Team 39

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 THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW UNION
Civ. No. 149-2012

BRIEF FOR JIM BOB BOWMAN
Defendant-Appellee

TABLE OF CONTENTS

TABLE OF AUTHORITIES

United States Supreme Court

United States Courts of Appeal

United States District Courts

Federal Rules of Civil Procedure

United States Code

Code of Federal Regulations

Federal Register

Secondary Sources

STATEMENT OF JURISDICTION

This case involves an appeal following the issuance of the Order of the United States District Court for New Union, granting Jim Bob Bowman's motion for summary judgment and denying New Union Wildlife Federation's motion for summary judgment. (R. at 1.) The district court had proper subject matter jurisdiction to hear the case under the Clean Water Act, 33 U.S.C. §§ 1251-1387 (2006). The United States Court of Appeals for the Twelfth Circuit has proper jurisdiction to hear appeals from any final decision of the United States District Court for the District of New Union. 28 U.S.C § 1291 (2006).

STATEMENT OF THE ISSUES

1. Does an association have standing to sue for a violation of the Clean Water Act (CWA), when its members experience an abstract feeling of loss over the alterations to a wetland that cannot be seen without trespassing, and their concerns about increasing pollution have neither been substantiated nor affected their enjoyment of a nearby river?

2. Under CWA § 301, does the mere presence of dredged and fill material in a wetland constitute an ongoing violation of a § 404 limitation, when the language of the statute indicates that its violation occurs only with the commission of a specific and discrete act?

3. Under CWA § 505(b), will the prior prosecution of a CWA violation by a state agency preclude a subsequent citizen suit for the same violation, when the agency has promptly negotiated for immediate compliance as well as valuable concessions from the alleged violator?

4. Under CWA § 301, does transferring material within a wetland constitute an "addition" of a pollutant, when no material is added from outside of the wetland?

STATEMENT OF THE CASE

This Court is being asked to affirm the district court's grant of summary judgment against appellant New Union Wildlife Federation ("NUWF") on all four of its stated grounds. NUWF commenced the present action against appellee Jim Bob Bowman ("Mr. Bowman") in the United States District Court for the District of New Union on August 30, 2011. (R. at 3.) NUWF's citizen suit was brought pursuant to § 505(a) of the Clean Water Act (CWA), 33 U.S.C. § 1365.

(R. at 3.) The NUWF complaint alleged that Mr. Bowman violated CWA § 301(a) by filling the wetland on his property without a § 404 permit. *Id*. § 1344. (R. at 3.) NUWF sought civil penalties and an order requiring Mr. Bowman to restore the wetland previously occupying his property. (R. at 5.) New Union Department of Environmental Protection ("NUDEP"), having commenced another CWA § 505(a) lawsuit against Mr. Bowman twenty days earlier, promptly intervened in the present action. (R. at 5.) NUWF also filed motions to intervene in NUDEP's lawsuit and to consolidate the two actions; both of NUWF's motions are pending in the district court. (R. at 5.)

Following discovery, Mr. Bowman and NUWF filed cross-motions for summary judgment. Mr. Bowman moved for summary judgment against NUWF on four separate grounds: (1) NUWF lacked standing to sue under the CWA for lack of an injury to its members traceable to his actions; (2) the district court lacked jurisdiction to adjudicate NUWF's citizen suit because it alleged a violation that was wholly past; (3) NUWF's citizen suit was barred under CWA § 505(b) because NUDEP's diligent prosecution; and (4) NUWF failed to establish that he caused an "addition" of any pollutants to the wetland. (R. at 5.) Conversely, NUWF moved for summary judgment against Mr. Bowman on the ground that Mr. Bowman had added dredged and fill material to navigable waters from a point source without a § 404 permit. (R. at 5.) At the same time, NUDEP, as intervenor, joined Mr. Bowman's motion on the second (continuing violation) and third (diligent prosecution) issues, and opposed his motion on the first (standing) and fourth (CWA violation) issues. (R. at 5.)

On June 1, 2012, the district court entered summary judgment for Mr. Bowman on all four issues and against NUWF on its CWA claim, ruling: (1) NUWF lacked standing; (2) the Court did not have jurisdiction over Mr. Bowman's actions because they were wholly past; (3)

NUWF's lawsuit was barred by prior state action; and (4) no violation of the CWA had occurred. (R. at 11.) Following entry of summary judgment, NUWF and NUDEP each filed timely notices of appeal before this Court. (R. at 1.) NUWF now takes issue with all four of the district court's rulings, while NUDEP challenges only the first (no standing) and fourth (no CWA violation) rulings. (R. at 1.) This Court granted review on September 15, 2012. (R. at 2.)

STATEMENT OF THE FACTS

1. The Bowman Property

Mr. Bowman owns a thousand-acre property situated along the Muddy River near Mudflats, New Union. (R. at 3.) The Muddy River forms a natural border between the states of New Union and Progress, stretching some forty miles above and below the Bowman property. (R. at 3.) The River is approximately six-foot deep and 500-foot wide as it flows past the Bowman property, which allows this portion of the river to be used for recreation. (R. at 3.)

Much of the Bowman property is covered by an occasionally inundated swamp. The property is classified as a wetland under the United States Army Corps of Engineers' *Wetlands Delineation Manual*, in part because portions of the property are at least partially inundated when the river is high. (R. at 3-4.) Until 2011, the Bowman property remained virtually undeveloped, covered with trees and other vegetation typical of a wetland. (R. at 4.) Despite its huge size, only about 650 feet of the property abuts the Muddy River. (R. at 3.) Nevertheless, the entire property is located within the river's hundred-year flood plain and is hydrologically connected to the river. (R. at 3.)

2. The Project

On June 15, 2011, Mr. Bowman set about developing the swamp into farmland on which he hoped to eventually grow wheat. (R. at 4.) He began by using a bulldozer to cut out trenches,

knock down trees, and level vegetation. (R. at 4.) The resulting debris was pushed into windrows that were at least partially burned and pushed into the trenches. (R. at 4.) The field was then leveled with soil from higher areas and redistributed into lower-lying areas. (R. at 4.) Finally, Mr. Bowman drained the field by forming a wide ditch or "swale" running from the back of his property into the river. (R. at 4.)

Shortly after work started, NUWF, a local nonprofit corporation organized to protect New Union fish and wildlife habitats, became aware of Mr. Bowman's activities. (R. at 4.) On July 1, 2011, NUWF notified Mr. Bowman of its intent to sue under the citizen suit provision of the CWA. 33 U.S.C. § 1365. (R. at 4.) A copy of the notice was also sent to NUDEP, the agency in charge of implementing the CWA in the State of New Union. (R. at 4.) The validity of this notice is not contested by either Mr. Bowman or NUDEP. (R. at 4.) By July 15, 2011, Mr. Bowman had ceased clearing and filling his land. (R. at 4.) Although most of the land had been filled, he left the portion of the property along the Muddy River untouched. (R. at 4.) The property adjacent to the Muddy River, and 150 feet inland, remains densely wooded. (R. at 4.)

3. Prosecution by NUDEP

Upon receipt of NUWF's notice of intent to sue, NUDEP contacted Mr. Bowman and informed him that his activities violated state and federal law. (R. at 4.) Although Mr. Bowman still maintains that his activities were not illegal, he promptly entered into a settlement agreement with NUDEP. (R. at 4.) Under the terms of the agreement, Mr. Bowman agreed not to clear any more wetlands. (R. at 4.) He also agreed to convey to NUDEP a 225-foot wide conservation easement along the Muddy River, incorporating the 150-foot wide unaltered swamp with an additional seventy-five-foot wide buffer zone. (R. at 4.) This easement will be dedicated to the public for appropriate recreational purposes, and Mr. Bowman will create a permanent wetland

that he will maintained year-round in the buffer zone. (R. at 4.) Once fully established, the new partially-inundated wetland will provide an even richer wetland habitat than existed before. (R. at 6.)

