agencies typically enjoy vanishes, and courts can no longer take state agencies at their word. A more thorough analysis reveals that the Department's actions are not calculated to bring Bowman into compliance with the CWA because they do not address the 996.6 acres of wetland that remained filled in, nor do they address the fact that Bowman's farming violates § 404's recapture provision.

## ARGUMENT

That the district court erred in each of its holdings evidences that this case exemplifies the old adage that appearances can be deceiving. Bowman relies on the fact that from the banks of the Muddy River, no one can see the damage he has inflicted on more than 996 acres of wetland. The Department relies on the air of diligence filing suit against Bowman has lent it. The facts and relevant law belie those appearances.

### I. The Federation has standing to sue Bowman because his dredge and fill activities injured the Federation's members, and this Court can grant a remedy that redresses that injury.

It has been over a decade since the Supreme Court clarified that a citizen group has standing when its members have reasonable concerns that a defendant's violation of the CWA will impair their recreational or aesthetic enjoyment of a waterway. *Friends of the Earth, Inc.*

*v. Laidlaw Envtl. Servs., Inc.*, 528 U.S. 167, 183-84 (2000). In spite of the Federation producing affidavits and testimony from three members who described those precise concerns, Bowman argued—and the district court agreed—that the Federation lacks standing. (R. at 6). The Federation has produced sufficient evidence to comply with the Court's holding in *Laidlaw*: Its members have suffered a direct injury, which Bowman caused, that both injunctive relief and civil penalties can remedy.

**a. The Federation's injury is established by the decrease in recreational and aesthetic value the Muddy River has for the Federation's members as a result of Bowman filling in his wetland.**

The Supreme Court made it very clear in *Laidlaw* that an environmental plaintiff has an injury in fact "when they aver that they use the affected area and are persons 'for whom the aesthetic and recreational values of the area will be lessened' by the challenged activity." *See Laidlaw*, 528 U.S. at 183 (quoting *Sierra Club v. Morton*, 405 U.S. 727, 735 (1972)). There, the Court held that the environmental group established standing through the averments of persons who picnicked, biked, walked, or fished as far as fifteen miles downstream from the point where a defendant discharged pollutants into a river. *See id.* at 182. In fact, the Court explicitly noted that those averments were both specific and direct enough to pass muster. *See id.* at 183.

The Court did so to draw a contrast between averments it had previously found to be deficient. For instance, in *Lujan v. National Wildlife Federation*, the Court found no concrete injury in a plaintiff's averment that they used an area "in the vicinity of" unspecified portions of a five-million acre national park. 497 U.S. 871, 887 (1990). That statement was too ambiguous to be tied to the specific acreage of land affected. *See id.* Similarly, in *Lujan v. Defenders of Wildlife*, averments that members had visited an affected area in the past and planned to

potentially revisit that area at some unspecified date in the future were too attenuated of a connection to create a direct injury. *See* 504 U.S. 555, 563-64 (1992). In contrast, the *Laidlaw* affiants actual use of the river within fifteen miles of the discharge site presented "reasonable concerns" that were "dispositively more than [] mere 'general averments' and 'conclusory allegations . . . .'" *Laidlaw*, 528 U.S. at 183-84.

Here, the Federation's members—like the *Laidlaw* affiants—testified that Bowman's dredge and fill activities have lessened their recreational use and aesthetic enjoyment of the Muddy River near Bowman's land. (R. at 6). Specifically, they testified that they picnic, boat, fish, and frog along the banks of the Muddy River. (*Id.*). Now they fear that with 996.6 acres of wetland filled in, the Muddy's waters will become more polluted and deteriorate without as much wetland filtering and replenishing it. (*Id.*). Dottie Milford even testified that the Muddy River already looks more polluted to her. (*Id.*). Their testimony tracks the affiants in *Laidlaw*, who used the river for similar purposes and noticed that the river had begun to look polluted. *See Laidlaw*, 528 U.S. at 182. And unlike the plaintiffs in either *Lujan* case, the Federation's members testified that they actually use the areas on or in the immediate vicinity of Bowman's property. (R. at 6); *see Nat'l Wildlife Fed'n*, 497 U.S. at 887; *Defenders of Wildlife*, 504 U.S. at 563-64. Accordingly, the Federation has established an injury in fact through its members that describe a direct and specific injury.[3]

[3] Also worth noting is that courts have found environmental plaintiffs' concerns about the long-term impact a violation of the CWA will have on a waterway is a direct and concrete injury. *Ocean Advocates v. U.S. Army Corps of Eng'rs*, 402 F.3d 846, 859 (9th Cir. 2001) (quoting *Ecological Rights Found. v. Pac. Lumber Co.*, 230 F.3d 1141, 1149 (9th Cir. 2000)) (citing *Friends of the Earth, Inc. v. Gaston Copper Recycling Corp.*, 204 F.3d 149, 160 (4th Cir. 2000)) (noting that "an individual can establish 'injury in fact' by 'showing a connection . . . sufficient to make credible the contention the person's future life will be less enjoyable . . . or will suffer in his or her degree of satisfaction—if the area in question remains or becomes environmentally degraded'"); *Ore. State Pub. Research Grp., Inc. v.*

**b. Bowman, and no one else, caused the Federation's injury by filling in his wetland.**

The Federation's injury is more than fairly traceable to Bowman. No party disputes that Bowman dredged and filled his wetland in the summer of 2011. (R. at 4). The Federation alleges that these activities have diminished their recreational and aesthetic enjoyment because they affect the wetland's ability to filter and replenish the Muddy River. (R. at 6). It follows, then, that the Federation's claimed injury "fairly can be traced to the challenged action of [Bowman], and not injury that results from the independent action of some party not before the court." *See Simon v. E. Ky. Welfare Rights Org.*, 426 U.S. 26, 41-42 (1976); *Ocean Advocates*, 402 F.3d at 860.

**c. Both an injunction that requires Bowman to remove the dredged spoil from his wetland and civil penalties can redress the Federation's injury.**

The Federation's injury is redressable because the prospect of the Federation obtaining relief from its injury is not too speculative. Essentially, the redressiblity prong of standing exists solely to ensure that the plaintiff has an adequate stake in the controversy. *Linda R. S. v. Richard D.*, 410 U.S. 614, 618-19 (1973). That's it. Thus, so long as the relief the plaintiff seeks can conceivably remedy their harm, the plaintiff's harm is redressable. *See id.*; *Salmon Spawning & Recovery Alliance v. Gutierrez*, 545 F.3d 1220, 1226-1227, 1229 (9th Cir. 2008) (holding that plaintiff had standing to pursue an injunction that would "remedy the harm asserted" but not for a separate claim where the injunction sought could not "fix" the problem as a court could not undo a treaty).

