No. 13-1246

IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE TWELFTH CIRCUIT

NEW UNION WILDLIFE FEDERATION,

Plaintiff-Appellant,

v.

NEW UNION DEPARTMENT OF ENVIRONMENTAL PROTECTION,

Intervenor-Appellant,

v.

JIM BOB BOWMAN

Defendant-Appellee

Appeal from the United States District Court
For the District of New Union

BRIEF OF THE INTERVENOR-APPELLANT

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

CASES Page

STATUTES

RULES

STATEMENT OF JURISDICTION

The district court had jurisdiction over this case pursuant to 28 U.S.C. § 1331 (2006). Jurisdiction of this Court is invoked under 28 U.S.C. § 1291 (2006), as an appeal from a final decision of the United States District Court for the District of New Union.

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

I. Does an environmental organization have standing to sue when the defendant's wetland destruction caused the plaintiffs to feel personal loss, diminished their enjoyment of the river, and curtailed their recreational and subsistence uses of the areas?

II. Under the Clean Water Act, is there a continuing or ongoing violation when the defendant has completely ceased all of his polluting actions and the state regulatory agency has entered a settlement agreement with the defendant that precludes him from ever polluting in the area again?

III. Has a state regulatory agency diligently prosecuted a defendant when the defendant has conveyed all of his land that he could clear to the state and the agency has required him to pay a substantial cost to construct and maintain a new wetland?

IV. Is there a violation of the Clean Water Act when a defendant admits that he has polluted from a point source into navigable waters by clearing his wetlands, burning the trees, and filling the wetlands with the remaining ashes and leveled vegetation?

STATEMENT OF THE CASE

This is an appeal from a judgment of the United States District Court for the District of New Union, rendered on June 1, 2012 in favor of Jim Bob Bowman. (R. at 11.) The New Union Wildlife Federation (NUWF) filed suit under the Clean Water Act's (CWA) citizen suit provision, alleging that Mr. Bowman had violated the CWA by dredging and filling his wetlands. (R. at 5.) NUWF's citizen suit sought civil penalties and an order requiring Mr. Bowman to completely restore his wetlands. (R. at 5.) The New Union Department of Environmental Protection (NUDEP) intervened in that action. (R. at 5.) NUDEP sought to ensure the court found that NUWF had Article III standing and that Mr. Bowman had violated the CWA. (R. at

5.) However, NUDEP argued the district court lacked subject matter jurisdiction because Mr. Bowman was not continuing to violate the CWA and NUDEP had already diligently prosecuted the violations that NUWF sought to remedy. (R. at 5.)

The district court found for Mr. Bowman on all four issues. (R. at 11.) First, relying on scant legal precedent, the district court found that NUWF lacked standing to sue Mr. Bowman. (R. at 6.) Second, the district court found that Mr. Bowman was not continuing to violate the CWA and that NUDEP had diligently prosecuted his CWA violation enough to "preserve the viewscape of the Muddy River and enhance the wetlands environment." (R at 7-8.) Finally, the court relied on a legal standard that is not applicable to the facts in this case to find that Mr. Bowman had not violated § 404 of the CWA. (R. at 11.) NUWF now appeals all four findings. NUDEP appeals the decisions regarding NUWF's standing and Mr. Bowman's § 404 violation.

STATEMENT OF THE FACTS

Before and after June 2011, Dottie Milford, Zeke Norton, and Effie Lawless spent their free time in and around the Muddy River. (R. at 6.) The three of them, and other members of the community, use the Muddy and its banks for boating, fishing, and picnicking. (R. at 6.) Norton has frogged the area for years, and enjoys frogging as a recreational activity that also provides him with subsistence. (R. at 6.) Milford, Norton, and Lawless, all understand that the wetlands that surround parts of the river are valuable in maintaining the integrity of the Muddy by absorbing sediment and pollutants, as well as buffering from floods. (R. at 6.) They are all members of the New Union Wildlife Federation, a not for profit corporation dedicated to the protection of fish, wildlife, and animal habitats in the state. (R. at 4.)

On June 15, 2011, Jim Bob Bowman began clearing his thousand-acre property, which borders the Muddy River. (R. at 4.) He bulldozed trees, pushed the fallen trees into windrows,

and burned those windrows. (R. at 4.) He then pushed the ashes and bulldozed trees into trenches. (R. at 4.) He dug a massive ditch to drain the remaining water in his newly built field into the wetlands. (R. at 4.) After a month of land clearing, tree burning, and wetland draining, Mr. Bowman had cleared all but a strip of land that bordered the Muddy. (R. at 4.) Mr. Bowman's destruction put fear and loss into the hearts of Milford, Norton, and Lawless. (R. at 6.) Primarily, they worried that Mr. Bowman's pollution would be the first of many instances of property owners decimating the Muddy, without regard for the humans, plants, or animals that rely on the river. (R. at 6.) Milford testified to how much dirtier the river appeared after Mr. Bowman's dumping into the wetlands. (R. at 4.)

Under the authority of federal and state law, the New Union Department of Environmental Protection (NUDEP) acted quickly and comprehensively to address Mr. Bowman's violations. (R. at 4.) Within the two weeks of Mr. Bowman finishing his destruction, NUDEP not only sent Mr. Bowman a notice of violation, but also worked with him to agree to an administrative order. (R. at 4.) The order conveys all of his remaining wooded land to NUDEP in a conservation easement, which will be open to the public for recreational purposes like those that Milford, Norton, and Lawless engaged in before Mr. Bowman cleared his property. (R. at 4.) The conservation easement includes a 75-feet wide buffer zone between the still-wooded area and Mr. Bowman's cleared land. (R. at 4.) Under the order, Mr. Bowman is required to construct and maintain a wetland on that buffer zone, which will be of considerable initial expense and indeterminable expense in the future. (R. at 4, 8.) Finally, Mr. Bowman must keep the easement area in its natural state and is prohibited from ever clearing wetlands in the area again. (R. at 4.)

SUMMARY OF THE ARGUMENT

The district court correctly held that Mr. Bowman's pollution did not constitute a continuing violation of the CWA and that NUDEP diligently prosecuted his actions, but erred in holding the NUWF lacked standing to sue and that Mr. Bowman had not violated the CWA. First, NUWF has standing to sue Mr. Bowman because members of the organization alleged that Mr. Bowman offended their aesthetic values when he cleared and filled the wetlands on his property. The United States Supreme Court has consistently held that standing is a low hurdle to overcome, requiring simply that plaintiffs allege an injury in fact that is fairly traceable to the defendant's actions and is redressable by the court. Here, regardless of whether Mr. Bowman violated the CWA or whether NUDEP's order adversely affected the redressability of NUWF's claims, NUWF's allegations have easily met the standards for Article III standing.

Second, the district court correctly held that Mr. Bowman is not continually or intermittently violating the CWA. For a court to have subject matter jurisdiction over a CWA citizen suit, the polluter either has to be in a state of continuous violation or be reasonably likely to violate again at the time the complaint filed. When Mr. Bowman cleared most of his land and then conveyed his remaining wooded land to NUDEP in a conservation easement, he ceased violating and foreclosed any possibility that he would continue.

Third, the district court correctly held that NUDEP has diligently prosecuted Mr. Bowman's case because NUDEP's administrative order brings Mr. Bowman into compliance with the CWA. Because citizen suits are meant to supplement, not supplant, state enforcement actions, citizen-plaintiffs have to meet a high burden to overcome the presumption that the state diligently prosecuted. Here, NUDEP has diligently prosecuted Mr. Bowman's case because Mr. Bowman agreed to an administrative order, which allows for public access to a conservation

easement on his wetland and also requires him to finance the construction and maintenance of a new section of wetland.

