Team 28

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.

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

Brief for New Union Wildlife Federation,
Plaintiff-Appellant.

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JURISDICTIONAL STATEMENT

This case is an appeal from a final judgment of the United States District Court for the District of New Union. (R. at 1.) The district court had jurisdiction to enter summary judgment over the case because it had proper subject matter jurisdiction. Federal courts have subject matter jurisdiction over civil actions arising under the laws of the United States, and the issues of the case arise under the Clean Water Act (CWA), 33 U.S.C. §§ 1251 *et seq*, a law of the United States. This court of appeals has jurisdiction over this appeal pursuant to 28 U.S.C. § 1291 because the district court's order is a final decision.

ISSUES PRESENTED FOR REVIEW

I. Does the New Union Wildlife Federation (NUWF) have standing to sue Jim Bob Bowman on behalf of its members, who possess an aesthetic and recreational interest in the Muddy River and the surrounding wetlands, for violating the CWA?

II. Is the unpermitted discharge of dredged and fill materials a continuous violation as required by § 505 when the dredged and fill materials remain in the wetlands?

III. Do the actions of New Union Department of Environmental Conservation (NUDEP) constitute diligent prosecution as required by § 505(b) of the CWA?

IV. Did Bowman violate the CWA when he cleared a wetland and deposited dredged and fill material into the same wetland?

STATEMENT OF THE CASE

On July 1, 2011, the NUWF sent notice of its intent to sue Bowman under § 505 of the CWA, 33 U.S.C. § 1365(a), to Bowman, the U.S. Environmental Protection Agency (EPA), and the State of New Union/NUDEP. (R. at 4.) Subsequent to NUWF's notification, NUDEP sent Bowman a notice of violation, informing Bowman that he had violated state and federal law

when he commenced land-clearing operations in a jurisdictional wetland. (R. at 4.) NUDEP and Bowman entered into a settlement agreement, which was incorporated into an administrative order on August 1, 2011. (R. at 4.) On August 10, 2012, NUDEP filed a complaint against Bowman in the United States District Court for the District of New Union under § 505 of the CWA. (R. at 5.)

On August 20, 2011, NUWF filed a complaint against Bowman in the United States District Court for the District of New Union under § 505 of the CWA. (R. at 5.) In its complaint, NUWF sought civil penalties and an order requiring Bowman to remove the dredged and fill material he deposited and to restore the wetlands. (R. at 5.)

After NUWF filed its complaint, NUDEP filed a motion to enter a consent decree, which is still pending in the district court. (R. at 5.) NUWF then filed a motion to intervene in the NUDEP § 505 action, to consolidate the NUDEP and NUWF actions, and an opposition to entry of the decree proposed by NUDEP in the NUDEP § 505 action. (R. at 5.) Subsequently NUDEP filed a motion to intervene in the NUWF action, which the district court granted. (R. at 5.)

After discovery, NUWF and NUDEP both filed cross-motions for summary judgment. (R. at 5.) The District Court granted Bowman's motion for summary judgment on all four counts, holding that the NUWF lacked standing, the District Court lacked subject matter jurisdiction because Bowman's violations of the CWA were wholly past, the court lacked subject matter jurisdiction because of prior state action, and Bowman did not violate the CWA. (R. at 1.)

This is an appeal from a final order of the District Court for the District of New Union granting Bowman's motion for summary judgment on all four counts. (R. at 1.) NUWF and NUDEP each filed a Notice of Appeal. (R. at 1.) NUWF challenges all four holdings of the

District Court, and the NUDEP challenges the court's holdings that the NUWF did not have standing to bring its citizen suit and that Bowman did not violate § 404 of the CWA. (R. at 1.)

STATEMENT OF THE FACTS

The Wetland and Its Uses

Bowman owns 1,000 acres of land hydrologically connected to the Muddy River, which includes 650 feet of Muddy River shoreline. (R. at 3.) His property is adjacent to the river, and the parties agree that Bowman's property is a wetland. (R. at 9.) The citizens of New Union commonly use the Muddy River for recreational activities. (R. at 3.) NUWF members Dottie Milford, Zeke Norton, and Effie Lawless often use the Muddy River for recreational boating and fishing, and they picnic on the river's banks. (R. at 6.) Additionally, Norton has frogged in the wetland area for years for both recreation and subsistence. (R. at 6.) He particularly likes Bowman's property for frogging because he could always count on getting a dozen good sized frogs. (R. at 6.) The wetlands also serve to maintain the integrity of the Muddy by absorbing sediment and pollutants and by acting as a flooding buffer. (R. at 6.)

Bowman's Wetland Destruction Activities

On June 15, 2011, Bowman began using bulldozers to knock down trees and level other vegetation. (R. at 4.) Bowman pushed the felled trees and vegetation into windrows and then burned those windrows. (R. at 4.) Bowman next used a bulldozer to dig trenches, and he pushed the cut trees, leveled vegetation, and the ashes from the burned trees and vegetation into them. (R. at 4.) Bowman leveled the field he had cleared by pushing soil from the higher portions of the wetlands into the trenches and lower-lying portions of the wetlands. (R. at 4.) Bowman finally dug a ditch running from the back of his property to the river for the purpose of draining the wetlands into the Muddy River. (R. at 4.) Because the land next to the river was difficult to

work with a bulldozer, especially when it was saturated, Bowman left a 150-foot-wide strip of land adjacent to the river so that he could clear it later after it had drained. (R. at 4.) Bowman worked on clearing and filling the wetlands until on or about July 15, 2011. (R. at 4.)

Harm Resulting From the Wetland Destruction

Since Bowman destroyed the wetland, Milford, Norton, and Lawless have felt a loss from the destruction and fear that the Muddy is more polluted as a result. (R. at 6.) They also fear that the river will become far more polluted if other adjacent wetlands are also cleared and drained. (R. at 6.) Milford has also noticed that the Muddy has appeared more polluted since Bowman's actions, and Norton has been unable to continue frogging in the area because he is lucky to find even one or two good frogs in the remaining buffer area. (R. at 6.)

When the NUWF, a not-for-profit corporation with the purpose of protecting the fish and wildlife of New Union by protecting their habitats, became aware of Bowman's dredging and filling activities, it sent Bowman, the EPA, and the NUDEP a notice of its intent to sue Bowman under § 505, the citizen suit provision, of the CWA.

Prosecution of Bowman's Violation

Subsequent to NUDEP's notice of its intent to sue, the NUWF sent Bowman a notice of violation, which informed him that he had violated both state and federal law when he destroyed the wetland. (R. at 4.) Thereafter, Bowman and NUDEP entered into a settlement agreement, which was incorporated into an administrative order on August 1, 2011, a month after NUWF sent its notice of intent to sue. (R. at 4.) In the settlement agreement, Bowman agreed to not destroy any more wetlands and to convey a conservation easement on the 150-foot-wide strip of remaining wetland to the NUDEP. (R. at 4.) Additionally, Bowman agreed to construct and maintain a 75-foot buffer wetland zone. (R. at 4.)

Shortly before the NUWF filed its complaint under § 505 of the CWA, the NUDEP filed a complaint against Bowman under § 505. (R. at 5.) NUDEP then filed a motion to enter a consent decree that contains identical terms to the administrative order; the motion is still pending. (R. at 5.) The NUWF § 505 complaint, unlike the NUDEP consent decree, seeks civil penalties and an order requiring Bowman to remove the dredged and fill material deposited in the wetland and to restore the wetland. (R. at 5.)

