Team No. 44

CA. No. **13-1246**

IN THE UNITED STATES
COURT OF APPEALS FOR THE TWELFTH CIRCUIT

NEW UNION WILDLIFE FEDERATION
Appellants,
v.
NEW UNION DEPARTMENT OF ENVIRONMENTAL PROTECTION
Intervenor-Appellant,
v.
JIM BOB BOWMAN
Appellee.

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

Brief for William Tiberius Shatner, ADMINISTRATOR,
New Union Department of Environmental Protection, Intervenor-Appellant.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

UNITED STATES SUPREME COURT

UNITED STATES CIRCUIT COURTS OF APPEALS

UNITED STATES DISTRICT COURTS

CONSTITUTIONAL PROVISIONS

STATUTES

RULES

REGULATIONS

JURISDICTIONAL STATEMENT

Pursuant to 28 U.S.C. § 1331 (2006), the district courts maintain original jurisdiction over any matters arising out of the laws of the United States including the Clean Water Act of 1972 ("CWA"), 33 U.S.C. § 1251 (2006). The Court of Appeals for the Twelfth Circuit maintains jurisdiction over the final judgments of the District Court, including cases dismissed on summary judgment. 28 U.S.C. §§ 1291, 1294(1) (2006).

STATEMENTS OF THE ISSUES PRESENTED ON APPEAL

1. Whether the New Union Wildlife Federation ("NUWF") has standing to bring suit against Bowman for violating the CWA.

2. Whether the Court lacks subject matter jurisdiction under § 505(a) because Bowman's alleged violations are wholly past.

3. Whether diligent prosecution of Bowman by New Union Department of Environmental Protection ("NUDEP"), pursuant to § 505(b) of the CWA, would bar NUWF's citizen suit.

4. Whether Bowman violated § 404 of the CWA by moving fill material from one part of a wetland adjacent to navigable water to another part of that same wetland.

STATEMENT OF THE CASE

I. Procedural Background

On August 10, 2011, NUDEP filed a complaint against Jim Bob Bowman in federal court under § 505 of the CWA. (R. at 5.) On August 30, 2011 NUWF, a not for profit organization established to protect fish and wildlife and their habitats, also filed a § 505 complaint against Bowman seeking injunctive relief for Bowman to remove the fill material and restore the wetlands. (R. at 4, 5.) The Court permitted NUDEP to intervene in NUWF's suit. (R. at 5.)

NUDEP and NUWF and Bowman filed cross-motions for summary judgment. (R. at 5.) Bowman argued that NUWF lacks standing because there was no traceable injury and the

Court lacks subject matter jurisdiction because the violations are wholly past, the State of New Union already took actions against him by issuing the consent decree, and that there is no § 404 violation since addition was not met. (R. at 5.) NUWF argued that Bowman violated § 404 by acting without a permit. NUDEP joins Bowman's motion for summary judgment on the issues of the continuing violation and diligent prosecution and joins NUWF's motion for summary judgment on the issues of standing and the violation of § 404. (R. at 5.)

II. Factual Background

Bowman owns 1000 acres of land adjacent to the Muddy River, including 650 feet of shoreline along the river. (R. at 3.) The public commonly uses the area both upstream and downstream from his property for recreational activities. (R. at 3.) On June 15, 2011, Bowman began to clear part of his land adjacent to the Muddy River for agricultural use. (R. at 4.) Using a bulldozer, he cut down trees and other vegetation, pushing the dead plant life into windrows, which he then burned. (R. at 4.) He leveled the field by pushing soil from the higher elevations to the lower. (R. at 4.) Bowman formed a swale to drain the field into the Muddy River, which runs 40 miles up and down stream from his land. (R. at 4.) By July 15, 2011, Bowman completed his work, leaving approximately 150 feet of land adjoining to Muddy untouched. In September 2011, the leveled field drained such that winter wheat could be planted. (R. at 4, 5.)

On July 1, 2011, locals and members of NUWF learned of Bowman's activities, particularly noting the more polluted appearance of the Muddy and the apparent depletion of the frog population. (R. at 4.) They responded by sending Bowman, the EPA, and NUDEP a notice to sue Bowman under § 505 of the CWA. (R. at 5.) Upon receiving this notice, NUDEP contacted Bowman, informing him that he had violated federal and state law. (R. at 4.) NUDEP reached a settlement with Bowman which provided that he would not clear more wetlands and he

would establish and maintain a conservation easement that permitted public entry and recreational use. (R. at 4.) This agreement was incorporated into an administrative order and finalized August 1, 2011. (R. at 4.) The agreement did not include a penalty of up to $125,000, which NUDEP could impose at its discretion. (R. at 4.)

During discovery, NUWF submitted affidavits from three of its members, Dottie Milford, Zeke Norton, and Effie Lawless, all of whom Bowman also deposed. (R. at 6.) They each use the Muddy River, including areas in the vicinity of or along the property of Bowman, for recreational purposes, such as boating, fishing, and picnicking. (R. at 6.) All three testified that they are aware of the differences in the wetlands after Bowman's actions, and feel a loss from the destruction of the wetlands. (R. at 6.) They are each aware that the wetlands serve valuable functions in maintaining the integrity of the Muddy River in absorbing sediment and pollutants, and serving as buffers for flooding. (R. at 6.) Hence, not only do they fear that the Muddy is more polluted, but they also fear that it will continue to become more polluted if adjacent wetlands are cleared and drained for agricultural purposes. (R. at 6.) Milford in particular testified that the Muddy looks more polluted to her than it did prior to Bowman's actions. (R. at 6.)

Norton also testified that he has used the area for frogging for many years for both recreational and subsistence purposes. (R. at 6.) Whereas he could previously count on catching a dozen frogs during the right seasons, he now attests that even in the right season, there are no longer any frogs in the drained field and he is lucky to find only two or three good sized frogs in the remaining woods and buffer area. (R. at 6.) He admits that the Bowman property was properly posted against trespassing and that Norton "supposed he might have been trespassing" while frogging on the property. (R. at 6.) A NUDEP biologist testified, however, that once the

conservation easement in the buffer zone is fully established, it will provide a richer wetland than the former, creating a higher quality and increased habitat for frogs. (R. at 6.)