Finally, Mr. Bowman violated § 404 when he cleared his wetlands, burned the trees, and filled in the wetland with the vegetation and ashes. The CWA forbids addition of a pollutant into navigable waters from a point source. Under § 404, adding dredge and fill in a way that changes a waterway's use or impairs or reduces the reach of that waterway is a violation. Here, Mr. Bowman violated § 404 by clearing his wetlands and filling them with ashes and vegetation in order to farm. These actions change the use of the waterway from a wetland to a field and reduce the reach of that waterway. Interpretations of act, such as the outside world theory and the unitary waters theory, that would analyze Mr. Bowman's actions through the lens of § 402 pollution discharge violations do not apply to this § 404 violation.

While NUWF has brought an important case to prosecute an environmentally egregious action, the case cannot survive Mr. Bowman's summary judgment motions. NUWF's worthy suit is barred because NUDEP has diligently prosecuted the case and Mr. Bowman is not continually or intermittently violating the CWA.

ARGUMENT

I. NUWF HAS STANDING TO SUE MR. BOWMAN BECAUSE THREE OF ITS MEMBERS ALLEGE INJURIES CAUSED BY MR. BOWMAN'S WETLAND CLEARING ACTIVITIES, WHICH CAN BE REMEDIED BY THIS COURT GRANTING THEIR REQUESTS FOR MONETARY AND INJUNCTIVE RELIEF.

NUWF may bring a suit against Mr. Bowman for his violations of the CWA because it has provided sufficient evidence to meet each of the standing elements required by the United States Constitution. Article III of the Constitution sets out three elements required for a plaintiff to have standing: (1) the plaintiff must have suffered an injury in fact, (2) which is fairly

traceable to the challenged conduct of the defendant, and (3) the injury must be likely redressable by a favorable decision. Lujan v. Defenders of Wildlife, 504 U.S. 555, 560-61 (1992). These requirements will be met if the plaintiff demonstrates allegations of fact in the complaint or in supporting affidavits; it is not necessary for the plaintiff to provide proof for the standing analysis. Gwaltney of Smithfield, Ltd., v. Chesapeake Bay Found., 484 US 49, 65 (1987). When an organization such as NUWF is a plaintiff, it will have standing when at least one of its members has standing to sue in his own right. Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc., 528 U.S. 167, 181 (2000). The standard of review for evaluating a grant of summary judgment is *de novo*. Barbour v. Dynamics Research Corp., 63 F.3d 32, 36 (1st Cir. 1995).

A. NUWF MEMBERS SUFFERED AN INJURY IN FACT BECAUSE MR. BOWMAN'S POLLUTION LESSENED THEIR REGULAR RECREATIONAL USES OF THE MUDDY RIVER

NUWF has satisfied the first standing element because three of its members have suffered an injury in fact. Each of the members testified they use the Muddy River in the vicinity of Mr. Bowman's property for recreational activities, and each alleges a loss from the destruction of the wetlands. (R. at 6.) Courts have explicitly recognized that this is a low threshold, noting that a plaintiff will meet the standing requirement with a showing of a trifling, identifiable injury. Save Our Cmty. v. E.P.A., 971 F.2d 1155, 1161 (5th Cir. 1992).

An injury in fact will be found when a citizen group identifies at least one member who can testify to feeling a loss from the CWA violator's activities. For example in Friends of the Earth v. Consolidated Rail Corp., the United States Court of Appeals for the Second Circuit held there was an injury in fact when a member of the plaintiff organization found the pollution "offensive to his aesthetic values." 768 F.2d 58, 61 (2d Cir 1985). In that case, an environmental

organization brought suit against the defendant for violating the CWA by polluting Butternut Creek. Id. Members of the group lived in the area, and used it for recreational activities. Id. at 60. In an individual member's affidavit, he testified that despite the effects of the defendant's CWA violations, his children continued to swim and fish in the river, and his family would continue their picnicking activities along its banks. Id. at 61. Citing clear Supreme Court precedent, the court concluded that the citizen group had sufficiently established standing. Id.

Here, NUWF has supplied affidavits from three of its members who use, and wish to continue to use, the Muddy River in the vicinity of Mr. Bowman's property for picnicking, boating, fishing, and frogging. (R. at 6.) Like the individual in Consolidated Rail, who suffered an injury to his aesthetic values, each of these members fear more pollution, and are aware of the wetlands diminished capacity to maintain the integrity of the Muddy. Id.; (R. at 6.) While they seek to continue to use the Muddy, they all testified that they feel a loss from Mr. Bowman's CWA violations. (R. at 6.) Specifically, Ms. Milford testified to the Muddy looking more polluted than it did prior to Mr. Bowman's illegal wetland filling. (R. at 6.) Furthermore, Mr. Norton, who frogs the area surrounding Mr. Bowman's property, has testified to a stark decrease in the number of frogs. (R. at 6.) This has directly inhibited his ability to continue using that area for recreational and subsistence purposes. (R. at 6.) While Mr. Norton may have trespassed onto Mr. Bowman's property, this is immaterial, as Mr. Norton also frogged in the Muddy, outside of Mr. Bowman's property. (R. at 6.) Therefore, the loss he alleged is not simply based on potentially illegal activities. (R. at 6.) Mr. Norton has thus sustained an injury in fact as the frog population in the vicinity of the property has been virtually eradicated by Mr. Bowman's destruction. (R. at 6.) Accordingly, Mr. Bowman's activities have caused three individual members of NUWF an injury in fact, and the first element is satisfied.

B. NUWF'S INJURIES ARE FAIRLY TRACEABLE TO MR. BOWMAN'S ACTIVITIES, BECAUSE THE LOSS OF WETLANDS CAUSED DIMINISHED RECREATIONAL USE AND HARM TO THE AESTHETIC VALUE OF THE MUDDY RIVER IN THE VICINITY OF THE BOWMAN PROPERTY.

NUWF also meets the second standing requirement because Mr. Bowman's violations of the CWA caused the injuries alleged here. To satisfy the causation element of the standing analysis, a plaintiff need only to allege that the defendant discharged a pollutant, which may have contributed to the injury. Friends of the Earth, Inc. v. Gaston Copper Recycling Corp., 204 F.3d 149, 161 (4th Cir. 2000). The plaintiff is not tasked with proving the defendant's pollution to a scientific certainty, nor showing that the defendant's conduct was the only potential cause for the alleged injury. Natural Res. Def. Council v. Sw. Marine, Inc., 236 F.3d 985, 994-95 (9th Cir. 2000); Pub. Interest Research Grp. of N.J., Inc. v. Powell Duffryn Terminals Inc., 913 F.2d 64, 72 (3rd Cir. 1990).

A citizen group will satisfy the fairly traceable prong when a defendant's illegal draining activities may have contributed to the injuries alleged. Save Our Cmty. v. EPA, 971 F.2d 1155, 1161 (5th Cir. 1992). For example, in Save Our Community, the United States Court of Appeals for the Fifth Circuit held that injuries alleged by the plaintiff organization were fairly traceable to a landfill operator's pond and wetland draining, which cut the water bodies' total acreage in half and lessened the value of the land for wildlife. Id. Members of the plaintiff organization claimed they would suffer harm to aesthetic, environmental or recreational interests as a result of this conduct. Id. at 1160-61. The landfill operator admitted to these activities, which were undertaken without a permit. Id. at 1161. Citing decisions from the Third and Fourth Circuits, the court found this element easily satisfied. Id.

The facts in this case are analogous to Save Our Community, as Mr. Bowman drained a considerable portion of his wetland to make a field. Id.; (R. at 4.) Like the pond draining activities undertaken by the landfill operator, Mr. Bowman's activities can be fairly traceable to injuries alleged, as they have led to diminished habitat for frogs. Id.; (R. at 6.) This is supported by Mr. Norton's testimony that there were substantially less frogs in the area. (R. at 6.) Even without Mr. Norton's affidavit, Ms. Milford testified to the Muddy looking more polluted after Mr. Bowman's clearing. (R. at 6.) While Ms. Milford's testimony is not supported by any proof or certainty, this speculation is sufficient to satisfy the low threshold of causation. Furthermore, there is no contention made by Mr. Bowman or anyone else as to another potential cause of the pollution. Therefore, it is enough that Mr. Bowman may have merely contributed to the type of injury alleged, and the second element is satisfied.