NUWF is concerned that Bowman's land-clearing activities have devastated the ecological integrity of the wetland and, as a result, caused harm to the fish and wildlife of the state by taking their habitat. For that reason, the NUWF filed this lawsuit to encourage the NUDEP to exercise its authority for maintaining the state's wetlands and require Bowman to reverse his wrong.

STANDARD OF REVIEW

Summary judgment must be granted if the record, viewed in a light most favorable to the non-moving party, *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986), shows that "there is no genuine issue as to any material fact and . . . the moving party is entitled to judgment as a matter of law." FED. R. CIV. P. 56(a). The court's role is not to judge the witnesses' credibility, evaluate the weight of the evidence, or determine the truth of the matter. *Anderson*, 477 U.S. at 249. The issues before this court are questions of law subject to de novo review. *Timmons v. White*, 314 F.3d 1229, 1232 (10th Cir. 2003). Thus, no deference should be accorded to the lower court's opinions and conclusions.

SUMMARY OF THE ARGUMENT

The district court erred in holding that the NUWF did not have standing, that there was no continuing violation as required by § 505(a) of the CWA, that the citizen suit was barred by

NUDEP's diligent prosecution of Bowman, and that the addition element of a CWA cause of action was not satisfied.

The NUWF has standing to bring its claim on behalf of its members against Bowman. The district court found that the members could not show an injury in fact as a result of Bowman's illegal dredge and fill activity. However, the members explicitly pointed to their concrete and particularized injuries: the loss of their recreational, economic, and aesthetic interest in the wetlands and the adjacent Muddy River caused by Bowman's destruction of the wetlands. The affiant members' interest is exemplified by Norton, who used to engage in recreational and subsistence frogging in the wetlands. However, when Bowman destroyed the wetlands, he destroyed the frogs' habitat with it and caused injury to Norton's recreational and economic interest in the wetlands. Bowman's limited mitigation efforts have not negated the NUWF members' injury claim because they have still lost their present enjoyment of the wetland and the adjacent river. Their injury is also fairly traceable to Bowman's illegal activity because the injuries of which the members complain were caused by Bowman's unpermitted dredging and filling. The NUWF members, therefore, would have individual standing to sue Bowman, so because they would have standing, the NUWF has standing to sue as a representative of its members.

Second, the district court erred in holding that the presence of the dredged and fill material in the wetlands did not constitute a continuing violation. The weight of authority has held that the unpermitted discharge of dredged or fill material into wetlands is a continuing violation for as long as the illegal material remains. Those cases that have found the remnants of past illegal discharges to not be a continuous violation dealt with § 402 violations. Deposits of dredged or fill material are still amenable to correction, which makes them materially different

than the remnants of § 402 violations. Thus, the court should follow the weight of authority and recognized that a continuing violation exists for so long as Bowman allows the prohibited dredged and fill material to remain in the wetlands.

Third, the district court erred in holding that NUWF's citizen-suit is barred by § 505(b) of the CWA. In order to apply the diligent prosecution defense under § 505(b) NUDEP's enforcement actions taken against Bowman must require compliance with the CWA and are in good faith calculated to do so. The consent decree NUDEP seeks to enter as part of its judicial action against Bowman does not provide any substantial relief as it fails to correct or resolve the violations alleged by NUWF—namely Bowman's destruction of the wetlands. Although NUDEP has required certain mitigation steps be taken by Bowman, these do not eliminate the continued violation resulting from the presence of displaced wetland material. Thus, NUDEP's enforcement is not in good faith calculated to require compliance. The court should therefore hold that NUWF's citizen-suit is not barred by the diligent prosecution limitation.

Finally, the district court erred in holding that Bowman did not violate the CWA. Bowman's use of a bulldozer to level wetland vegetation, burn the vegetation, and dig drainage ditches resulted in the addition of a dredged spoil into a wetland. It makes no difference that wetland material Bowman deposited did not come from outside of the wetland body. Congress clearly intended for Bowman's land-clearing activities to be permitted under § 404 in order to fulfill the Act's goal of restoring and maintaining the integrity of the Nation's waters. To hold otherwise would allow for the destruction of wetlands and cause harm to the environment because wetland ecology is vital to maintaining water quality. Moreover, the weight of authority holds that a violation of the CWA in the context of dredge and fill material does not require a

pollutant to derive from outside of the wetland because such a holding would undermine the § 404 permitting program.

ARGUMENT

I. THE NUWF HAS SATISFIED THE CONSTITUTIONAL MINIMUM OF STANDING BY DEMONSTRATING THAT ITS MEMBERS HAVE SUFFERED AN INJURY IN FACT FAIRLY TRACEABLE TO BOWMAN'S CWA VIOLATIONS.

Article III of the United States Constitution limits the power of courts to adjudicating "cases" and "controversies." U.S. CONST. art. III, § 2. Standing is part of this constitutional minimum. *Lujan v. Defenders of Wildlife*, 504 U.S 555, 560 (1992). However, in the context of environmental litigation, "the standing requirements are not onerous." *American Canoe Ass'n v. Murphy Farms, Inc.*, 326 F.3d 505, 517 (5th Cir. 2003). An organization has standing to sue in federal court on behalf of its members when: (1) its members would otherwise have standing to sue on their own behalf; (2) the interests at stake "are germane to the organization's purpose; and (3) neither the claim nor the requested relief requires the individual members to participate in the lawsuit. *Warth v. Seldin*, 422 U.S. 490, 511 (1975). For the organization's individual members to demonstrate Article III standing to sue in their own right, they must show: (1) they suffered an injury in fact or an invasion of a legally protected interest that is "concrete and particularized" and "actual or imminent"; (2) that is causally connected to the defendant's alleged violations; and (3) that is redressable by a favorable decision. *Lujan*, 504 U.S at 560–61. It is enough for the organization to show that one of its members has individual standing. *Sierra Club v. U.S. Army Corps of Eng'rs*, 645 F.3d 978, 986 (8th Cir. 2011), citing *Watt v. Energy Action Educ. Found.*, 454 U.S. 151, 160 (1981).

In addition to satisfying the constitutional minimum for standing, the plaintiff must also satisfy any statutory standing requirements. *Friends of the Earth, Inc. v. Gaston Copper*

Recycling Corp., 204 F.3d 149, 155 (4th Cir. 2000). Section 505 grants citizen-suit standing to any "person or persons having an interest which is or may adversely be affected," bestowing standing on a broad range of affected persons. 33 U.S.C. § 1365(g). Congress thereby conferred standing on citizen–plaintiffs to enforce the CWA to the full extent allowed by Article III of the Constitution. *See Middlesex Cnty. Sewerage Auth. v. Nat'l Sea Clammers Ass'n*, 453 U.S. 1, 16 (1981). So, a plaintiff meeting the constitutional standing requirements satisfies the statutory threshold as well. *Gaston*, 204 F.3d at 155.

In response to a summary judgment motion, the plaintiff need only set forth specific facts by affidavit or other evidence, which will be taken as true, establishing each of the standing requirements. *Lujan*, 504 U.S at 561. However, the plaintiff does not carry a heavy burden. *Id.* at 590. It need not prove it was "actually or imminently harmed," but only that there is a "genuine issue of material fact" as to standing. *Id.* A dismissal for lack of standing receives de novo review. *Piney Run Pres. Ass'n v. Cnty. Comm'rs of Carroll Cnty.*, 268 F.3d 255, 262 (4th Cir. 2001).

