UNITED STATES COURT OF APPEALS
FOR THE TWELFTH CIRCUIT

No. 13-1246

NEW UNION WILDLIFE FEDERATION
Plaintiff-Appellant

v.

NEW UNION DEPARTMENT OF ENVIRONMENTAL PROTECTION
Intervenor-Appellant

v.

JIM BOB BOWMAN
Defendant-Appellee

Appeal From The U.S. District Court
For The District of New Union

BRIEF FOR INTERVENOR-APPELLANT NEW UNION DEPARTMENT OF ENVIRONMENTAL PROTECTION

Team 42
Attorneys for New Union Department of Environmental Protection

QUESTION PRESENTED

I. Whether NUWF has standing to sue Bowman for violating the CWA, with an injury in fact that is fairly traceable to the alleged violations and is redressable by the court.

II. Whether Bowman had a continuing or ongoing violation of the CWA with his activities as required by § 505 of the CWA.

III. Whether NUWF's citizen suit has been barred by NUDEP's diligent prosecution of Bowman as set out in § 505(b) of the CWA.

IV. Whether Bowman's actions of moving dredged and fill material from one part of a wetland adjacent to a navigable water to another part of the same wetland satisfied all the elements required for a violation CWA §§ 301(a) and 404, including addition.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES Page(s)

STATUTES

OTHER AUTHORITIES

JURISDICTIONAL STATEMENT

This case is an appeal from an Order entered by the District Court for the District of New Union entered into on June 1, 2012. Intervenor-Appellant New Union Department of Environmental Protection ("NUDEP") filed a complaint pursuant to the Clean Water Act ("CWA") § 505. 33 U.S.C. § 1365 (2006). The district court properly held that it did not have subject matter jurisdiction under CWA § 505 to hear the New Union Wildlife Federation's ("NUWF") claim because there was no continuing violation. *Id*. at § 1365(a). Thus, the Twelfth Circuit Court of Appeals has no authority to hear NUWF's claims and must affirm the district court's granting of Jim Bob Bowman's ("Bowman") motion for summary judgement in that matter.

STATEMENT OF THE CASE

Statement of the Facts

Within one month of first becoming aware of Bowman and his dredge and fill activities, NUDEP and Bowman entered into a settlement agreement whereby Bowman consented to comply with all of NUDEP's demands. R. at 4. While the matter was resolved efficiently and effectively, Bowman is superfluously being dragged into the current litigation by NUWF. It all started when Bowman decided to clear land on his property, a wetland as recognized by the U.S. Army Corps of Engineers, the agency in charge of regulating wetlands in cooperation with the Environmental Protection Agency ("EPA"). R. 3–4. Bowman owns one thousand acres of wooded or previously wooded land adjacent to the Muddy River, in the state of New Union. R. at 3. His property is within the flood plain of the Muddy River, and every year when the river is high, Bowman's property is inundated. R. at 3. Members of NUWF, including Dottie Milford, Zeke Norton, and Effie Lawless, use the Muddy River for boating and fishing, and sometimes picnic on or near Bowman's property. R. at 6. In addition, Norton has frogged the area for years both for recreation and for subsistence, and in good season, can find about a dozen frogs on Bowman's land. R. at 6. Norton admits that he was trespassing while he frogged on Bowman's property. R. at 6.

On June 15, 2011, Bowman used bulldozers to knock down trees, level out vegetation, and push this combination into windrows which he then burned. R. at 4. He dug trenches and placed the burned vegetable remains into them, and pushed soil from high portions of the field into low-lying ones. R. at 4. He cleared land to create a field, and left an approximately 150-foot wide strip of land adjacent to the 650-foot length of river on his property. R. at 4. By July 15, he was finished clearing land, and there is no reason to believe he will resume these operations. R.

at 7. A few months later, Bowman observed that his new field had sufficiently drained to plant, and he sowed it with winter wheat. R. at 5.

Shortly after Bowman cleared the land, NUWF sent him, the EPA, and NUDEP a notice of its intent to sue under CWA § 505. R. at 4. NUWF is a not-for-profit corporation under the laws of New Union whose purpose is to protect the habitats of fish and wildlife. R. at 4. It is funded by members' dues and contributions, and members elect the Board of Directors, which in turn elects its President. R. at 4. In response, NUDEP sent Bowman a notice of violation of the CWA, and within a month, entered into a settlement agreement with him. R. at 4. A state statute virtually identical to CWA §§ 309(a) and (g) (33 U.S.C. §1319(a), (g)) grants NUDEP the authority to issue administrative orders. R. at 4. Although it did not assess financial penalties, NUDEP's administrative compliance order put some stipulations on Bowman, which include forbidding him from clearing more wetlands in the area, conveying to NUDEP a conservation easement on the 150-foot strip of still wooded property adjacent to the river, and creating an artificial wetland on the 75-foot buffer zone between the field and the wooded property. R. at 4. The easement allows public entry for recreational purposes, and requires Bowman to keep it in its natural state. R. at 4. While Milford, Norton, and Lawless cannot see a difference in the land from the river or its banks, they claim they feel a loss, and Milford says that since Bowman initiated his activities, the Muddy looks more polluted. R. at 6. Norton has testified that there are no frogs in the drained field and there are two or three frogs at most in the remaining woods and buffer area. R. at 6. However, according to a NUDEP biologist, once Bowman constructs the artificial wetland, the new partially-inundated wetland will provide richer wetland habitat than the natural wetland that was destroyed, which will lead to more frogs. (R. 6).

Summary of the Proceedings

This is an appeal to the United States Court of Appeals for the Twelfth Circuit from a final order of the United States District Court for the District of New Union granting Bowman's motion for summary judgement on all counts. On August 10, NUDEP filed a suit against Bowman under CWA § 505, and a few weeks later, NUWF filed its own § 505 complaint seeking civil penalties and an administrative compliance order requiring Bowman to remove the fill material and restore the wetlands. R. at 5. NUDEP filed a motion to enter a decree to judicially enforce its compliance order on September 5. R. at 5. The Twelfth Circuit subsequently granted NUDEP's motion to intervene in the NUWF case, without prejudice to NUDEP's rights to enforce the proposed decree. R. at 5. After discovery, the parties filed cross-motions for summary judgement. R. at 5. The District Court granted all of Bowman's motions for summary judgement, and denied all of NUWF's. R. at 11. The successful motions include: (1) Plaintiff NUWF lacks standing; (2) The District Court lacks subject matter jurisdiction because all violations were wholly past; (3) The District Court lacks subject matter jurisdiction over NUWF's claim because NUDEP diligently prosecuted Bowman; and (4) There is no violation of the CWA because Bowman did not meet the "addition" requirement of the CWA permitting process when he moved dredged and fill material from one part of the wetland into a part of the same wetland. R. at 11.

On September 14, 2012, the parties filed a Notice of Appeal to the Court of Appeals for the Twelfth Circuit. R. at 2. NUDEP argues that: (1) NUWF does have standing pursuant to CWA § 505; (2) The Twelfth Circuit lacks subject matter jurisdiction as required under CWA § 505(a) because Bowman's violations were wholly past as he ceased his activities on July 15; (3) NUDEP's prosecution of and consent decree with Bowman satisfy the requirements for diligent

prosecution and so NUWF's citizen suit should be barred; and (4) Bowman violated CWA § 404 when he moved dredged and fill material from one part of a wetland adjacent to navigable water to another part of the same wetland. R. at 1–2.

STANDARD OF REVIEW

This court should review the lower court's determinations of law *de novo*. *Pierce v. Underwood*, 487 U.S. 552, 557 (1988). Summary judgement is appropriate when the movant proves that "there is no genuine issue as to any material fact and that the movant is entitled to judgement as a matter of law." FED. R. CIV. P. 56(a).