C. A FAVORABLE RULING WOULD REDRESS THE INJURIES ALLEGED BY NUWF BECAUSE IT WOULD RESTORE THE FORMER ENVIRONMENTAL VALUE TO MR. BOWMAN'S PROPERTY.

If NUWF were to be successful in its suit against Mr. Bowman for his violations of the CWA, their alleged injuries would be effectively remedied. The burden to meet this standard is equally low. It is sufficient for a plaintiff to show that its alleged injury will be decreased not that the waterway will be returned to its prior condition. Pub. Interest Research Group of N.J., Inc. v. Powell Duffryn Terminals Inc., 913 F.2d 64, 72 (3d Cir. 1990). However, plaintiffs seeking different types of remedies have to demonstrate standing separately for each form of relief sought. Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc., 528 U.S. 167,185 (2000). With respect to the civil penalties, plaintiffs can meet the redressability standard when the monetary fines discourage defendants from continuing current violations and deter them from committing future ones. Id. A plaintiff seeking injunctive relief can meet this standard by

alleging a continuing violation or the imminence of a future violation. Natural Res. Def. Council v. Sw. Marine, Inc., 236 F.3d 985, 994 (9th Cir. 2000).

Here, NUWF alleges that Mr. Bowman is in continuous violation of the CWA by keeping fill material in the former wetland. (R. at 7.) Accordingly, NUWF is seeking both civil penalties for Mr. Bowman's violations to the CWA, and injunctive relief through an order compelling Mr. Bowman to remove the fill material and restore the wetlands. (R. at 5.) The injuries alleged by NUWF clearly meet both of these standards as an imposition of civil penalties would induce Mr. Bowman to quickly and efficiency bring his land into compliance with the court order, and incentivize him and his neighbors to refrain from future violations. Furthermore, an order compelling him to remove the fill material and restore the wetland would return the land to the state it was in before the activities, thus bringing back a habitat for frogs, eliminating the feelings of loss, and concerns about environmental degradation.

The elements of standing are clearly satisfied in this case. Courts conducting the standing analysis consistently impose low burdens on environmental plaintiff groups, to ensure their right to bring suit against violators of the CWA who cause their members harm. See e.g., Natural Res. Def. Council v. Sw. Marine, Inc., 236 F.3d 985, 994 (9th Cir. 2000). Through the testimony of its members, the relation between Mr. Bowman's conduct and the injury alleged, and the relief sought to remedy those injuries, NUWF has met the requirements of standing. Therefore, because NUWF has standing to sue Mr. Bowman for his violations of the CWA, NUDEP respectfully requests that the Court reverse the grant of summary judgment on this issue.

II. BECAUSE MR. BOWMAN HAS NOT REPEATED HIS VIOLATIONS AND THERE IS NO REASONABLE LIKELIHOOD THAT HE WILL DO SO, THERE IS NO CONTINUING VIOLATION AS REQUIRED BY THE CWA.

No aspect of Mr. Bowman's past dredging or his actions after he entered into the settlement agreement with NUDEP indicate that he has actually continued to violate the CWA or that he is reasonably likely to do so. The CWA authorizes citizen suits "against any person . . . who is alleged to be in violation of (A) an effluent standard or limitation under [the CWA], or (B) an order issued by the Administrator or a State with respect to such a standard or limitation." 33 U.S.C. § 1365(a)(2006). Clarifying the application of this provision, in Gwaltney of Smithfield, Ltd., v. Chesapeake Bay Foundation, the United States Supreme Court held that citizen plaintiffs may not bring suits concerning "wholly past violations." 484 US 49, 64 (1987). Therefore, plaintiffs must allege the defendant is continually or intermittently violating the CWA at the time the complaint is filed in order to defeat the defendant's motion for lack of subject matter jurisdiction. Id. at 57.

Because Mr. Bowman stopped clearing his land and will not clear any more, there is no continuing violation of the CWA. Gwaltney gives plaintiffs two ways to prove a continuing violation: (1) by proving violations that continue on or after the date the complaint is filed, or (2) by adducing evidence from which a reasonable trier could find a continuing likelihood of a recurrence in intermittent or sporadic violations. Chesapeake Bay Found., Inc. v. Gwaltney of Smithfield, Ltd., 844 F.2d 170, 172 (4th Cir. 1988); Conn. Coastal Fishermen's Ass'n v. Remington Arms Co., Inc., 989 F.2d 1305, 1311 (2d Cir. 1993). NUWF has not alleged a continuing violation under either of Gwaltney's two prongs. First, after Mr. Bowman cleared and leveled his land he did not continue to violate the CWA and, as held by the Court in Gwaltney and correctly applied by the District Court here, the mere presence of the dredge and fill material in the former wetland is not a continuing violation. 844 F.2d at 172; (R. at 7.) Second, because

Mr. Bowman has cleared all of his land except the area which he has conveyed to NUDEP in a conservation easement, he will not continue his violations in the future. (R. at 4.)

A. THE DREDGE AND FILL MATERIAL REMAINING ON MR. BOWMAN'S LAND DOES NOT CONSTITUTE A CONTINUING VIOLATION UNDER THE CWA.

As the district court correctly held, the dredge and fill material remaining in the former wetland is not a continuing violation. (R. at 7.) By arguing that pollution remaining in the water after a polluter has stopped discharging is a violation, NUWF obscures the clear holding in Gwaltney and the intention of the CWA. In Gwaltney, the Supreme Court explained that, "the harm sought to be addressed by the citizen suit lies in the present or the future, not in the past." 484 U.S. at 59. Analyzing the language of the citizen suit provision, the Court determined that Congress' use of the present tense[1] demonstrates the CWA's prospective nature. Id. at 59-60. Then, addressing the CWA's preference for and deference to State enforcement decisions, the Court reasoned, "permitting citizen suits for wholly past violations of the CWA could undermine the supplementary role envisioned for the citizen suit." Id. at 60.

To show a continuing violation, citizen plaintiffs may not simply rely on an allegation that the defendant has previously polluted. Conn. Coastal Fishermen's Ass'n v. Remington Arms Co., Inc., 989 F.2d 1305, 1311 (2d Cir. 1993); see also, Am. Canoe Ass'n v. Murphy Farms, 412 F.3d 536, 539 (4th Cir. 2005). For example, in Connecticut Coastal, the Second Circuit dismissed the plaintiff's claims, finding that the violations were wholly past because the defendants did not discharge pollutants after the complaint was filed. 989 F.2d at 1313. There, the court found no continuing violation because the defendants had already closed the plant that had discharged the pollutants when the plaintiffs filed the case. Id. at 1312. The court

[1] "The alleged violation *occurs*," defendants are alleged "*to be* in violation," a permit "*is* in effect." 33 U.S.C. §1365 (2006). (emphasis added).

acknowledged that pollutants remained in the water, explaining that, despite the plaintiff's contention, dissolution of pollutants in a waterway is not a violation in itself. Id. at 1313. Addressing important policy concerns, the court in Connecticut Coastal reasoned, "The present violation requirement of the CWA would be completely undermined if a violation included the mere decomposition of pollutants." Id.

In cases outside the citizen suit context, some courts have held that the mere presence of pollution constitutes a continuing violation. In Gwaltney, the Supreme Court explained that the nature of violations in citizen suits differs from those in state actions because "it is little questioned that the Administrator may bring enforcement actions to recover civil penalties for wholly past violations." 484 U.S. at 58. Similarly, in Sasser v. Administrator, the Fourth Circuit held that "each day the pollutant remains in the wetlands without a permit constitutes an additional day of violation." 990 F.2d 127, 129 (4th Cir. 1993). That case differs from the one at hand as it concerned an EPA enforcement action and no citizen suit. Id. Therefore, the court in Sasser used a different standard for continuing violations because Gwaltney's citizen suit precedent did not apply. Id.