In his motion for summary judgment, Bowman contest only the first two elements of the individual standing test—whether the NUWF members suffered an injury in fact fairly traceable to Bowman's dredge and fill activity. The NUWF has established it has standing to sue Bowman on behalf of its members by submitting affidavits of three NUWF members explaining how their recreational and aesthetic interests in the wetlands have been negatively affected by Bowman's destruction of the wetlands. Thus, this court should reverse the district court's grant of summary judgment and find that the NUWF has sufficiently established Article III standing.

A. NUWF members have suffered an injury in fact because Bowman's dredge and fill violations affected their recreational, economic, and aesthetic interests in the wetlands.

The standard for showing an injury in fact sufficient to establish standing is not high—"an identifiable trifle" of an injury is enough. *United States v. Students Challenging Regulatory Agency Procedures (SCRAP)*, 412 U.S. 669, 689 n.14 (1973); *Save Our Cmty. v. E.P.A.*, 971 F.2d 1155, 1161 (5th Cir. 1992). The pertinent question in an environmental case is whether the plaintiff has suffered an injury, as opposed to whether the environment was actually harmed. *Atlantic States Legal Found., Inc. v. Hamelin*, 182 F. Supp. 2d 235, 239 (N.D.N.Y. 2001). An organization bringing suit on behalf of its members can show actual injury by demonstrating that they use the affected area or are affected by the defendant's violative actions. *See Sierra Club v. Morton*, 405 U.S. 727, 734–36 (1972).

1. The NUWF members' injuries are concrete and particularized because Bowman's CWA violations personally and individually harmed their aesthetic, recreational, and economic interests in the wetlands.

Because aesthetic or recreational interests in an affected area can be widely shared, *Gaston*, 204 F.3d at 154, a plaintiff must demonstrate that the injury has affected him "in a personal and individual way." *Lujan*, 504 U.S at 560; *see Warth*, 422 U.S. at 500 (generalized grievances shared by the public at large cannot provide individual plaintiffs with standing). An organization's members need only show that they used the affected area and that they are individuals "for whom the aesthetic and recreational values of the area [are] lessened." *Morton*, 405 U.S. at 735; *see Friends of the Earth, Inc. v. Laidlaw Envt'l Servs. (TOC), Inc.*, 528 U.S. 167, 184 (2000) (holding that plaintiffs had established an injury in fact because the defendant's activity directly affected their "recreational, aesthetic, and economic interests").

Here, the NUWF members are not concerned bystanders "asserting a mere academic or philosophical interest in the protection of" wetlands affected by Bowman's dredge and fill activity. *Id.* at 159. All three NUWF affiants have pointed to specific facts supporting their injury

to establish standing. All three NUWF affiants use the area for recreational boating, fishing, and picnicking, and Bowman's actions clearly affect their concrete, particularized interests in the affected area.

Norton's injury is a concrete indication that Bowman's dredging and filling activity has personally and individually affected a NUWF member. Prior to Bowman's filling of the wetlands, Norton successfully frogged in the area. In *Hudson Riverkeeper Fund, Inc. v. Yorktown Heights Sewer District*, the court found standing where the plaintiff alleged that he regularly fished in the affected waters and that fishing had deteriorated markedly since the polluting had begun. 949 F. Supp. 210, 211–12 (S.D.N.Y. 1996). The Supreme Court stated in *Lujan* that "[o]f course, the desire to use or observe an animal species, even for purely aesthetic purposes, is undeniably a cognizable interest for the purpose of standing." 504 U.S. at 562–63. Norton, similarly, has suffered a decrease in the number of frogs he has been able to catch since the area was dredged and filled. By destroying the frogs' natural habitat, Bowman has injured Norton's economic interest as a subsistence frogger in a manner sufficient to confer standing. Moreover, the trial court conceded that Bowman's activity directly injured Norton, and the NUWF need only show that a single plaintiff satisfies the standing requirements. Thus, the injuries the NUWF members have suffered as a result of Bowman's CWA violations are concrete and particularized and are not merely generalized grievances.

2. The NUWF members have suffered an actual or imminent injury to their recreational, aesthetic, and economic interests in the wetlands because they are concerned about the future environmental impacts of the wetlands destruction.

A plaintiff may express reasonable concern about the future impact of a challenged activity, and a threatened injury is sufficient to confer standing. *See Gaston*, 204 F.3d at 160 ("threats or increased risk . . . constitute cognizable harm. Threatened environmental injury is by

nature probabilistic."); *see also Sierra Club*, 645 F.3d at 988 (recognizing imminent, concrete harm would result from discharge of dredge or fill material into wetlands because it could change the wildlife in the area substantially).

In *Sierra Club*, the defendant argued that because all but 0.15 acres of the impact of dredge and fill activity on the wetland and stream would occur on private property not open to public use, the plaintiffs lacked standing. *Id.* at 988–89. However, the Eighth Circuit held that the plaintiffs had nevertheless alleged an adequate injury in fact based upon its similarity to the plaintiffs in *Laidlaw*. *Id*. at 989.

In *Laidlaw*, the members averred that their use and enjoyment of waters downstream from the polluting defendant's facility had decreased due to their fear of pollution. 528 U.S. at 180–85. Some of the affiants used waters within a few miles of the defendant's facility while others were as far as forty miles away. *Id.* at 181–83. The Court found that injury to the plaintiffs had been established because their affidavits and testimony showed that the defendant's "discharges, and the affiant members' reasonable concerns about the effects of those discharges, directly affected those affiants' recreational, aesthetic, and economic interests." *Id*. at 183–84. Like the *Laidlaw* plaintiffs, those in *Sierra Club* contended that the "affected area" included the area in which the dredged and fill material was being discharged "as well as the area in its immediate proximity." 645 F.3d at 689. The court held that the plaintiffs had alleged adequate injury to their recreational and aesthetic interests because the defendant's actions under its § 404 permit affected the area in which the Sierra Club members hunted, bird watched, and photographed. *Id*.

Similarly, the NUWF members have shown a reasonable concern about the effects of Bowman's dredge and fill violations. Like the *Laidlaw* plaintiffs, the NUWF members fear that

the Muddy River is more polluted as a result of Bowman's actions and that it will become further polluted as wetlands serve an important function in maintaining the integrity of rivers. It is inconsequential that Norton had to trespass on Bowman's property to go frogging because the area affected by Bowman's dredge and fill activity includes the immediately proximate area, including the Muddy River. Although the dredging and filling occurred on wetlands on Bowman's property, because Bowman's dredge and fill activity affected the NUWF members' recreational and aesthetic interest in the area generally, they have alleged an actual injury. The court in *Sierra* club also held that the affiants' concern that the destruction of wetlands would reduce the birds and insects that the affiants observed in the area was not speculative.

Similarly, here, the NUWF members' fear that the Muddy River will become more polluted as a result of the wetlands destruction is not speculative. The destruction of only some of the wetlands has also affected the river's integrity and vastly reduced Norton's frogging opportunities in the area. It is certain that the frogs Norton is interested in have died or left, thus the uncertainty of the injury lies not in the existence of the harm, but in the harm's extent.

B. Bowman's mitigation efforts do not negate the NUWF members' injury because the appropriate point of reference is harm to the plaintiff not harm to the environment, and they have lost present enjoyment of the wetlands due to Bowman's Clean Water Act violations.