On August 1, 2011, NUDEP incorporated its agreement with Mr. Bowman into an administrative order, issued pursuant to New Union's equivalent of § 309 (a) and (g) of the CWA, 33 U.S.C. § 1319(a), (g). And though the New Union statute would have authorized the imposition of $125,000 in civil penalties against Mr. Bowman, NUDEP elected to forego penalties in exchange for his immediate concessions. (R. at 4, 7.) On August 10, 2011, NUDEP brought suit in the United States District Court for the District of New Union, seeking to have the settlement agreement and subsequent administrative order entered as a consent decree ("NUDEP Lawsuit"). (R. at 5.) NUDEP's motion for entry of a consent decree, unopposed by Mr. Bowman, is currently pending before the district court, as is a motion by NUWF to intervene in the NUDEP Lawsuit. (R. at 5.)

4. Attempted Prosecution by NUWF

On August 30, 2011, NUWF commenced the action presently before this Court ("NUWF Lawsuit"). (R. at 5.) Like the NUDEP Lawsuit, the NUWF Lawsuit also attempts to prosecute Mr. Bowman for violating the CWA. (R. at 5.) But unlike the NUDEP Lawsuit, the NUWF Lawsuit seeks the imposition of civil penalties against Mr. Bowman, as well as an order that would require the removal of all fill material and the restoration of the former wetland. (R. at 5.) NUDEP successfully moved to intervene in the NUWF Lawsuit shortly after the complaint was filed. (R. at 5.)

NUWF has submitted affidavits from three of its members, Dottie Milford, Zeke Norton, and Effie Lawless, attempting to establish an injury from Mr. Bowman's actions. (R. at 6.) All

three member-affiants followed the same basic narrative in their testimony. They each use the Muddy River and its banks near the Bowman property for boating, fishing and picnicking. (R. at 6.) None claim that these activities are affected by Mr. Bowman's project. (R. at 6.) They admit that they are unable to see any changes to Mr. Bowman's property, either from the Muddy River or its banks. (R. at 6.) The newly-planted wheat field remains completely hidden behind over 150 feet of densely wooded swamp. (R. at 6.)

Nevertheless, the member-affiants insist they "feel a loss" over the swamp's disappearance. (R. at 6.) In their opinions, wetlands such as the one previously on Mr. Bowman's property provide valuable ecological benefits, which include absorbing ambient sediment and pollutants from the river and serving as buffer zones during floods. (R. at 6.) Since they cannot see Mr. Bowman's field, they assert their loss stems from the fear that the Muddy River is now more polluted and could become more polluted if other nearby landowners also fill their wetlands. (R. at 6.) Their fears are based only on their opinions and beliefs, and NUWF has not offered any corroborating expert testimony. One member, Dottie Milford, testifies that the Muddy River looks "more polluted" to her, without further elaboration or substantiating evidence. (R. at 6.)

Another member, Zeke Norton testifies that he had "frogged" the area for years. (R. at 6.) He recalls that the Bowman property used to be an especially good area for "frogging," but now there are no frogs in the drained field. (R. at 6.) He claims that he would be lucky to find even two or three "good sized frogs" in the wooded area. (R. at 6.) Mr. Norton acknowledges that he might have been trespassing when he frogged on the Bowman property. (R. at 6.) Under the terms of Mr. Bowman's settlement with NUDEP, Mr. Norton will now be permitted to

legally frog in the wooded area and buffer zone, and the area is expected to be an even richer habitat for the frogs. (R. at 4, 8.)

Fields of wheat, planted in September 2011, now cover the entire Bowman property, save the 225-foot easement. (R. at 5.) Mr. Bowman has no plans to fill or drain the easement or any other wetlands. (R. at 7.) Construction of the new wetland habitat, pending issuance of the consent decree, is estimated to be considerably expensive, with maintenance costs as of yet unknown. (R. at 8.)

STANDARD OF REVIEW

This case concerns the district court's grant of summary judgment, which is a question of law. An appellate court reviews the grant of summary judgment de novo, applying the same legal standard as a district court. *E.g.*, *Pierce v. Underwood*, 487 U.S. 552, 557-58 (1988). Facts are viewed in the light most favorable to the nonmoving party, but only when there is a genuine dispute as to those facts. *Scott v. Harris*, 550 U.S. 372, 380 (2007). Summary judgment is appropriate when the non-moving party is unable to show a genuine issue of material fact. Fed. R. Civ. P. 56(c).

SUMMARY OF THE ARGUMENT

The district court properly granted summary judgment on all four issues because: (1) NUWF does not have standing; (2) the CWA precludes a citizen suit when a plaintiff alleges only wholly past CWA violations; (3) NUWF's suit is barred by NUDEP's diligent prosecution of Mr. Bowman; and (4) Mr. Bowman's actions did not result in any "addition" of a pollutant under the CWA.

First, NUWF cannot establish standing because it does not show that any of its members would have standing to sue in his own right. One member, Zeke Norton, asserts only that his

enjoyment of "frogging" on Mr. Bowman's property has been impaired—an entirely *illegal* activity. Another member, Dottie Milford, believes that the Muddy River now "looks more polluted," but fails to specify what she means by such an ambiguous comment. Nevertheless, all three insist that they feel a loss over the disappearance of the wetland because they fear it has resulted in increased pollution. Neither they, nor NUWF, support these fears with any kind of evidence. Subjective apprehensions such as these do not amount to an injury, especially when they clearly have not diminished any aesthetic or recreational enjoyment of the Muddy River.

Even if there were an increase in pollution, it is certainly not fairly traceable to Mr. Bowman's actions. NUWF does not argue that Mr. Bowman has caused pollution. Instead, it contends that other sources, wholly unrelated to Mr. Bowman, cause an increase in pollution. NUWF's theory is far too attenuated to establish causation for standing purposes. Additionally, it is unlikely that NUWF can be redressed by the relief it seeks. If Mr. Bowman's alleged violation is indeed now wholly past, the civil penalties are completely unavailable, and any injury actually caused, if any, has already been remedied by NUDEP's administrative order and pending consent decree. Thus, all three elements of standing are not satisfied.

Second, the district court did not have subject matter jurisdiction over NUWF's claim because NUWF fails to allege a continuing CWA violation. Mr. Bowman has ceased all land clearing activities and there is no realistic possibility that he will resume them again. Instead, NUWF relies on an imaginative theory that the mere presence of dredged and fill material constitutes a continuing violation. However, this theory contradicts the plain language of the CWA, ignores the Supreme Court's holding in *Gwaltney of Smithfield, LLC v. Chesapeake Bay Foundation,* and is unsupported by the authorities that NUWF cites. NUWF alleges nothing more than a continuing impact on the environment from a past discharge, which will not suffice.

Third, NUWF's suit is also barred under CWA § 505(b) because NUDEP has commenced a civil action against Mr. Bowman for the same violation and is diligently prosecuting that action to ensure compliance. NUDEP's civil action, filed twenty days prior to the present action, is presumed diligent because Congress intended the states to be the primary enforcers of the CWA. NUWF cannot meet the heavy burden to overcome this presumption because NUDEP has proactively negotiated a consent decree that requires Mr. Bowman to cease all CWA violations immediately and effectuate environmental benefits at considerable costs to Mr. Bowman.

Fourth, Mr. Bowman's land-clearing activities do not constitute an "addition" of a pollutant under the CWA because he merely transferred material from one part of the wetland to another. An "addition" occurs only when a pollutant is first introduced into navigable waters from the "outside world." This definition was recently incorporated into an EPA regulation and thus, is entitled to *Chevron* deference. When Mr. Bowman's activities are viewed in light of this definition of "addition," it cannot be said that he caused any "addition" of a pollutant into navigable waters. Therefore, summary judgment was proper as to all four issues, and this Court should affirm the lower court's decision in its entirety.