Here, the alleged violations are wholly past because Mr. Bowman did not continue to violate the Clean Water Act after NUWF filed its complaint. All of Mr. Bowman's violations occurred between June 15 and July 15, 2011. (R at 4.) By the time NUWF filed its suit on August 30, Mr. Bowman had already completed his land clearing and agreed to construct and maintain a new wetland per NUDEP's administrative order. (R at 4.) Furthermore, Mr. Bowman did not violate the administrative order when he planted winter wheat on the field because the order only requires him to not clear any more of his property and to maintain the buffer zone. (R. at 5.) While Mr. Bowman must keep the entire easement area in its natural state, not developing

it any way, nothing precludes him from planting on his land outside of the easement. (R. at 5.) Therefore, like the plant that was closed by the time the suit was filed in Connecticut Coastal, there is no continuing violation because Mr. Bowman did not clear any land after July 15, 2011. 989 F.2d at 1312.

Other courts have improperly found that pollution remaining in the water constitutes a continuing violation by relying on Justice Scalia's concurrence in Gwaltney. Carr v. Alta Verde Industries, Inc., 931 F.2d 1055, 1062-1063 (5th Cir. 1991) (finding that violations continue until the defendant obtains a permit). While Justice Scalia concurred in the judgment in Gwaltney, he disagreed with the majority's holding, arguing instead that cases should be dismissed in favor of the defendant when the defendant proves that it has "clearly achieved the effect of curing all past violations by the time the suit was brought." Gwaltney, 484 U.S. at 70. Following Justice Scalia's argument instead of the majority's holding creates a different, improper, result because defendants under Justice Scalia's scheme are in violation until they completely undo the effects of their conduct. Id. In North Carolina Wildlife Federation v. Woodbury, a district court held that "it is not the physical act of discharging dredge wastes itself that leads to the injury . . . but the *consequences* of the discharge in terms of lasting environmental degradation." (Emphasis in original) 1989 WL 106517, *2 (E.D. N.C. 1989). The court in Woodbury reached this incorrect result by overlooking the majority opinion in Gwaltney, and instead applying Justice Scalia's definition. Id.

Even though NUWF's argument for a continuing violation aligns with Woodbury, Justice Scalia's concurrence in Gwaltney, and the pocketbooks of plaintiff's attorneys everywhere, it is against the precedent of the Supreme Court and other Circuit Courts. (R. at 7.) As the United States Court of Appeals for the Eleventh Circuit held, the CWA, like all legislation, "reflect[s]

compromises cobbled together by competing political forces," and "it is not difficult to believe that the legislative process resulted in a Clean Water Act that leaves more than one gap in the permitting requirements it enacts." Friends of Everglades v. S. Fla. Water Mgmt. Dist., 570 F.3d 1210, 1227 (11th Cir. 2009). While NUWF's argument may be tempting, it is not based on precedent or congressional intent. Getting that pig to fly requires the court to disregard the majority opinion in Gwaltney, which firmly explained that "Congress could have phrased its requirement in language that looked to the past ("to have violated"), but it did not choose this readily available option." 484 U.S. at 57. Therefore, because Mr. Bowman had ceased all violations by the time the complaint was filed, and pollution remaining in the land is not a continuing violation, there is no continuing violation under the first prong of Gwaltney.

B. BECAUSE MR. BOWMAN'S VIOLATION WAS ONE DISCRETE ACTION AND HE HAS CONVEYED ANY LAND THAT HE COULD CLEAR TO NUDEP, HE WILL NOT VIOLATE THE CLEAN WATER ACT AGAIN.

No trier of fact could conclude that Mr. Bowman is reasonably likely to violate the Clean Water Act again because his settlement agreement with NUDEP precludes that possibility. If citizen plaintiffs fail to prove that the defendant continued to violate after the complaint was filed, they can attempt to show that there is "a reasonable likelihood that a past polluter will continue to pollute in the future." Gwaltney, 484 U.S. at 57. On remand from the Supreme Court in Gwaltney, the Fourth Circuit clarified the "reasonable likelihood" standard, holding that "intermittent or sporadic violations do not cease to be ongoing until the date when there is no real likelihood of repetition." Chesapeake Bay Found. v. Gwaltney of Smithfield, Ltd., 844 F.2d 170, 171 (4th Cir.1988) (per curiam) (on remand from 484 U.S. 49 (1987)). The Second Circuit has addressed the pleading requirements for this second prong, holding that "once a defendant has come forward with evidence showing . . . it is unlikely [that it] will continue its illegal

discharges . . . plaintiffs must demonstrate more than good faith." Conn. Coastal, 989 F.2d at 1312. Here, not only did the record not address whether Mr. Bowman would likely pollute in the future, but the facts also demonstrate that Mr. Bowman cannot continue to violate the CWA.

Plaintiffs must prove more than just past wrongdoing to show that the defendant will likely repeat its violations in the future. Chesapeake Bay Found., 844 F.2d at 172; Conn. Coastal, 989 F.2d at 1312; George v. Reisdorf Bros., Inc., 410 Fed.Appx. 382, 384 (2d Cir. 2011). In George, the Second Circuit found no continuing violation because the plaintiffs' allegation was either "a single, discrete incident . . . or was too speculative to raise a question of fact." 410 Fed.Appx at 384. In that case, the plaintiffs presented two insufficient pieces of evidence to show that the defendants were likely to pollute again: testimony describing pictures showing that the defendant was polluting again by dumping molasses into the creek and testimony from the plaintiffs themselves, alleging that they thought the defendant would continue violating. Id. at 386. The court found that no reasonable jury could find from this evidence that the defendant was likely to continue violating. Id.

Courts find a likelihood of a continuing violation when the defendant has repeatedly violated the CWA and not taken remedial measures. Chesapeake Bay Found., Inc. v. Gwaltney of Smithfield, Ltd., 890 F.2d 690, 695 (4th Cir. 1989); Am. Canoe, 412 F.3d at 540. In Gwaltney II, the third time the Fourth Circuit addressed the facts in Gwaltney, the court found that the defendants were reasonably likely to continuing violating even though there were no actual violations after the complaint was filed. Gwaltney II, 890 F.2d at 695. In that case, cold weather initiated the pollution, and the only time that that occurred was in the winter before the suit was filed. Id. at 694-95. It was understandable that the defendants would not have polluted in the warmer months between the filing of the suit in June and when the trial was held in December.

Id. However, the court found that a continuing violation was likely because the pollution would be even more substantial in the winter after the trial than the actual pollution was the previous year. Id.

When remedial measures are insufficient, courts will also find a likelihood of continuing violation. In Carr v. Alta Verde Industries, Inc., the Fifth Circuit found that a defendant was reasonably likely to violate in the future even though it had improved its pollution system substantially. 931 F.2d 1055, 1063 (5th Cir. 1991). In that case, the pollution occurred when holding ponds of animal manure overflowed into local rivers after heavy rainfall. Id. at 1057-58. After the suit was filed, the defendants improved their system so that it would contain manure as long as there was not a "chronic rainfall event." Id. at 1061. Even though a "chronic" storm strong enough to overflow the defendants' new holding ponds had not occurred since 1936 – the case was decided in 1991 – the court found that the risk was sufficient to create a continuing likelihood of intermittent or sporadic violations. Id. at 1059, 1063.

Here, Mr. Bowman's actions constitute a single, discrete incident with no real likelihood of further violations. (R. at 4.) While many polluters are companies with a financial need to circumvent the CWA and keep dumping illegally, this suit brought against Mr. Bowman as a private citizen, and he has already achieved his goal of clearing his land. (R. at 3.) NUWF may argue that the fact that Mr. Bowman planted on his land suggests that he is likely to clear the remaining wooded portion of his property. (R. at 5.) However, that planting was entirely legal and thus does not indicate whether he would clear other land in violation of the law. Therefore, like the plaintiffs in George who only produced their own testimony to show that violations might continue, NUWF has not managed to include anything in the record that indicates that Mr. Bowman would continue to violate. 410 Fed.Appx. at 384.