SUMMARY OF THE ARGUMENT

The district court erred in finding that NUWF does not have standing because it had not suffered an injury in fact. To have standing under the CWA, a plaintiff must show an injury in fact that is fairly traceable to the defendant's alleged violations which is redressable by the court. The parties focus only upon the first prong, the presence of an actual injury. NUWF's "actual or imminent" injury satisfies the standing requirement. NUWF's lawsuit involves a specific resource and concrete harm, which typically meets the injury in fact requirement. The specific resource is the Muddy River and the concrete harm is change in aesthetics and reduction in frog population. Moreover, injury is concrete and imminent because the organization's members plan on revisiting the Muddy River and continuing their recreational activities of boating and picnicking. Therefore, the actual and concrete injury that standing requires is present in the current case. In such cases, the question typically comes down to whether plaintiff actually spent time on or near that particular body of water. NUWF's members spend sufficient time on or adjacent to the Muddy River. Also, they are forced to avoid that area due to pollution and

aesthetic injury. These members live within the area and frequent the vicinity in question. In short, the members are kept from using the land due to Bowman's activities.

Finally, the presence of "increased risk" is sufficient to satisfy the injury element of standing. Because standing does not require the injury to have already occurred, the presence of "imminent" injury establishes standing. Increased risk is evidenced by testimony that residents avoid their recreational activities that they would otherwise enjoy in or around the Muddy River. The deterrence of regular activities due to an increased risk is sufficient in this case for the injury in fact requirement of standing.

Because Bowman's activities are wholly past and there is no ongoing violation, this court does not have subject matter jurisdiction under CWA § 505(a). Bowman's alleged violations ceased on July 15, 2011 and therefore his activities are not ongoing. The question remains whether they are likely to resume or the activities are wholly past. There is sufficient evidence to prove that Bowman will not resume his activities. Since the dredging, he has not resumed dredging and filling the wetland. He also signed a settlement agreement with NUDEP where he agreed to not clear more wetlands in the area and conveyed a conservation easement on the still wooded part of his property plus an additional 75-foot buffer zone to NUDEP. The fifteen-month gap between the date of the alleged violation and the suit, compliance with the agreement, and impossibility of furthering the violation is sufficient evidence that the violation is not intermittent and Bowman's activities are wholly past. Therefore, there is not subject matter jurisdiction because defendant can prove that the allegation of ongoing violation is not reasonably likely to recur.

The district court was correct in granting summary judgement on the issue of whether NUWF's citizen suit was barred by NUDEP's diligent prosecution of Bowman. Citizen suits are

barred under CWA § 505 if a state has commenced and is presently diligently enforcing a civil action in a federal court. Moreover, if a state has brought an action against a polluter that is comparable to an EPA administrative order, the citizen suit is also barred. NUWF's suit must be dismissed. Firstly, Congress intended for citizen suits to supplement state suits, and they are proper only if state agencies fail to exercise their enforcement responsibility. Most courts have held that an administrative compliance order such as the one issued by NUDEP must preclude a citizen suit, because the agency has exercised its enforcement responsibility. Secondly, NUDEP's actions are owed a high level of deference, and the context of the prosecution was diligent; prosecution was timely, imposed mandatory and ongoing responsibilities onto Bowman, and was capable of requiring compliance with the CWA. Thirdly, and finally, NUDEP's agency strategy would be undermined if NUWF's suit were not precluded, because such a policy would discourage voluntary settlements between the government and polluters.

The district court was incorrect in granting summary judgement that Bowman did not violate the CWA when he moved dredged and fill material from one part of a wetland adjacent to navigable water to another part of the same wetland. Bowman's actions satisfy all four requirements of a CWA violation: there was an "addition" of a "pollutant" from a "point source" into a "navigable water." There is no dispute that there was a pollutant from a point source into a navigable water, but the district court incorrectly held that there was no addition. Firstly, the redeposit of vegetation has been determined to be an addition because it turns a nonpollutant into a pollutant. None of the theories upon which the district court relied, such as the outside world theory and the unitary waters theory, are persuasive. The outside world theory does not apply to wetlands CWA § 404 cases. The unitary waters theory has never been applied to a case factually similar to the instant case. Moreover, the district court failed to consider 40 C.F.R. § 232.2

(2010), which clarifies the treatment of dredged and fill materials. Finally, none of the exceptions to the discharge of dredged and fill materials applies. Thus, the district court's holding on summary judgement should be upheld on two counts (subject matter jurisdiction and diligent prosecution), and reversed on two counts (standing and CWA violation).

ARGUMENT

I. THIS COURT SHOULD REVERSE THE JUDGMENT OF THE DISTRICT COURT THAT NUWF DOES NOT HAVE STANDING BECAUSE THE NUWF MEMBERS SUFFERED AN INJURY IN FACT FAIRLY TRACEABLE TO BOWMAN'S ALLEGED VIOLATION.

NUWF has established that its members have standing under Article III. In the CWA context, the Supreme Court has held that a plaintiff has Article III standing if it can show: (1) an "'injury in fact,'" (2) that is "fairly traceable" to the defendant's "challenged action," and which (3) a "favorable [judicial] decision" will likely prevent or redress. *Lujan v. Defenders of Wildlife,* 504 U.S. 555, 560 (1992) ("*Lujan*"); *Friends of Earth, Inc. v. Laidlaw Environmental Services, Inc.,* 528 U.S. 167, 180-181 (2000) ("*Laidlaw*"). The Supreme Court has stated the necessity for an "actual" and "concrete" injury. *Lujan*, 504 U.S. at 560. At the same time, the Court has not required large or physical sorts of injuries in environmental cases. *Id*. (finding that standing was not present because injury was not concrete enough); *Sierra Club v. Morton*, 405 U.S. 727 (1972) (finding organization's mere interest in an environmental problem was not sufficient to allege that it was adversely affected).

As organizations, respondents can assert their members' standing. *See Summers v. Earth Island Inst.*, 555 U.S. 488, 489 (2008). Harm to their members' recreational, or even their mere aesthetic, interests in the environment will suffice to establish the requisite concrete and particularized injury, but generalized harm to the environment will not alone suffice. *Sierra Club v. Morton*, 405 U.S. at 734–36. The parties do not deny that NUWF meets the latter two

requirements for standing. It focuses only upon the first, the presence of "actual," as opposed to "conjectural or hypothetical," injury. The district court erred in finding that NUWF does not have standing because it had not suffered an injury in fact.

1. Injury in Fact must be Actual or Imminent.

The Supreme Court's ruling of *Lujan v. Defenders of Wildlife* is the touchstone for federal court standing requirements. In *Lujan*, plaintiff failed to meet the injury in fact requirement because it did not present an actual and concrete injury. *Lujan*, 504 U.S. at 560. Two members testified that they were injured because American-funded activities were accelerating the extinction of endangered species in Egypt and Sri Lanka, where they hoped to return again some day. *Id*. at 562. The Court stated that the desire to observe an animal species for purely aesthetic purposes is "undeniably a cognizable interest for purposes of standing." *Id*. at 562-63. Nevertheless, "some day" intentions of return without concrete or specific plans failed to support a finding of "actual or imminent" injury for purposes of standing.