Bowman's mitigation of the damage he wrought on the wetlands is beside the point. In *American Bottom Conservancy v. U.S. Army Corps of Engineers*, the defendant promised to preserve 31% of the wetlands and create nearly twice the affected wetlands in mitigation. 650 F.3d 652, 654 (7th Cir. 2011). However, the Seventh Circuit dismissed the defendant's argument that this negated the plaintiff's injury because “by the time the [mitigated] wetlands reach maturity, the affiant may be dead of old age.” *Id*. at 659. Similarly, although the court conceded that the creation of twice the wetlands that the defendant would destroy could be a boon to the

environment once they reached maturity, such a consideration went to the merits of the plaintiff's challenge of the defendant's actions. *Id.* 659–60. The mitigating effects did not "detract from the injuries to the current members, who presented uncontradicted evidence that they [would] lose present enjoyment of the wildlife" from the destruction of the wetlands. *Id.* at 660.

By the time Bowman's artificial wetlands reach maturity and provide a habitat for frogs and other wildlife, it might be too late to preserve the habitat that was destroyed. Although Bowman has committed to preserving some of the destroyed area as artificial wetlands, maybe—despite probable delay in the area developing to the point at which it will provide a habitat comparable to what was destroyed—that will suffice to maintain the frog population. However, that is a question that goes to the merits of the plaintiffs' claim. It does not detract from the members' injuries, as they—Norton in particular—have presented uncontradicted evidence that they have lost present enjoyment of the area and of the wildlife because of Bowman's actions. Additionally, the relevant injury for standing is injury of the plaintiff not injury to the environment. Thus, the fact that a plaintiff's injury may be offset by other benefits does not defeat standing.

The plaintiffs here have alleged precisely those types of injuries that Congress intended the CWA to prevent. The CWA was enacted to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a). Affirming the lower court's ruling would encroach on congressional authority by erecting barriers to standing so high as to frustrate citizen enforcement of the CWA. As is appropriate at the summary judgment stage, the NUWF members have offered evidence regarding NUWF's suitability as a plaintiff. All three affiants are members of NUWF and all have explained the direct and immediate impact the destruction of this wetland has had on their continued ability to enjoy the wildlife and scenery of

the wetland. The harm resulting from Bowman's actions clearly surpasses the threshold required for NUWF and its members to show an injury in fact fairly traceable to Bowman's CWA violations.

C. The NUWF members' injuries are fairly traceable to Bowman's illegal actions because their injuries are causally connected to his unpermitted dredge and fill activity.

When a causal link between the defendant's conduct and the injury exists, the injury is fairly traceable to the defendant's conduct. To satisfy the traceability prong, it "must be likely that the injury was caused by the conduct complained of and not by the independent action of some third party not before the court." *Gaston*, 204 F.3d at 154. The plaintiff's injury must be fairly traceable to the challenged action of the defendant and not the result of some independent action. *Lujan*, 504 U.S. at 561. The plaintiff need "merely show that the defendant's discharges a pollutant that causes or contributes to the kinds of injuries alleged." *Piney Run,* 268 F.3d at 264.

The NUWF members' affidavits trace their injuries to Bowman's unpermitted dredge and fill activity. Norton has shown the loss of his economic and recreational interest in frogging on the wetlands, and this is traceable to Bowman's destruction of the frogs' habitat. Similarly, all three affiants fear the Muddy River is more polluted and that it will become more polluted in the future because the wetlands served a valuable function in maintaining the integrity of the river by acting to absorb sediment and pollutants. Their fear for the loss of the river's integrity was caused by Bowman's illegal activity. Thus, the members' have established a causal connection between their injury and Bowman's illegal activity. The NUWF members, therefore, have demonstrated that they would have individual standing to sue Bowman, so because the members would have standing, the Federation has standing to sue as a representative of its members.

II. THE COURT BELOW ERRED IN GRANTING BOWMAN'S MOTION FOR SUMMARY JUDGMENT BECAUSE THE CONTINUING PRESENCE OF

DREDGED AND FILL MATERIAL IN THE WETLANDS CONSTITUTES AN ONGOING VIOLATION AS REQUIRED BY § 505(a) FOR SUBJECT MATTER JURISDICTION.

Section 505(a)(1) of the CWA grants citizens the right to bring civil actions against any person "alleged to be in violation of" the Act. 33 U.S.C. § 1365(a). Jurisdiction attaches once the plaintiff makes a good faith allegation, sufficient to satisfy Rule 11 of the Federal Rules of Civil Procedure, of a continuous or intermittent violation. *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Found., Inc.*, 484 U.S. 49, 65–66 (1987). Section 505 does not, however, permit citizen suits for "wholly past violations." *Id.* at 64.

At summary judgment, the burden of proof is on the defendant to challenge the plaintiffs' allegations of a continuing violation. *North Carolina Wildlife Fed'n v. Woodbury*, No. 87 584 CIV 5, 1989 WL 106517, at *2 (E.D.N.C. Apr. 25, 1989). The defendant carries a heavy burden of proof—he "must demonstrate that it is *absolutely clear* that the allegedly wrongful behavior could not reasonably be expected to recur." *Id.* (*quoting Gwaltney*, 484 U.S. at 66). If the plaintiffs offer some evidence to support their allegations, and the defendant "fail[s] to show that the plaintiffs' allegations are a sham," the defendant's summary judgment motion must be denied. *Id.* at *2.

A. An unpermitted discharge of dredged or fill materials into wetlands is a continuing violation for as long as the dredged or fill material remains.

In determining whether a CWA violation is "continuing"—as opposed to wholly past—the different types of violations covered by § 505(a) must be distinguished. Suits based on those discharges that are not susceptible to remedial measures "due to effective natural dissipation or dispersion" are to be barred under *Gwaltney* as being "wholly past" violations, while those violations "having persistent effects that are amenable to correction" constitute continuing violations until corrected. *Id.* at *3. Deposits of dredged or fill material—as opposed to, for

example, discharges of a leachate plume, *Aiello v. Town of Brookhaven*, 136 F. Supp. 2d 81 (E.D.N.Y. 2001), or petroleum products, *Wilson v. Amoco Corp.*, 33 F. Supp. 2d 969 (D. Wyo. 1998)—do not significantly dissipate over time. *City of Mountain Park v. Lakeside at Ansley, LLC*, 650 F. Supp.2d 1288, 1296 (N.D. Ga. 2008). Fill materials, instead, "stay intact over time and thus continue to have roughly the same net polluting effect years or even decades after the time of their deposit." *Id.* Although courts may be split on the issue of when a violation ceases to be ongoing and becomes "wholly past" in § 402 cases, courts are not split in their interpretation of § 505 and *Gwaltney* in § 404 dredge and fill cases. *See* 33 U.S.C. § 1344(a) (permits under § 404 are for the discharge of "dredged or fill material" into navigable waters, including wetlands).

Case law confirms this distinction among types of violations. The weight of authority characterizes § 404 dredged and fill material violations as ongoing so long as the material remains in the water. *See Stepniak v. United Materials, LLC*, No. 03 CV 0569A, 2009 WL 3077888, at * 4 (W.D.N.Y. Sept. 24, 2009) (holding that "the weight of authority supports [the] position that the continued presence of fill material constitutes a continuing violation"); *Greenfield Mills, Inc. v. Goss*, No. 1:00 CV 0219, 2005 WL 1563433, at *2 (N.D. Ind. June 28, 2005) ("the weight of authority supports the . . . position that where dredged materials remain, a continuing violation is established"); *Informed Citizens United, Inc. v. USX Corp.*, 36 F. Supp. 2d 375, 377 (S.D. Tex. 1999) (several courts have found that "a violation is 'continuing' for purposes of the statute until illegally dumped fill material has been removed"); *United States v. Reaves*, 923 F. Supp. 1530, 1534 (M.D. Fla. 1996) ("[U]npermitted discharge of dredged or fill materials into wetlands . . . is a continuing violation for as long as the fill remains."); *United States v. Tull*, 615 F. Supp. 610, 626 (E.D. Va. 1983) (pre-*Gwaltney* case establishing that filling the wetlands and "allowing the illegal fill to remain" were illegal activities).