SUMMARY OF THE ARGUMENT

NUWF has demonstrated sufficient injuries in fact to establish constitutional and representational standing to sue Bowman for violating the CWA by adding dredge and fill material to navigable waters from a point source without a permit. NUWF has proven all three requirements in order to establish constitutional standing to sue. The District Court erred in holding that Bowman's actions have not harmed Milford, Norton, and Lawless's recreational and aesthetic interests in the Muddy River, and they have each suffered an injury sufficient to establish standing. Their injuries are fairly traceable to Bowman's actions, and are likely redressable by the court through civil penalties and an order to remove the fill material and restore the wetlands. NUWF also has representational standing to bring suit against Bowman on behalf of its members Milford, Norton, and Lawless.

The court lacks subject matter jurisdiction to hear a CWA citizen suit as Bowman's violations were wholly past. Since Bowman ceased his filling operation on July 15, 2011, the active conduct requirement § 505(a) was not met, preventing suit from being brought. 33 U.S.C. § 1365(a) (2006). The alleged distinction between § 404 and § 402 violations, which arises out of required permitting bodies, does not relate to the requirement for continuing violation and ignores the similarities in the impacts of the two violations, where fill materials are deemed remaining effects of a wholly past violation. The court should maintain the same definition of continuing action to all acts of dumping to fulfill the jurisdictional requirement implied by 33 U.S.C. § 1365(a). Such a ruling would do little to diminish the enforceability of the act while simultaneously limiting the court's caseload.

NUWF is further barred from suit by the diligent prosecution of Bowman by NUDEP, as required under 33 U.S.C. § 1365(b)(1)(B). NUDEP met the required time constraints necessary for diligent prosecution by entering an administrative order in thirty days and a within the 60-day notice period. Furthermore, the actions themselves would be considered diligent prosecution, since they address the problem raised in the notice and fall within the discretion of the enforcing agency.

Bowman's activities met the standard of addition, and therefore constituted a § 404 violation. The lower court erred in granting deference to the Environmental Protection Agency's ("EPA") outside world definition of addition since it was only used as a litigation position in § 402 cases, and therefore never formalized. The lower court should have also hesitated in granting deference to the EPA since the Army Corps of Engineers, and not the EPA, is in charge of regulating the § 404 permitting scheme. Without the obligatory deference, the court is free to recognize that the outside world definition of addition is illogical to apply in cases involving fill material, as there need not be an external pollutant. With an outside world definition, environmental consequences would ensue such that the intention of the CWA would be undermined. By applying the appropriate definition of addition, the court must find that addition was met, yielding a § 404 violation.

STANDARD FOR REVIEW

The District Court's dismissal for summary judgment is a question of law and subsequently requires *de novo review*. Thus, the District Court's dismissal for lack of subject matter jurisdiction and lack of standing must be reviewed *de novo*. The District Court erred in its determination and therefore its decision should be reviewed for judgment as a matter of law. *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Found., Inc.*, 484 U.S. 49 (1987).

ARGUMENT

I. NUWF HAS DEMONSTRATED SUFFICIENT INJURIES IN FACT TO ESTABLISH CONSTITUTIONAL AND REPRESENTATIONAL STANDING TO SUE BOWMAN FOR VIOLATING THE CWA BY ADDING FILL MATERIAL TO NAVIGABLE WATERS FROM A POINT SOURCE WITHOUT A PERMIT.

The District Court erred in granting summary judgment against NUWF on the issue of standing. Under Article III of the Constitution, the judicial power of the federal courts is limited to resolving "cases" and "controversies." U.S. Const. art. III, § 2. The Supreme Court has held that there are three minimum requirements to establish Article III standing: first, the party bringing suit must establish an "injury in fact"; second, the injury must be "fairly traceable" to the defendant's challenged actions; third, it must be "likely" that the injury will be redressed by a decision in the plaintiff's favor. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992). Furthermore, the Supreme Court has held that an association has representational standing to bring suit on behalf of its members when: "(a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit." *See Hunt v. Washington State Apple Advertising Com'n*, 432 U.S. 333 (1977).

The District Court erred in concluding that NUWF's allegations do not constitute a sufficient injury in fact to establish Article III standing. NUWF has submitted affidavits from three of its members who have suffered sufficient injuries by Bowman's violations of the CWA to establish constitutional standing, and therefore representational standing for NUWF as well.

A. NUWF has proven all three requirements in order to establish constitutional standing to sue.

NUWF's allegations clearly fulfill all three of the requirements for constitutional standing. Article III standing requires at minimum an "injury in fact" that is "fairly traceable" to the defendant's challenged actions and is "likely" redressable by the court. *Defenders of Wildlife*, 504 U.S. at 560-61. An "injury in fact" is an "invasion of a legally protected interest" that is "concrete and particularized," "actual or imminent," and "not 'conjectural' or 'hypothetical.'" *Id.* at 560. Next, there must be a "causal connection" between the injury and the alleged conduct of the defendant, without an intervening cause by a third party. *Id.* at 560. Finally, the injury must be "likely," and not merely speculatively, to be redressed by a decision in the plaintiff's favor. *Id.* at 561. Because NUWF has established an injury in fact that is fairly traceable to Bowman's actions and is likely to be redressed by a favorable decision by the courts, it has Article III standing to bring suit against Bowman.

i. Bowman's actions have harmed Milford, Norton, and Lawless's recreational and aesthetic interests in the Muddy River, and they have each suffered a sufficient injury in fact due to his destruction of the wetlands.

The District Court erred in holding that NUWF did not establish a sufficient injury in fact on behalf of its members. In defining an injury in fact, the Supreme Court has held that an injury need not harm one's economic interest; rather, injury to "aesthetic, conservational, and recreational" values is sufficient to establish an "injury in fact," such as showing that there are citizens who use the affected area and "for whom the aesthetic and recreational values of the area will be lessened" by the challenged activity. *See Sierra Club v. Morton*, 405 U.S. 727, 735, 738 (1972) (internal quotation marks omitted). An injury, however, need not be substantial; "an identifiable trifle is enough for standing." *U.S. v. Students Challenging Regulatory Agency Procedures (SCRAP)*, 412 U.S. 669, 689 n. 14 (1973). Indeed, the court has ruled that "[t]o

survive [a] motion for summary judgment on standing, respondents need not prove that they are actually or imminently harmed. They need show only a 'genuine issue' of material fact as to standing. This is not a heavy burden." *Defenders of Wildlife*, 504 U.S. at 590 (internal citations omitted).