Furthermore, Mr. Bowman's remaining uncleared land has been conveyed to NUDEP in a conservation easement. (R at 4.) Mr. Bowman agreed to convey that land to NUDEP in the settlement agreement under state law, and has also consented to do so in NUDEP's suit in federal court. (R at 5.) Therefore, this is unlike Gwaltney II, where the prospect that the defendant would pollute only grew stronger from the time the defendants originally polluted until the trial. 890 F.2d at 695. Here, Mr. Bowman has cleared all of the land that he could possibly clear and both state and federal administrative orders are in place to enforce that. (R. at 3-5.)

Finally, Mr. Bowman is not likely to violate again because his agreement with NUDEP is sufficient to protect from future polluting actions. Mr. Bowman violated CWA with a single incident of land clearing, not with a pipe leaking into a reservoir or an overflowing holding pond. (R. at 4.) While the holding pond in Carr could have been deeper, to prevent even the most catastrophic of rainfalls, there is no polluting apparatus to be fixed in Mr. Bowman's case. 931 F.2d at 1063. Instead, NUDEP penalized Mr. Bowman sufficiently by opening his remaining wooded land to the public and subjecting him to a substantial financial obligation. This will deter him and others from violating in the future. So, unlike in Carr, nothing about Mr. Bowman's land or his agreement with NUDEP demonstrates that he would continue to violate CWA, even under the most unlikely circumstances beyond his or NUDEP's control.

Because Mr. Bowman did not continue to violate the CWA after he finished clearing his land, and he is not likely to violate again, NUDEP respectfully requests that this court affirm the district court's ruling on this issue.

III. NUWF'S SUIT IS BARRED BY NUDEP'S DILLIGENT PROSECUTION OF MR. BOWMAN UNDER § 505 (B) BECAUSE NUDEP'S SETTLEMENT ENDED MR. BOWMAN'S VIOLATIONS AND WILL DETER FUTURE VIOLATIONS THROUGH THE CONSERVATION EASEMENT.

NUWF's citizen suit is barred by § 505 (b) of the CWA because NUDEP has commenced prosecution of Mr. Bowman in this court and has negotiated a settlement agreement that effectively ends the violation in question and deters future violations. The citizen suit provision of the Clean Water Act provides in part that a citizen suit is barred, "if the Administrator 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." 33 U.S.C. § 1365(b)(1)(B) (2006).

A. NUDEP'S DECISIONS ARE ENTITLED TO GREAT DEFERENCE AND A PRESUMPTION OF DILIGENT PROSECUTION BECAUSE IT IS A STATE AGENCY CHARGED WITH ENFORCING THE CWA.

The Supreme Court has held that the intent of the CWA is to prefer agency action over citizen suits to enforce its provisions and bring violators into compliance. Gwaltney, 484 U.S. at 59. Therefore, agency decisions, issued through consent decrees or administrative orders, are given great deference by reviewing courts. Id. Accordingly, when a citizen-plaintiff seeks to bring a comparable § 505 action against violators of the CWA, they have the high burden of showing that the prior state action is not diligent. Karr v. Hefner, 475 F.3d 1192, 1198 (10th Cir 2007). As the Supreme Court held in Gwaltney, citizen suits are meant to supplement, rather than supplant government action. Gwaltney, 484 US at 59.

Consistently reinforcing a preference for state action over citizen suits, Courts of Appeals have established how exceedingly difficult it is for a plaintiff to overcome the presumption of deference. For example, in Karr, citizen-plaintiffs appealed a motion to dismiss by arguing the EPA failed to diligently prosecute the defendants for violations of the CWA. 475 F.3d at 1199. The plaintiffs cited the EPA's failure to file suit within sixty days of plaintiffs' notice, failure to address all of the thirty-seven sites listed it their complaint, and failure to prosecute all but two of

the defendants. Id. at 1198. The United States Court of Appeals for the Tenth Circuit dismissed the plaintiffs' arguments, holding instead that, "in light of our deferential view of the matter, we do not hesitate to hold that the EPA's prosecution against the Defendants was diligent." Id. The court reasoned that when an agency chooses to enforce the CWA through a consent decree, a court's failure to defer to its judgment can undermine agency strategy and give defendants little incentive to negotiate settlements. Id. at 1197-1198.

Similarly, courts have held that a citizen group may be able to rebut this presumption if and only if it can provide clear and convincing evidence that the agency is not in good faith and their enforcement measures cannot ensure compliance. Piney Run Preservation Ass'n v. Cnty. Comm'rs of Carol Cnty., 523 F.3d 453, 460 (4th Cir. 2008). For example, in Piney Run, a citizen association brought suit against a County for violating a CWA permit through its operation of a water treatment plant. Id. at 455. The district court granted the County's motion for lack of subject matter jurisdiction finding that the State's enforcement action through a consent judgment constituted diligent prosecution. Id. at 460. The Fourth Circuit agreed, holding that the citizen suit was barred because the Association could not produce clear and convincing evidence to overcome the presumption that the State's enforcement action was diligent. Id. The court explained that diligence is presumed because the government is meant to be the primary enforcer of the CWA, and that courts are not equipped to review the proper design construction or maintenance of water treatment plants. Id.

Here, NUDEP's settlement agreement with Mr. Bowman should be given substantial deference. Like the state agency in Piney Run, NUDEP is the agency charged with enforcement of the CWA in New Union, and its decisions have the authority of administrative orders. 523 F.3d at 455; (R. at 4.) Additionally, NUDEP filed suit within sixty days of receiving NUWF's

notice, which was more diligent that the EPA in Karr, whom the court found unquestionably diligent. 475 F.3d at 1199; (R. at 4.) While NUWF wants this court to analyze the sufficiency of this settlement with Mr. Bowman without this deference, NUWF has failed to provide even a modicum of the necessary evidence to support such a request. As such, NUDEP is entitled to this level of deference, for holding otherwise may discourage future New Union citizens from reaching settlement agreements with the agency. (R. at 7.)

Furthermore, NUWF seeks to proceed with its suit despite NUDEP's settlement and civil actions, contending that these measures do not amount to diligent prosecution. However, like the citizen-plaintiffs in Piney Run, NUWF also fails to provide clear and convincing evidence to overcome the presumption of diligent prosecution. Therefore, as the court in Piney Run found in comparable circumstances, NUWF's suit cannot proceed without a sufficient basis to impute diligence.

B. NUDEP'S PENALTIES CONSTITUTES DILIGENT PROSECUTION BECAUSE IT IMMEDIATELY ENDED MR. BOWMAN'S CWA VIOLATIONS, STRIPPED MR. BOWMAN OF A LARGE PORTION OF HIS PROPERTY, AND REQUIRED HIM TO CONSTRUCT AND MAINTAIN AN ENHANCED WETLAND ON THAT PORTION.

The purpose of a penalty provision is to require compliance with the CWA, prevent recurrence of violation and deter others from committing future violations. Atl. States Legal Found., Inc. v. Eastman Kodak Co., 933 F.2d 124, 127 (2d Cir. 1993). A state agency's action to bring CWA violators in compliance will ordinarily be considered diligent so long as that agency is capable of requiring compliance with the CWA, and is in good faith to do so. Piney Run, 523 F.3d at 460. Appropriate penalties will depend on the situation presented by each case. Id.,

(finding that the State deciding to give a lower fine than they previously had is not a sign of diligent prosecution.) [2]

It is well established that the imposition of civil penalties in a settlement agreement are not a vital element of diligent prosecution. N. and S. Rivers v. Town of Scituate, 949 F.2d 552 (1st Cir. 1991). For example, in Scituate, the United States Court of Appeals for the First Circuit held the Massachusetts Department of Environmental Protection diligently prosecuted a town for violations of the CWA by issuing an administrative order under the state's version of the CWA.[3] Id. at 557. While the order imposed no financial penalties to the town, the court found it more controlling that the town was already complying with several mandatory provisions such as the planning of a new treatment facility, costing close to one million dollars, and enforcing a sewer hookup moratorium. Id. The court explained that while the DEP may not be taking the exact action the citizen-group wanted it to, ultimately the DEP action fulfilled the purpose of the CWA: to restore and maintain the integrity of the nation's waters. Id. The court noted, "actions aimed at exacting financial penalties in the name of environmental protection at a time when remedial measures are well underway do not further this goal." Id.