In the present case, three NUWF members submitted affidavits testifying to direct injuries. Like *Lujan*, the members enjoyed the aesthetics of the Muddy River environment. R. at 6. But even more, the members regularly used the Muddy for recreational boating, fishing, and picnicking purposes. R. at 6. In *Lujan*, the members were injured because activities were hastening the extinction of endangered animals. Here, Bowman's activities make the Muddy looks more polluted and lessened the number of good-sized frogs. R. at 6. The Supreme Court rejected standing in *Lujan* because the members' intention of returning was at some unknown time in the future and therefore the harm was not "actual or imminent." *Lujan*, 504 U.S. at 560. That problem is not present in this case. The members plan on revisiting the Muddy River and continue their recreational boating and picnicking but for the change in appearance and feel of

the banks and river. R. at 6. Therefore, the "actual or imminent" injury that standing requires is present in the current case.

2. Injury in Fact can be the Cessation of Activities Due to Reasonable Fears.

The Court is also more likely to find standing when the lawsuit involves a specific resource and concrete harm. *Laidlaw*, 528 U.S. at 176. In *Laidlaw*, plaintiff asserted injury in fact because concerns about mercury pollution forced them to stop their recreational activities near the North Tyger River. *Id*. In a 7-2 majority, the Court found plaintiffs' "reasonable fears" of mercy pollution sufficient injury in fact to support standing. *See also Ecological Rights Found., v. Pac. Lumber Co.*, 230 F.3d 1141 (9th Cir. 2000) (standing met where two lumber facilities had runoffs into the Yager Creek); *Natural Res. Defense Council, Inc. v. Texaco Refining and Mktg., Inc.*, 2 F.3d 493 (3d Cir. 1993) (standing where plaintiff's activities created an oily sheen on the Delaware River). The holding in *Laidlaw* and its later applications suggest that the Court is more likely to find standing when the lawsuit involves a specific resource (i.e. the North Tyger River), and concrete harm, (i.e. avoidance due to mercury pollution).

The question of a concrete injury typically comes down to whether plaintiff spent any time on or near that particular environment. The circuit courts have generally found aesthetic injury allegations sufficient where the plaintiff actually spends time on or adjacent to the environment in question. *See, e.g., Natural Res. Defense Council, Inc.* 2 F.3d at 493; *Sierra Club v. Simkins*, 847 F.2d 1109 (4th Cir. 1988); *Powell Duffryn Terminals*, 913 F.2d 64, 71 (3d Cir. 1990). In *Texaco*, the NRDC affidavits showed that its members had stopped their recreational activities of boating, swimming and enjoyment of the waterfront of the Delaware River because of oily sheens and unpleasant odors in their recreating areas. This was sufficient aesthetic injury to an environment plaintiff spent time on to uphold standing. Other cases have found standing on

less detailed showing of use and injury in the area. In *Sierra Club v. Simkins Indus.*, standing was based on the fact that a single member of the Sierra Club regularly went hiking near the Patapsco River adversely affected with pollutants. 847 F.2d at 1109. In *Powell Duffryn Terminals*, the members lived near the Kill Van Kull shoreline, jogged, and hiked several times per year near the affected waterfront, and were offended by the polluted waters. 913 F.2d. at 70-1. The court found the repeated activities in the vicinity of the affected area sufficient to be a concrete injury in fact. *Id.* at 71. In the CWA context, several cases have directly established injury in fact by showing that defendant's use of the affected the environment was hampered negatively in some fashion. *See, e.g., Atl. State Legal Found. v. Al Tech Specialty Steel Corp.*, 635 F. Supp. 285, 287 (N.D.N.Y. 1986).

The facts in the present case are sufficient to supports injury in fact because it involves a specific resource, (the Muddy River) and concrete harm (the reduction of frogs and the increase of pollution in the vicinity). Similar to *Laidlaw* where the members feared the presence of mercury pollution, the members of NUWF fear pollutant entering the wetlands from agricultural uses. R. at 6. This pollution, similar to *Laidlaw*, has raised reasonable concerns for the NUWF members and has similarly forced the NUWF members to stop using the Muddy River. R. at 6. Where in *Texaco*, it was sufficient to show that pollution in the river kept the members from eating local fish, here, the members are also kept from recreating in or near the River. Similar to *Powell*, the NUWF members also frequent "on or in the vicinity" of the Muddy River R. at 6. Although the member do not see the pollutants or a change in appearance like the member in *Texaco*, both sets of members are kept from using the land either for boating, fishing, and picnicking purposes. Because the NUWF members have an interest in preserving the Muddy

River and their interests are injured due to Bowman's activities, it is sufficient to support standing.

3. Increased Risk Sufficient to Support Injury in Fact.

Since the *Laidlaw* decision, the U.S. Court of Appeals for the First, Second, Fourth, and Ninth Circuits have all accepted "increased risk" sufficient to satisfy the injury element of standing. *See e.g., Friends of the Earth, Inc. v. Gaston Copper Recycling Corp.*, 204 F.3d 149, 159 (4th Cir. 2000) (en banc); *Ecological Rights Foundation v. Pac. Lumber Co.*, 230 F.3d at 1144.

In *Ecological Rights Found. v. Pacific Lumber Co.*, the Ninth Circuit held "increased risk of harm can itself be injury in fact sufficient for standing." 230 F.3d at 1144, 1151 (citing *Laidlaw*, 528 U.S. at 180). The court explained that the conditions for standing do not require the plaintiff to have already suffered an injury, rather an "imminent, not conjectural or hypothetical" injury is sufficient for the injury in fact requirement. *Id*. at 1551 (internal citation omitted). Members of plaintiff organization, who lived four miles from the Lumber factory, testified that they "avoided some activities they would otherwise enjoy in and around Yager Creek" because "they fear that runoff from Pacific Lumber's two facilities is damaging the creek and its wildlife." *Id.* at 1151. Looking to *Laidlaw*, the Ninth Circuit also held deterrence of regular activities due to an increased risk is sufficient to satisfy an injury in fact for standing purposes.

Similar to the Ninth Circuit, the Fourth Circuit in *Friends of the Earth, Inc. v. Gaston Copper Recycling Corp.* explicitly held "[t]hearts or increased risk" are sufficient to prove injury in fact. 204 F.3d at 159-160. A member "testified that he and his family swim less in and eat less fish from the lake because of his fears of pollution" due to Gaston Copper's repeated permit violations. *Id.* at 159. Because plaintiff showed an "increased risk to its members' downstream

uses," plaintiff established sufficient evidence of a "threatened injury" to establish injury in fact. *Id*.; *see also Maine People's Alliance & Natural Res. Defense Council v. Mallinckrodt, Inc.*, 471 F.3d 277, 278 n.1. (1st Cir. 2006) (holding that a finding of "threat that must be close at hand, even if the perceived harm is not").

In the present case, NUWF members are threatened by an increased risk of harm due to the pollutants in the Muddy River caused by Bowman's activities. R. at 6. Similar to the members in *Gaston Copper* and *Pacific Lumber*, the NUWF members are threatened by the pollutants in the river and are forced to avoid swimming, fishing, and other activities they would otherwise enjoy in or around the environment. R. at 6. Bowman's activities dredging has increased the risk of destruction of the wetlands and pollutants entering the Muddy from his agricultural activities. R. at 6. NUWF members also testified that the frogs decreased in number due to Bowman's polluted activities in the area. Although the district court claims that NUWF members are prevented from illegal using the area for frogging, similar to *Pacific Lumber*, the members testified that they used the banks in the vicinity of and adjacent to Bowman's property. R. at 6. Many miles of the Muddy River is commonly used both upstream and downstream of Bowman's property. R. at 3. Similar to *Pacific Lumber* where the members lived four miles downstream of the factory, Bowman's activities have an increased risk to properties both upstream and downstream in addition to its 650-foot shoreline property. Experts claim there will be benefits in the future from Bowman's dredging wetlands. R. at 6. However, these benefits are too far in the future and only speculative. R. at 3. Such possibilities of richer wetland habitat cannot be considered in the face of NUWF's members evidencing an imminent increased risk of injury sufficient to support the injury in fact element of standing.