In applying this standard in *Friends of the Earth, Inc. v. Laidlaw Environmental Services (TOC). Inc.*, Friends of the Earth submitted an affidavit from a citizen who alleged that a river "looked and smelled polluted." His concerns about the pollution prevented him from recreational activities such as fishing, camping, swimming, or picnicking in or near the river. The Supreme Court ruled that this was sufficient to establish an injury in fact. 528 U.S. 167, 181-82 (2000). Similarly, another member claimed that she no longer "picnicked, walked, birdwatched, [nor] waded in and along" the river "because she was concerned about the harmful effects from discharged pollutants," which the court ruled "adequately documented injury in fact." *Id.* at 182-83.

Several of the federal Courts of Appeals have applied this standard similarly, finding sufficient evidence for injury in fact in various cases. *See, e.g.*, *Friends of the Earth v. Consolidated Rail Corp.*, 768 F.2d 57, 61 (2d Cir. 1985) (finding that one citizen's statement that he "find[s] the pollution in the river offensive to [his] aesthetic values" was sufficient (internal quotation marks omitted)); *Public Interest Research Group of New Jersey, Inc. v. Powell Duffryn Terminals Inc.*, 913 F.2d 64, 71 (3d Cir. 1990) (holding that affidavits from citizens alleging that pollution has prevented them from enjoying recreational activities such as hiking, bicycling, or birdwatching were sufficient); *Friends of the Earth, Inc. v. Gaston Copper Recycling Corp.*, 204 F.3d 149, 152-53 (4th Cir. 2000) (holding that an allegation such as a citizen limiting his swimming and fishing time in a lake due to concerns about pollution was sufficient); *Sierra Club*

v. Franklin County Power of Illinois, LLC, 546 F.3d 918, 925 (7th Cir. 2008) (holding that one member alleging "likely exposure" to pollutants was sufficient); *and U.S. v. Metropolitan St. Louis Sewer Dist. (MSD)*, 883 F.2d 54, 56 (8th Cir. 1989) (finding that citizens whose recreational purposes are adversely affected by the pollution of waters was sufficient).

While the Supreme Court has rejected allegations of injury in fact, it was in the context of a notably different fact pattern. In *Sierra Club v. Morton*, the Supreme Court found that the Sierra Club failed to establish an injury in fact because it did not show that its members used the area in question "for any purpose, much less that they use it in any way that would be significantly affected by the proposed actions" of the defendants. 405 U.S. at 735.

Finally, where evidence presented in the record is contradicted by other sources, the courts have ruled that "[d]isposition by summary judgment [is] . . . inappropriate" because it is an "issue of fact" that should be weighed and evaluated by a finder of fact. *See Natural Resources Defense Council Inc. v. Watkins*, 954 F.2d 974, 981 (4th Cir. 2008).

With respect to NUWF's standing to bring suit, NUWF's affidavits from its members Dottie Milford, Zeke Norton, and Effie Lawless clearly establish an injury in fact. Unlike the case in *Sierra Club v. Morton*, where the Sierra Club failed to prove that its members used the polluted area for any purpose, the three affiants here have each testified that they use the Muddy River for recreational purposes, including boating, fishing, and picnicking, on the banks of the river on or in the vicinity of Bowman's property. Each "[felt] a loss from the destruction of the wetlands" despite the buffer zone, indicating the severe amount of damage inflicted. Not only do they each "[fear] the Muddy is more polluted as a result," but they also fear that it "will be far more polluted if other adjacent wetlands are cleared and drained for agricultural uses." (R. at 6). Furthermore, Milford testified that "the Muddy looks more polluted to her than it did prior to

Bowman's activities." (R. at 6). These affidavits are plainly consistent with the Supreme Court's decision in *Laidlaw*, as well as those of the several federal Courts of Appeals, in which testimony that an affected area looked more polluted was ruled a sufficient injury in fact. Bowman's land clearing and leveling operations clearly infringed upon Milford, Norton, and Lawless's aesthetic and recreational values in the area.

Furthermore, Norton's testimony that there are no longer any frogs in the drained field and substantially fewer in the remaining woods and buffer area also constitute a sufficient injury in fact. His recreational purposes in the area are obviously diminished by Bowman's actions in clearing the land. The District Court erred in dismissing Norton's activities for their alleged illegality; in accordance with NUDEP's decree, the conservation easement that Bowman has agreed to create in the buffer zone, one of the areas that Norton frogs, is to remain open to public and recreational use. Therefore, Norton's actions are not entirely illegal, and his testimony that the buffer area has fewer frogs and inhibits his recreational frogging gives rise to a sufficient injury to support standing. The District Court also erred in giving preference to the deposition of the NUDEP biologist, who testified that the conservation easement might actually improve the quality of the land as a habitat for frogs. His contradictory testimony does not dismiss Norton's alleged injury, but rather creates a genuine issue of fact that must be evaluated by a trier of fact, pursuant to the court's rulings in both *Defenders of Wildlife* and *Watkins*.

The affidavits of Milford, Norton, and Lawless clearly established injuries in fact to each of their recreational values sufficient to support standing, and the District Court erred in giving preference to the affidavit of the NUDEP biologist and granting summary judgment on the issue.

ii. The injuries suffered by the members of NUWF are fairly traceable to Bowman's actions.

NUWF members Milford, Norton, and Lawless's injuries are fairly traceable to Bowman's destruction of the wetlands. In assessing the traceability of an injury, the Supreme Court has ruled that a plaintiff need not establish a "but-for" causal link between the defendant's actions and the injury suffered. *See Duke Power Co. v. Carolina Environmental Study Group, Inc.*, 438 U.S. 59, 77-78 (1978). Nor does a plaintiff need to show "scientific certainty" that the defendant's actions, and the defendant's actions alone, caused the injury. *Powell Duffryn*, 913 F.2d at 72. Instead, the "fairly traceable" requirement only intends to ensure that the injury was not caused by a third party. *Defenders of Wildlife*, 504 U.S. at 560. "Where a plaintiff has pointed to a polluting source as the seed of his injury, and the owner of the polluting source has supplied no alternative culprit, the 'fairly traceable' requirement can be said to be fairly met." *Gatson Copper*, 204 F.3d at 162.