ARGUMENT

I. NUWF LACKS STANDING BECAUSE IT FAILS TO DEMONSTRATE AN INJURY-IN-FACT TO A MEMBER THAT IS BOTH FAIRLY TRACEABLE TO MR. BOWMAN'S ACTIONS AND CAPABLE OF REDRESS.

NUWF's suit fails for lack of associational standing. Citizen suits may be expressly authorized by CWA § 505(a), but they do not escape the Article III standing requirement. *See Middlesex Cnty. Sewerage Auth. v. Nat'l Sea Clammers Ass'n*, 453 U.S. 1, 16 (1981). NUWF, an association, cannot establish standing unless it initially demonstrates that at least one of its

members would have standing in his own regard. *Hunt v. Wash. State Apple Adver. Comm'n*, 432 U.S. 333, 342 (1977) (requiring also germaneness to organizational purpose and non-compulsory participation of members). Therefore, at least one NUWF member must manifest (1) an actual or imminent injury-in-fact, (2) the causation of which is "fairly traceable to the challenged actions of the defendant," (3) and that redress is "likely, as opposed to merely speculative." *See Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 180-81 (2000).

Despite submitting affidavits from three different members, NUWF is unable to show injury-in-fact, causation, or redressability for any of these individuals. First, the record reveals the absence of any legally cognizable injury. Second, even if NUWF could somehow show an injury, the causation of the injury is not fairly traceable to Mr. Bowman. Finally, the redressability requirement is equally unmet because it is unclear that the relief NUWF demands would actually remedy the injury its members assert. With none of these three elements met, NUWF's suit must be dismissed, and this Court should affirm the district court's holding that NUWF did not have standing to sue Mr. Bowman.

A. NUWF Does Not Present an Injury-in-Fact to Its Members.

An injury-in-fact is "an invasion of a legally protected interest which is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992) (citations omitted) (internal quotation marks omitted). The relevant inquiry concerns injury to the *member*, rather than injury to the environment. *Laidlaw*, 528 U.S. at 181. Thus, any alleged impact to the environment must directly affect the member in a tangible and specifically identifiable way. *E.g., Sierra Club v. Morton*, 405 U.S. 727, 734-35 (1972). Here, the collective grievances of NUWF members may be reduced to three primary

allegations: (1) Zeke Norton finds fewer frogs on Mr. Bowman's property; (2) Dottie Milford asserts that the river "looks more polluted"; and (3) all three member-affiants assert that they "feel a loss from the destruction of the wetlands, fearing the Muddy is more polluted … and will be far more polluted." (R. at 6.) However, none of their claims embody a form of legally cognizable harm.

1. Zeke Norton's interest in "frogging" on the Bowman property is not a legally protected interest because trespassing is illegal in New Union.

At the outset, NUWF may assert its member-affiants' interests only in the Muddy River and its banks where they claim to boat, fish, and picnic; trespassing on the Bowman property is not among its members' protected interests. The interests of an environmental plaintiff are confined to areas he or she actually uses. *See Defenders of Wildlife*, 504 U.S. at 565-66. Trespassing, however, is *illegal* in New Union and is not a protected interest. (R. at 6.) Accordingly, NUWF cannot establish standing based on Zeke Norton's assertion that he no longer finds any frogs on Mr. Bowman's property. Mr. Norton may very well enjoy "frogging" the whole region, but the only diminution in enjoyment the he alleges is occurring when he trespasses onto Mr. Bowman's property. (R. at 6.) Whether "frogging" for recreation or subsistence, Mr. Norton maintains no protected interest in "frogging" when he violates the law to do so.

2. None of the NUWF member-affiants, including Dottie Milford, establish any direct harm to their aesthetic or recreational interests in the Muddy River.

To establish an environmental injury-in-fact, a plaintiff must demonstrate that a personal aesthetic or recreational value in an affected area has been lessened. *See Laidlaw*, 528 U.S. at 183. Here, NUWF members have not alleged that their recreational interest in Muddy River has

been impaired, and have not sufficiently shown that the disappearance of the wetland has had any aesthetic impact.

All three NUWF member-affiants admit that they cannot see any changes to Mr. Bowman's land from the river. (R. at 6.) Indeed, the affected land remains hidden behind at least 150 feet of densely wooded wetland that continues to adjoin the river. (R. at 6.) Any injury to their aesthetic value in the Muddy River is further dispelled when member-affiants do not claim that their enjoyment of boating, fishing and picnicking along the Muddy River has been impaired by Mr. Bowman's actions. (R. at 6.) Missing facts cannot be presumed to avoid summary judgment. *See Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871, 888 (1990) (explaining that the standard of review favoring the non-moving party on a summary judgment motion cannot support "'assuming' that general averments embrace the 'specific facts' needed to sustain the complaint"). Hence, the member-affiants have established only that they continue to enjoy boating, fishing, and picnicking as they always have.

Furthermore, NUWF cannot rely on member-affiant Dottie Milford's vague observation to establish an aesthetic injury. At her deposition, Ms. Milford commented that the Muddy River now "looks more polluted to her" than it did before. (R. at 6.) But without any further specificity, this single unsubstantiated statement is not enough. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 252 (1986) (noting that the "mere existence of a scintilla of evidence in support of the plaintiff's position" will not preclude summary judgment). Demonstrating a "distinct and palpable injury," *Warth v. Seldin*, 422 U.S. 490, 501 (1975), calls for at least some specificity because "aesthetic perceptions are necessarily personal and subjective." *Ecological Rights Found. v. Pac. Lumber Co.*, 230 F.3d 1141, 1150 (9th Cir. 2000). The fact that the river's very namesake suggests its natural turbidity only underscores the need for specificity.

Otherwise, an environmental plaintiff will be allowed to "replace conclusory allegations of the complaint … with conclusory allegations of an affidavit." *See Nat'l Wildlife Fed'n*, 497 U.S. at 888.

3. The member-affiants' sense of loss and subjective fears of increased pollution do not constitute an injury-in-fact because their fears are neither realistic nor cause concrete harm.

NUWF also cannot establish an injury-in-fact based on its members' sense of "loss from the destruction of the wetlands," or their fear that "the Muddy is more polluted as a result and will be far more polluted if other adjacent wetlands are cleared and drained." (R. at 6.) "[G]eneral emotional harm, no matter how deeply felt," will not establish an injury in fact. *Human Soc. v. Babbitt*, 46 F.3d 93, 98 (D.C. Cir. 1995). Accordingly, the members' sense of loss by itself is irrelevant. Moreover, their fears, however, are also insufficient.

First, the member-affiants' assertions do not establish an imminent injury because NUWF members fail to offer any realistic basis for their fears. Standing requires more than just the plaintiff's own subjective apprehensions. *See City of Los Angeles v. Lyons*, 461 U.S. 95, 107 n.8 (1983). In *Lyons*, the plaintiff lacked standing because he could not show that the harm he feared was likely to occur. *Id*. at 108. Similarly, NUWF offers no evidence that the disappearance of Mr. Bowman's wetland is actually capable of causing the pollution that its members fear. An imminent injury does not arise solely out of conjecture. *See O'Shea v. Littleton*, 414 U.S. 488, 494 (1974).

Second, the NUWF member-affiants' concerns have not actually diminished their aesthetic and recreational enjoyment of the Muddy River. Under *Laidlaw*, a plaintiff's concerns about the effects of a particular discharge will only constitute an injury-in-fact to the extent that those concerns *directly affect* their aesthetic, recreational, or economic interests. 528 U.S. at

183-84; *see also Friends of the Earth, Inc. v. Gaston Copper Recycling Corp.*, 204 F.3d 149, 153 (4th Cir. 2000) (establishing injury-in-fact when affiant limited time spent swimming in lake); *Pac. Lumber*, 230 F.3d at 1150 (establishing injury-in-fact when affiant refrained from fishing and swimming in creek); *Pub. Interest Research Grp. of N. J., Inc., v. Powell Duffryn Terminals, Inc.*, 913 F.3d 64, 71 (3d. Cir. 1990) (establishing injury-in-fact when affiant was discouraged from bird-watching on river).