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*Pac. Coast Seafoods Co.*, 361 F. Supp. 2d 1232, 1239-40 (D. Ore. 2005) (finding injury in fact from averments establishing members "ha[d] an interest in preserving the aesthetic integrity of" a river they walked along); *accord Laidlaw*, 528 U.S. at 184-85 (noting that this proposition is "entirely reasonable . . . and that is enough for injury in fact"). The Federation's members express that concern as well, which further evidences that the Federation has alleged a sufficient injury. (R. at 6).

In the context of environmental citizen suits, that injunctive relief can redress a plaintiff's injury flows naturally: an injunction abates the violation; it redresses the injury. *See Laidlaw*, 528 U.S. at 184-85. In this case, the Federation specifically seeks an injunction that would require Bowman to remove the fill material from his land—restoring it to wetland. (R. at 5). That injunction would actually put a stop to Bowman's violation of the CWA. Thus, the injunctive relief the Federation seeks can redress the Federation's injury. *See Salmon Spawning*, 545 F.3d at 1229.

With regard to civil penalties, the Federation must separately demonstrate that civil penalties can effectively remedy its injury. That is because a request for injunctive relief and a request for civil penalties are separate causes of action. *See Laidlaw*, 528 U.S. at 185. Even still, civil penalties under the CWA act as a deterrent so that defendants will know that they will not be able to exact economic benefit from skirting the CWA. *See id*. ("[C]ivil penalties in Clean Water Act cases do more than promote immediate compliance . . . they also deter future violations."). The Federation perceptively noted its concern for the long-term implications of Bowman's violation, and now, Bowman farms his filled-in wetland. (R. at 4-6). The Department's settlement agreement did not address this new farming activity—even though Bowman will undoubtedly derive economic benefit from it. (R. at 4, 6).

Instead of sending a message that farmers cannot simply just leave a small strip of land along the Muddy River untouched and then fill in all the land hidden behind the trees, the Department cut Bowman a deal. All Bowman must do under the terms of the settlement agreement is keep up appearances on a small strip of land along the Muddy; he can do as he pleases on the other 996.6 acres of filled-in wetland. (R. at 4). At the core then, the lack of civil penalties in this case sends one message to farmers along the Muddy's banks: Dredge

and fill away—just make sure no one can see the damage from the riverbank. *Cf. Laidlaw*, 528 U.S. 186 ("[A]n actual award of civil penalties does in fact bring with it a significant quantum of deterrence over and above the mere prospect of such penalties.").

Not only does allowing Bowman to escape without penalty send a dangerous message to other farmers along the Muddy River, it also contravenes the purpose of the CWA. Congress's purpose in enacting the CWA was to "maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251 (2006). Converting over 996 acres of wetland into a wheat field while leaving less than four acres of wetland hardly comports with that goal. That maintains nothing. Nor does it address the future impact of Bowman's farming activities, which will continue to violate § 404(f)'s prohibition of dredge and fill operations that pave the way for farming. *See* 33 U.S.C. § 1344(f)(2) (2006). As such, issuing civil penalties to Bowman will achieve not just the purpose civil penalties serve, but the broader aims of the CWA, too. And because civil penalties achieve those objectives here, awarding civil penalties in this case will redress the Federation's injury by "preventing future ones." *See Laidlaw*, 528 U.S. at 187.

**d. Bowman has not demonstrated that it is absolutely clear that he no longer violates the CWA or that he will no longer violate the CWA.**

The district court held that the Federation lacked a justiciable interest because it concluded that the Department and Bowman's settlement agreement fixes the problem. (R. at 6). It based that holding on the fact that "the environment *may* be benefited rather than injured" by the terms of the settlement agreement between Bowman and the Department. (*Id.* (emphasis added)). That holding appears to implicate the prudential doctrine of mootness.

The mootness doctrine provides that even where a plaintiff can establish standing, the controversy may cease to exist if it becomes "absolutely clear that the allegedly wrongful be-

havior c[an] not reasonably be expected to recur." *See United States v. Concentrated Phosphate Export Ass'n*, 393 U.S. 199, 203 (1968). The Court has always described a defendant's burden of establishing that a controversy is moot as "a heavy one." *See United States v. W.T. Grant Co.*, 345 U.S. 629 (1953). Indeed that burden is heavy: remedial conduct only deprives a citizen of standing if the defendant can prove that there is no reasonable basis for a court to conclude that the violations will reoccur or recur. *See Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Found., Inc.*, 484 U.S. 49, 66-67 (1987).

The record before this Court demonstrates that it is far from absolutely clear that there is no reasonable basis to conclude that Bowman will not violate § 404 in the future or that he is not violating § 404 now. As will be discussed below, Bowman continues to violate the CWA in two ways. *See infra* Part II. First, the dredged spoil he used to fill in his wetland continues to fill over 996 acres. Second, he now farms the filled-in wetland, which violates § 404(f)(2)'s recapture provision.

Additionally, the deal struck between Bowman and the Department does not keep Bowman from violating § 404 in the future or continuing to violate § 404 presently. Indeed, it only prevents Bowman from altering the 2.24 acres of wetland that Bowman had not yet drained and the just a little over an acre of "buffer zone" next to it. (R. at 4). The Federation's members, however, share a concern for the impact caused by Bowman filling in 996.6 acres of wetland to begin farming—not just the 3.4 acres of wetland viewable from the banks of the Muddy River. (R. at 6). They understand that the filled-in wetland weakens the integrity of the Muddy River because less wetland is available to absorb sediment and pollutants. (*Id.*). Thus, even if the settlement agreement improves the aesthetic qualities of the viewable parts of Bowman's land—it does not address the Federation's concerns that about the long-term

affect that nearly all of the wetland being filled in will have on the river. *See Ocean Advocates*, 402 F.3d at 859; *accord Laidlaw*, 528 U.S. at 184-85, 191-95. As such, it is far from "absolutely clear" that Bowman's violations have ceased to occur and will not reoccur. *See Laidlaw*, 528 U.S. at 189. Therefore, this Court should reverse the district court's decision and hold that the Federation has standing to sue Bowman for his violations of the CWA.

## II. Bowman continues to violate the CWA because his wetland remains filled in and he continues to engage in non-exempt farming activity.