II. THIS COURT SHOULD UPHOLD THE JUDGMENT OF THE DISTRICT COURT THAT IT LACKS SUBJECT MATTER JURISDICTION BECAUSE NUWF FAILED TO MAKE A GOOD FAITH ALLEGATION OF AN ONGOING OR INTERMITTENT VIOLATION.

NUWF has not made a good faith allegation of an ongoing violation for the court to have subject matter jurisdiction under CWA § 505(a). The requirements for subject matter jurisdiction under CWA § 505(a) state that a citizen-suit may be brought against a party alleged "to be in violation" of the CWA. 33 U.S.C. § 1365(a); *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Found., Inc.*, 484 U.S. 49, 59 (1987) (*Gwaltney I)*. The statement "to be in violation" requires there to be an intermittent or continuing violation for a valid suit. *Gwaltney I*, 484 U.S. at 57. Justice Marshall specified that the language "does not permit citizen suits for wholly past violation." *Id*. at 64. Further, he defined "to be in violation" as "a reasonable likelihood that a past polluter will continue to pollute in the future." *Id.* at 57. Moreover, intermittent and sporadic violations are considered ongoing until there is no real likelihood of repetition. *Chesapeake Bay Found., Inc. v. Gwaltney of Smithfield*, 844 F.2d 170, 171-72 (4th Cir. 1988) (*Gwaltney II*). In short, without an ongoing or intermittent violation, the court does not have subject matter jurisdiction. *Id*.

Additionally, the language "*alleged* to be in violation" of Section 505 suggests Congress intended that subject matter jurisdiction require only a "*good faith* allegation to suffice for jurisdictional purposes." *Id*. at 65 (emphasis added). As such, so long as allegations are not a sham, the plaintiff needs only a good faith allegation of facts to establish jurisdiction.

The Fourth Circuit in *Gwaltney II* established a two-part test for proving the existence of an ongoing violation. *Id.* at 171. This test states that a plaintiff can show a violation is continuous or intermittent if plaintiff can either (1) prove that the violation continued on or after the date of the complaint is filed, or (2) adduce evidence from which a reasonable tier of fact could find a

continuing likelihood of a recurrence in intermittent or sporadic violations. *Id.* at 171. All courts to address the issue of subject matter jurisdiction have applied this test. *See, e.g., Natural Res. Defense Council, Inc. v. Texaco Refining and Mktg., Inc.*, 2 F.3d 493, 501 (3d Cir. 1993); *Carr v. Alta Verde Indus., Inc.*, 931 F.2d 1055, 1062 (5th Cir. 1991); *State Line Fishing & Hunting Club v. Waskom, Texas*, 754 F. Supp. 1104, 1110 (E.D. Tex. 1991). NUWF has not shown the existence of any ongoing or intermittent violation. The evidence shows that there were no violations on or after the day NUDEP and NUWF filed suit. Further, the evidence shows that there is no reasonable likelihood that Bowman will engage in intermittent or sporadic violations. Therefore, Bowman's alleged violations are wholly past and the court lacks subject matter jurisdiction.

1. <u>Bowman's violations are not ongoing.</u>

To show that a violation is ongoing, the plaintiff must set forth proof that one or more violations of the same type occurred on or after the date of the complaint. *Natural Res. Defense Council, Inc. v. Texaco Refining and Mktg., Inc.*, 2 F.3d at 501. The Third Circuit in *Texaco* found the pre-complaint violation to be continuous and intermittent based solely on proof of a post-complaint violation. *Id*. at 502, *see also, State Line Fishing & Hunting Club v. Waskom, Texas*, 754 F. Supp. at 1111 (held that multiple violations pre-complaint violations and one post-complaint violation established the violations to be ongoing in nature); *Public Interest Research Group of N.J. v. Yates Indus., Inc.*, 790 F. Supp. 511, 515 (D.N.J. 1991) (stating that evidence of post-complaint violations satisfied the first prong of *Gwaltney II*).

In the present case, the last time Bowman allegedly violated the Act was in July 15, 2011. R. at 7. Since then he has not resumed dredging and filling material in the wetland. R. at 4. There is also Bowman's testimony that the remaining untouched land is difficult to access for dredging

purposes, and he has no plans on furthering his activities into those areas. R. at 4. As such, the evidence compels the conclusion that Bowman's activities are wholly past.

2. <u>There is no reasonable likelihood Bowman will engage in intermittent violations.</u>

The second part of the *Gwaltney* test requires the plaintiff to demonstrate that the pre-complaint violations are "ongoing or intermittent" with "evidence from which a reasonable trier of fact could find a continuing likelihood of a recurrence in intermittent or sporadic violations." *Gwaltney II*, 844 F.2d at 171-172. In *Gwaltney*, the defendant's monthly violations ceased one month before the suit was filed. *Chesapeake Bay Found. v. Gwaltney of Smithfield*, 890 F.2d 690, 693 (4th Cir. 1989) (*Gwaltney III*). The Fourth Circuit held that there was a reasonable likelihood that the defendant would resume violations because the violations were repeated monthly violations and there was no evidence indicating that violations had completely ceased. *Id*. at 694. Whereas, in *Conn. Coastal Fishermen's Ass'n v. Remington Arms*, Remington Arms had operated a skeet shooting range on the shores and was alleged to have lead shot and clay targets without a permit under the CWA. 989 F.2d 1305, 1308, 1311 (2d Cir. 1993). About four months before the suit was filed, Remington shut down the range entirely. *Id*. at 1312. About a year later, it dismantled the facilities necessary for skeet shooting. *Id*. The Second Circuit found that this was sufficient evidence to conclude that there was no likelihood of repetition. *Id*. at 1312-1313; *see also Allen Cnty. Citizens for the Envt. v. B.P. Oil Co.*, 762 F. Supp. 733, 740 (N.D. Ohio 1991), *aff'd*, 966 F.2d 1451 (6th Cir. 1992) (due to a forty-one month gap between a violation that occurred pre-complaint and one that occurred post-complaint, the latter violation was deemed an isolated incident rather than a continuing violation).

In the present case, Bowman has presented sufficient evidence to prove his activities will not resume. He has terminated his activities and has made a good faith effort to plant wheat seeks

and drain the property through drainage ditch. R. at 7. He has also complied with his settlement agreement with NUDEP, under which he agreed not to clear more wetlands in the area and convey a conservation easement on the still wooded part of his property plus an additional 75-foot buffer zone to NUDEP. R. at 4. Similar to *Remington Arms* removing the equipment and making skeet shooting difficult, for Bowman it is difficult, if not impossible, to reach the additional wooded areas of his property to further violate the Act. The fourteen-month gap between the violation and the filing of the suit, the compliance with agreement, and the impossibility of furthering the violation all together evidence that the violation is not intermittent and will not likely to resume. In short, Bowman's good faith efforts show that it is not reasonably likely that Bowman will again intermittently violate the Act. Therefore, there is no subject matter jurisdiction because Plaintiff (1) failed to allege an ongoing violation and (2) the defendant can prove that the allegation of an ongoing violation is not reasonably likely to recur.

III. NUWF'S CITIZEN SUIT MUST BE BARRED BY NUDEP'S PROSECUTION OF BOWMAN BECAUSE THE ROLE OF CITIZEN SUITS IS MEANT TO BE SUPPLEMENTARY, NUDEP'S PROSECUTION WAS DILIGENT, AND ALLOWING NUWF'S CLAIM TO MOVE FORWARD WOULD DISCOURAGE VOLUNTARY SETTLEMENTS SUCH AS THOSE REACHED BY NUDEP AND BOWMAN.