Even under *Laidlaw*, fear without any concrete effect is not a legally cognizable harm. *See Pollack v. Dept. of Justice*, 577 F.3d 736, 742-43 (7th Cir. 2009). In *Pollack*, the court held that the plaintiff could not establish standing in part because his fear of pollution along Lake Michigan did not affect his recreational activities. *Id.* Here too, the NUWF member-affiants do not claim that they limit their use of the Muddy River for fear of pollution. (R. at 6.) Again, there is no evidence that member-affiants' recreational enjoyment has been impaired at all. NUWF might argue that Ms. Milford's fear of pollution has lessened the river's aesthetic value for her in that it "looks more polluted." But recognizing a purely aesthetic injury from fear is untenable; courts will have no means to objectively verify whether the injury is genuine. *See* David N. Cassuto, *The Law of Words: Standing, Environment and Other Contested Terms*, 28 Harv. Envtl. L. Rev. 79, 100 (2004).

Finally, the injury in *Laidlaw* arose out of evidence that the plaintiffs limited or curtailed their recreational activities on the river, knowing it was contaminated with mercury, "an extremely toxic pollutant." 528 U.S. at 183-84. Had the defendant's discharge been truly harmless, as is the case here, the Court in *Laidlaw* would probably not have reached the same conclusion. *See* Bradford Mank, *Summers v. Earth Island Institute Rejects Probabilistic*

Standing, But a "Realistic Threat" of Harm Is a Better Standing Test, 40 Envtl. L. 89, 102 (2010). Therefore, the injury-in-fact requirement is not satisfied.

B. Any Pollution in the Muddy River Is Not Fairly Traceable to the Challenged Actions of Mr. Bowman.

Standing also requires the plaintiff to demonstrate that the causation of his injury is "fairly traceable to the challenged action of the defendant, and not the result of the independent action of some third party not before the court." *Defenders of Wildlife*, 504 U.S. at 560. The asserted "causal connection … cannot be too speculative, or rely on conjecture about the behavior of other parties." *Pac. Lumber*, 230 F.3d at 1152. Scientific certainty is not required, but a mere exceedence of a permitted limit will not suffice. *Powell Duffryn Terminals*, 913 F.3d at 73 & n.10. Most circuits require a plaintiff to at least demonstrate that the discharged pollutant itself actually "causes or contributes to the kinds of injuries alleged." *Id.* at 72; *accord Sierra Club, Lone Star Chapter v. Cedar Point Oil Co.*, 73 F.3d 546, 556-57 (5th Cir. 1996); *Piney Run Pres. Ass'n v. County Comm'rs*, 268 F.3d 255, 264 (4th Cir. 2001).

The NUWF affiants assert little more than an unsupported belief that the wetland formerly occupying Mr. Bowman's property might have helped to remove some of the sediment and pollutants from the Muddy River. (R. at 6.) Filling the part of the wetland, the affiants speculate, has therefore deprived the river of these purported ecological benefits, in turn causing the river to become increasingly polluted by other sources *wholly unrelated* to Mr. Bowman's activities. Without any firm evidence, this sort of attenuated and speculative connection will not confer standing. Moreover, the material allegedly discharged was dredged and fill material—not the material that NUWF members believe is polluting the Muddy River. Thus, the causal requirement is also not met.

C. NUWF Fails to Demonstrate That the Relief It Seeks Would Redress Any of the Purported Injuries to Its Members.

NUWF presently seeks civil penalties and an order requiring Mr. Bowman to remove the fill material and restore the swamp, but even if it could establish an actual injury to its members, neither form of relief is appropriate. There can be no standing for relief that extends beyond the actual injury alleged. *Allen v. Wright*, 468 U.S. 737, 753 n.19 (1984). This requirement ensures that any relief sought substantially relates to the actual injury it would remedy and applies separately to *each* form of relief sought. *Laidlaw*, 528 U.S. at 185.

Civil penalties are unavailable to private plaintiffs where the violation is wholly past because they have no interest in what belongs solely to the public treasury. *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 106 (1998). If Mr. Bowman's project were a violation of the CWA, it is now one *wholly past* as a matter of law. *See infra* Part II. There is no realistic possibility that Mr. Bowman might engage in similar conduct in the future. He is already subject to an order from NUDEP in which he is prohibited from clearing any more land and required to maintain a year-round wetland area along the Muddy River. (R. at 4.) The decision not to impose civil penalties on Mr. Bowman is well within the discretion of NUDEP. In a situation such as this, "the deterrent effect of a claim for civil penalties becomes so insubstantial or so remote that it cannot support citizen standing." *See Laidlaw*, 528 U.S. at 186.

Likewise, an order to restore the swamp is equally inappropriate because standing does not exist for harms that have already been remedied. *See Summers v. Earth Island Institute*, 555 U.S. 488, 494 (2009) ; *accord Steel Co.*, 523 U.S. at 107 ("Relief that does not remedy the injury suffered cannot bootstrap a plaintiff into federal court."). For example, in *Summers*, the plaintiff lacked standing to assert an injury that had already been remedied by a prior settlement. 555 U.S. at 494. Here, the uncontroverted testimony of NUDEP biologists establishes that the new

wetland zone will provide far more ecological benefits than the former swamp did. (R. at 6.) If anything, Mr. Bowman's conveyance of the conservation easement to NUDEP actually enhances the aesthetic and recreational interests of the NUWF members.

Standing "assures there is a real need to exercise the power of judicial review in order to protect the interests of the complaining party." *Summers*, 555 U.S. at 493. It does not, however, permit a party to petition for relief other than what is necessary to redress its injury. *See id*. at 494. Consequently, NUWF lacks grounds for either form of relief it requests. And because NUWF cannot that its members would have standing, it lacks standing to sue Mr. Bowman. Therefore, the district court's grant of summary judgment should be affirmed.

II. THE DISTRICT COURT DID NOT HAVE SUBJECT MATTER JURISDICTION OVER NUWF'S CLAIM BECAUSE NUWF ALLEGES A WHOLLY PAST VIOLATION OF THE CWA.

Under CWA § 505(a), a private right of action does not exist where the defendant's violation of the CWA is wholly past. *Gwaltney of Smithfield, LLC v. Chesapeake Bay Found.*, 484 U.S. 49, 64 (1987) (interpreting 33 U.S.C. § 1365(a)). Unless a plaintiff alleges a violation that is ongoing or intermittent, his claim will be dismissed for lack of subject matter jurisdiction. *Id*. Here, there is no question that Mr. Bowman's land-clearing activities have ended and will not resume. Instead, NUWF relies solely on an unsupported proposition that the continued presence of dredged and fill material on his property amounts to a continuing violation of the CWA. This theory ignores the actual language of CWA §§ 301(a) and 404(a), contradicts *Gwaltney* by focusing on the effect of a violation rather than the violating act itself, and cannot

be supported by precedent. Mr. Bowman's discrete actions cannot be construed as anything but actions now wholly past. Therefore, NUWF's citizen suit is barred by § 505(a).[1]

A. NUWF's Theory That the Presence of Fill Material Constitutes Its Own Continuing Violation Is Inconsistent with the Plain Language of the CWA.