In the face of a welter of authority establishing the opposite, Bowman and the Department argue that Bowman's violations of the CWA are all in the past. But that welter of authority establishes that the continued presence of fill material in a wetland continually violates the CWA. And the undisputed facts in the case establish that Bowman's land remains filled in with dredged spoil. (R. at 4-5). Moreover, Bowman continues to farm the filled-in wetland—a violation of § 404's recapture provision. Thus, the Federation both pleaded and proved that Bowman continues to violate the CWA.

### a. Fill material that remains in a wetland continually violates the CWA because the harm fill material inflicts on a wetland cannot dissipate without remediation.

Under the Court's precedent, a citizen brings suit for a continuing violation so long as the violation at issue has not completely ceased. In *Gwaltney*, the Court made it clear that there is only one reasonable interpretation of § 505's requirement that a violation be continuing in order for a citizen to bring suit. *Gwaltney*, 484 U.S. at 57. Based on weighing both the statute's plain meaning and its legislative history, the Court concluded that the only kind of violation a citizen may not bring suit for is a violation that is "wholly past"—a violation that has completely ceased to exist and has no likelihood of reoccurrence. *Id.* at 58-59 ("[T]he harm sought to be addressed by the citizen suit lies in the present or future, not in the past.").

Thus, the Court held that § 505 gives citizens the right to "enjoin or otherwise abate an ongoing violation" of the CWA. *Id.* at 59.

Although *Gwaltney* provides a clear legal standard, courts have split on how to apply *Gwaltney* to the myriad of violations that are possible under the CWA. Courts typically strictly apply *Gwaltney*'s prohibition of "wholly past" violations when the defendant has discharged a pollutant from an easily controlled, discrete source. *See, e.g., Brewer v. Ravan*, 680 F. Supp. 1176, 1182-83 (M.D. Tenn. 1988) (holding no continuing violation existed where defendant violated its daily discharge limit of PCB five years earlier and plant subsequently closed). In these cases, although the pollutants are still in the water, the defendant can easily eliminate the source of the discharge, allowing the pollutant to disperse to non-threatening levels quickly—making remediation unnecessary.[4] But when the defendant has not eliminated the source of the discharge, courts are less likely to find that the alleged violation is "wholly past." *See, e.g., Informed Citizens United, Inc. v. USX Corp.*, 36 F. Supp. 2d 375, 377-78 (S.D. Tex. 1999). As such, the split amongst lower courts on how to apply *Gwaltney* does not stem from some fundamental disagreement over the scope of *Gwaltney*'s holding. Instead, the divergent holdings are tied to the type of pollutant discharged, the source of the discharge, and the body of water the pollutant was discharged in. *See City of Mountain Park v. Lakeside at Ansley*, 560 F. Supp. 2d 1228, 1293-96 (N.D. Ga. 2008) (noting this distinction).

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[4] *See U.S. Pub. Interest Research Group v. Stolt Sea Farm*, No. 00-149-B-C, 2002 WL 240386, *6 n.3 (D. Me. Feb. 19, 2002) (concluding that the discharge of altered salmon blood into the ocean was not a continuing violation because defendant had ceased the practice five years earlier); *Aiello v. Town of Brookhaven*, 136 F. Supp. 2d 81, 120-21 (E.D. N.Y. 2001) (holding that ongoing migration of leachate plume did not constitute an ongoing violation where defendant had removed the source of leachate); *Friends of Santa Fe Cnty. v. LAC Minerals, Inc.*, 892 F. Supp. 1333, 1353-54 (D. N.M. 1995) (finding no continuing violation where plaintiff alleged a discharge of acid in subsurface waters but defendant had contained the acid leaching metal and the remaining acid would dissipate).

The distinction that courts draw between discharges of pollutants into large bodies of water and filling in wetlands makes sense given how each causes harm and how that harm can be remedied. Discretely emitted pollutants into large bodies of water usually disperse to less harmful levels naturally. *Cf. Aiello*, 136 F. Supp. 2d at 120-21 (finding that although effects of leachate remained, those effects would naturally dissipate because defendant brought the source of leachate under control). But the dredging and filling of a wetland inhibits the important ecological function it serves and does so in a manner that will not abate naturally. *See Greenfield Mills, Inc. v. Goss*, No. 1:00-CV-0219, 2005 WL 1563433, *4 (N.D. Ind. June 28, 2005) (distinguishing between residual effects of a prior discharge and the continuing harm fill material causes in a wetland). Fill material substantially disrupts the flow of water between the wetland and the adjacent body of water that conveys nutrients, biological materials, and sediment between them. *See, e.g.*, 33 C.F.R. § 320.4(b) (2012); *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 134-35 (1985). Thus, until the defendant removes the fill material from the wetland, the fill material will keep degrading both the wetland and the adjacent body of water. *See N.C. Wildlife Fed'n v. Woodbury*, No. 87-584-CIV-5, 1989 WL 106517, *2-3 (E.D. N.C. Apr. 25, 1989) ("[I]t is not the physical act of discharging dredge waste itself that leads to injury . . . but the *consequences* of the discharge in terms of environmental degradation.").

Because of the way that fill material inflicts harm on wetlands, courts consistently hold that the presence of fill material in a wetland is a continuing violation of the CWA. *E.g.*, *Stillwater of Crown Point Homeowner's Ass'n, Inc. v. Kovich*, 820 F. Supp. 2d 859, 895-896 (N.D. Ind. 2011); *City of Mountain Park*, 560 F. Supp. 2d at 1296-97; *Woodbury*, 1989 WL 106517 at *2-3. To be sure, an aberration that reaches the opposite conclusion does exist—

*Bettis v. Town of Ontario*. *See* 800 F. Supp. 1113, 1119 (W.D. N.Y. 1992) (summarily concluding that fill material in a wetland is not a continuing violation; citing no authority). But not even subsequent cases in the Western District of New York follow *Bettis*. *E.g.*, *Stepniak v. United Materials, LLC*, No. 03-CV-569A, 2009 WL 3077888, *4 (W.D. N.Y. Sept. 24, 2009). And of the ten cases that have cited *Bettis*, all have done so either to explicitly reject *Bettis*'s holding regarding continuing violations, *e.g.*, *Stillwater* 820 F. Supp. 2d at 895, or to cite *Bettis*'s other holding that a defective notice letter is a jurisdictional bar. *E.g.*, *City of Newburgh v. Sarna*, 690 F. Supp. 2d. 136, 147 (S.D. N.Y. 2010). An aberration notwithstanding, then, "[t]he weight of authority supports [the Federation's] position that the continued presence of fill material constitutes a continuing violation." *See Stepniak*, 2009 WL 3077888 at *4; *Stillwater*, 820 F. Supp. 2d at 895-896; *Woodbury*, 1989 WL 106517 at *2-3.