The Third Circuit's three-part test for traceability requires a plaintiff to show that the defendant has "1) discharged some pollutant in concentrations greater than allowed by its permit 2) into a waterway in which the plaintiffs have an interest that is or may be adversely affected by the pollutant and that 3) this pollutant causes or contributes to the kinds of injuries alleged by the plaintiffs." *Powell Duffryn*, 913 F.2d at 72.

In applying this test in *Sierra Club, Lone Star Chapter v. Cedar Point Oil Co. Inc.*, the court found that the plaintiff's injuries were "fairly traceable" to the defendant's actions, reasoning that where the defendant had no permit to discharge pollutants whatsoever, "any discharge exceeds that which is allowed under the CWA," fulfilling the test's first requirement. 73 F.3d 546, 558 (5th Cir. 1996). The court further found that an individual with recreational interests in the vicinity of a defendant's discharge fulfills requirement two. Finally, it ruled that

the plaintiff did not need to show that the defendant's discharge "*in particular* injured him in any way," but rather that it "*contributes* to the pollution that impairs [his] use of the bay." *Id.* at 558.

In the present case, the injuries suffered by Milford, Norton, and Lawless are also "fairly traceable" to Bowman's actions, and fulfill all three prongs of the Third Circuit's test. Similar to *Cedar Point Oil Co.*, Bowman's discharges were obviously in concentrations greater than allowed by a permit under the CWA, being that he had no permit whatsoever. Pursuant to the second requirement, as established above, Milford, Norton, and Lawless all have recreational interests in the Muddy River that have been adversely affected by Bowman's discharges. With regards to the third requirement, Bowman's activities, which included bulldozing, burning, and burying trees and vegetation in the wetlands, clearly contribute to the type of pollution alleged by the plaintiffs. Finally, because the defendant has not suggested any alternative culprit for the pollution, the "fairly traceable" requirement can be said to be fairly met by his actions, pursuant to the ruling in *Gaston Copper*. 204 F.3d at 162.

The injuries suffered by Milford, Norton, and Lawless are all fairly traceable to the actions of Bowman and fulfill each of the requirements of the Third Circuit's test for traceability.

iii. The injuries are likely redressable by the court through civil penalties and an order to remove the fill material and restore the wetlands.

Consistent with Article III standing, the injuries of NUWF's members are likely to be redressed by a favorable decision by the court. In evaluating redressability, the court has reasoned that similar to the "fairly traceable" requirement's focus on "the connection between the defendant's conduct and the plaintiff's injury, the redressability factor focuses on the connection between the plaintiff's injury and the judicial relief sought." *Powell Duffryn*, 913 F.2d at 73.

Regarding civil penalties, the Supreme Court has ruled that "Congress has found that civil penalties in Clean Water Act cases . . . deter future violations." *Laidlaw*, 528 U.S. at 185. The courts have also ruled that "[w]here Congress has expressly granted a right of action and plaintiffs have shown a distinct and palpable injury, plaintiffs may invoke the general public interest in support of their claim." *Powell Duffryn*, 913 F.2d at 73 (internal quotations marks omitted).

In evaluating the necessity of injunctive relief, a plaintiff can demonstrate redressability by "alleg[ing] a continuing violation or the imminence of a future violation." *Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83, 108 (1998). The courts have also held that injunctive relief is appropriate "[w]here a plaintiff complains of harm to water quality because a defendant exceeded its permit limits." *Id.* at 73.

The injuries of NUWF's members are redressable by both civil penalties and injunctive relief in the form of an order to remove the fill material and restore the wetlands. The CWA grants NUWF and its members a right of action to bring suit against Bowman for their injuries due to his violation; because civil penalties serve the general public's interest in clean waterways, the injuries are likely to be redressed by a favorable decision. Similarly, Bowman had no permit to discharge pollutants in the Muddy River; therefore, any pollutants discharged were in excess of permit limits. (R. at 4.) Thus, injunctive relief is appropriate because Milford, Norton, and Lawless have complained of pollution and fear for the integrity of the Muddy River due to Bowman's actions. Finally, NUWF alleges in its complaint that there is a continuing violation. Although NUDEP does not join NUWF in the assertion of this claim, an alleged continuing violation is enough to establish the necessity of injunctive relief, and therefore redressability.

NUWF and its members have established clear injuries in fact that are traceable to Bowman's violations of the CWA and likely to be redressed by a favorable decision by the courts. Therefore, NUWF has Article III constitutional standing to bring suit against Bowman and the District Court erred in granting summary judgment against NUWF on the issue of standing.

B. NUWF has representational standing to bring suit against Bowman on behalf of its members Milford, Norton, and Lawless.

The Supreme Court has ruled that an association has representational standing to bring suit on behalf of its members when "(a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit." *Hunt,* 432 U.S. at 343.

NUWF fulfills all three requirements for representational standing to bring suit on behalf of its members against Bowman. NUWF's members not only have constitutional standing to bring suit, but the CWA expressly authorizes "any citizen" to bring suit against any person for an alleged violation of the CWA. 33 U.S.C. § 1365(a) (2006). The CWA defines "citizen" as "a person or persons having an interest which is or may be adversely affected." 33 U.S.C. § 1365(g) (2006). Thus, because Milford, Norton, and Lawless's recreational interests in the Muddy River and Norton's frogging activities are adversely affected by Bowman's actions, they each have standing to sue in their own right. Furthermore, Milford, Norton, and Lawless's interest are certainly germane to NUWF's purpose. NUWF's purpose is to protect the fish and wildlife of New Union by protecting their habitats, among other things. (R. at 4.) NUWF has an obvious stake in protecting the integrity of the Muddy River, as well as ensuring that its frog population is not adversely affected by Bowman's actions. Finally, the affidavits of Milford,

Norton, and Lawless are sufficient to establish standing and the relief requested does not require their direct participation for the lawsuit's proceedings. Thus, NUWF fulfills all three requirements for representational standing on behalf of its members in order to bring suit against Bowman.

NUWF clearly has standing, both constitutional and representational, to bring suit against Bowman for his violation of the CWA. Not only has NUWF established that three of its members have suffered injuries in fact that are fairly traceable to Bowman's actions and likely to be redressed by a favorable decision by the court, but NUWF also has representational standing to bring suit on behalf of those members. The District Court erred in dismissing NUWF on summary judgment for lack of standing.