NUWF' proposition is facially inconsistent with the plain language of the CWA. In matters of statutory construction, courts turn first to the "language of the statute itself." *Consumer Prod. Safety Comm'n v. GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980). "Absent a clearly expressed legislative intention to the contrary, that language must ordinarily be regarded as conclusive." *Id*. Here, § 301(a) establishes the CWA's general prohibition against the unauthorized "*discharge* of any pollutant." 33 U.S.C. § 1311(a) (2006) (emphasis added); *see also id*. §1362(12) (2006) (defining "discharge" as "any *addition* of any pollutant to navigable waters from any point source"). Similarly, CWA § 404 prohibits the unpermitted "*discharge* of dredged or fill material into navigable waters" so as to bring the property into a different use. *Id.* § 1344 (emphasis added); 33 C.F.R. § 323.2(d)(1) (2008) (defining "discharge of dredged material" as "any addition of dredged material"). Therefore a CWA violation occurs with a "discharge," defined as "addition."

The *present-tense* use of two action verbs, "discharge" and "addition," is not simply coincidental. *See Sierra Club v. El Paso Gold Mines, Inc.*, 421 F.3d 1133, 1145 (10th Cir. 2005) ("[s]ection 404 emphasizes the 'activity' giving rise to the discharge of dredged material"). In fact, subsection (f) of § 404 prohibits only unpermitted discharge of dredged or fill material when it is "incidental to any *activity*." 33 U.S.C. § 1344(f)(2). This means that a permit is only

[1] In the proceedings below, NUWF relied solely on the theory that the existence of dredged and fill material itself constituted the continuing violation. To the extent that NUWF might now try to argue that the draining of the field is a CWA violation, that argument is precluded because it was not presented before the district court.

required for the *act* of discharging dredged or fill material. Thus, a violation of a § 404 limitation occurs when action is taken and *at no other time*. *C.f. Borden Ranch P'ship v. U.S. Army Corps Of Eng'rs*, 261 F.3d 810, 818 (9th Cir. 2001) (calculating § 404 violations as incurring with each action that causes a discharge for purposes of penalty calculation). Furthermore, a violation occurs only when there is an "addition" *from a point source*, which further indicates that fill remaining is not a continuing violation because there is no longer a point source. 33 U.S.C. § 1362(12); *Conn. Coastal Fishermen's Ass'n v. Remington Arms Co.*, 989 F.2d 1305, 1313 (2d Cir. 1993).

Next, the absence of any provision concerning past discharges or discharges that remain is equally significant. It would be entirely improper to infer that Congress' omission is anything but intentional. For example, Resource Conservation and Recovery Act (RCRA) § 7002(a)(1)(B) expressly and unequivocally authorizes citizen suits against "any *past or present* generator … who *has contributed* or who is contributing to the *past or present … storage …* or disposal of any solid or hazardous waste." 42 U.S.C. § 6972 (2006) (emphasis added). In the RCRA then, it is clear that Congress made the mere presence of solid or hazardous waste a continuing violation. In the CWA, it is unmistakable that Congress contemplated that individuals might use dredged and fill material to alter the character of a navigable body of water, s*ee, e.g.*, 33 U.S.C. § 1344(f)(2), but chose not to differentiate the manner of violation from any discharge. To imply that discharge of dredge and fill material in a wetland somehow operates outside the scope of this scheme is more than the statutory language will permit.

B. A Continuing Impact Will Not Substitute for Continuing Conduct under the Supreme Court's Ruling in *Gwaltney*.

NUWF's "continuing violation" theory incorrectly focuses on the consequences of Mr. Bowman's actions rather than the actual conduct giving rise to the alleged violation. More

importantly, it is antithetical to the Supreme Court's ruling in *Gwaltney*. 484 U.S. at 67. *Gwaltney* addressed whether citizen-plaintiffs could maintain a claim under § 505(a) when the defendant had ceased the violating activity—discharging a pollutant in excess of its permit. *Id.* at 56. The Court held that citizen-plaintiffs must be able to allege in good faith that defendant will again discharge a pollutant in excess of its permit (or without a permit) for subject matter jurisdiction under § 505(a). *Id.* at 67. In contrast, the possibility that some of the pollutants that defendant discharged in excess of its permit remained in the nation's water would not suffice. *See id.* The continuance of the violation depends on continuance of the violating conduct—not its continuing effects.

NUWF's continuing violation theory amounts to nothing more than a continuing impact theory. The continuing impact theory has been argued by plaintiffs when a violator's past discharge continues to have an environmental impact; however, this theory has been consistently rejected for allowing a citizen suit to proceed. *E.g. Remington Arms*, 989 F.2d at 1313 ("The present violation requirement of the [CWA] would be completely undermined if a violation included the mere decomposition of pollutants."); *accord Hamker v. Diamond Shamrock Chem. Co.*, 756 F.2d 392, 394 (5th Cir. 1985).

NUWF might attempt to support its theory by pointing to the *Gwaltney*'s concurrence, but this too fails to sustain its argument. Justice Scalia contended that the phrase "to be in violation" "suggests a state rather than an act," and that a past violation is continuing until the violator has "put in place remedial measures." 484 U.S. at 69 (Scalia, J., concurring). This does not mean what NUWF hopes. Indeed, Justice Scalia concludes that the remedial measures are to "clearly eliminate the cause of the violation." *Id.* Therefore, the concurrence suggests that violators should make modifications to the point source to prevent future violations. This is not

an issue here. Mr. Bowman put in place remedial measures by removing the point source, the bulldozer, which clearly eliminates the cause of the violation.

NUWF's attempt to narrow *Gwaltney*'s reach to only violations of CWA § 402 limitations is also fruitless. In both §§ 402 and 404, the operative language ("discharge") remains the same—Congress addressed the discharge of two very different kinds of pollutants, isolating each into a separate provision, but it did not change the language identifying when a permit will required. *Compare* 33 U.S.C. § 1344 (requiring a permit for the discharge of dredged and fill material for the purpose of changing the use of land or interrupting water flow and exempting a list of other purposes) *and* 33 U.S.C. § 1342 (requiring a permit for the discharge of pollutants, including dredged spoil and various types of fill material per 33 U.S.C. § 1362(6)). Therefore, a violation under § 301(a) for either § 402 or § 404 limitations remains the same; it requires a discharge. This indicates that congress contemplated the ways in which the CWA would treat the pollutants differently, but method of violation was not one of them.

C. NUWF's Attempt to Redefine a Violation of the CWA Is Unsupported by Precedent and Unjustified by Policy.

NUWF relies on *Sasser v. Administrator* to support its theory that the presence of dredged and fill material can constitute a continuing CWA violation. 990 F.2d 127, 129 (4th Cir. 1993). However, such reliance is misplaced. *Sasser* concerned whether the EPA could assess civil penalties administratively under a then recent amendment of the CWA since defendant had filled his property when the CWA had no provision for civil penalties. *Id.* at 129. The court held that the EPA could assess penalties because the fill material remained on the property. *Id*. Beyond the question of retroactive application, this holding is unremarkable because there is no question that the EPA can assess penalties for past violations—unlike citizen suits. *Gwaltney,* 484 U.S. at 48 (citing 33 U.S.C. § 1319). *Sasser* was simply a case of needing to provide the

EPA a remedy. There is no basis for extending this principle to a theory that presence of fill material constitutes a continuing violation that will permit a citizen suit.

Likewise, the two district court cases cited by *Sasser* do not support extending its holding beyond the government's ability to assess penalties. One simply repeats the other, and neither involved a citizen suit. *See United States v. Ciampitti*, 669 F. Supp. 684, 700 (D.N.J. 1987) (citing *United States v. Cumberland Farms*, 647 F. Supp. 1166, 1171 (D. Mass. 1986)). *Cumberland Farms* did not concern subject matter jurisdiction either; it only addressed calculation of penalties. 647 F. Supp. at 1161. There, the government had obtained a court order against the defendant for illegally filling wetland. *Id*. at 1171. Still, the defendant continued to fill, ditch, and grade the wetland, violating the court's order. *Id.* at 1171. To punish the defendant, the district court assessed penalties not only for the days bulldozers and backhoes were used, but also for every day that the defendant continued to *violate the terms of the injunction*. *Id.* at 1184–85. This is entirely consistent with the CWA, which makes a violator's refusal to comply with an injunction a factor in penalty calculation. 33 U.S.C. § 1319(d). But here, Mr. Bowman is not in violation of any court order.