**b. Bowman's land still contains fill material, and thus, Bowman continues to violate the CWA.**

The uncontroverted facts in the record demonstrate that dredged spoil continues to fill over 996 acres of Bowman's land. (R. at 4-5). Thus, a substantial amount of fill material continues to degrade both the wetland and the Muddy River. (R. at 4-6); *see, e.g.*, *Woodbury*, 1989 WL 106517 at *2-3; *cf. Sasser v. EPA*, 990 F.2d 127, 129 (4th Cir. 1993) ("Each day the pollutant remains in the wetlands without a permit constitutes an additional day of violation."). Only one basis existed, then, for the district court to grant Bowman's motion for summary judgment and that is if these facts do not constitute a continuing violation of the CWA—as a matter of law. *See* Fed. R. Civ. P. 56(a).

The district court concluded that these facts do not establish a continuing violation of the CWA for reasons that cannot stand under the weight of authority. The district court reasoned that if the presence of fill material in a wetland is a continuing violation of the CWA, a

plaintiff might file suit outside the five-year limitation period imposed by 28 U.S.C. § 2462. (R. at 7). But a cause of action accrues under the CWA only when either the EPA or an equivalent state agency receives a report of the violation—not when the violation first occurs.[5] Thus, the statute of limitations tolls five years after the relevant agency learns about a defendant's violation—regardless of when a defendant actually dredges and fills their wetland. *E.g.*, *Woodbury*, 1989 WL 106517 at *3. This accrual date makes sense because

> If citizen-suits were barred . . . because . . . drainage of a wetland tract was completed . . . violators would have a powerful incentive to conceal their activities from public and private scrutiny—which would lead to serious problems in public and private enforcement of the Clean Water Act.

*Id.* Accordingly, when the district court rejected the weight of authority as "nonsense," it did so based on reasoning that is directly contradicted by both settled law and the purpose the citizen-suit provision serves. (R. at 7); *see City of Mountain Park*, 560 F. Supp. 2d at 1296-97; *Woodbury*, 1989 WL 106517 at *3.

Based on both the applicable case law and the policy considerations supporting it, though, the Federation has both pleaded and proved a continuing violation of the CWA. That is because the decided weight of authority applying § 505 to dredged and filled wetlands establishes that—as a matter of law—Bowman continues to violate the CWA. *See, e.g.*, *Stillwater*, 820 F. Supp. 2d at 895-96. What is more, that conclusion sensibly accounts for how Bowman's dredging and filling of his wetland continues to harm both the wetland and the Muddy River. *See Woodbury*, 1989 WL 106517 at *2-3 ("[I]t is not the physical act of dis-

[5] *See, e.g.*, *Atl. States Legal Found. v. Al Tech Specialty Steel Corp.*, 635 F. Supp. 284, 287-88 (N.D. N.Y. 1986); *Woodbury*, 1989 WL 106517 at *4; *United States v. Hobbs*, 736 F. Supp. 1406, 1409-10 (E.D. Va. 1990); *United States v. Reaves*, 923 F. Supp. 1530, 1533-34 (M.D. Fla. 1996).

charging dredge waste itself that leads to injury . . . but the *consequences* of the discharge in terms of environmental degradation.").

**c. Bowman's ongoing, non-exempt farming continues to violate the CWA.**

Although the CWA exempts discharges of dredge or fill material caused by normal agricultural activities, that exemption is subject to § 404's recapture provision. *See* 28 U.S.C. § 1344(f)(2); *see Greenfield Mills, Inc. v. Macklin*, 361 F.3d 934, 953-55 (7th Cir. 2004); *United States v. Brace*, 41 F.3d 117, 124-129 (3d Cir. 1994). The recapture provision's unambiguous language provides a two-part, conjunctive test. *See Greenfield Mills*, 361 F.3d at 954. Farming activity is "recaptured" if (1) the defendant's dredge and fill activity allowed the wetland to become suitable to farm for the first time, and (2) the defendant's dredge and fill activity either impairs the flow of water in the wetland or reduces the reach of water to the wetland. *See id.*; *United States v. Cundiff*, 555 F.3d 200, 214-15 (6th Cir. 2009).

The evidence before this Court establishes both elements of the recapture provision. Bowman's land was covered with trees and wetland vegetation prior to his demolition of the land. (R. at 3). As such, Bowman was not engaged in established farming practices on his land, and thus, Bowman's dredge and fill activities are "what allowed the wetland to become suitable to farm for the first time." § 1344(f)(2); 33 C.F.R. § 323.4 (2012); *Brace*, 41 F.3d at 125-26; *United States v. Cumberland Farms*, 647 F. Supp. 1166, 1175-76 (D. Mass. 1986) (holding where no credible evidence demonstrated wetland had been in prior use for farming activities, subsequent dredge and fill activity to begin farming established recapture as a matter of law). Bowman's dredge and fill activity substantially impeded the flow of water from the Muddy River to his land and has substantially reduced the reach of the Muddy River. (R. at 4-5). Bowman has since planted wheat and farms his land. (R. at 5). As such, he continues

to violate the CWA. *See* § 1344(f)(2); 33 C.F.R. § 323.4; *Greenfield Mills*, 361 F.3d 954-55; *Cumberland Farms*, 647 F. Supp. at 1175-76.

For these reasons this Court should reverse the district court's decision and hold that the Bowman continues to violate the CWA.

## III. The Department has not diligently prosecuted Bowman's violations of the CWA because its settlement agreement does not put an end to Bowman's violations.

Both Bowman and the Department claim that the Federation's suit should be dismissed because the Department has diligently prosecuted Bowman's violation. To be diligent, the Department's actions must be calculated to put an end to Bowman's violations. Admittedly, the Department has instigated two actions against Bowman: (1) The Department reached a settlement agreement with Bowman on August 1st as a result of informal negations between only the Department and Bowman that started after the Federation sent its notice of intent to sue on July 1st; (2) The Department then filed suit in the district court on August 10th to have the district court simply enter the settlement agreement as a judgment. (R. at 4-5).