Congress intended private citizens to act as private attorneys general to help enforce the Clean Water Act, hoping to increase citizen participation in government, promote transparency and trust, and to encourage government enforcement by assuring compliance with environmental statutes. Jeffrey G. Miller, *Overlooked Issues in the "Diligent Prosecution" Citizen Suit Preclusion*, 10 WIDENER L. REV. 63, 73 (2003). The citizen suit provision includes several limitations, such as prohibitions on either filing suit prior to sixty days after a plaintiff has given notice of the alleged violation, or if the state or the EPA has "commenced and is diligently prosecuting a civil or criminal action in a court of the United States." 33 U.S.C. § 1365(b)(1)(B).

If a state has brought an action against an alleged violator which is comparable to an EPA administrative order, the citizen suit is barred. 33 U.S.C. § 1319(g)(6)(A)(ii). NUWF's citizen suit is precluded NUDEP, a state agency granted authority to issue administrative orders under a state statute identical to the § 1319, R. at 4, for the following three reasons: (1) Congress intended to preclude such actions because the role of citizen suits is meant to be supplementary, (2) NUDEP's enforcement actions were diligent, and (3) Allowing NUWF's claim to move forward would discourage voluntary settlements such as those reached by NUDEP and Bowman.

1. **Congress intended to preclude actions such as NUWF's because the role of citizen suits is meant to be supplementary.**

The Supreme Court partially relied on the legislative history of the CWA to interpret the purpose of the bar on citizen suits when governmental enforcement action is underway. *Gwaltney*, 484 U.S. at 60. The Court was persuaded that citizen suits are meant to "supplement rather than supplant governmental action," and are proper only if "Federal, State, and local agencies fail to exercise their enforcement responsibility." *Id*. (citing S. Rep. No. 92 414, p. 62 (1971)). Congress intended for citizens to have a role that is interstitial, not "potentially intrusive" on agency discretion. *Id*. at 61.

Indeed, there is a "careful distribution of enforcement authority" between government regulators and private citizens such as NUWF which permit citizen suits only when the state actually *failed* to act, not when the regulator acted, but not aggressively enough in the citizen's view. *Ellis v. Gallatin Steel Co.*, 390 F.3d 461, 477 (6th Cir. 2004). Many courts hold that administrative compliance orders, such as the one given to Bowman by NUDEP, preclude citizen suits, and that to get to this conclusion, a court must look at the "overall statutory scheme," including legislative history and purpose. *McAbee v. Fort Payne*, 318 F.3d 1248, 1253 (11th Cir. 2003); *see also, N. & S. Rivers Watershed Ass'n v. Scituate*, 949 F.2d 552 (1st Cir. 1991);

Lockett v. EPA, 319 F.3d 678, 687 (5th Cir. 2003); *Jones v. Lakeland*, 224 F.3d 518, 526 (6th Cir. 2000); *Arkansas Wildlife Fed'n v. ICI Americas, Inc*., 29 F.3d 376, 380 (8th Cir.1994). Moreover, simply because the regulators are not taking the precise actions, with the alacrity citizens would prefer them to take, does not entitle them to injunctive relief. *Scituate*, 949 F.2d 552 at 558. Finally, simply because the results of enforcement action are not quite satisfactory does not mean that the agency is not "diligently" prosecuting. *Id*. at 558.

In *Scituate*, the state environmental enforcement agency issued an administrative compliance order to a town which operated a sewage facility that discharged pollutants into an estuary without the required permits. *Id*. at 553. The state elected not to assess penalties, although it was statutorily authorized to do so. *Id*. at 554. The First Circuit deferred to the state agency and held that regardless of the fact that the state did not assess penalties, the citizen action was properly barred under a state statute equivalent to CWA § 309(g) because the compliance order was analogous to the citizen suit and should thus be favored by a court. *Id*. at 557.

Like the state environmental agency in *Scituate*, NUDEP entered into a compliance order with Bowman on August 1, 2011, which was filed with the court for judicial enforcement on September 5, 2011. R. at 4-5. NUWF sued Bowman because he violated the CWA by filling wetlands without a permit. R. at 3. Their complaint required Bowman to remove the fill material and restore the wetlands. R. at 5. The compliance order did not require Bowman to remove the fill material like NUWF's complaint would have ordered, but it forbade him from clearing any more wetlands, and required him to construct and maintain a conservation easement on wooded property adjacent to the Muddy River. R. at 4. Under the logic adopted by the First, Fifth, Sixth, Eighth and Eleventh Circuits, the compliance order must preclude the citizen suit, as long as it is

comparable to the federal CWA § 309(g) statute. R. at 4. The fact that NUDEP did not assess civil penalties does not matter—NUDEP's compliance order should be favored by the Twelfth Circuit.

The Ninth Circuit is the only circuit that has rejected the argument that compliance orders preclude citizen suits. *Wash. Public Interest Research Group v. Pendleton Woolen Mills*, 11 F.3d 883 (9th Cir. 1993). The court rejected the legislative history arguments relied upon by the other circuits, dismissing them by saying that "general arguments about congressional intent and the EPA's need for discretion cannot persuade us to abandon the clear language that Congress used when it drafted the statute." *Id*. at 886. However, the Twelfth Circuit should not adopt this view because it is not persuasive. Firstly, not a single one of the several courts which have heard CWA § 309(g) cases since the Ninth Circuit's holding have adopted its reasoning.

Secondly, *Wash. Public Interest Research Group* interpreted §1319(g)(6)(A)(i), which interprets the EPA's enforcement actions, while Bowman's case is governed by §1319(g)(6)(A)(ii). See *Knee Deep Cattle Co. v. Bindana Invs.*, 904 F.Supp. 1177, 1181 (D. Oregon, 1995) (*rev'd on other grounds*, 94 F.3d 514 (9th Cir. 1996)). The reason why this is important is because while the direct language of CWA § 1319(g)(6)(A)(i) clearly limits preclusion to situations where the EPA brings a penalty action, while CWA § 1319(g)(6)(A)(ii) does not clearly limit preclusion as such; in fact, there is no requirement that states assess penalties at all. Finally, this year, the Supreme Court affirmed a holistic approach to statutory interpretation of the CWA that is not merely limited to the express language of the statute—"intent drawn from the statutory scheme as a whole" must be analyzed. *Sackett v. EPA*, 132 S.Ct. 1367, 1372 (2012) (citing *Block v. Cmty. Nutrition Inst.*, 467 U.S. 340, 349 (1984)). Thus, the

Ninth Circuit's reasoning, both off-point and unpersuasive, should not affect preclusion of NUWF's suit.

2. NUWF's suit must be precluded because NUDEP's prosecution was diligent, which is all that CWA requires.

CWA § 505 does not require the government's prosecution to be far-reaching or zealous—it requires only diligence. *Karr v. Hefner*, 475 F.3d 1192, 1197 (10th Cir. 2007). Generally, the "burden of proving non-diligence is heavy," because a government action will be presumed diligent as long as it was calculated in good faith to require compliance with the CWA. *Ohio Valley Envtl Coal.*, 808 F.Supp.2d 868, 884 (S.D.W.Va. 2011). However, deference owed is not unlimited, and the court must examine the context of the prosecution to determine whether it was diligent. *Id.* Some of these include the time spent enforcing the administrative order, whether or not the orders were "mandatory and ongoing," and whether they are capable of requiring compliance in the future. *N.Y. Coastal Fishermen's Ass'n v. New York City*, 772 F.Supp.162, 168-9 (S.D.N.Y. 1991); *Scituate*, 949 F.2d at 557; *Ohio Valley Envtl. Coal.*, 808 F.Supp.2d at 884; *Newburgh v. Sarna*, 690 F.Supp.2d 136, 155 (S.D.N.Y. 2010).