[2] Some courts consider whether there is a relative prospect that the violation alleged by plaintiffs will continue, notwithstanding government action as part of their diligent prosecution analysis. However, the relative prospect inquiry is the standard for mootness. Mootness is its own doctrine, separate from diligent prosecution and standing. We take no stance as to whether mootness is at issue here, as no part of the district court decision analyzed mootness under these facts. Therefore, it has not been certified as an argument on appeal.

[3] In Paper, Allied-Indus., Chem. And Energy Workers Int'l Union v. Cont'l Carbon Co., the United States Court of Appeals for the Tenth Circuit disagreed with the holding in Scituate, for barring the citizen suit, which sought both injunctive relief and civil penalties, because the state agency only pursued an administrative order, which is less than the judicial enforcement required by 33 U.S.C. § 1365(b)(1)(B)(2006), and therefore, should have only excluded the civil penalties claim. 428 F.3d 1285 (10th Cir. 2005). Citing congressional intent, the Court concluded that when a state is pursuing something less than judicial enforcement, there is no bar against citizen suits seeking injunctive relief. However, in this case, NUDEP has pursued both an administrative order, and sought judicial enforcement of this order in federal court. Accordingly, the specific deficiencies found in Scituate by the Tenth Circuit are not at issue here.

Conversely, in Jones v. City of Lakeland, Tennessee., the United States Court of Appeals for the Sixth Circuit held the state was not diligently prosecuting the defendant when the state environmental division only imposed nominal penalties, "In lieu of punitive compliance incentive penalties of $10,000 per day authorized by the Clean Water Act." 224 F.3d 518, 522 (6th Cir. 2000). The Sixth Circuit noted that despite a number of compliance orders issued by the state, the state permitted the defendants to discharge illegal amounts of sewage, sludge, and other toxic substances into a river. Id. Therefore, the citizen suit was not precluded by § 505 of the CWA. 33 U.S.C. § 1365(b) (2006).

In this case, NUDEP's settlement with Mr. Bowman fulfills the CWA purpose of ending and preventing a violation. Ultimately, the effect of this order will not only restore the water quality of the Muddy River adjacent to the Mr. Bowman's property, but it will improve it and allow for greater recreational use. Like the state agency in Scituate, NUDEP negotiated the settlement agreement under New Union's version of the CWA.[4] 949 F.2d at 554; (R. at 4.) The provisions of the settlement adequately address and remedy NUWF's alleged injuries, included feelings of loss, increased pollution, and a debilitated frog habitat. (R. at 6.) Furthermore, the settlement ensures such violations will never happen again as Mr. Bowman has conveyed a 225 foot conservation easement to the State, including 150 feet of uncleared land, in addition to a 75 foot buffer zone where he will have to create and maintain a year-round partially inundated wetland. (R. at 4.) It will also prevent Mr. Bowman from benefiting from the agricultural value of his land, as a considerable portion of that land will be wetland.

[4] The bar against citizen's civil penalty suits only operates where the State has brought an action comparable to subsection 309(g). See 33 U.S.C. § 1319(g)(6)(A)(ii)(2006). A state statute virtually identical in relevant parts to §§309 (a) and (g) of the CWA, id, §§ 1319 (a),(g), grants NUDEP authority to issue administrative orders. (R. at 4.)Therefore, a comparability analysis is unnecessary here.

While NUDEP has not decided to enforce the specific penalty provision under New Union law, it is clear that the economic burden imposed upon Mr. Bowman will deter him, and others, from future violations. (R. at 8.) Unlike the State in Lakeland, which practically invited future violations, NUDEP's settlement does not impose menial monetary fees in lieu of the CWA penalties. 224 F.3d at 522; (R. at 4-5.) Rather, Mr. Bowman will be solely financially responsible for the construction and maintenance of the year-round wetland buffer zone, in addition to any future expense to maintain it and keep it open to the public for recreational use. (R. at 8.) Furthermore, unlike the defendant's violation in Lakeland, Mr. Bowman's violation was an isolated incident, which cannot be repeated as NUDEP has already been deeded the land for the conservation easement. Id. at 520; (R. at 4.) Ultimately, the settlement agreement presents the best possible outcome as the ongoing benefit of an enhanced wetland environment far outweighs the benefit of paying a one-time penalty paid into the United States Treasury.

Because NUDEP has both brokered a settlement agreement and pursued action in federal court, it has fulfilled the diligent prosecution provision of § 505(b) of the CWA. Through the conservation easement laid out in the settlement agreement, NUDEP has both remedied the effects of Mr. Bowman's past violations, and ensured that he cannot continue to violate the CWA. Furthermore, Mr. Bowman will be solely financially responsible for the construction and maintenance of the enhanced wetland environment, which will be open year-round for public recreational use. Accordingly, summary judgment for Mr. Bowman should be affirmed on this issue.

IV. BECAUSE NEITHER THE UNITARY WATERS THEORY OF NAVIGABLE WATERS NOR THE OUTSIDE WORLD THEORY OF ADDITION APPLY TO § 404 PERMITTING VIOLATIONS, MR. BOWMAN'S WETLAND CLEARING AND LEVELING ACTIONS SATISFY ALL ELEMENTS OF A CWA VIOLATION UNDER § 301 (a) AND § 404, INCLUDING ADDITION.

The district court ignored the structure of the CWA and overlooked consistent judicial interpretations of § 301 when it ruled that Mr. Bowman did not violate § 404. At the heart of the CWA are two permitting programs, one administered by EPA and the other by the Army Corp of Engineers. 33 U.S.C. § 1342 (2006); 33 U.S.C. § 1344 (2006); Ohio Valley Envtl. Coal., Inc. v. Hobet Min., LLC, 723 F. Supp. 2d 886, 901 (S.D.W. Va. 2010). Section 301 of the CWA, which prohibits the "discharge of any pollutant" into any navigable waters without a permit, acts as the trigger for both the EPA and the Corps permitting program. 33 U.S.C. § 1311 (2006). Because of the distinct nature of the two permitting programs, courts have elected to read judicial interpretations of § 301 language made in the context of one permitting program narrowly when deciding a case under the other program. See e.g., Greenfield Mills, Inc. v. Macklin, 361 F.3d 934, 948 (7th Cir. 2004). The district court deviated from the practice of narrowly reading precedent from one permitting program when considering facts under the other program.

The CWA defines the "discharge of pollutants" that is prohibited in §301 as "an addition of any pollutant to navigable waters from any point source." 33 U.S.C. 1362(12) (2006). The district court found the element of "addition" lacking in Mr. Bowman's actions, relying on two similar but distinct theories of §301, the "outside world" theory of addition and the "unitary waters" interpretation of the term "navigable waters." (R. at 9, 10.) Both of these principles were adopted by courts in § 402 permitting cases, and relying on them to decide this § 404 case is contrary to precedent and leads to absurd results that contravene the intent of the CWA. Accordingly, the district court erred in finding that the element of addition is not satisfied by Mr. Bowman's activities, because it misinterpreted case law and imported inapplicable standards from the § 402 program into the § 404 program.

A. COURTS HAVE CATEGORICALLY DECLINED TO APPLY THE OUTSIDE WORLD THEORY TO THE § 404 PERMITTING PROGRAM AND IT ACCORDINGLY DOES NOT GOVERN MR. BOWMAN'S ACTIVITY.

The outside world theory does not apply to this case because courts have determined that utilizing the theory in § 404 cases is contrary to the purpose of the CWA. The outside world theory relied on by the district court posits that there is no "addition" of a pollutant under the CWA, unless the source of the pollutant is distinct from the water to which it is added. Nat'l Wildlife Fed'n v. Gorsuch, 693 F.2d 156, 174-75 (D.C. Cir. 1982); (R. at 9.) The district court noted that since the fill material and organic matter that were incorporated into the wetland as a result of Mr. Bowman's land clearing actions did not originate outside of the wetland area that he cleared, these materials – though pollutants – were not added from the outside world and thus did not satisfy the element of addition under the CWA. (R. at 9.)