But the Department's settlement agreement will not bring Bowman into compliance with the CWA. Thus, the diligent prosecution bar of § 505 does not bar the Federation's suit. First, the plain language of § 309 precludes a finding that the Federation's suit is barred based on the administrative action that resulted in Bowman and the Department's settlement agreement. Second, diligent prosecution is determined in view of the circumstances of each particular case, and the circumstances of this case evidence that the Department's prosecution is not diligent because it will not bring Bowman into compliance with CWA. However, even if this Court finds that the Department has diligently prosecuted Bowman's violations, the Federation's statutory right of intervention in the Department's action necessitates that the Federation's suit be consolidated with the Department's suit—not dismissed.

**a. The Federation's suit is not barred by the Department's agency action because the Federation filed suit within 120 days of serving its notice of intent to sue.**

Although it is well settled that citizen suits are to supplement—not supplant—government enforcement of the CWA, it is equally well established that "citizens are not to be treated as nuisances or troublemakers but rather as welcomed participants in the vindication of environmental interests." *See Friends of the Earth v. Consol. Rail Corp.*, 768 F.2d 57, 63 (2d Cir. 1985). Section 309 provides that if a state agency prosecutes a claim against a violator in an administrative action, a citizen suit is barred. 33 U.S.C. § 1319(g)(6)(B) (2006). But Congress refused to apply that bar to citizens whose prompt actions to enforce the CWA spurred the agency's action. Thus, Congress provided two exceptions to the agency action bar, one of which is relevant here:

> The limitations contained in subparagraph (A) on civil penalty actions under section 1365 of this title *shall not apply* with respect to any violation for which—
> . . .
> (ii) notice of an alleged violation . . . has been given . . . prior to commencement of an action under this subsection and [the citizen suit] with respect to such alleged violation is filed before the 120th day after the date on which such notice is given.

§ 1319(g)(6)(B)(ii). The plain meaning of this provision allows a citizen to bring suit despite agency action so long as (1) the agency's administrative action began only after the citizens gave notice of their intent to sue, and (2) the citizens file their suit within 120 days of serving notice. *See Black Warrior Riverkeeper, Inc. v. Birmingham Airport Auth.*, 561 F. Supp. 2d 1250, 1253 (N.D. Ala. 2008) (holding citizen suit not barred when agency commenced action only after receiving citizen's notice and citizens filed suit within 120 days of serving notice); *Altamaha Riverkeepers v. City of Cochran*, 162 F. Supp. 2d 1368, 1373 (M.D. Ga. 2001) (same); *Sierra Club v. Hyundai Am., Inc.*, 23 F. Supp. 2d 1177, 1181-82 (D. Ore. 1997)

(same); *Pub. Interest Grp. v. Yates Indus., Inc.*, 757 F. Supp. 438, 444-45 (D. N.J. 1991) (same).

The facts of this case fit squarely within § 309(g)(6)(B)(ii). On July 1st, the Federation issued its notice of intent to sue. (R. at 4). Only after receiving the Federation's notice did the Department begin discussions with Bowman that would lead to their settlement agreement. (*Id.*). Then the Federation filed suit on August 31st—well within the 120-day limit § 309 imposes. (R. at 5). Therefore, the Federation's suit is not barred by the Department's settlement agreement with Bowman because the Department had not acted to cure Bowman's violation prior to the Federation's notice and the Federation filed suit within 120 days of serving its notice. *See, e.g., Black Warrior Riverkeeper*, 561 F. Supp. 2d at 1253.

**b. The Department's suit against Bowman does not bar the Federation's suit because it is not a diligent prosecution of Bowman's violations of the CWA.**

The more difficult issue is posed by the Department's suit against Bowman that was filed after it cut its deal with Bowman and before the Federation could file suit. Section 505 does bar a citizen suit when the "State has commenced and is diligently prosecuting a civil or criminal action in a court." 33 U.S.C. § 1365(b)(1)(B) (2006). But that bar is limited to suits filed by the state that actually "require compliance with the standard, limitation, or order" the violator violated. *Id.* As such, the Federation's suit is barred only if the Department's suit is "calculated to eliminate the cause(s) of [Bowman's] violations," which it does not. *See Friends of Milwaukee's Rivers v. Milwaukee Metro. Sewerage Dist.*, 382 F.3d 743, 760 (7th Cir. 2004).

**i. Instead of focusing on curing Bowman's violations of the CWA, the Department's actions have been geared more towards keeping the Federation from participating in enforcing the CWA.**

Courts have routinely allowed citizen suits to go forward when the state structures and times it suit or settlement agreement in such a way that it prevents citizens from meaningfully participating in enforcing the CWA. *E.g., Friends of the Earth, Inc. v. Laidlaw Envtl. Servs., Inc.*, 890 F. Supp. 470, 489-90 (D. S.C. 1995), *aff'd on other grounds*, 528 U.S. 167 (2000) (citing *Love v. N.Y. State Dep't of Envtl. Conservation*, 529 F. Supp. 832, 843-44 (S.D. N.Y. 1981)). For instance, in *Laidlaw*, the state agency and the defendant quickly reached a settlement agreement and then sought to have settlement agreement entered as a consent decree by a court—which would have kept the citizens out of the matter entirely. *See id.* The district court found that the state's rush to dispose of the matter triggered heightened scrutiny—even though diligent prosecution analysis usually accords states great deference. *See id.* With deference removed, the district court held the state's suit did not evidence diligent prosecution because the settlement agreement did not completely address the violations, nor did it account for the economic gain the defendant received by violating the CWA. *See id.* at 490-97 *accord Laidlaw*, 538 U.S. 177-78 n.1, 186 n.2 (approving of the district court's determinations).

Like the state agency in *Laidlaw*, the Department's actions in this case appear to be aimed more so at preventing the Federation from participating in enforcing the CWA than at bringing Bowman into compliance. At any point during its negotiations with Bowman, the Department could have solicited the Federation's involvement to reach a final agreement acceptable to all parties. Indeed, § 309 directs the Department to do just that. Section 309 requires a state agency to "provide[] public notice of" the settlement agreement, allow an oppor-

tunity for comment on the agreement, and give citizens a chance to request a hearing to present evidence at. *See* § 1319(g)(4)(A)-(C).

The Department never complied with its obligation to allow the Federation to participate and tried to sidestep its obligation instead. The Department never reached out to the Federation to involve it in negotiating a settlement agreement. (R. at 4-5). Nor does it appear that the Department followed its statutory obligations to provide notice and an opportunity for comment. (*Id.*). Instead of soliciting the kind of meaningful citizen participation Congress intended, the Department just filed suit and then urged the district court to affirm its process-skirting conduct by barring the Federation's suit. *See Laidlaw*, 890 F. Supp. 489-90; *Student Pub. Interest Grp. v. Fritzsche, Dodge, & Olcott, Inc.*, 759 F.2d 1131, 1139 (3d Cir. 1985) (finding no diligent prosecution where agency did not afford meaningful public participation because settlement agreements "are not designed to subsume the procedural protections of the adversarial system").