II. THE DISTRICT COURT LACKS SUBJECT MATTER JURISDICTION TO HEAR NUWF'S CASE UNDER § 505(A) OF THE CWA BECAUSE BOWMAN'S VIOLATIONS ARE WHOLLY PAST.

While NUWF has standing to bring a case in federal court under the CWA for the injuries sustained, the jurisdictional requirements set out by the CWA prevent their suit against Bowman from progressing. The language of § 505(a)(1) of the CWA indicates that suits can only be brought when the violation is ongoing. 33 U.S.C. § 1365(a)(1) (2006). Since Bowman ceased land-clearing operations in July of 2011, 45 days prior to NUWF filing suit, the violation would be considered wholly past and subsequently barred. (R. at 4-5.) Furthermore, the statute creates no separate standard for determining what is wholly past for different types of violations; creating such a distinction based on the separate permitting procedure is questionable in practice. A single standard for wholly past incidents based on the existence of an ongoing action would provide a comparable level of remediation with less litigation.

A. Since there has been no additional filling, Bowman's actions are not ongoing violations as required by § 505(a).

The actions taken by Bowman are considered a wholly past violation under the CWA. Under § 505, citizen suits are permitted against persons "who [are] alleged to be in violation of (A) an effluent standard or limitation under this chapter or (B) an order issued by the Administrator or a State with respect to such a standard or limitation." 33 U.S.C. § 1365 (2006). The definition of a violation as "the discharge of any pollutant" within § 301 further elucidates the requirement of a continuous action. 33 U.S.C. § 1311(a)(1) (2006). Since the discharge of pollutants, as defined in § 502, consists of the "addition of pollutants," the act of adding is required for a discharge to exist. 33 U.S.C. § 1361 (2006). If the act of adding or moving a pollutant is necessary to constitute a discharge, it would follow that such active addition was required to be ongoing to constitute a continuing violation. Under such a regime, Bowman's filling, which ceased on July 15th of 2011, cannot be considered ongoing, as there has been no additional discharge to constitute a continuing violation. (R. at 4.)

In *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Found., Inc.*, the court affirmed that the language of "in violation" required the action to be a continuing violation, where a direct action could be stopped. 484 U.S. at 59 (1987). In this case, a unanimous court held that a sewage plant's discharges that had violated the effluent requirements of its permits could not be subject to a citizen suit if the violations had ceased, remanding the case to make such a determination. Such violations, deemed as "wholly past" by the court, are contrary to the plain meaning language of the statute, which requires a present or future violation. The choice to use the present progressive language rather than a past tense indicates that the law prevents recovery in instances where the incident is wholly past. Were the act to refer to a past action, the court argues, the language of the statute would not employ the present tense as extensively as it is in §

505. *Id.* at 59. As a result, the courts have required at least an allegation of a continuing violation for § 505 suits to progress. *See, e.g.*, *Pawtuxet Cove Marina, Inc. v. Ciba-Geigy Corp.*, 807 F.2d 1089, 1093 (1st Cir. 1986); *Connecticut Coastal Fishermen's Ass'n v. Remington Arms Co., Inc.*, 989 F.2d 1305, 1312 (2d Cir. 1993); *Sierra Club v. Union Oil Co. of California*, 853 F.2d 667, 670 (9th Cir. 1988).

In holding that a violation needs to be ongoing to qualify under the citizen suit provision, the courts have required an active placement of new pollutants for an action to be considered an ongoing violation. In *Hiebenthal v. Meduri Farms*, the court held that there were no grounds for a suit under § 505 against a fruit drying company that had previously polluted, since they ceased polluting prior to the filing of suit. 242 F.Supp.2d 885, 893 (D.Or. 2002). The requirement for an ongoing violation at the time of filing was further addressed in *Aiello v. Town of Brookhaven*. 136 F.Supp.2d 81 (E.D.N.Y. 2001). The court held that a municipality's discharge activities in a landfill were considered wholly past rather than ongoing, even when the polluting material continued to leak into the waterway. In determining that the act was wholly past, they reasoned that the leaking substance would be considered a residual effect of a wholly past violation and thereby not requiring a full remediation of the site. *Id.* at 120.

Since Bowman's filling and clearing actions ceased 45 days before NUWF filed suit, the action should be considered wholly past. After July 15th of 2012, he did not place any additional dredged material into his wetland property, nor has he violated any other prohibitions outlined by the CWA. (R. at 4.) Any sediment or fill that remains on the property could be appropriately seen as a continuing effect of his original dumping actions.

B. The distinction between § 404 and § 402 violations in relation the ongoing violation requirement of § 505 citizen-suits is superfluous.

The inclusive language of the citizen suit provision implies a single definition for what constitutes an ongoing violation. This single definition only applies to the context of ongoing violations for the purposes of citizen suits and does not preclude distinctions on other aspects of violations under the CWA. While Counsel for NUWF claims that there is a necessary difference between violations under §404 and §402 that would require separate definitions, the distinction is not intended to apply to the definitions of the violations under the citizen suit provisions of the act. Furthermore, the use of such distinctions becomes arbitrary, producing the potential for disparate judgments on the nearly identical fact patterns. Relying on such an arbitrary system should therefore be avoided.

The distinction between a fill material violation and a pollutant violation is based on the permitting process and is not contained in the jurisdictional requirements for bringing a citizen suit under § 505. § 404 and § 402 of CWA describe the permits necessary to avoid a violation, with § 404 providing a route for dredging and fill permits and § 402 offering paths for the discharge of other non-hazardous pollutants. 33 U.S.C. §§ 1342, 1344 (2006) . Key to this differentiation is the organizations required to issue the permit, as filling activity requires permitting by the Army Corps of Engineers and general pollutants require approval from the state or national Environmental Protection Agency. 33 U.S.C. §§ 1344(b), 1342(b) (2006). However, the statute governing citizen suits offers no distinction whatsoever, simply addressing "violations" of the limiting statutes collectively and providing a single route for suits to take. 33 U.S.C. § 1365 (a)(1)(a). This section of the act also contains the language that serves as a basis for the wholly past conditionality of commencing a suit, which likewise makes no differentiation between a continuing fill or a continuing emission of effluent material. If such a distinction had

been deemed necessary by the drafters of the act, it would be likely that the language of the statute would reflect this desire; since no such differentiation exists, the grouping of all violations under the simple term "violations" would necessitate a similar treatment for § 404 and § 402 violations.