In *Woodbury*, the defendants had constructed ditches and canals in a wetland for drainage in their planned peat mining operation, which caused the discharge of dredged and fill material. 1989 WL 106517, at *1. Plaintiffs brought a CWA citizen suit, and the defendants moved for summary judgment, arguing their violations were wholly past because they had stopped their dredging and filling prior to the suit. *Id.* at *2. The court rejected this argument and stated, "[I]t is not the physical act of discharging dredge wastes itself that leads to the injury giving rise to citizen standing, but the *consequences* of the discharge in terms of lasting environmental degradation." *Id*. Similarly, the Fourth Circuit found a continuing violation where the defendant had discharged dredged or fill material into wetlands without a permit and refused to restore the area. *Sasser v. E.P.A.*, 990 F.2d 127, 128–30 (4th Cir. 1993). In holding that the violation was ongoing, the court stated that "[e]ach day the pollutant remains in the wetlands without a permit constitutes an additional day of violation." *Id.* at 129.

Conversely, courts applying *Gwaltney* to § 402 violations for the discharge of pollutants other than dredged or fill material have found that no ongoing violation can be established where the residual effects of a past prohibited discharge are all that remain when the suit was filed. In *Aiello*, plaintiffs alleged that the town had violated § 402 by discharging pollutants from a landfill without first obtaining a permit. 136 F. Supp. 2d at 117. The defendant town argued that the pollution was wholly past because the landfill had stopped functioning, while the plaintiff argued that so long as the contaminants were seeping from the landfill, the town was committing a continuing violation. *Id*. at 120. The court held that the defendant "should not be held liable under the CWA as a past polluter for the ongoing migrating leachate plume." *Id*. at 121.

Although *Aiello* makes a case that no ongoing violation can be established where the residual effects of a prior discharge in violation of § 402 are all that remain at the time of suit,

the injury alleged in a § 404 suit is not only that the defendant violated the dredge and fill provisions, but also that the consequences of the original violation continue until the dredged or fill material has been removed. In this case, Bowman cannot dispute that fill remains in the wetland, and thus the injury here is not only that Bowman violated the dredge and fill provisions, but also that the consequences of the original violation will continue until he removes the prohibited material from the wetlands.

Thus, total reliance on *Gwaltney* is misplaced because it involved a § 402 wastewater violation, 484 U.S. at 52–54, which is materially different than a § 404 dredged or fill material violation. Resultantly, several courts hearing filled wetland cases have found inapplicable a strict application of *Gwaltney* and, consequently, found the violation was "continuing" until the defendant removed the illegally dumped fill material. *See, e.g.*, *City of Mountain Park*, 650 F. Supp.2d at 1296 (discussing *Gwaltney*'s application to fill material discharges); *Informed Citizens United, Inc.*, 36 F. Supp. 2d at 377 (concluding *Gwaltney* does not apply to discharged fill material because it involved a wastewater violation); *Stillwater of Crown Point Homeowner's Ass'n v. Kovich*, 820 F. Supp. 2d 859, 895 (N.D. Ind. 2011) (finding "the weight of authority, notwithstanding the Supreme Court's ruling in *Gwaltney*, to be persuasive that the continued presence of fill material in the waterway constitutes a continuing violation").

The line between wholly past and continuing violations is easily drawn under this approach and is supported by Justice Scalia's concurrence in *Gwaltney*, in which he was joined by Justices Stevens and O'Connor. *Gwaltney*, 484 U.S. at 69. Justice Scalia stated that

> [w]hen a company has violated an effluent standard or limitation, it remains for purposes of § 505(a) 'in violation' of that standard or limitation so long as it has not put in place remedial measures that clearly eliminate the cause of the violation.

Id. Citizen suits for past discharges "not susceptible to remedial efforts, due to effective dissipation or dispersion," would continue to be barred by *Gwaltney* and the CWA. *Woodbury*, 1989 WL 106517, at *2. However, those violations with persistent effects "amenable to correction"—such as dredge and fill violations—would constitute continuing violations until remedied. *Id*.

The court should follow the weight of authority and recognize that a continuing violation exists for so long as the prohibited dredged and fill material remains in the wetlands. NUWF has made a good faith allegation of a continuous violation of § 404 by demonstrating that although Bowman released the illegal dredged and fill material into the wetlands prior to NUWF filing suit, the consequences of his original dredging and filling violation will continue until the material has been removed from the wetlands. Thus, not only was every day that Bowman actually placed dredged and fill materials in the wetlands a violation, but every day that Bowman allowed the illegal material to remain therein constituted a violation. Bowman cannot dispute that the dredged and fill material remains in the wetlands, and he has not carried his heavy burden of proving that NUWF's allegations are a sham. Thus, because the waste remains a remediable threat to the environment and the citizens' enjoyment thereof, the decision of the district court should be reversed and the citizen suit permitted to proceed.

B. Recognizing that the continuing presence of dredged and fill material in the wetlands as a continuous violation aids enforcement of and supports the principles underlying the CWA.

Barring citizens from bringing suit merely because the illegal dredge and fill activity was completed before it might reasonably have been discovered would incentivize violators to conceal their activities, which would lead to serious problems for both government and citizen enforcement of the CWA. *Id.* *3. The CWA's inclusion of the phrase "alleged to be in violation"

reflects a recognition of the practical difficulties of detecting and proving recurring violations of environmental standards. *Gwaltney*, 484 U.S. at 65.

Moreover, the CWA's objective is "to *restore* and maintain the chemical, physical, and biological integrity of the Nation's waters." § 1251(a) (emphasis added). Thus, "[t]reating the failure to take remedial measures as a continuing violation is eminently reasonable" because "it is not the physical act of discharging dredge wastes itself that leads to the injury giving rise to citizen standing, but the *consequences* of the discharge in terms of lasting environmental degradation." *Woodbury*, 1989 WL 106517, at *2. Holding that "no continuing violation exists when the very consequence of an illegal discharge is the harm," provides no remedy to plaintiffs such as the members of the NUWF where they seek remediation of the continued presence of fill material in the wetlands. *Greenfield Mills*, 2005 WL 1563433, at *5. Thus, this court should conclude that a continuing violation exists in this case because the plaintiffs have demonstrated that dredged materials remained in the river at the time the complaint was filed.

III. NUDEP ENFORCEMENT ACTIONS AGAINST BOWMAN DO NOT CONSTITUTE "DILIGENT PROSECUTION" AS REQUIRED TO SUPPORT A DEFENSE AGAINST A CITIZEN SUIT UNDER § 505(B) OF THE CWA, BECAUSE THE ACTIONS DO NOT REQUIRE COMPLIANCE WITH THE CWA AND ARE NOT IN GOOD FAITH CALCULATED TO REQUIRE COMPLIANCE.