Had the Department just complied with § 309, the Federation might have helped the Department shape an acceptable agreement—obviating the need for a suit in federal court; an important consideration given that, as noted above, the Department's settlement agreement could not bar a suit filed by the Federation with 120 days of its notice. § 1319(g)(6)(B)(ii). But instead of complying with § 309, the Department filed suit to have the district court do what the Department could not have done on its own: render a final, preclusive order that could prevent the Federation from filing suit. (R. at 5). As such, the Department's actions appear to be geared towards skirting the procedure Congress detailed in § 309 and not towards bringing Bowman into compliance. And thus, the Department's decision-making should be accorded no deference. *See Laidlaw*, 890 F. Supp. at 489-90.

**ii. The Department's settlement agreement does not bring Bowman into compliance with the CWA because it does not address the root causes of Bowman's violations.**

When analyzing diligent prosecution, courts have focused on the circumstances that both lead up to and proceed the state filing suit. *E.g.*, *Ohio Valley Envtl. Coal., Inc. v. Maple Coal Co.*, 808 F. Supp. 2d 868, 884 (S.D. W.Va. 2011) (citing *Student Pub. Interest Grp. v. Fritzsche, Dodge, & Olcott, Inc.*, 579 F. Supp. 1528, 1535 (D. N.J. 1984)) ("The court must also consider the context surrounding the state prosecution."). For a state to have diligently prosecuted a violation depends on whether—all things considered—the state intends to bring the violator into compliance and its actions are "in good faith calculated to do so." *Friends of Milwaukee's Rivers*, 382 F.3d at 760; *see also* Jeffery G. Miller, *Overlooked Issues in the "Diligent Prosecution" Citizen Suit Preclusion*, 10 Widener L. Rev. 63, 83 (2003) ("Actions of a non-coercive nature or directed at simply penalizing past violations, as opposed to addressing or deterring present and future violations do not fit within [the] plain meaning [of "to require compliance]."). In order to bar the Federation's suit, then, the Department's actions must demonstrate that the Department actually seeks to put an end to Bowman's violations of the CWA. *Cf. Weinberger v. Romero-Barcelo*, 456 U.S. 305, 315 (1982) (noting that giving effect to the purpose of the CWA through agency action is "achieved by compliance with the Act.").

The circumstances surrounding the Department's suit strongly suggest that the Department has not diligently sought to eliminate Bowman's violations of the CWA. Bowman violated § 404 by clearing his land, burning the plants and trees he knocked down in the process, and then leveling his land with a mixture of ash and dredged soil. (R. at 4). Even though Bowman's dredge and fill activities have resulted in the vast majority of his land being filled

with dredged spoil, the Department seeks only to stop Bowman from destroying the remaining the 2.24 acres he could not get to and have him remediate a scant 1.1 acre "buffer zone." (*Id.*). Further, not only do 996.6 acres of Bowman's land remain filled with dredged spoil, Bowman now farms the land—a violation of § 404(f)(2). Yet the Department's settlement agreement does not prevent or even seek to regulate Bowman's non-exempt farming activities on the filled-in portion of his land. (R. at 4-5). Simply put, the Department's settlement agreement will not "result in [the] elimination of the root causes underlying [Bowman's] large-scale violations." *See Friends of Milwaukee's Rivers*, 382 F.3d at 764 (holding that state's actions that seek only to "reduc[e], not eliminate[e], violations are insufficient to indicate diligent prosecution").

The district court concluded that the Department diligently prosecuted Bowman's violation because it accepted the Department and Bowman at their word. (R. at 5, 7). But "diligent prosecution analysis requires more than mere acceptance at face value of the potentially self-serving statements of a state agency and the violator . . . regarding their intent with respect to the effect of a settlement agreement." *Friends of Milwaukee River*, 382. F.3d at 760. And the foregoing analysis demonstrates a strong basis for this Court to conclude that the Department's actions are not calculated to put an end to Bowman's violation of the CWA. The Department's settlement agreement requires that Bowman preserve only 3.4 acres of wetland—all while allowing Bowman to farm 996.6 acres of filled-in wetland in violation of § 404(f)(2). (R. at 4-5). Accordingly, this Court should hold that the Department has not diligently prosecuted Bowman's violations. And at the very least, this Court should remand this case back to the district court for it to actually consider the purpose and intent of the Department's action. *See Atl. States Legal Found., Inc. v. Eastman Kodak, Co.*, 933 F.2d 124, 127-

28 (2d Cir. 1991) (remanding for determination of whether settlement agreement would end violations after citizen demonstrated basis for appellate court to believe that it would not).

**c. But if this Court finds that the Department has diligently prosecuted Bowman's violations of the CWA, it should remand this case to be consolidated with the Department's suit.**

Should this Court find that the Department has diligently prosecuted Bowman's violations of the CWA, dismissal is not the appropriate remedy. That is because § 505 grants the Federation the right to intervene in the Department's suit, which the Federation has already sought. § 1365(b)(1)(B) ("any citizen may intervene as a matter of right"); (R. at 5). Moreover, the Federation's suit and the Department's suit both raise the same issues of law and fact and are thus ripe for consolidation. Rather than dismissing the Federation's suit, if this Court finds that the Department diligently prosecuted Bowman's violations, this Court should remand this case for consolidation with the Department's suit, which the Federation has requested. (R. at 5).

Consolidation is the precise remedy Congress had in mind when it enacted the diligent prosecution bar. Congress recognized that there would be instances where citizens would file a separate suit based on their belief that the state was not diligently prosecuting violators. In those instances, Congress expected that courts would consider whether "consolidation of the citizen petition" is warranted because the state is diligently prosecuting a violation, or whether the state's lack of diligent prosecution imposes no bar on the citizen suit. S. Rep. No. 92-414 (1971), *reprinted in* 1972 U.S.C.C.A.N. 3,668, 3,745-46. The district court, however, gave no consideration to consolidation. (R. at 7-8).