A key example of why such distinctions prove ineffective in the practical determination of the "ongoing" standard can be seen in borderline cases, where the impacts of the different types of violation are largely the same. Relying on this distinction increases the possibility of creating inconsistent outcomes. In *Remington*, a case against a gun club that discharged substantial waste into the Long Island Sound was dismissed under the jurisdictional requirements of § 505(a), as their violation was considered wholly past. 989 F.2d at 1305. Although the case proceeded as a § 402 violation, the waste in question consisted of solids that could be easily removed, such as clay pigeons and used lead from ammunitions. While this material was, for all intents and purposes, continuing to exist on the bottom of the Sound, changing the integrity of the body of water, the court reasoned that its presence was merely a residual effect of a wholly past incident and that there was subsequently no subject matter jurisdiction. 989 F.2d at 1321; *see also Aiello*, 136 F.Supp.2d at 121 (holding that a pollutant leachate that continued to pollute the waters of the US was considered a continuing effect rather than continuing incident). There is little difference between the conduct in *Remington* and Bowman's own actions, where his single activity of filling produced a residual impact of fill material on the property. Where the facts surrounding the two incidents are so similar, it would seem questionable that they would ultimately be decided in such contrary ways.

The court should hold that the distinction between § 404 and § 402 violations is not applicable to the jurisdictional requirement of the CWA. The separation of the violations based

on a permitting provision would counteract the collective nature of the wording used to describe violations under § 505, while simultaneously creating disparate outcomes, an overall undesirable effect.

C. Enforcement of such a distinction would be contrary to both legislative intent and public policy.

The potential inequities created by an arbitrary distinction could be easily remedied through the application of a single standard of review for finding cases wholly past. Tightening of the citizen suit provision of the CWA would exist in full accord with the original intent outlined by the legislature. Furthermore, it would likely have little to no impact on the actual remediation under the act, shifting the burden away from private litigation toward the administrative solutions.

The inclusive language of the statute would require a single approach to determining whether a violation is ongoing. This would require taking either a very strict definition based on the act of polluting or a loose definition based on remnants from a past violation. The latter solution, however, would not be compatible with the original legislative intent of the act. The use of the language of "in violation" implies a necessary standard for the allegations, one that requires the action to be current or ongoing. 33 U.S.C. 1365(a). If all suits where a residual impact existed were permitted, the jurisdictional requirement of the act would be toothless, since all violations would be considered ongoing until all residual impacts were removed and all potential suits could proceed. Furthermore, allowing an individual to sue for a wholly past violation could open defendants up to a disproportionate amount of litigation. A more closed approach, on the other hand, would allow most citizen suits currently permitted while maintaining the jurisdictional bar. The court should therefore consider all violations where no further addition of pollutants exists to be wholly past, regardless of the type of violation.

Following this more stringent standard would also not significantly alter the power of the CWA to address issues of pollution. Citizen suits, rather than providing the bulk of enforcement power of the act, are in fact intended only as a failsafe in the absence of other action. *See Sierra Club v. Shell Oil*, 817 F.2d 1169, 1175 (5th Cir. 1987) ("The private enforcement action . . . is supplementary to the scheme of the statute overall"). Within the confines of the act are numerous alternative measures for penalties, including both civil and criminal prosecution by the government agencies or administrators. 33 U.S.C. § 1319 (2006). While the NUWF would have a diminished opportunity to bring a citizen suit, they would still have methods of redress available through the various protection administrations, such as the EPA or its state affiliates. Citizens further have the ability to bring suits against those administrations for failure to perform their duties under § 505(a)(2), a provision that does not have the same requirement for wholly past violations. 33 U.S.C. 1365(a)(2). In the instant case, Bowman would still be required to adequately address the issues present on his property through the actions of NUDEP, regardless of the existence of an ancillary citizen suit.

The court should affirm the decision of the district court that Bowman's actions were wholly past, thereby barring the suit brought by NUWF. This will maintain a consistent standard for defining wholly past violations under § 505 of the CWA as violations where the addition of pollutants has ceased, regardless of the permitting procedure necessary to develop them. Such a ruling would help maintain the jurisdictional requirement of the act and does little to limit the power of the CWA to address violations.

III. PURSUANT TO § 505(B)(1)(B) OF THE CWA, NUWF'S SUIT WOULD BE BARRED DUE TO DILIGENT PROSECUTION BY NUDEP.

The citizen suit brought by NUWF would also be precluded by the various enforcement actions taken by NUDEP, a state agency responsible for the enforcement of the CWA. By

entering an administrative order within the notice period provided for by § 33 U.S.C. 1365(b) and subsequently filing suit in the district court, the agency adequately commenced and is in the process of diligently prosecuting the matter in a civil action. (R. at 4-5.) The provisions of NUDEP's settlement with Bowman were a matter of institutional discretion and necessitate a degree of administrative deference. Barring the case from progressing on this ground would, from a policy perspective, increase the accountability of the administrative agency while not substantially limiting the ability of the citizen plaintiff to address their concerns. The court should affirm the ruling of the district court and bar NUWF from bringing suit.

A. The timing of the actions taken by NUDEP qualifies as a diligent prosecution.

By entering a consent order and filing suit with the district court within the two-month notice window, NUDEP diligently commenced prosecution of Bowman as required to preclude a suit by the CWA. Under § 502(b)(1)(2), citizen suits are prohibited in cases where "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). This provision helps to assure that other methods of prosecuting wrongs under the act are allowed to work, keeping the citizen suit as a method of last resort when other methods of prosecuting violations fail. By not permitting suit within 60 days of original notice being given, the act itself provides a minimum scale for what can be considered a diligent prosecution. This minimum has become a widely applied common law guideline for when action must be commenced to be considered a diligent prosecution. *Gwaltney,* 484 U.S. at 60-61; *see also Atl. States Legal Found., Inc. v. Eastman Kodak Co*., 933 F.2d 124, 127 (2d Cir. 1991) (act "permit[s] a citizen suit to begin if the appropriate state or federal authorities have not acted within the 60-day notice period"); *Envtl. Conservation Org. v.*

City of Dallas, 529 F.3d 519, 526 (5th Cir. 2008)*; Ellis v. Gallatin Steel Co.*, 390 F.3d 461, 467 (6th Cir. 2004); *Friends of Milwaukee's Rivers v. Milwaukee Metro Sewerage Dist*., 382 F.3d 743, 752 (7th Cir. 2004) (allowing suit when no action was taken within the 60 day notice period).