The CWA carves out a role for the ordinary citizen in its enforcement scheme through the citizen-suit provision. The citizen-suit provision, "a critical component of the CWA," permits citizens to bring suit in order to "abate pollution when the government cannot or will not command compliance." *Environmental Conservation Org. v. City of Dallas*, 529 F.3d 519, 526 (5th Cir. 2008) (alteration in original) (quoting *Gwaltney*, 484 U.S. at 62). Congress empowered private citizens to "provide a second level of enforcement . . . [and] ensure the state and federal

governments are diligent in prosecuting Clean Water Act violations." *Sierra Club v. Hamilton Cnty. Bd. of Cnty. Comm'rs*, 504 F.3d 634, 637 (6th Cir. 2007).

However, the CWA subjects commencement of a citizen-suit to some limitations under the CWA. Citizens are prevented from filing suit only if the citizen has not given the requisite notice to the violator and governmental agencies, or if the defendant can invoke the "diligent prosecution" defense under § 1365(b)(1)(B). 33 U.S.C. § 1365(b)(1)(A), (B); *See Environmental Conservation Org.*, 529 F.3d at 526. Because the parties do not argue that NUWF failed to provide adequate notice, only the "diligent prosecution" limitation is at issue.

Section 1365(b)(1)(B) may bar citizen-suits when the EPA or state "has commenced and is diligently prosecuting a civil or criminal action in a court of the United States, or a State to require compliance with the standard, limitation, or order." § 1365(b)(1)(B). To determine whether a defendant may invoke § 1365(b)(1)(B) to avoid defending a citizen suit, the court must engage in a two-part inquiry. *Connecticut Fund for Environment v. Contract Plating Co. Inc.*, 631 F. Supp. 1291, 1293 (D. Conn. 1986). First, the court must determine whether the state or EPA has commenced any suit to require compliance. § 1365(b)(1)(B). Second, the court must determine whether the acting agency is diligently prosecuting the action. *Id.*

Here, NUDEP has satisfied the first inquiry of a § 1365(b)(1)(B) defense because the agency has brought suit against Bowman in federal court and sought to enter a consent decree. Yet, the agency is not "diligently prosecuting [the suit]… to require compliance" because the violation is ongoing. § 1365(b)(1)(B).

A governmental enforcement action is considered diligent prosecution so long as the action is "capable of requiring compliance with the Act and is in good faith calculated to do so." *Friends of Milwaukee's Rivers v. Milwaukee Metro Sewerage Dist.*, 382 F.3d 743, 760 (7th Cir.

2004). But, a judicial action that does not correct or resolve the violations alleged by the plaintiff does not constitute diligent prosecution. *Id.* at 754. While courts recognize that diligence on the part of the action agency is presumed, a court that determines the agency action is not diligent '"should not hesitate to allow a citizen suit to proceed."' *Ohio Valley Envt'l Coal., Inc. v. Maple Coal Co.*, 808 F. Supp. 2d 868, 884 (S.D.W.Va. 2011) (quoting *Ohio Valley Envt'l Coal., Inc. v. Hobet Mining, LLC*, No. Civ. A. 3:08-0088, 2008 WL 5377799, at *5 (S.D.W.Va. Dec. 18, 2008)). Courts should recognize the importance of citizen suits when determining diligent prosecution and not treat citizen groups "as nuisances or trouble makers but rather as welcomed participants in the vindication of environmental interests." *Friends of the Earth v. Conso. Rail Corp.*, 768 F.2d 57, 63 (2d Cir. 1985). Congress intended to provide private citizens with significant opportunities to participate in the enforcement of the CWA. *See* S.Rep. No. 414, 92d Cong., 1st Sess. (1971), *reprinted in* 1972 U.S.C.C.A.N. 3668, 3738 ("An essential element in any control program involving the nation's waters is public participation.").

A. NUDEP's enforcement action is not capable of requiring compliance because the consent decree does not eliminate the cause of Bowman's CWA violation.

In determining whether an enforcement action is "capable of requiring compliance," the focus of the inquiry "should be on whether the actions are calculated to eliminate the cause(s) of the violations." *Friends of Milwaukee's Rivers*, 382 F.3d at 760. Additionally, when a consent decree is at issue, the court should "look at the substantive provisions of the order." *Atlantic States Legal Found., Inc.*, 182 F.Supp.2d at 247. The substantive provisions of the consent decree at issue cannot reasonably be found to eliminate the cause of Bowman's violation—land-clearing activities—because the decree essentially relieves Bowman from compliance with the CWA.

The CWA prohibits the discharge of any pollutant unless the activity is permitted under § 402 or § 404 of the CWA. 33 U.S.C. § 1311(a). The decree NUDEP seeks to enter does require the conveyance of a conservation easement to NUDEP, and Bowman has agreed to construct and maintain a wetland in a small portion of the area he cleared. Yet, the decree does not require Bowman to obtain a § 404 permit for his deposit of dredged and fill materials into a wetland or require continued maintenance of the easement. Thus, the decree is incapable of requiring compliance.

The fact alone that the settlement reached by the state and Bowman is substantially less burdensome on Bowman than the remedy sought by NUWF may not show a lack of diligent prosecution. But, a lack of substantial relief in a state's settlement should be "considered by the court in determining whether the state action was diligently prosecuted." *Friends of the Earth, Inc., v. Laidlaw Envt'l Serv. (TOC)*, 890 F. Supp. 470, 490 (D.S.C. 1995). The consent decree at issue does not require Bowman to take any mitigation measures. The decree only requires Bowman to cease destroying any additional wetlands in the area. By allowing Bowman discretion in maintaining the artificial wetland and not requiring Bowman to return his field to its original wetland ecology, NUDEP has failed to provide any substantial relief.

B. NUDEP's enforcement action is not in good faith calculated to require compliance because the violation is ongoing.

Citizen–plaintiffs bear the burden of proving that the state agency has failed to diligently prosecute a violation. *Piney Run Pres. Ass'n,* 523 F.3d at 459. Courts evaluate the "diligence" of agency prosecution by comprehensively measuring "the process and effects" of the enforcement action. *Student Pub. Interest Research Grp. of New Jersey, Inc. v. Fritzsche, Dodge & Olcott, Inc.*, 579 F. Supp. 1528, 1535 (D.N.J. 1984). A "diligent prosecution analysis requires more than a mere acceptance at face value of the potentially self-serving statements of a state agency and

the violator… with respect to the effect of the settlement." *Friends of Milwaukee's Rivers*, 382 F.3d at 760.

NUDEP has not even tried to require Bowman come into compliance with §§ 301 and 404 of the CWA. Because the settlement entered into alleviates NUWF of any responsibility of overseeing Bowman's future actions and allows for the continued presence of dredged and fill material, it effectively allows Bowman to continue violating the CWA. NUDEP has not prosecuted an enforcement action that is in good faith calculated to require compliance because the violation is ongoing: "[An] unpermitted discharge of dredged or fill materials into wetlands on the site is a continuing violation for as long as the fill remains." *Reaves*, 923 F. Supp. at 1534.

IV. THE DISTRICT COURT'S HOLDING IS ERRONEOUS AND SHOULD BE REVERSED BECAUSE BOWMAN'S DISCHARGE OF THE DREDGED SPOIL ONTO A WETLAND CONSTITUTED THE ADDITION OF A POLLUTANT INTO THE WATERS OF THE UNITED STATES AND A VIOLATION OF THE CLEAN WATER ACT.