Beyond penalty calculation, *Sasser*'s approach receives little support. *E.g.*, *United States v. Telluride Co.*, 884 F. Supp. 404, 408 (D. Co. 1995) *rev'd on other grounds* 146 F.3d 1241 (10th Cir. 1998) (holding lack of subject matter jurisdiction based on statute of limitations). No circuit court has applied the *Sasser* theory in any context. Moreover, district courts applying *Sasser*'s theory do so based solely on trumped up arguments of policy. *See Informed Citizens United, Inc. v. USX Corp.*, 36 F. Supp. 2d 375, 377 (S.D. Tex. 1999) (relying on dicta from *N.C. Wildlife Fed'n v. Woodbury*, No. 87 584 CIV 5, 1989 WL 106517 (E.D.N.C. April 25, 1989)). Their lines of reasoning have been criticized as inconsistent with the CWA's statutory language

and *Gwaltney*. *United States v. Rutherford Oil Corp.*, 756 F. Supp. 2d 782, 792 (S.D. Tex. 2010); *see also* David S. Foster, *The Continuing Violations Doctrine and the Clean Water Act: Untenable Solutions and a Need for Reform*, 32 Envtl. L. 717, 736-37 (2002).

Finding itself without statutory basis or persuasive precedent, NUWF also turns to a policy argument. However, there is simply no need for this Court to redefine a violation of the § 404 limitation. NUWF argues that unless *Sasser*'s approach is adopted, violators will destroy wetlands with impunity, and injured parties will be deprived of their day in court. However, this argument ignores the intended role of the citizen suit within the CWA's broader statutory scheme: "to supplement, not supplant, government action." *Gwaltney*, 484 U.S. at 60. The EPA and the states, unlike private plaintiffs, can still impose penalties for past violations. *Id.* at 48 (citing 33 U.S.C. § 1319). Hence, the discharging of dredged and fill material into a wetland still creates the potential for severe penalties, the penalties merely cannot be assessed by private citizens. *Id.*

Moreover, the lack of a private right of action over fill remaining in a wetland does not prevent the CWA's goals from being realized. It is merely a subject that Congress wanted the government to have discretion in choosing to remedy as it sees fit. Ultimately, this Court need not decide whether or not NUWF public policy argument is compelling. "Only Congress may change the law in response to policy arguments, courts may not do so." *Envtl. Def. Fund, Inc. v. City of Chicago*, 985 F.2d 303, 304 (7th Cir. 1993).

In conclusion, the district court properly granted summary judgment because NUWF failed to allege a continuing violation of the CWA. The mere remainder of fill material in Mr. Bowman's swamp cannot constitute a continuous violation under the CWA because the violation is contingent on a discrete action. NUWF's reliance on the *Sasser* is antithetical to the text of the

CWA, as well as the Supreme Court's interpretation in *Gwaltney*. Therefore, this Court should affirm the lower court and hold that NUWF's suit is barred by § 505(a) of the CWA.

III. NUWF'S CITIZEN SUIT IS BARRED BY CWA § 505(b) BECAUSE NUDEP IS DILIGENTLY PROSECUTING MR. BOWMAN.

NUWF's claim is also barred under CWA § 505(b) because of NUDEP's diligent prosecution of Mr. Bowman. The CWA authorizes private enforcement only if state and federal agencies fail their responsibilities as primary enforcers. *See* 33 U.S.C. § 1365(a)-(b). Citizen suits occupy a secondary role in CWA enforcement by encouraging state action with the statutory notice procedure. Steven C. Anderson, Note, *Stop Swinging for the Fences!: An Argument for Citizen Intervention in CWA Enforcement Actions*, 29 J. Land Resources & Envtl. L. 377, 397 (2009). Consequently, whenever a state commences and diligently prosecutes civil actions compelling compliance with the CWA, any subsequent citizen action will be barred. Indeed, the need for private enforcement has vanished. 33 U.S.C. § 1365(b)(1)(B); *see Gwaltney*, 484 U.S. at 60-61. Private plaintiffs may proceed *only* if they overcome a strong presumption of diligence on the part of the state. *N. & S. Rivers Watershed Ass'n v. Town of Scituate*, 949 F.2d 552, 557 (1st Cir. 1991). Here, NUDEP's action precedes that of NUWF, entitling it to a presumption of diligence, and NUWF is unable to show that NUDEP's efforts have been anything but diligent.

A. NUDEP's Prosecution of Mr. Bowman Is Presumed Diligent.

Prosecution of alleged violations of the CWA in the State of New Union belongs squarely within the authority of NUDEP. Again, Congress intended for States to be the primary enforcers of the CWA. *See Gwaltney*, 484 U.S. at 60. Private enforcement was merely "meant to supplement rather than to supplant government action." *Id*. For this very reason, courts are extremely deferential to states' prosecutorial discretion and will expressly *presume* diligent

enforcement once proceedings have been commenced. *Karr v. Hefner*, 475 F.3d 1192, 1198 (10th Cir. 2007); *Scituate*, 949 F.2d at 557.

NUDEP, the agency tasked with enforcing the CWA in New Union, commenced civil enforcement against Mr. Bowman within forty days of receiving NUWF's notice of intent to sue and over twenty days before NUWF filed this lawsuit. (R. at 4-5.) NUDEP commenced its enforcement in federal district court concerning the same alleged violations alleged by NUWF—Mr. Bowman's land-clearing activities. (R. at 4.) As a direct result of NUDEP's efforts, Mr. Bowman entered into a settlement agreement in which he is required to cease all land-clearing activities and convey a conservation easement to NUDEP. (R. at 4.) The negotiated conveyance includes all of the wooded property adjacent to the Muddy River plus an *additional* seventy-five-foot buffer zone on which Mr. Bowman will construct and maintain an artificial wetland. (R. at 4.) According to a NUDEP biologist, this "new, year-round, partially-inundated wetland in the buffer zone will provide richer wetland habitat than the former, occasionally-inundated wetland presently occupied by the field." (R. at 6.) The settlement, subsequently formalized as an administrative order, is now the subject of a pending motion for consent decree before the district court in NUDEP's lawsuit, which is unopposed by Mr. Bowman. (R. at 6.) These actions, all of which predate NUWF's lawsuit, will be presumed diligent as a matter of law.

B. NUWF Cannot Rebut the Presumption That NUDEP Is Diligently Prosecuting Mr. Bowman.

NUWF's lingering discontent is not enough to rebut the presumption that NUDEP has prosecuted Mr. Bowman's alleged violations diligently. Because Congress intended the States to be the CWA's primary enforcers, courts examine their decisions in an extremely deferential manner. *E.g.*, *Scituate*, 949 F.2d at 557. Hence, the presumption of diligence places a *heavy burden* on a prospective plaintiff. *Karr*, 475 F.3d at 1198; *Piney Run*, 523 F.3d at 459; *Scituate*,

949 F.2d at 557. It is not enough for the plaintiff to simply show that the prosecution "is less aggressive than he would like" or that the prosecution has resulted in a compromise. *Karr*, 475 F.3d at 1197; *accord Piney Run*, 523 F.3d at 459; *Friends of Milwaukee's Rivers v. Milwaukee Metro. Sewerage Dist.*, 382 F.3d 743, 762 (7th Cir. 2004), *cert. denied*, 544 U.S. 913 (2005). This is because "Congress did not intend for [private enforcement] to be even 'potentially intrusive'" on the state's discretion. *Karr*, 475 F.3d at 1197 (quoting *Gwaltney*, 484 U.S. at 61).