Consolidation under Federal Rule of Civil Procedure 42(a) requires merely that there be a common question of law or fact between the two cases. Courts do have discretion to deny

consolidation, but that discretion is not unlimited. *See, e.g., Johnson v. Celotex Corp.*, 889 F.2d 1281, 1285 (2d Cir. 1990); *accord* 9A Charles Alan Wright & Arthur R. Miller, *Federal Practice & Procedure* § 2383 (3d ed. 2008). Courts properly deny consolidation where the "specific risks of prejudice and possible confusion [are] overborne by the risk of inconsistent adjudications of common factual and legal issues, the burden on the parties, witnesses, and available judicial resources posed by multiple lawsuits." *Arnold v. E. Airlines, Inc.*, 681 F.2d 186, 193 (4th Cir. 1982). And in the context of the CWA, consolidation is not proper if the citizen's suit seeks punitive damages, alleges personal injuries, or also alleges violations of common law torts. *See U.S. E.P.A. v. City of Green Forest*, 921 F.2d 1394, 1403 (8th Cir. 1990). But when a citizen suit does not introduce new issues of law or fact, courts have routinely consolidated the separate citizen and state suits. *See Sierra Club v. Hamilton Cnty. Bd. of Cnty Comm'rs*, 504 F.3d 634, 639, 642-43 (6th Cir. 2007) (holding that a citizen group was a proper party in a consolidated action that resulted from a citizen suit that was filed after the state agency had filed suit); *Atl. States Legal Found., Inc. v. Koch Ref. Co.*, 681 F. Supp. 609, 614 (D. Minn. 1988) (consolidating citizen suit and state agency's suit; noting the consistent approach of courts is to consolidate).

If necessary then, consolidating the Federation and Department's actions is the proper remedy. More importantly, it just makes sense. The resulting lawsuit would involve the exact same parties: the Federation, the Department, and Bowman. The resulting lawsuit would also pose the exact same questions of law and fact: the CWA and whether Bowman's actions violated it. Further, § 505 already grants the Federation a statutory right of intervention in the Department's action. *See* § 1365(b)(1)(B). Accordingly, neither the Department nor Bowman would suffer prejudice if the cases were consolidated. *See Hamilton Cnty.*, 504 F.3d at 639,

642-43 (holding that citizen group was a proper party after district court consolidated case between citizen group and state agency that district court found was diligently prosecuted). Therefore, if this Court finds that the Department has satisfied the diligent prosecution bar, it should remand this case to the district court to be consolidated with the Department's suit.

## IV. Bowman's land clearing violated the CWA because he added dredged spoil—the discharge of a pollutant—into a wetland so that he could farm it for the first time.

The forgoing analysis has assumed that Bowman's actions constitute a violation of the CWA. To escape liability for his actions, though, Bowman lodges one final argument: He has not violated the CWA because the dredged spoil he used to fill in his wetland—the burnt plant life and bulldozed soil—did not add pollutants to his wetland. The parties agree that the only issue regarding a violation of the CWA is whether the redeposit of dredged spoil adds pollutants to a wetland. (R. at 9). The EPA, the Corps, and courts all conclude that the redeposit of dredged spoil is an addition of a pollutant under § 404. Also, § 404(f)(2) recaptures Bowman's subsequent farming activity. Thus, Bowman violated the CWA by both adding dredged spoil to his wetland and by discharging pollutants through his non-exempt farming activities.

### a. Under the agencies' interpretation of § 404, Bowman added pollutants to his wetland when he redeposited dredged spoil.

The EPA, the Corps, and the courts reviewing the EPA and Corps's interpretation of § 404, agree that "redeposits" are an addition. The only disagreement between the agencies and a court about whether redeposits are an addition came when the EPA and the Corps promulgated a very broad definition that any redeposit—even the incidental fallback of dirt—constituted an addition. *See Nat'l Mining Ass'n v. U.S. Army Corps of Engineers*, 145 F.3d 1399, 1400 (D.C. Cir. 1998). Reviewing that broad definition, the D.C. Circuit did invalidate the agencies' interpretation that mere incidental fallback is an addition under § 404. *Id.* But

the D.C. Circuit invalidated the interpretation only to correct the over breadth of the agencies' definition of incidental fallback. *See id.* at 1405. In doing so, though, the D.C. Circuit never questioned the agencies' interpretation that "redeposits" are an addition. *Id.* And in fact, it approvingly cited cases where courts had held that filling in a wetland with its own dredged spoil violates the CWA. *See id.* (citing *Avoyelles Sportsmen's Leagues v. Marsh*, 715 F.2d 897 (5th Cir. 1983)). Thus, all the D.C. Circuit sought to rein in was the agencies' attempt to regulate *all* incidental fall back—even just some dirt falling off the edge of a shovel. *See id.*

Since *National Mining Association*, the EPA and the Corps have backed off their expansive definition of § 404. In December of 2008, the agencies issued a final rule—pursuant to § 553 of the APA—that conforms the agencies' interpretation of § 404 to the rather narrow limits the D.C. Circuit placed on regulable redeposits. *See* 73 Fed. Reg. 79,641, 79,643 (Dec. 30, 2008) (codified at 33 C.F.R. pt. 323; 40 C.F.R. pt. 232); *see also United States v. Mead Corp.*, 533 U.S. 218, 229-30 (2001) (holding agency rules issued pursuant to the APA's notice and comment procedure are entitled to *Chevron* deference). Now the agencies define the discharge of dredged material as "any *addition*, including excavated material" caused by "mechanized land clearing." *See* 33 C.F.R. § 323.2(d)(1)(iii) (2012) (emphasis added).

Bowman's activities plainly involved the addition of excavated material caused by mechanized land clearing. Bowman began excavating his property by using a bulldozer to knock down trees and uproot wetland vegetation on his property. (R. at 4). He then continued by piling the plants and trees together and setting them on fire. (*Id.*). While he waited for the fire to die down, Bowman dug trenches to bury the plant and tree ash in. (*Id.*). Afterwards, Bowman bulldozed the plant ash and soil mixture from the high-lying portions of his land to the low-lying portion of his land, thereby redepositing the excavated plant ash and soil. (*Id.*).

When he finished filling in his land with plant ash and dredged soil, Bowman dug a ditch across his property so that his land would drain into the Muddy River—which it did. (R. at 4-5). Thus, Bowman added excavated materials because of his mechanized land clearing—the agencies' precise definition of what it means to discharge a pollutant under § 404. *See* 33 C.F.R. § 323.2(d)(1)(iii).