Congress enacted the CWA with the stated objective to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters." § 1251(a). In order to achieve that objective, Congress outlawed the "discharge of any pollutant by any person" into the Nation's waters. § 1311(a). "Discharge of a pollutant" is broadly defined as "any addition of any pollutant to navigable waters from any point source." 33 U.S.C. § 1362(12). Section 404 of the Act prohibits the discharge of "dredged or fill material" into "navigable waters" without a permit issued by the Army Corp of Engineers (Corps). § 1344. Bowman's violated the CWA because his land-clearing actions satisfy all the elements required for a violation under §§ 301 and 404. When Bowman redeposited and leveled wetland material, without a permit, he added a "dredged" and "fill material" into the waters of the United States, which constituted a discharge of a pollutant under the CWA.

Four elements are required for a violation of the CWA under §§ 301(a) and 404, including: (1) "addition" (2) "of any pollutant" (3) "to navigable waters" (4) "from any point source." The district court correctly determined, and Bowman did not contest in his motion for summary judgment, that three of the four elements—pollutant, navigable water, and point source—are met. The wetland material moved by Bowman's land-clearing activities constitutes a pollutant under the CWA. § 1362(6) (the term "pollutant" is broadly defined to include "dredged spoil . . . biological materials . . . rock, sand [and cellar dirt."). The wetland at issue is a "navigable water" under the CWA because it is adjacent to the Muddy River, which the parties concur is a navigable water. *See United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 139 (1985) (holding that "waters of the United States" include wetlands adjacent to navigable water). The bulldozer used by Bowman in his land-clearing activities is a point source. *See* § 1362(14) (defines "point source" as "any discernible, confined and discrete conveyance); *See Avoyelles Sportsmen's League, Inc. v. Marsh*, 715 F.2d 897, 927 (5th Cir. 1983) (finding that a bulldozer is a point source).

However, the district court incorrectly found that Bowman's land-clearing activities did not result in the addition of a pollutant. Bowman argues, and the district court erroneously held, that Bowman's land clearing activities do not constitute an "addition" of a pollutant because the redeposit of indigenous material from within the same water body does not add any material from the "outside world". Such an argument and holding that requires the introduction of non-indigenous material into a wetland to establish a violation of the CWA is contrary and inconsistent with the language and stated purpose of the CWA, with the ecological understanding and reasons for preserving wetland areas, and would undermine the § 404 permitting program.

A. The statutory language of the CWA and congressional intent support a broad interpretation of "discharge" to include addition of indigenous material.

Statutory interpretation must begin with an analysis of the text and structure of the statute itself. *See Brotherhood of Locomotive Eng'rs v. Atchison, Topeka & Santa Fe. Ry. Co.,* 516 U.S. 152, 156 (1996). Such an analysis must examine "the text of the statute as a whole by considering its context, object, and policy." *Harmon Indus., Inc. v. Browner,* 191 F.3d 894, 899 (8th Cir. 1999) (citation omitted). The text and structure of the CWA, specifically the broad definition of "discharge of a pollutant," supports Congress's explicitly stated policy and intent to protect the integrity of the Nation's waters.

Here, the district court's narrow reading of "addition" as it defines "discharge of a pollutant" is erroneous in that it goes beyond the intent of Congress, and as a result negates the overall "context, object, and policy" of the CWA. If Congress had intended to narrow the statutory definition of discharge it could have and would have done so when enacting or amending the CWA. However, the statutory language reflects Congress's intent to broadly define discharge in order to meet its ambitious objective of restoring the Nation's waters. The statute does not read "the addition of *a non-indigenous material"*; rather, it reads "the addition of *any* pollutant." § 1311(a). Moreover, the statutory definition supports the congressional intent to broadly define discharge by including traditional contaminants—e.g., non-toxic materials—such as dredged spoil, biological materials—e.g., vegetation—heat, "rock, sand, cellar dirt," and agricultural waste. § 1362(6).

Pursuant to the exercise of its regulatory jurisdiction over wetlands under § 404, the Corps has broadly interpreted "addition" to include the redeposit of wetland material and land-clearing activities. First, the Corps defines "dredged material" to include "material that is

excavated or dredged *from* waters of the United States," meaning material that comes from the water body itself. 33 C.F.R. § 323.2(c) (emphasis added); *see Avoyelles Sportsmen's League, Inc. v. Marsh*, 715 F.2d 827, 924 n.43 (5th Cir. 1983) (rejecting the application of an "outside world" requirement in the § 404 permitting context). Second, the Corps has expressly established jurisdiction over "landclearing, ditching, channelization or other excavation" because the activities inherently involve the "addition of dredged material into, including redeposit of dredged material . . . the waters of the United States." 33 C.F.R. § 323.2(d)(1)(iii).

The Corps regulations that specifically acknowledge and assert jurisdiction over the land-clearing activities performed by Bowman support the statutory language and congressional intent of the CWA. Because the district court's application of an "outside world" requirement circumvents the Corps asserted regulatory jurisdiction under § 404, such an application is a clear misreading and understanding of the language and purpose of CWA.

The Fifth Circuit, in determining whether the redeposit of wetland material incidental to land-clearing activities constituted a violation of the CWA, recognized that reading "addition" to include "redeposit" "is consistent with both the purposes and legislative history of the statute." *Avoyelles,* 715 F.2d at 923. Congress has recognized the importance of protecting wetlands in order to reach the CWA goals of protecting the integrity of the nation's waters. *Id.* Thus, because activities that redeposit wetland material "significantly alter"—or in other words pollute—a wetland, such activities run counter to Congress's intent and therefore require a permit under § 404. *Id.* The court "concluded that the term 'discharge' covers the redepositing of materials taken from wetlands." *Id.* Thus, the Avoyelles' redeposit action of moving wetland material from one part of the wetland into another part of the same wetland constituted a discharge under the CWA. *Id.* at 923–24.

As in *Avoyelles*, Bowman's land-clearing activities clearly and significantly altered the wetland area in issue. Surely it was not Congress's intent to allow the unpermitted clearing of wetland vegetation and ditching, which resulted in an alteration of the very nature of the wetland, when it sought to protect wetlands as part of the integrity of the nation's waters.

B. The ecological purpose for preserving wetlands supports the conclusion that redeposit of wetland material constitutes the "addition" of a pollutant.

An underlying purpose of the CWA and § 404 is to preserve the ecology of wetlands because they are vital for "maintaining water quality by trapping sediment and toxic and nontoxic pollutants before they reach streams, rivers, or other open bodies of water." *United States v. Deaton*, 209 F.3d 331, 336 (4th Cir. 2000) (citing Office of Technology Assessment, U.S. Congress, *Wetlands: Their Use and Regulation* 48-50 (1984)). The environment is harmed once wetland soil and vegetation is excavated and redeposited into those waters:

> The addition of dredged or fill material may destroy wetland vegetation [and]…. disruption or elimination of the wetland system can degrade water quality by obstructing circulation patterns that flush large expanses of wetland systems.

40 C.F.R. § 230.41(b). Congress sought to protect the aquatic values of wetlands when it determined that even plain dirt excavated from a wetland and redeposited into that same water could not occur without causing harm to the environment. *Deaton*, 209 F.3d at 336.

Admittedly, it is possible to read the CWA "addition" requirement narrowly to cover only the "discharge" of foreign materials. Yet, that interpretation of the CWA is foreclosed because the Act is clearly concerned not with the mere addition of "material," but with the addition of a "pollutant"—"material can be benign in one spot and seriously disruptive to the surrounding ecological system in another." *United States v. Cundiff*, 555 F.3d 200, 213 (6th Cir. 2009). Once soil, vegetation, and biological matter are removed from a wetland, the material becomes "dredged spoil," a statutorily defined pollutant. *See Deaton*, 209 F.3d at 335–36; *Borden Ranch*

P'ship v. U.S. Army Coprs of Eng'rs, 261 F.3d 810, 814 (9th Cir. 2001). Thus, the redeposit of the material from the same wetland adds a pollutant, not just dirt.