In the current case, there is no doubt that the government action fulfills the timeliness argument required for diligent prosecution. NUWF's original notice, filed on July 1st, creates a deadline for government action on August 29th, exactly 60 days after the original incident. NUDEP entered an administrative order on August 1st, well within this boundary for commencing action. They went further to file suit against Bowman on August 10th. (R. at 5.) Action had clearly progressed well within the necessary 60-day time frame, with the suit by NUDEP preceding NUWF's suit by nearly three weeks. As a result of the timely action taken by NUDEP, their response should be considered diligent prosecution of the violations of the CWA.

B. The administrative order and decree entered by NUDEP would be sufficient to qualify as "diligent prosecution" under the act.

In addition to progressing within a reasonable time frame, the actions taken by NUDEP were sufficient in their impact to be considered diligent prosecution. By entering an administrative order in their settlement agreement, they adequately addressed the concerns raised in the initial notice and provided reasonable solutions to compel compliance. Although such actions may be seen by NUWF as inadequate in forcing compliance with the act, such matters are typically left to the discretion of the agency prosecuting.

Overall the issue of diligence is handled with a tremendous amount of deference toward the agency acting in a prosecutorial capacity. The burden of proof for the existence of subject matter jurisdiction is on the plaintiff, who is required to prove that diligence did not exist. While NUWF may argue that the actions taken were not sufficient, such a determination is considered

to be a matter of discretion for the agency. As the primary arbiters of the environmental policy of a region, agencies have a far greater degree of understanding of the issues at play in a case than either the courts or interested parties. *See N. & S. Rivers Watershed Ass'n, Inc. v. Town of Scituate*, 949 F.2d 552, 557 (1st Cir. 1991) ("While it is true we are not in the business of planning, designing and constructing sewage treatment facilities, we are not prepared to say that the State has not enforced its Order with diligence"). For this reason, the act accords the greatest degree of enforcement power to the agencies themselves. *See, e.g.*, *The Piney Run Pres. Ass'n v. The County Com'rs Of Carroll County, MD*, 523 F.3d 453, 459 (4th Cir. 2008); *Ellis*, 390 F.3d at 477.

Administrative orders and consent decrees, which do not require the expense of discovery or trial, offer one of the most frequently used methods of enforcing the act. *See, e.g.*, *Friends of the Earth v. Eastman Kodak Co.*, 834 F.2d 295, 296 (2d Cir. 1987); *Supporters to Oppose Pollution, Inc. v. Heritage Group*, 973 F.2d 1320, 1324 (7th Cir. 1992); *Karr v. Hefner*, 475 F.3d 1192, 1198 (10th Cir. 2007). As a result, it is clear that in the opinion of NUDEP, the administrative order entered into with Bowman consisted of an appropriate measure to remedy his violations of the CWA's standards, addressing the concerns raised in the initial notice and providing what, in its estimation, was an appropriate remedy. (R. at 5.)

Even cases placing a greater duty on the agency in charge indicate that the courts continue to give them a high degree of deference in determining what constitutes compliance. Beginning with *Friends of* Milwaukee*'s Rivers,* some courts have held that a diligent action must also be capable of requiring compliance and must have intended to require it, 382 F.3d at 759; *see also Piney Run*, 523 F.3d at 459. While it could be argued that the state did not fulfill this diligence requirement by virtue of not assessing a fine, in those cases where such a requirement

was cited, a high degree of deference was still afforded to the states in determining the methods of enforcement. *Arkansas Wildlife Fed'n v. ICI Americas, Inc*., 29 F.3d 376, 380 (8th Cir. 1994). The courts have frequently held that "a citizen-plaintiff cannot overcome the presumption of diligence merely by showing that the agency's prosecution strategy is less aggressive than he would like or that it did not produce a completely satisfactory result." *Piney Run*, 523 F.3d at 459. The lower burden for successful remediation of a problem is further evidenced in that an agency is only required to show that they "tried" to remedy the situation rather than successfully did so. *Heritage Group,* 973 F.2d at 1324. Even though NUDEP did not pursue a strategy involving the statutorily allowed fines, the consent decree did create a conservation zone alongside the river, an action seeking to prevent further degradation of the integrity of the Muddy River and its wetland areas. (R. at 5.)

The various requirements and conditions placed on Bowman by NUDEP would constitute a diligent prosecution, barring the NUWF from bringing suit. Although not the maximum allowable penalties, the provisions that mandate over 146,000 square feet of his property to be preserved for public use and wildlife integrity address the injuries alleged by NUWF in an adequate fashion. (R. at 4-5.) Furthermore, it is well within the discretion of the agency to determine which remedies are adequate for compliance.

C. Allowing excessive suits would be both superfluous and potentially damaging to the efficacy of the act.

From a policy perspective, allowing more citizen suits to progress would produce a number of ancillary effects that would diminish the efficacy of the administrative agencies. As the primary enforcement mechanism of the CWA, the state or agency is able to best tailor the approach taken to not only the potential necessary remediation, but also the political and psychological climate in which the alleged polluter exists. *Sierra Club v. Shell Oil*, 817 F.2d at

1175. In assuring compliance and negotiating a settlement, the threat of heavy fines can provide a counterbalance to the potentially high cost of remediation or prevention of future damage. *Heritage Group*, 973 F.2d at 1323 ("An administrator unable to make concessions is unable to obtain them"). Allowing citizen suits when the results are less desirable for non-governmental groups would decrease the probability of settlement, since defendants would be unwilling settle if they knew they were still likely liable for additional damages. While NUDEP did not levy a fine, they reached a settlement with Bowman that prevented further damage to the land and secured 150 feet in from the bank of the river for public use, with an agreement to remedy an additional 75 foot wide parcel of already cleared land. (R. at 4.) It is unlikely that Bowman would have made nearly that many concessions were a fine to be levied. It is also unlikely that Bowman would have agreed to such a limitation on the use of his property if he knew that a citizen suit was still possible. In such an event, allowing the citizen suit to progress would limit NUDEP's enforcement power.