This misapplication of the outside world theory is contrary to both the origins of the theory and its evolution in CWA jurisprudence. The hallmark case for the outside world theory, decided in 1982 by the United States Court of Appeals for the District of Columbia, is National Wildlife Federation v. Gorsuch. 693 F.2d 156, 161 (D.C. Cir. 1982). The issue in the case was whether a § 402 permit was violated by the release of water from a dam, when the dam caused water quality changes such as sedimentation, temperature change, and supersaturation that were then introduced to the water below. Id. at 164. Determining that there was no violation by the release of the water, the court deferred to EPA's position that "Addition from a point source occurs only if the point source itself physically introduces a pollutant into water from the outside world," and therefore there was no addition of a pollutant. Id. at 175. Because the term "addition" was ambiguous and EPA was the agency charged with the implementation of the

term, the court, finding the outside world interpretation reasonable, deferred to the agency interpretation. Id. at 174.

The court in Gorsuch found the outside world theory reasonable in light of the § 402 permit question that was before it, but considering the implications theory to § 404 violations, subsequent courts have been loath to extend the theory's reach. For example, in Avoyelles v. Sportsman's League, Inc. v. Marsh, a landowner cleared and leveled a wetland, moving dirt and placing trees felled on the land into low areas without a permit. 715 F.2d 897, 923 (5th Cir. 1983). The court held that there was an addition under the CWA since the landowner's leveling activities "redeposit[ed]" material from the land back onto it. Id. The court concluded, "The word 'addition,' as used in the definition of the term 'discharge,' may reasonably be understood to include 'redeposit,'" and noted, "This reading of the definition is consistent with both the purposes and legislative history of the statute." Id.

Similarly, in United States v. Deaton, a landowner dug ditches to drain a wetland and excavated dirt from those ditches without a permit. 209 F.3d 331, 333 (4th Cir. 2000). The Fourth Circuit rejected the landowner's argument that nothing was added since the soil originated in the wetland, and instead held that these actions satisfied the element of addition under the CWA. Id. at 334. The court reasoned that the ditch digging activity, though it did not bring new soil into the wetland, changed the soil into "a *type* of material that up until then was not present on the [landowner's] property" and thus was an addition of a pollutant. Id. at 335 (emphasis in original); see also, Borden Ranch P'ship v. U.S. Army Corps of Engineers, 261 F.3d 810, 814 (9th Cir. 2001) aff'd, 537 U.S. 99 (2002), (holding that "deep ripping" is an addition of a pollutant though the practice "simply churns up soil that is already there, placing it back basically where it came from" because it changed the nature and composition of the soil). This

inclusive interpretation of addition in the § 404 context is widely accepted as the rule. United States v. Hummel, 2003 WL 1845365 (N.D. Ill. Apr. 8, 2003) ("The Deaton Court's understanding of the word 'addition' is the same as that of nearly every other circuit to consider the question.")

Directly addressing the superficial inconsistency between Gorsuch and consensus of the courts rejecting the outside world theory to § 404 permitting, the United States Court of Appeals for the Seventh Circuit reconciled the two by limiting Gorsuch's authority to the "very circumscribed facts upon which [the decision was] based." Greenfield Mills, Inc. v. Macklin, 361 F.3d 934, 948 (7th Cir. 2004). In Macklin, the court noted that recent cases have "severely undercut" the holding in Gorsuch. Id. at 947. The Macklin court determined that the element of addition did not carry with it the outside world theory for three main reasons: first, a broader interpretation of the element of addition is more consistent with the purpose of the CWA, which is to protect the nations waters; second, soil and vegetation that is removed and redeposited in the wetland does effect the nature of the wetland in important ways; and third, reading outside world theory into §404 would read the dredge and fill provision out of the statute since most dredge and fill material originates in the same area where it is deposited. Id. at 948.

Given this resounding rejection of the outside world theory after the Gorsuch decision, the district court erred in relying on the case. The facts here are closely analogous to the line of cases rejecting the outside world theory. Like the landowner in Avoyelles who leveled wetland and used trees to fill low points, Mr. Bowman leveled the land and integrated organic material into the soil by "pushing soil from high portion of the field into … low lying portions of the field" and "pushing vegetation remains and ashes" into trenches. Id. at 923; (R. at 4.) Accordingly, like the court in Avoyelles, that held that when the landowner "redeposited" the

wetland material there was addition of a pollutant, this Court should find that Mr. Bowman's leveling activity redeposited wetland material constituted an addition of a pollutant. Id.; (R. at 4.) Furthermore, Mr. Bowman dug ditches and a wide swale like the landowner in Deaton who dug ditches to drain a wetland area. 209 F.3d at 333; (R. at 4.) Just as the Fourth Circuit in Deaton rejected the landowner's contention that he had not added anything when he dug the ditch since the soil originated in the wetland he had polluted, this Court should not accept the district court's analysis that Mr. Bowman did "not add the pollutants from outside his former woods/wetland, thus not meeting" the element of addition. Id.; (R. at 9.)

Consequently, the district court misapprehended the precedential value of Gorsuch when it relied on the case to inform this inquiry. As the court in Macklin explained, Gorsuch should be read narrowly and the holding should be "circumscribed to its limited facts." Macklin, 361 F.3d at 948. In light of the strong precedent on point that has held that there is an addition under the CWA when wetlands are cleared, leveled, and drained, Mr. Bowman's activities constitute an addition of a pollutant under the CWA.

B. APPLYING THE UNITARY WATERS THEORY TO § 404 PERMITTING CASES RENDERS § 404 MEANINGLESS.

Because applying the unitary waters theory to § 404 cases would lead to absurd results – results that would eliminate the vitality of the § 404 permitting program – the unitary waters theory does not apply to § 404. Both the outside world theory and the unitary waters theory were adopted by courts considering § 402 facts and both theories lead to absurd results when applied to §404. Accordingly, this Court, like the courts that rejected the outside world theory, should not extend the reach of the unitary waters theory into § 404.

The unitary waters theory posits that under the CWA the navigable waters of the United States are a single body. Friends of Everglades v. S. Fla. Water Mgmt. Dist., 570 F.3d 1210,

1217 (11th Cir. 2009). Under the theory, water bodies that one might intuitively consider to be distinct are considered to be one entity for the purposes of the CWA since they are both part of the larger single body: the navigable waters of the United States taken as a whole. Initially, the theory, even in § 402 cases, did not enjoy a warm reception in the courts. Id. ("The unitary waters theory has a low batting average. In fact, [as of 2008] it has struck out in every court of appeals where it has come up to the plate.") However, in 2008 EPA promulgated "NPDES Water Transfer Rule", which exempts water transferred from one body to another from the permitting requirement of the CWA. 40 C.F.R. § 122.3(i) (2008). The rule, which implied but did not expressly adopt the unliterary waters theory, faced a challenge but was upheld by the Eleventh Circuit in Friends of Everglades v. South Florida Water Management District, thus casting a more favorable light upon the theory. 570 F.3d 1210, (11th Cir. 2009).

In Friends of the Everglades, environmental groups challenged the South Florida Water Management District's practice of pumping heavily polluted canal water up and over a dike and into the significantly cleaner Lake Okeechobee. 570 F.3d at 1214. The issue was whether this pumping constituted and addition of a pollutant without a permit in violation of § 402. Id. at 1216. The court found that there was two reasonable interpretations of the term "addition… of any pollutant to navigable waters" and deferred to the interpretation advocated for by EPA, which understood the phrase to mean any addition to navigable waters as a whole. Id. at 1227. Under this reading of the statute, the Water Transfer Rule's exemption for this activity is consistent with the CWA, and was upheld. Id.