Therefore, activities that destroy wetland ecology, such as land-clearing, "are not immune from the Clean Water Act merely because they do not involve the introduction of material brought in from somewhere else." *Borden*, 261 F.3d at 814–15. A logical conclusion can be drawn that soil and vegetation removed from one part of a wetland, as part of an activity that is purposefully seeking to alter the wetland area, and redeposited in the same wetland will disturb the ecological vitality of wetlands that the CWA is intended to preserve. *See Greenfields Mills, Inc. v. Macklin*, 361 F.3d 934, 949 (7th Cir. 2004) (holding that the discharge of dredged material constitutes an "addition" of dredged spoil).

Bowman's land-clearing activities clearly destroyed wetland ecology and thus caused harm to the environment. When he bulldozed, dug, and burned, and buried the wetland vegetation he not only moved dirt from one place to another, but added a pollutant—dredged spoil—and as a result seriously altered the ecological vitality of the wetland. Bowman's land-clearing activity that caused alteration to the wetland cannot be held, as the district court did, to support the underlying purpose of the CWA.

C. Case law does not support the "outside world" reading of addition because such a reading would undermine the § 404 permitting program.

In finding that no addition of a pollutant occurred in Bowman's activities, the district court relied on an "outside world" interpretation of the term addition. The district court's reliance is misplaced, however, because the "outside world" cases on which the district court relied, *National Wildlife Federation v. Gorsuch*, 693 F.2d 156 (D.C. Cir. 1982) and *National Wildlife Federation v. Consumers Power Company*, 862 F.2d 580 (6th Cir. 1998), must be limited to their

facts. These cases specifically involve the NPDES permitting scheme under § 402, dams or hydo-electric facilities, and deference to an EPA decision—none of which are present here.

Both *Gorsuch* and *Consumer Power* considered whether water quality changes caused the by facilities' recirculation of water required pollutant discharge permits under § 402. *Gorsuch*, 693 F.2d at 161; *Consumers Power*, 862 F.2d at 581. In *Gorsuch*, the court upheld the EPA's decision not to regulate the dam because the release of water did not involve an "addition" from a point source. *Gorsuch*, 693 F.2d at 175. Similarly, in *Consumers Power*, the court upheld the EPA's decision to regulate the hydro-electric facility because the puree of dead fish passing through the facility's generators did not constitute an "addition." *Consumers Power*, 862 F.2d at 586. Unlike the issues present in *Gorsuch* and *Consumer Power*, Bowman's land-clearing activity does not involve an issue of water quality changes due to water circulation through a dam or hydro-electric facility.

The court in *Gorsuch* noted that its holding must be limited to the facts: "[W]e emphasize the narrowness of our decision . . . [that] EPA's interpretation is reasonable . . . and entitled to great deference. *Gorsuch*, 693 F.2d at 161. Both courts gave significant deference to EPA "policy, its role in administering the NPDES program, and its construction of the term added." *Id.* at 590. No such EPA decision has been made in Bowman's circumstance.

Unlike in the § 402 context involved in *Gorsuch* and *Consumers Power*, a broader definition of addition should be employed for § 404 cases. *See Greenfield Mills*, 361 F.3d at 948 (the EPA, participating as an amicus curiae, urged the application of the broader definition of "addition" in § 404 cases). The holdings of other circuit cases support such a position, including the Sixth Circuit, which also decided *Consumers Power*. In *United States v. Cundiff*, which involved the unauthorized dredging and filling of wetlands, the Sixth Circuit departed from its

holding in *Consumers Power* and specifically noted that the case was distinguishable from *Consumer Power* for two reasons. *Id.* at 214 n.8. First, *Cundiff* was not "about agency deference to the EPA's interpretation of addition" as *Consumer Power* was. *Id.* Second, "*Consumer Power* was about normal dam operations that resulted in changes to water quality, while this case concerns a defendant who took proactive steps to purposefully alter and fill his wetlands." *Id.* Similarly, the Fourth Circuit in *Deaton* held that a landowner who dug a draining ditch across his wetland and sidecast excavated dirt into the wetland violated the CWA, and specifically noted that "Congress would not have used the word 'addition'… to prohibit the discharge of dredged spoil in a wetland, while intending to prohibit such pollution only when the dredged material comes from outside the wetland." 209 F.3d at 332–33.

The NUWF does not argue that Bowman should have obtained a permit under § 402, thus the requirement that an "outside world" pollutant must be added to constitute a violation is in applicable to this case. The district court incorrectly failed to apply to applicable definition of addition and subsequently erred in holding that Bowman did not violate the CWA.

Moreover, the court should follow the weight of authority that holds reading an "outside world" requirement into the definition of addition would undermine the § 404 permitting program. The Fifth Circuit in *Avoyelles* argued that "[a] requirement that all pollutants must come from outside sources would effectively remove the dredge-and-fill provision of the statute" and held that land-clearing activities in a wetland violated the CWA. 715 F.2d at 924 n.43. The Seventh Circuit in *Greenfield Mills* reiterated the argument made in *Avoyelles* and held that a broader definition of "addition" supported the conclusion that the any discharge of dredged material constitutes a violation of the CWA. 361 F.3d at 949. Finally, the holdings of multiple courts—including the Eighth, Ninth, Tenth, and Eleventh circuits—have all found that activities

resulting in the "addition" of substances cannot escape § 404 permitting. *Minnehaha Creek Watershed Dist. v. Hoffman*, 597 F.2d 617, 624 (8th Cir. 1979) (dam construction and placement of riprap constituted discharge); *United States v. Moses*, 496 F.3d 984, 991 (9th Cir. 2007) ("simply dredging up and redepositing what was already there is sufficient to run afoul of the CWA); *Borden*, 261 F.3d at 815 (deep ripping a wetland resulted in "addition" and a discharge of a pollutant); *United States. v. Hubenka*, 438 F.3d 1026, 1035 (10th Cir. 2006) (use of a bulldozer to move river cobbles and sand for constructing dikes constituted a discharge of a pollutant); *United States v. M.C.C. of Florida, Inc.* 772 F.2d 1501, 1506 (11th Cir. 1985) ("M.C.C. did violate the Act by redepositing the vegetation and sediment"), *vacated and remanded on other grounds, readopted in relevant part*, 481 U.S. 1034 (1987). Similarly, this court should not allow activities that result in the destruction of wetlands to escape § 404 permitting, simply because the violator did not bring an "outside world" pollutant into the wetland.

CONCLUSION

This court should hold that the NUWF has standing to bring its claims because the its members suffered an injury in fact fairly traceable to Bowman's CWA violation. Furthermore, the citizen suit should be permitted to proceed because the lower court had subject matter jurisdiction as the remaining dredged and fill material meets the continuing violation jurisdictional requirement of § 505(a). The citizen suit has not been barred by NUDEP's actions because they did not satisfy the "diligent prosecution" requirements of § 505. Lastly, Bowman's actions satisfy all of the elements required for a violation of § 301(a) and § 404, including addition. For the foregoing reasons, the NUWF respectfully requests that this court reverse the

district court's decision to grant Bowman's motion for summary judgment and permit the citizen suit to proceed.