A state acts "as a pen pal, not a prosecutor," and thus not diligently prosecuting an alleged polluter, when its enforcement measures take "too long to rectify" an environmental issue. *N.Y. Coastal Fishermen's*, 772 F.Supp. at 168-9 (S.D.N.Y. 1991). The court held that the two administrative compliance orders issued by New York to a leaking landfill site did not qualify as diligent prosecution. *Id*. at 168. The first compliance order was issued in 1985, but it took until 1988 for a temporary plan to be adopted, and a permanent plan was never established. *Id*. A new administrative order was issued, but it did not demand compliance; instead, it gave defendants time to figure out what should be done. *Id*. The court was not convinced that any of

the state's demands would be enforced, and thus held that the citizen suit may move forward. *Id*. at 169.

When administrative orders impose mandatory and ongoing responsibilities onto polluters, it can be indicative of the state's diligent prosecution. *Scituate*, 949 F.2d 552, 557; *Ohio Valley Envtl. Coal.*, 808 F.Supp.2d at 884. The Massachusetts Department of Environmental Protection issued an administrative order which required the polluting town to submit regular test results from groundwater monitoring wells, spend close to one million dollars to build a new treatment facility, and enforce a sewer hookup moratorium. *Scituate*, 949 F.2d at 557. The court was satisfied that the state was diligently enforcing the administrative order, and thus, the citizen suit was barred.

The most important enquiry remains whether the enforcement action is incapable of requiring compliance with the CWA, and just because the relief requested by the state agency is more limited than those sought by the citizen-plaintiffs does not necessitate a conclusion that the state did not diligently enforce. *Newburgh v. Sarna*, 690 F.Supp.2d 136, 155 (S.D.N.Y. 2010). Citizen-plaintiffs sued a development project, requesting relief in the form of a declaratory judgement that the defendant was violating the CWA, an injunction prohibiting the expansion of the development and compelling the defendants to implement weekly testing, maximum civil penalties and damage for trespass onto city property. *Id*. at 144. On the other hand, the state's compliance order included the same declaratory judgement the citizen-plaintiffs requested, lower civil penalties, and an order compelling the defendants to take remedial measures. *Id*. at 144-45. The court held for the state, dismissing the charge that it was not diligently enforcing because its relief was more limited than the relief sought, because there was no evidence that the state was engaging in conduct that was dilatory, collusive, or in bad faith. *Id*. at 155. Another example of a

court which issued a similar holding also pointed out that just because the compliance order did not establish a final deadline for compliance did not establish a lack of state diligence. *The Piney Run Pres. Ass'n v. Carroll Cnty.*, 523 F.3d 453, 460 (4th Cir. 2008).

NUWF has a heavy burden proving that NUDEP was not diligent in its prosecution of Bowman. Unlike the state agency in *N.Y. Coastal Fishermen's*, which took too long to issue compliance orders which did not even mandate specific actions on the polluter, NUDEP's orders were timely and specific. NUDEP issued the order just one month after receiving NUWF's notice of intent letter. R. at 7. It was very specific about the actions Bowman was required to take. He was prohibited from clearing any more wetlands, and was required to convey a conservation easement on the still-wooded property. R. at 4. The easement must be maintained as a wetland, cannot be developed and must be opened to public use. R. at 4. Bowman consented to the order, has already placed the requested land into an easement, and there is no reason to believe he will violate the order. R. at 7. Clearly, the state's demands have already been enforced, unlike the demands in *N.Y. Coastal Fishermen's.*

Moreover, like the compliance order in *Scituate*, there were mandatory and ongoing responsibilities placed on the polluter. The compliance order required Bowman to construct and maintain an artificial wetland on the buffer zone between the new field and the still wooded property. R. at 4. This would be at a considerable cost to Bowman, and there is no deadline for the cessation of this responsibility. R. at 7. While it is true that NUDEP's requested relief was more limited than NUWF's, since it did not require Bowman to remove the dredged and fill material and did not have a deadline for compliance, this does not mean that the citizen suit should be allowed to move forward. NUDEP did not engage in conduct that was dilatory, collusive, or in bad faith by having a more limited form of relief. The effectiveness of the relief

sought has clearly been established, since Bowman has been complying, so NUDEP's actions were clearly calculated in good faith to require compliance with the CWA.

3. NUWF's suit should be precluded because allowing it to move forward would discourage voluntary settlements between regulators and polluters.

Finally, failure to defer to an enforcement agency's compliance order and subsequently dismiss a citizen suit can undermine agency strategy. *Karr*, 475 F.3d at 1197. If citizen-plaintiffs were allowed to bring private actions against polluters despite an effective compliance order, polluters would be less likely to compromise and settle with the agency. *Id*. at 1198. Polluters would thus potentially be exposed to duplicative administrative penalties because they would need to comply both with the order (which would expose them to civil penalties and possibly remedial actions at their expense) and with the court-mandated penalties brought on by the citizen suit. *Envtl. Conservation Org. v. Dallas*, 529 F.3d 519, 528 (5th Cir. 2008). This would discourage voluntary settlements, and would inappropriately shift primary responsibility of enforcement from "expert agencies to the necessarily generalist courts." *Id*. at 528.

NUDEP's strategy would be undermined if NUWF's suit were not precluded. Bowman would have been discouraged to enter into voluntary settlement with NUDEP, and would have spent expenses on litigation instead of on remedial measures such as creating the artificial wetland. Citizens such as Bowman would rather risk prevailing in court because that would be the only way to avoid duplicative penalties which would result from settlement and then subsequent litigation. NUDEP's expertise and discretion in deciding the best penalties for Bowman's wetland would thus be curtailed, and then, in the Supreme Court's own words in *Gwaltney*, citizen suits would supplant government action.

IV. BOWMAN VIOLATED THE CWA WHEN HE MOVED DREDGED AND FILL MATERIAL FROM ONE PART OF THE WETLAND TO ANOTHER PART OF THE SAME WETLAND BECAUSE HIS ACTIONS SATISFIED ALL THE ELEMENTS, INCLUDING ADDITION, REQUIRED FOR A VIOLATION OF CWA §§ 301(A) AND 404.

Wetlands are regulated by CWA § 404, which gives the federal government or states with an EPA Administrator-approved permit program the authority to issue permits for the discharge of dredge or fill materials into navigable waters at specified disposal sites. 33 U.S.C. § 1344. CWA § 301(a) prohibits the discharge of any pollutant by any person. 33 U.S.C. § 1311. "Discharge" is defined in the Act as the "addition of any pollutant to navigable waters from any point source." *Id*. at § 1362(12).

Bowman violated the CWA when he moved dredged and fill material from one part of a wetland to another part of the same wetland because all four § 301(a) requirements are met. None of the parties contest that there was a pollutant, navigable waters, or a point source, but NUDEP argues that there also was an addition. Firstly, circuit courts almost unilaterally agree that when an activity transforms a material from a non-pollutant to a pollutant, there is an "addition." Secondly, the unitary water theory does not apply because that theory does not apply to additions to the same navigable water. Thirdly, the definition of discharge of dredged material includes any redeposit of dredged material into the same navigable water. 40 C.F.R. § 232. Finally, none of the statutory exceptions to §404 apply to Bowman's operations. Therefore, this court should reverse the District Court's decision and hold that Bowman violated the CWA.