Extending the precedential value of Friends of the Everglades to § 404 cases is contrary to the intent of the CWA and disregards the duel-agency structure of the permitting programs. The aftermath of Gorsuch shows that Friends of the Everglades is properly read narrowly and

thus stands for the proposition that the Water Transfer Rule is consistent with the CWA because the unitary waters interpretation of navigable waters is reasonable in the context of EPA's § 402 program. Read broadly, Gorsuch could have provided the seed to grow the outside world theory into a robust doctrine that changed the nature of the CWA. The post-Gorsuch cases, however, recognized that the change that would result from reading Gorsuch into § 404 would undermine the purpose of the CWA and decided to limit the applicability of the theory to the specific facts before the Gorsuch court, i.e., water passing from one side of a dam to another. See, e.g., Greenfield Mills, Inc. v. Macklin, 361 F.3d 934, 949 (7th Cir. 2004). In pruning the outside world theory to its bare facts, the courts recognized the important distinctive nature of the different CWA permitting programs and the absurd consequences that would result from applying the outside world theory to § 404 cases. Like the courts following Gorsuch, which limited their reading of that case, this Court should read Friends of the Everglades narrowly and decline to adopt the unitary waters theory in § 404 cases.

Adopting the unitary waters theory would contravene the intent of Congress in enacting the CWA since it would render the § 404 program virtually meaningless. In the § 404 context, Congress intended the term "navigable waters" not to encompass the unitary waters theory for if it did so, there would be no § 404 program at all. Congress would not have enacted a law with a meaningless provision, and since the meaning of § 404 depends on the rejection of the unitary waters theory, that theory must be rejected. See Food & Drug Admin. v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 125 (2000) (considering the consequences of a proposed interpretation of statutory language in order to determine legislative intent).

Dredged material necessarily comes from water, so any dredge material from navigable waters would never constitute an addition of pollutant under the CWA because it would never be

added back into navigable waters since that is where it originated. See Nw. Envtl. Def. Ctr. v. Envtl. Quality Comm'n, 232 Or. App. 619, 630 (2009) (defining dredged material is "material that has been 'scoop[ed] or [dug] … from the bed or body of water") (quoting Webster's Third New Int'l Dictionary 688). The unitary waters theory would drastically limit the applicability of the dredge material provision of the CWA because the only candidate for dredge material that would constitute an addition would have to originate in foreign waters or waters that are not navigable. Since Congress intended navigable waters to be read broadly, this would be a drastic and unfounded limitation. Deaton, 209 F.3d at 333 ("Consistent with the intent of Congress, the Corps has construed 'waters of the United States' to include the territorial seas, interstate waters, waters used or susceptible to use in interstate commerce, tributaries of any of these waters, and wetlands adjacent to all of these waters."); see 33 C.F.R. § 328.3(a) (2008); see also, Avoyelles Sportsmen's League, Inc. v. Marsh, 715 F.2d 897, 914-15 (5th Cir. 1983). Thus, adopting the unitary waters theory would render the dredging provision virtually meaningless.

The prospect of the judiciary eliminating § 404 from the CWA was the same worry that led post-Gorsuch courts to reject the outside world theory. The Avoyelles Court reasoned that a redeposition of material from the same wetland was an addition because requiring the pollutant to come from another area "would effectively remove the dredge-and-fill provision from the statute." 715 F.2d at 924; see also, Greenfield Mills, Inc. v. Macklin, 361 F.3d 934, 949 (7th Cir. 2004) ("[W]e agree with our colleagues on the Fifth Circuit that excluding such dredged materials from the concept of "addition" "would effectively remove the dredge-and-fill provision from the statute.") For this reason, courts faced with the outside world theory found that adopting it would be contrary to congressional intent. The court in Deaton reasoned that the damage caused by dredge and fill material was equally harmful, whether it originated in the same

wetland it was deposited into, or from an outside source. 209 F.3d at 336. The Deaton court determined that reading the language from Gorsuch too literally would be contrary to congressional intent since it would create a formalistic exception to some discharged material without reference to the harm that it caused. Deaton, 209 F.3d at 336 ("Surely 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.")

Post-Gorsuch courts considering the outside world theory have made clear that it is not the source of the material that governs whether the CWA applies, it is the effect that the material has upon the water. See United States v. Deaton, 209 F.3d 331, 335 (4th Cir. 2000). The process of dredging material changes the nature of the material and thus when it is returned to the water it causes a negative change in the quality of the water. Id. Similarly, reading the unitary waters theory too broadly would contravene the intent of the statue to "restore and maintain the chemical, physical and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a) (2006). Doing away with the permit requirement for depositing dredging material as long as it originated from some navigable waters of the United States would allow for a massive loophole in the CWA, which would be directly contrary to the purpose of restoring and maintain the integrity of the nation's waters. See 33 U.S.C. § 1251(a) (2006). With dredge and fill pollution, the harmful effect on the nations waters does not depend on the source the material since it is the dredging and filling itself that causes the harmful change in the composition of the soil and thus the water it is redeposited into. United States v. Deaton, 209 F.3d 331 (4th Cir. 2000).

EPA addressed this very issue in the comments to the Water Transfer Rule. In the "Public Comments" section of the EPA's explanation for the rule, the agency acknowledged concerns

that the "rule implies that dredged material never requires a permit unless the dredged material originates from a waterbody that is not a water of the U.S." National Pollution Discharge Elimination System (NDPES) Water Transfer Rule, 73 Fed. Reg. 33697 (codified at 40 C.F.R. 122). In response to this concern, EPA stated, "[T]oday's final rule will not have an effect on the 404 program…. [The rule] has no effect on the 404 permit program, under which discharges of dredged or fill material may be authorized by a permit." Id. Thus to import the unitary waters theory into § 404 would be contrary to both the purpose of the CWA and the intent of the very agency that crafted the Water Transfer Rule that gave credibility to the theory. Therefore, this Court should not impose such a result.

While § 402 and § 404 depend on "discharge of a pollutant" triggering language, they cover distinctly different activities. Thus, while the statutory language is the same, the structure of the CWA and the distinction of the permitting programs show that the meaning of terms as applied within the different permitting programs diverge. This is reinforced by the delegation of different agencies, with notably different mandates and philosophies, to administer each program. This multi-agency delegation indicates that Congress envisioned these sections playing different roles and applying distinctive standards. Thus, in delegating to different agencies the different permitting sections, Congress has indicated that the standards that drive one program do not necessarily also control the other. See Coeur Alaska, Inc. v. Se. Alaska Conservation Council, 557 U.S. 261 (2009) (holding that where there is concurrent authority the Corps' standard governs). Therefore, while both agencies apply the term "discharge of pollutant," the Court should not import the unitary water theory from § 402 to § 404 since adopting the theory here would crated the same kind of judicially imposed gap in the CWA that the post-Gorsuch

cases declined to create. See e.g., Avoyelles Sportsmen's League, Inc. v. Marsh, 715 F.2d 897 (5th Cir. 1983).

In sum, because adopting the rule would impermissibly read out a key provision of the CWA, the unitary waters theory has no place in § 404, and therefore, no implication on the facts here. Mr. Bowman's activities involved clearing, leveling, and redisposing wetland material and thus Mr. Bowman's violation stems from adding fill material to navigable waters and falls squarely under the purview of § 404 of the CWA. See e.g., id. at 923; (R. at 4, 9.) Accordingly, the District Court was mistaken in relying on the unitary waters theory in finding that the element of addition was not satisfied. Moreover, considering case law following Gorsuch, the District Court impermissibly departed from precedent in relying on the outside world theory in finding that the element of addition was not satisfied. Appreciating the jurisprudential rejection of the outside world theory, and the consensus that dredge and fill material redeposited on a wetland is an addition under the CWA, the District Court erred in finding that Mr. Bowman's activities did not constitute an addition under the CWA.

CONCLUSION

For the foregoing reasons, the Intervenor-Appellant New Union Department of Environmental Protection respectfully requests that this Court reverse the judgment of the district court with respect to NUWF's standing and Mr. Bowman § 404 violations, and affirm the judgment with respect to continuing violation and diligent prosecution.