Generally, courts require only that states' efforts be "'capable of requiring compliance with the Act and … in good faith calculated to do so.'" *Piney Run*, 523 F.3d at 459 (quoting *Friends of Milwaukee's Rivers*, 382 F.3d at 760). Here, NUDEP's negotiated settlement and subsequent administrative order requires Mr. Bowman to "immediately cease further violations of § 404." (R. at 7.) It is difficult to imagine what actions could be any more targeted at requiring compliance. Not only have NUDEP's negotiations resulted in the cessation of Mr. Bowman's land-clearing, they have also secured additional concessions that extend far beyond mere compliance. In fact, NUDEP compelled Mr. Bowman to construct a year-round wetland and convey a conservation easement that is dedicated to public use. (R. at 7.) These actions are certainly capable of and calculated to ensure compliance with the CWA.

This is not a situation where state efforts have proven ineffective in ending the defendant's violations. In *Friends of Milwaukee's Rivers*, the state's prosecution, initiated twenty-five years earlier, had resulted in sewerage infrastructure that clearly lacked the capacity to prevent subsequent discharges of sewage into local waters. 382 F.3d. at 763. And although a later settlement accomplished a reduction in overflow, the sewerage district admitted that the changes would not eliminate overflow altogether. *Id*. In contrast, NUDEP's settlement here has

resulted in the *complete* cessation of activity alleged to be in violation of the CWA, with no realistic possibility of it resuming again in the future. (R. at 4-5.)

NUDEP's prosecution remains diligent, even if it is not as sweeping as NUWF would prefer. *See Karr*, 475 F.3d at 1197. For example, in *Karr*, the state took action against fewer defendants for fewer violations than the citizen-plaintiffs were charging in their subsequent lawsuit. *Id*. at 1195. But, because the subsequent suit was for "essentially the same violations," the court held that the private plaintiffs failed to demonstrate that the state's decisions made its prosecution any less diligent. *Id.* at 1199-1200. Similarly, NUWF contends that NUDEP's prior prosecution is not diligent because it only seeks to stop Mr. Bowman from future violations, whereas NUWF seeks the removal of fill remaining on the property and would require the former swamp to be restored. In reality however, NUDEP's actions achieve far more restorative results than NUWF would seek. (R. at 6, 7-8.) NUWF cannot overcome the presumption that NUDEP is diligently prosecuting Bowman simply because it would choose a different strategy. *Karr*, 475 F.3d at 1197; *Piney Run*, 532 F.3d at 459.

Finally, a decision not to pursue civil penalties or any other particular remedy does not reflect a lack of diligence. *See Ark. Wildlife Fed'n v. ICI Amer., Inc.*, 29 F.3d 376, 382 (8th Cir. 1994). The inquiry focuses solely on "whether the State's action is going to bring about compliance." *Friends of Milwaukee's Rivers*, 382 F.3d at 762; *accord Scituate*, 949 F.2d at 557. But more importantly, allowing citizen suits to proceed where an agency elects to forego penalties in favor of imposing costly improvements not otherwise required would be harmful to the public interest. *Gwaltney*, 484 U.S. at 60-61. For example, "[i]f a defendant is exposed to a citizen suit whenever the EPA grants it a concession, defendants will have little incentive to negotiate consent decrees." *Karr*, 475 F.3d at 1197.

NUDEP declined to impose civil penalties on Mr. Bowman because it obtained valuable concessions from him that go further than simply bringing about compliance—all at great expense to Mr. Bowman. The cost of constructing the new wetland will be considerable, and the future expenses in maintaining it are not yet determinable. (R. at 8.) Mr. Bowman is also relinquishing all agricultural and developmental value in the public-use easement and the maintained wetlands. Mr. Bowman would not have made these concessions if he were still required to pay penalties.

In conclusion, because NUWF cannot show that NUDEP has failed to diligently prosecute Mr. Bowman, NUWF's citizen suit is barred by CWA § 505(b). Second-guessing NUDEP's judgment will only serve to undermine its broader strategy of enforcement. *See Karr*, 475 F.3d at 1197. NUWF may intervene in NUDEP's lawsuit, but only to protect its own interests. 33 U.S.C. § 1365(b). Therefore, summary judgment was appropriate, and the district court should be affirmed.

IV. MR. BOWMAN DID NOT VIOLATE THE CWA BECAUSE HE DID NOT ADD A POLLUTANT TO THE WETLAND.

Section 301(a) of the CWA prohibits "the discharge of any pollutant" without a permit. 33 U.S.C. § 1311(a). The CWA defines "discharge of a pollutant" as "any addition of any pollutant to navigable waters from any point source." 33 U.S.C. § 1362(12). The term "addition" is undefined under the CWA, but is used identically to define discharges under both §§ 402 and 404. Therefore, the term must maintain a consistent meaning throughout the entire CWA, absent express Congressional intent to the contrary. *See Sorenson v. Sec'y of the Treasury*, 475 U.S. 851, 860 (1986).

The EPA has consistently relied on the "outside world" theory to define "addition." *E.g.*, *Nat'l Wildlife Fed'n v. Gorsuch*, 693 F.2d 156, 165 (D.C. Cir. 1982). Under that theory, the

"addition" of a pollutant from a point source occurs only when the point source *introduces* the pollutant "into navigable water from the outside world." *Gorsuch*, 693 F.2d at 165. In other words, "[i]f one takes a ladle of soup from a pot, lifts it above the pot, and pours it back into the pot, one has not added soup or anything else to the pot." *S. Fla. Water Mgmt. Dist. v. Miccosukee Tribe of Indians*, 541 U.S. 95, 110 (2004) (quoting *Catskill Mountain Chapter of Trout Unlimited, Inc. v. New York*, 273 F.3d 481, 291 (2d Cir. 2001)).

The EPA incorporated its "outside world" theory into its recently promulgated Water Transfers Rule. 40 C.F.R. § 122.3(i) (2008). In so doing, the EPA defines "addition" by specifically excluding certain activities from that definition; explicitly excluded is the transfer of pollutants within the same body of water. *Id*. This EPA interpretation necessarily includes both the narrow proposition that "addition" occurs only when a pollutant is introduced from the outside world and the broader proposition that all waters are considered "unitary waters." *See Friends of Everglades v. S. Fla. Water Mgmt. Dist.*, 570 F.3d 1210 (11th Cir. 2009). Although the "unitary waters" theory is itself inapplicable here because only one body of water is at issue, the Water Transfers Rule's implicit incorporation of the "outside world" definition of "addition" is relevant here. Because of this incorporation, the "outside world" theory's definition of "addition" is entitled to *Chevron* deference, and when applied here, Mr. Bowman's actions do not constitute an "addition." Therefore, this Court should affirm the district court and hold that Mr. Bowman has not violated CWA § 301(a).

A. The "Outside World" Theory Merits *Chevron* Deference Because It Has Been Formally Incorporated into the EPA's Water Transfers Rule.

The EPA's definition of "addition" is entitled to *Chevron* deference because it is the agency charged with enforcing and guiding the issuance of § 404 permits. 33 U.S.C. § 1319(g)(B); *Chevron, U.S.A., Inc. v. Nat'l Res. Def. Council, Inc.,* 467 U.S. 837, 842 (1984).

Chevron deference requires a court to defer to the agency's interpretation of a statute wherever (1) the statute is silent or ambiguous on the precise issue, and (2) the agency's regulatory interpretation of such issue is reasonable. *Chevron*, 467 U.S. at 843. If both elements are met, "a court may not substitute its own construction" of the statutory provision, but rather, "must give effect to the agency's reasonable interpretation." *Friends of Everglades*, 570 F.3d at 1219.