**b. Because it is entitled to full *Chevron* deference, this Court should apply the agencies' interpretation of § 404 and find that Bowman's redeposit of dredged spoil violated the CWA.**

Bowman's argument below, which the district court accepted, requires rejecting the agencies' interpretation of § 404—something that can only be done if this Court finds the interpretation is unreasonable. *See Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 843 & n.11 (1984) ("[T]he question for the court is whether the agency's answer is based on a permissible construction of the statute."). The Sixth Circuit has already encountered a challenge to the reasonableness of the agencies' definition of regulable redeposits by "a defendant who took proactive steps to alter and fill his wetlands"—just like Bowman, here. (R. at 4); *see Cundiff*, 555 F.3d at 214 n.8. Addressing the defendant's contention that the redeposit of dredged spoil from side casting was not an addition, the Sixth Circuit held that even if § 404 did not unambiguously regulate redeposits, the agencies' interpretation that § 404 does prohibit redeposits "is nevertheless a reasonable agency interpretation." *Id.* at 214 (citing *Chevron*, 467 U.S. at 843).

The reasonableness of the agencies' interpretation is evidenced by the fact that courts have consistently held that the redeposit of dredged spoil adds pollutants to a wetland. Indeed, since as far back as 1983, the Fifth Circuit has recognized that redeposited dredged spoil is an addition. *Avoyelles*, 715 F.2d at 923-25. Just like Bowman, the defendant in *Avoyelles* cut

down all the trees and wetland vegetation, piled them up, burned them, buried the ash in the soil, and then ditched the wetland to drain it. (R. at 4); *Avoyelles*, 715 F.2d at 901, 923-25. Based on the CWA's legislative history, the *Avoyelles* court concluded that § 404 regulates, and thus prohibits, "the redepositing of materials taken from the wetlands." *Avoyelles*, 715 F.2d at 923. Now, along with the Fifth Circuit, the Third, Fourth, Sixth, Seventh, Ninth, and Eleventh Circuits also hold that the redeposit of dredged spoil is the addition of a pollutant.[6] The agencies' interpretation, then, is consistent with the widespread judicial interpretation of § 404. This consistency not only underscores the reasonableness of the agencies' interpretation, it also explains why the agencies considered their rule to merely be one that conformed their interpretation of § 404 to the courts' interpretation of § 404. *See* 73 Fed. Reg. at 79,642. Thus, this Court should defer to the agencies' interpretation of § 404 because it is a reasonable interpretation that was issued in accordance with § 553 of the APA. *See Mead*, 533 U.S. at 227-30 (holding that agency rules issued in accordance with the APA's notice and comment procedure are entitled to *Chevron* deference).

Bowman's argument that redeposits are not additions requires ignoring the deference courts owe the agencies' interpretation of § 404. *See Mead*, 553 U.S. at 227-30. And that is precisely what the district court did when it imposed its own construction of § 404 that differs from both the agencies' construction and the vast majority of courts' construction. (R. at 9). More confusing than the district court contravention of *Chevron*, though, is that the district court supplanted the agencies' § 404 rule with an EPA rule the EPA promulgated to clarify

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[6] *See, e.g.*, *Brace*, 41 F.3d at 129; *United States v. Deaton*, 209 F.3d 331, 335-37 (4th Cir. 2000); *Greenfield Mills*, 361 F.3d at 948-49; *Borden Ranch P'ship v. U.S. Corps of Eng'rs*, 261 F.3d 810, 815 (9th Cir. 2001), *aff'd*, 537 U.S. 99 (2002) (per curiam); *United States v. M.C.C. of Fla., Inc.*, 772 F.2d 1501, 1505-06 (11th Cir. 1985), *rev'd on other grounds*, 481 U.S. 1034 (1987).

that the "unitary body theory" applies to § 402. (R. at 9-10 (citing 73 Fed. Reg. 33,697 (June 13, 2008) (codified at 40 C.F.R. pt. 122)). The district court's decision is confusing because the EPA expressly stated that its § 402 rule "has no effect on the 404 permit program." 73 Fed. Reg. at 33,703. Also, the EPA and the Corps issued their § 404 rule on December 31, 2008—six months after the EPA issued its § 402 rule on June 12, 2008. Thus, the EPA's § 402 rule could not have even implicitly "overruled" the agencies' joint § 404 rule. Accordingly, the district court improperly relied on the EPA's § 402 rule, which the EPA has both expressly and implicitly made inapplicable to § 404.

**c. Bowman dredged and filled his wetland so that he could farm it for the first time, and thus, his dredge and fill activities violate § 404's recapture provision.**

Even if this Court rejects the EPA and the Corps's interpretation of § 404, Bowman's activities still violate § 404. Section 404(f)(2), the recapture provision, provides a two-part, conjunctive test for non-exempt farming activity. 28 U.S.C. § 1344(f)(2). Farming activity is recaptured if (1) the defendant's dredge and fill activity allowed the wetland to become suitable to farm for the first time, and (2) the defendant's dredge and fill activity either impairs the flow of water in the wetland or reduces the reach of water to the wetland. *See Greenfield Mills*, 361 F.3d at 953-55; *Cundiff*, 555 F.3d at 214-15.

Bowman's actions fit the recapture provision to a tee. Bowman cleared and leveled his land so that he could sow wheat seeds. (R. at 4-5). In order for the dredged and filled land to be suitable to farm, Bowman had to drain the water that naturally flowed from the Muddy River to his wetland back into the Muddy River through the ditch he constructed. (*Id.*). Thus—like many other farmers whose transformations of their land have violated § 404(f)(2) before him—Bowman impaired the flow of water to his wetland and reduced the flow of the Muddy River through his dredge and fill activities. (R. at 4-5); *see* § 1344(f)(2); *Greenfield*

*Mills*, 361 F.3d at 954-56; *Borden Ranch*, 261 F.3d at 815; *Avoyelles*, 715 F.2d at 901, 923-25 n.44; *Cumberland Farms*, 647 F. Supp. at 1175-76. As such, this Court should hold that Bowman has violated § 404's recapture provision and reverse the district court's decision.

## CONCLUSION

This Court should hold that the Federation has standing to bring its claim against Bowman for the injuries its members sustained from Bowman's violations of the CWA. Bowman violated the CWA because he added redeposited dredged spoil—a pollutant—to his wetland and now farms it. Not only does Bowman's farming continue to violate the CWA, Bowman's violation persists because the manner by which fill material harms a wetland necessitates that courts find keeping a wetland filled in continually violates the CWA. Nearly all of Bowman's wetland remains filled in and Bowman can farm it because the Department cut Bowman a deal instead of diligently prosecuting Bowman to put an end to his violations. For these reasons, the Federation respectfully requests that this Court reverse the decision of the district court to grant Bowman's motion for summary judgment. This Court should then grant the Federation's motion for summary judgment.

Respectfully submitted,

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Counsel for the New Union Wildlife Federation