1. Bowman's dredge and fill operations are an addition of a pollutant.

The CWA does not define what is considered an "addition" of a pollutant. *National Wildlife Federation v. Gorsuch*, 693 F.2d 156, 175 (D.C. Cir. 1982). Courts have almost unanimously held that the removal of and redeposit of vegetation and other materials into the

same wetland constitutes an addition. *United States v. Deaton*, 209 F.3d 331 (4th Cir. 2000); *Avoyelles Sportsmen's League Inc. v. Marsh*, 715 F.2d 897 (5th Cir. 1983); *Greenfield Mills, Inc. v. Macklin*, 361 F.3d 934 (7th Cir. 2004); *Rybacheck v. U.S. E.P.A.*, 9904 F.2d 1276 (9th Cir. 1990); *United States v. M.C.C. of Florida, Inc*., 772 F.2d 1501 (11th Cir. 1985); *American Mining Congress v. U.S. Army Corps of Engineers*, 120 F.Supp.2d 23 (D.D.C. 2000). These courts have cited various persuasive reasons for their decisions: this definition is consistent with the purpose and legislative history of the CWA; it is an addition when a nonpollutant is transformed into a pollutant; and the outside world theory relied on by the district court is not persuasive.

a. A definition of addition that includes redeposit of vegetation is consistent with the purpose and legislative history of the CWA.

An interpretation of the CWA must examine its broad stated purposes and legislative history. *Gorsuch*, 693 F.2d at 170-71 (citing *Train v. Colo. Pub. Interest Research Group, Inc*., 426 U.S. 1, 9-10 (1976)). The broad stated purpose of the CWA is to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters," and Congress recognized the importance of protecting wetlands to reach this goal. *Avoyelles*, 715 F.2d at 923 (citing 33 U.S.C. § 1251(a)) (citing Legislative History, 869 (remarks of Sen. Muskie)). A reading of the term "addition" to mean redeposit of materials is consistent with the purpose and legislative history of the CWA. The redepositing of spoil dredged up and moved to another part of the wetland disturbs the physical and biological integrity of waters and the resulting damage is too great for nature to be able to restore the wetland to its undamaged state. *Deaton*, 209 F.3d at 336; *Avoyelles*, 715 F.2d at 923; *Greenfield*, 361 F.3d at 948-49; *M.C.C. of Florida*, 772 F.2d at 1506.

The integrity of waters is disturbed when the character of land is changed. *Avoyelles*, 715 F.2d at 924-25. Private landowners used bulldozers to cut vegetation to ground level, raked the

trees into windrows, burned them, and moved them to level other parts of the property. *Id*. at 901. The Fifth Circuit held that the landowners' activities were meant to replace the aquatic area with dry land, and the activities were changing the bottom elevation of the waterbody. *Id*. at 924-25. These changes were sufficient evidence that the redepositing activities changed the character of the wetland and limit the vital ecological functions it serves—which was meant to be protected under the CWA. *Id*. at 923. Bowman's dredge and fill operations are factually identical to the landowners' operations in *Avoyelles*, and thus, would similarly violate the purpose and legislative history of the CWA. His property was transformed from an aquatic area—covered in trees and other vegetation characteristic of wetlands —to dry land—a field to be covered with winter wheat. R. at 3, 5. The ecological functions of a wetland are clearly not met, and thus, the physical and biological integrity of the nation's waters were not maintained.

b. The district court incorrectly dismissed the argument that the redeposit of material is an addition because it turned a nonpollutant into a pollutant.

The CWA prohibits the addition of a pollutant, which may be accomplished without the addition of material, so the redeposit of materials already in the same wetland may constitute an addition. *Deaton*, 209 F.3d at 335. In *Deaton*, property owners dug a drainage ditch through wetlands they planned to develop into a residential subdivision. *Id*. at 333. They piled excavated dirt on either side of the ditch, a practice called sidecasting. *Id*. The court held that the deposit of dredged material from a wetland into the same wetland constituted an addition, despite the fact that there was no net increase in the amount of material in the wetland. *Id*. at 335. There was an addition because the landowner's activities transformed material from a nonpollutant to a pollutant—the material that was previously in the wetland became dredged spoil, a statutory pollutant that was not previously present on the property. *Id*; see also *Avoyelles*, 715 F.2d at 924;

Greenfield Mills, 361 F.3d at 949; *Rybacheck*, 904 F.2d at 1286; *M.C.C. of Florida*, 772 F.2d at 1506.

Despite what the district court held, Bowman's activities are not merely "mov[ing] soil… a mere few feet within a wetland." R. at 10. Like the property owners in *Deaton*, when Bowman dug up knocked down trees, leveled vegetation, pushed the trees into windrows, burned the windrows, and then placed this mixture into trenches to level the fields, his actions profoundly changed vegetation that was already into the wetland, into a dredged spoil, a pollutant. This pollutant had not previously been on the property. This transformation is critical because Bowman's dredge and fill activities significantly changed the character of the wetland in order to drain the field along the Muddy River. R. at 3-4. Thus, a definition of addition which includes Bowman's activities has been upheld by many other circuit courts and should be persuasive to the Twelfth Circuit.

c. The "outside world" theory relied upon by the district court is not persuasive.

The district court held that in other context such as CWA § 402 cases, courts have deferred to the EPA's arguments that an addition only occurs when the point source physically introduces a pollutant into the water from the outside world. *Gorsuch*, 693 F.2d at 174-75; *Nat'l Wildlife Fed'n v. Consumers Power Co*., 862 F.2d 580 (1st Cir. 1996). These arguments simply do not apply to a CWA § 404 scenario such as the instant case. Firstly, the *Gorsuch* and *Consumers Power* holdings are limited to their facts because they were decided based on deference to the EPA's arguments. *Catskill Mountains Chapter of Trout Unlimited v. New York*, 273 F.3d 481, 490 (2d Cir. 2001). Those courts merely held that the EPA's interpretation was reasonable, not whether it was "the best one . . . or even whether it is more reasonable than the [appellants'] interpretation." *Gorsuch*, 693 F.2d at 183. These cases were decided before *United*

States v. Mead, where the Supreme Court held that informal agency statements do not deserve the broad Chevron deference, so a court today would not give the EPA statements such deference. *Catskill Mountains*, 272 F.3d at 490 (citing 553 U.S. 218 (2001)). Moreover, in CWA § 404 cases, the EPA has urged a broader definition of addition to include redeposited materials, so the logic in *Gorsuch* and *Consumers Power* is simply no longer valid. *Greenfield Mills*, 361 F.3d at 948.

Moreover, there is a logical inconsistency in applying the outside world theory to CWA § 404. *Avoyelles*, 715 F.2d 897, n. 43. A dredged material by definition is material that comes from the water itself, so a requirement that pollutants come from outside sources would remove the dredge-and-fill provision entirely. *Id*. Clearly, Congress could not have intended the outside world theory used in CWA § 402 to apply to CWA § 404 cases.

2. <u>The district court incorrectly interpreted the unitary water theory as described in the Water Transfers Rule and by the Supreme Court and the Eleventh Circuit</u>.

The unitary navigable waters theory holds that it is not an addition to move existing pollutants from one navigable water to another. See, e.g., *Friends of Everglades v. S. Florida Water Mgmt. Dist*., 570 F.3d 1210, 1217 (11th Cir. 2009). An addition occurs once pollutants enter navigable waters from a point source, not when they are moved between navigable waters. *Id*. The unitary waters theory was criticized by the Supreme Court recently in *South Florida Water Mgmt Dist. v. Miccosukee Tribe of Indians*, although the Court ultimately declined to resolve it because it was not properly briefed. 541 U.S. 95, 107-109 (2004) ("The 'unitary waters' approach could also conflict with current NPDES regulations"). The theory was later confirmed in a final rule ("Water Transfer Rule") promulgated by the EPA which was affirmed

in *Friends of Everglades*. 40 C.F.R. § 122.3 states that the following is excluded from permitting requirements:

> Discharges from a water transfer. Water transfer means an activity that conveys or connects waters of the United States without subjecting the transferred water to intervening industrial, municipal, or commercial use. This exclusion does not apply to pollutants introduced by the water transfer activity itself to the water being transferred.