First, the meaning of an "addition … to navigable waters" is entirely ambiguous in the CWA. The CWA does not define the term "addition" anywhere in the statute. Instead, Congress merely dictated that the "discharge of a pollutant" necessarily includes "addition." *See* 33 U.S.C. 1311(a). The general purpose of the statute, to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters," does not provide any further guidance as to what Congress may have meant by "discharge of a pollutant." 33 U.S.C. § 1251(a). Congress' stated purpose is instead extremely "broad and ambitious." *Friends of Everglades*, 570 F.3d at 1225. Because the issue is ambiguous, it is evident that Congress intended the EPA to provide further guidance.

Second, the EPA's definition of "addition" in the Water Transfers Rule is also reasonable. Under the *Chevron* standard, "[i]f Congress has explicitly left a gap for the agency to fill … such legislative regulations are given controlling weight unless they are arbitrary, capricious, or manifestly contrary to the statute." *Chevron*, 467 U.S. at 844. Even if the court would decide the issue differently, it "may not substitute its own construction of a statut[e]…for a reasonable interpretation made by the…agency." *Id*. Therefore, as long as the EPA's interpretation is reasonable, it must be upheld. *Id.*

For example, in *Friends of Everglades*, the court analyzed the Water Transfers Rule in terms of reasonableness. 570 F.3d at 1228. In looking at the "unitary waters" portion, the court

compared the theory to marbles being transferred between two buckets. *Id.* As the Eleventh Circuit describes it, although one person may say that there are now marbles where there were none before (in the other bucket), another person could say that there are still the same amount of marbles in buckets. *Id*. The court held that the Water Transfers Rule, which necessarily includes the "outside world" theory, was certainly not arbitrary, capricious, or manifestly contrary to the statute because either construction is reasonable. *Id*. Moreover, at least two Circuits have already held that the "outside world" theory was both a reasonable interpretation of "addition," and not inconsistent with the purpose or any provisions of the CWA. *E.g.*, *Gorsuch*, 693 F.2d at 184; *Nat'l Wildlife Fed'n v. Consumers Power Co*., 862 F.2d 580, 584 (6th Cir. 1988).

NUWF may argue that this theory is inapplicable because it was developed in § 402 litigation, and that the United States Army Corps of Engineers (Corps) has promulgated a regulation defining "discharge of dredged or fill material" under § 404(g). *See* 33 C.F.R. § 323.2(d)-(e). Indeed, the Corps characterized the "redeposit" of material into the same body of water as an "addition" requiring a permit. *Id.* § 323.2 (d)(1)(iii). However, the Corps' definition of "addition" directly contradicts the EPA's position, thus imposing two diverging meanings of "addition" under CWA §§ 402 and 404. The EPA may very well believe that "'addition' should be interpreted in accordance with the text of more specific sections of the [CWA]," such as §§ 402 and 404. National Pollutant Discharge Elimination System (NPDES) Water Transfers Rule, 73 Fed. Reg. 33, 687, 33,701 (June 13, 2008). Still, its fractured conception of statutory interpretation runs counter to the rules of statutory construction and common sense. Heide Hand, *Is the EPA's Unitary Waters Theory All Wet?*, 6 Wyo. L. Rev. 401, 435-36 (2006). Absent Congress' express intent to the contrary, a statutory term must carry a unitary definition

throughout the CWA. *See Sorenson*, 475 U.S. at 860. In other words, one type of activity cannot simultaneously constitute an "addition" under § 402, but not § 404.

The EPA, not the Corps, was designated as the primary administrator the CWA. 33 U.S.C. § 1251. And although the Corps is tasked with issuing § 404 permits, "the EPA must write the guidelines for the Corps to follow in determining whether to permit a discharge." *Coeur Alaska, Inc. v. Se. Alaska Conservation Council*, 557 U.S. 261, 274 (2009). This necessarily means that the EPA is given the *final say* in what actually constitutes an "addition." Therefore, to the extent that the Corps attempts to regulate the redeposit of material as an "addition" under 33 C.F.R. § 323.2, its regulations are invalid.

Alternatively, NUWF may argue that the EPA's interpretation of "addition" is not entitled to *Chevron* deference because the rule itself does not define "addition," or even use the word. This theory however, ignores the history of the rule. Prior to the issuance of the rule, EPA produced a memorandum entitled *Agency Interpretation on Applicability of section 402 of the Clean Water Act to Water Transfers,* which concluded that transfers of water between navigable waters do not constitute an "addition." 73 Fed. Reg. at 33,699 . In the final regulation, EPA concluded that "water transfers, as defined by the rule, do not require NPDES permits *because they do not result in the 'addition' of a pollutant." Id*. (emphasis added). To ignore the rule's history is to ignore the very reason for its adoption.

B. Mr. Bowman's Actions Do Not Constitute an "Addition" Because He Has Not Introduced a Pollutant from the "Outside World."

NUWF may argue that when Mr. Bowman burned the then-leveled vegetation, the resulting ash was a new pollutant from the "outside world." Yet, this argument overlooks how courts have historically addressed what is and what is not an "addition." *See, e.g., Gorsuch*, 693 F.2d at 175, 183; *Consumers Power*, 862 F.2d at 584. For example, in *Gorsuch*, the court held

that pollution caused by a dam did not constitute a discharge of a pollutant because the pollutants merely passed through the dam and was not *introduced* to the water from dam (the point source). 693 F.2d at 175. Likewise, in *Consumers Power*, the court held that a hydro-electric facility that removed and returned water containing biological materials from Lake Michigan did not constitute an "addition" because the biological material remained in the water throughout the entire transfer. 862 F.2d at 585-86

In this case, Mr. Bowman's activities did not *introduce* any pollutants into the wetland from the "outside world." Indeed, all of the pollutants were already on the Bowman property when the land-clearing commenced. (R. at 4.) Despite its movement of biological materials within the wetland, the bulldozer added nothing to the wetland. Mr. Bowman simply pushed around material already on his property; he did not add any fill material collected from any other source. (R. at 4.) Like in *Gorsuch* and *Consumers Power*, his actions merely passed the pollutant from one part of his wetland to another part of the same wetland.

Any change in form occurring during an activity is also immaterial. *See Consumers Power*, 862 F.2d at 584. In *Consumers Power*, the pump-back process had the effect of destroying an enormous amount of fish and other life as the water passed through the facility's massive turbines, dumping their entrails back into Lake Michigan. *Id*. at 582. Still, the court held that this transformation of the biological material—live fish to a combination of live and dead fish—*did not add* a pollutant to the lake. *Id.* Because the facility did not *create* the fish and because live fish are "just as much as a pollutant" as the mixture, the process did not constitute an "addition." *Id.* In other words, the change in form did not matter, the only thing that mattered was whether the material was previously in the water. *Id*. at 585-586. Like the defendant in *Consumers Power*, Mr. Bowman did not *create* the pollutants but merely changed

the form of pollutants previously in the wetland, and those biological materials (vegetation and soil) are just as much a pollutant as the burned ashes. Undoubtedly, NUWF will continue to insist that applying the "outside world" theory to § 404 permits would render that provision meaningless. (R. at 9.) This is certainly not the case as fill material typically comes from dry land and would still be subject to such permits. Although requiring the materials to come from somewhere outside the wetland certainly limits the Corps discretion to issue § 404 permits, it does not render the permit program meaningless.

Finally, NUWF's reliance on *United States v. Deaton*, 209 F.3d 311 (4th Cir. 2000), or any other case involving side-casting decided prior to promulgation of the Water Transfers Rule, is unhelpful. The *Deaton* court's interpretation of "addition" may be one reasonable interpretation of "addition," but so too is the agency's interpretation. When two reasonable interpretations are possible, Courts must defer to the one chosen by the agency. *Friends of the Everglades*, 570 F.3d 1228. As a result, there was no "addition" and thus, "no discharge of a pollutant." Therefore, no violation of the CWA has occurred. Summary judgment on this ground should be affirmed.

CONCLUSION

For the foregoing reasons the district court's grant of summary judgment for Mr. Bowman should be affirmed.

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