The district court held that under this theory, when Bowman moved soil a few feet on the wetland, he was not adding pollutants because once the pollutants were in one navigable water, they are all other navigable waters and thus cannot be added.

However, neither the Water Transfer Rule nor *Friends of Everglades* and *Miccosukee Tribe* are on point. In fact, they are addressing a completely different situation; while the instant case involves Bowman depositing pollutants from one part of a water to a part of the same water, these authorities are addressing cases where a defendant is depositing pollutants from one navigable water into another. The *Miccosukee Tribe* Court reinforced that it is important to distinguish between fact patterns that involve polluting within the same navigable water and those that involve polluting between different navigable waters. 541 U.S. at 109-12. Thus, this decision "has not modified court of appeals' decisions holding that an 'addition' of pollutants into a navigable body of water occurs for purposes of section 301(a) of the CWA . . . where soil or vegetation on a wetland (that is a navigable body of water under the CWA) are dug up or excavated and "re-deposited" back into that same wetland." Steven G. Davison, *Defining "addition" of a pollutant into navigable waters from a point source under the Clean Water Act: The questions answered—and those not answered—by* South Florida Management District v. Miccosukee Tribe of Indians, 16 FORDHAM ENVTL. L. REV 1, 86 (Fall 2004).

Since *Miccosukee Tribe* affirmed the distinction between polluting in the same water and a different water, the Water Transfer Rule does not apply to the instant case. The Rule states that

transferring pollutants between distinct navigable waters is not an addition. *Friends of Everglades*, 570 F.3d at 1227. Thus, the unitary water theory is upheld in cases such as *Friends of Everglades* where a defendant moved polluted water from a canal to a distinct navigable water such as a lake, but even that court limited its holding to such fact patterns. That court used the *Chevron* test to decide that the CWA was ambiguous, and that the Water Transfer Rule was a permissible construction of the ambiguous statute. *Id*. at 1227-28. The court noted that its decision that the CWA was ambiguous was limited to the *Friends of Everglades* facts, and not those where pollutants are moved within the same water. *Id*. at 1221. The context and facts of a case mean a lot with regard to circumstances under which a statute is ambiguous, so they are important. *Id*. (quoting *United States v. Santos*, 553 U.S. 507, 512 (2008)).

To make a final point, even if the Twelfth Circuit would hold that the Water Transfer Rule applies to the instant case, it still would not preclude Bowman's activities from being considered an addition. The Rule specifically excludes "pollutants introduced by the water transfer activity itself to the water being transferred." Bowman's dredge and fill activities result in a pollutant being introduced where a non-pollutant previously existed. Thus, the unitary water theory and its interpretations are inapplicable to the instant case, and the district court's reasoning should be rejected by this court.

3. The district court failed to consider Army Corps of Engineers rules which clarify the treatment of dredged and fill material.

The Army Corps of Engineers ("Corps"), the agency which regulates CWA § 404 permits along with the EPA, has provided ample guidance which holds that Bowman's activities should be considered an addition. In 1986, the Corps issued a regulation ("Tulloch rule") defining the term "discharge of dredged material" as stated in CWA § 404 to include "[a]ny addition, including any redeposit, of dredged material . . . which is incidental to any activity." *American*

Mining Cong. v. U.S. Army Corps of Eng'rs., 120 F.Supp.2d at 25. This rule requires a permit for even incidental deposits of dredged and fill material, which are called incidental fallbacks. The Tulloch rule was invalidated by the D.C. Circuit for being contrary to Congress' intentions not to regulate incidental fallback. *Nat'l Mining Ass'n v. U.S. Corps of Engrs.*, 145 F.3d 1399, 1405 (D.C.Cir. 1998). The Corps and the EPA modified their definitions of "discharge of dredged materials" to read:

> Except [with regarding dredged material extracted for commercial use, activities involving cutting or removing vegetation above the ground which does not redeposit excavated soil material, or incidental fallback], the term discharge of dredged materials means any *addition* of dredged materials into, *including redeposit of dredged material* other than incidental fallback within, the waters of the United States.

40 C.F.R. § 232.2. (emphasis added). The regulating agencies' determinations of whether a particular redeposit of dredged material in waters would require a CWA § 404 permit would be done on a case-by-case basis. Further Revisions to the Clean Water Act Regulatory Definition of "Discharge of Dredged Material," 66 F.R. 4550-01 (2001).

These final rules clarify that the agencies intended to include redeposited material such as the type used by Bowman in their definitions of "discharge of dredged materials," where "discharge" is defined as "addition." In fact, the definitions proposed by this rule were recently affirmed by the Supreme Court in *Coeur Alaska, Inc. v. Se. Alaska Conservation Council*. 557 U.S. 261, 275 (2009). In that case, the Court rejected the argument of an environmental group that CWA § 404 contains an implicit exception that denies the Corps the authority to permit a discharge of fill material if it is subject to an EPA new source performance standard. *Id*. at 276. The Court held instead that the definitions provided in 40 C.F.R. § 232.2 offer clear answers to the question of the meaning of discharged dredge fill material, and this "defined, and workable, line" is the way that discharges must be regulated. *Id*. at 276-77.

Like the definitions upheld in *Coeur Alaska*, the definition of "discharge of dredged material" applies perfectly to the instant case. Clearly, the Corps and the EPA intended to regulate the type of redeposit generated by Bowman's activities, which was neither incidental fallback nor done for commercial use. Since this rule has been modified so many times, the agencies had many chances to refine the definitions, which could have been altered to exclude redeposits, if that was what the agency intended. Despite this, the agencies have remained firm in their understanding that an addition includes a redeposit.

4. <u>None of the exceptions in 33 USC 1344(f) applies here</u>.

CWA § 404 regulates the discharge of dredged and fill material, but there are a few statutorily-recognized exceptions to the EPA/Corps' authority. Two possible exceptions Bowman can argue are the exception for "normal farming . . . activities such as . . . seeding" and the "for the purpose of maintenance." 33 U.S.C. § 1344(f)(1)(A)-(B). However, the next section holds that if the purpose of the discharge of dredged or fill material is to bring "an area of the navigable water into a use to which it was not previously subject," it must apply for the federal permit; i.e., the exceptions of the prior two sections do not apply. *Id*. at § 1344(f)(2). Thus, to successfully argue an exception, Bowman has the burden of demonstrating that his activities satisfy both the requirements of §404(f)(1) while simultaneously avoiding §404(f)(2). See, e.g., *United States v. Brace*, 41 F.3d 117, 124 (3d Cir. 1994). The subsections, when read together, "provide a narrow exemption for agricultural activities that have little or no adverse effect on the waters of the United States." *Id*. Bowman may not take advantage of these exceptions, because his activities transformed the wetland into a use to which it was not previously subject. Bowman's property was transformed from wooded or previously wooded land, which was

transformed into a field to be sowed with winter wheat, a new use. R. at 3, 5. Thus, Bowman is precluded from arguing that his land is exempt from the federal permitting requirement.

CONCLUSION

For the foregoing reasons, the Twelfth Circuit should hold that (1) NUWF did not have standing to bring a claim under CWA §505; (2) The court has subject matter jurisdiction to hear the case, (3) NUWF's citizen suit should be precluded because NUDEP diligently prosecuted the claim, and (4) Bowman violated CWA § 404 when he performed dredge and fill operations in the same wetland.