Although NUWF argues that a prohibition on citizen suits would limit their ability to address concerns under the CWA, it ignores the various accountability measures and methods for redress present in both the administrative and judicial proceedings. *See Karr*, 475 F.3d at 1195 (allowing the EPA to compromise does not strip citizens of their role in helping to bring about remedies for CWA violations). Each agency has a means for public address of concerns that can adequately counter any such problems, allowing groups like NUWF to voice their problems with the enforcement of the act, including a comment period specifically for environmental consent decrees. *Karr*, 475 F.3d at 1198. This goal is furthered by the intervention clause contained in § 505(b)(1)(b), allowing any third party enjoined from bringing suit to join as a party to the state or agency suit, addressing the needs potentially underserved by the agency efforts. 33 U.S.C.

1365(b)(1)(b). NUWF has the right to intervene in the suit commenced by NUDEP, a right they have already exercised. (R. at 5.) Whether or not they are able to bring their own suit, they have numerous opportunities to address their concerns.

As a result of the bar on citizen suits, NUWF's suit should be dismissed. NUDEP diligently prosecuted Bowman by filing its administrative order within the 60-day notice period, well within the bounds citied in the case law. Furthermore, the provisions of the order, while somewhat of a compromise, do address the concerns for the integrity of the wetlands in a fashion appropriate under the deferential standard provided for by the act. At the same time, enforcing the prohibition on citizen suits in cases where action has commenced could potentially limit the enforcing agency's efficacy in achieving the goals of the CWA.

IV. BOWMAN VIOLATED THE CWA BY SATISFYING ADDITION WHEN HE MOVED FILL MATERIAL FROM ONE PART OF A WETLAND ADJACENT TO NAVIGABLE WATER TO ANOTHER PART OF THE SAME WETLAND.

While the lower court appropriately granted summary judgment for Bowman due to lack of a continuing violation, it erred in granting summary judgment for Bowman on the issue of a § 404 violation because Bowman's activities did constitute addition. By dispelling with the lower court's erroneous application of the EPA's "outside world" definition of addition and assessing the proper definition in a § 404 context, this court should conclude that Bowman's activities met the standard for § 404 violation. (R. at 9.)

Congress passed the CWA to regulate discharges of pollutants into the waters of the United States, with the goal of restoring and maintaining the chemical, physical, and biological integrity of the Nation's waters. 33 U.S.C. § 1251(a) (2006). Under the CWA, § 402 and § 404 provide the permitting schemes for an array of discharges: § 402 regulates the discharge of any pollutants into navigable water and § 404 specifically regulates the discharge of dredge and fill

material. 33 U.S.C. § § 1342, 1344 (2006). While dredge and fill material are broadly speaking "pollutants," their discharge falls exclusively under § 404 and is not subject to § 402 regulation. Under both § 402 and § 404, violation occurs when there is "any addition of any pollutant into navigable waters from any point source." 33 U.S.C. § 1362 (2006).

In 2008, Congress enacted the Water Transfer Rule, which permits the transfer of water, regardless of its pollutants, from one body to any other water body in the United States under the unitary navigable waters theory, which considers all waters of the United States one. The EPA wrote that the Water Transfer Rule applies to § 402, but not § 404. Water Transfers Rule, 40 C.F.R. § 122.3(i) (2008).

The lower court aimed to defer to the EPA on its "outside world" interpretation of addition in order to reach its decision, but failed to consider that the EPA does not administer § 404 and that the "outside world" interpretation arose from a litigation position in a § 402 case. (R. at 9.) This court need not rely on the previous interpretation, and thus can formulate an appropriate definition of addition in a § 404 case by considering the environmental consequences of an "outside world" interpretation and the intentions of the CWA. The court should also acknowledge that the EPA itself exempted § 404 from the "outside world" definition and the unitary navigable waters theory of the Water Transfers Rule. After assessing the most logical definition of "addition" in the context of § 404, this court should find that Bowman's activities met the standard of "any addition of any pollutant into navigable waters from any point source."

A. The material differences between activities requiring § 402 and § 404 permits undercut the presumption that a single definition of addition should be applied.

The lower court erred in its presumption that the same reading of addition needed to be applied to both § 402 and § 404, given their substantial differences in the types of violation they regulate. (R. at 9.) The primary difference between § 402 and § 404 is that § 402 seeks to issue

permits for the discharge of any pollutants into navigable waters, while § 404 is concerned with the discharge of dredge and fill material. Diane Regas, Director at the Office of Wetlands at the EPA, explains the definition for fill material as "material placed in waters of the US where the material has the effect of either replacing any portion of a water of the US with dry land or changing the bottom elevation of any portion of the water." 67 Fed. Reg. 31130. Fill material also includes open water disposal of material removed during digging. 33 U.S.C. § 1344 (2006). Applying the § 402 standard, which was created in the context of adding foreign pollutants into a body of water, to the nature of fill material in a § 404 violation is illogical since fill material is often already part of the body of water, particularly in the case of wetlands. By pushing soil from the high portions of the wetland to the low portions in the midst of digging, Bowman leveled the field such that the bottom elevation of the wetland was necessarily altered and a disproportionate amount of dry land was added. (R. at 4.) § 404 is the only relevant permitting scheme to regulate Bowman's behavior, as both the unitary navigable waters theory and the outside world definition of § 402 would render his activities not illegal, and thus undermine the intentions of the CWA. Using the same definition of addition for statutes regulating violations as fundamentally different as § 402 and § 404 is inappropriate and illogical.

B. Because the Army Corps of Engineers is the agency enforcing § 404 permits, the court should not apply the EPA's "outside world" definition.

Given the permitting differences between § 402 and § 404, the Army Corps of Engineers and not the EPA regulates § 404 permits; thus the court need not grant Chevron deference to an EPA definition of addition. According to *Coeur Alaska Inc v. Southeast Alaska Conservation Council*, if the Army Corps of Engineers has the authority to regulate § 404 discharges, then the EPA may not regulate. 557 U.S. 261 (2009). Without the ability to regulate, the EPA's definition should not be granted deference since deference is only accorded to an executive

department's construction of a statutory scheme it is entrusted to administer. *See Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 844 (1984). The EPA does have some control over § 404 permits, but this is limited to veto power over the Corps' permits and providing a set of guidelines for when to issue those permits. *Coeur Alaska Inc.*, 557 U.S. at 261. Neither function constitutes a direct administering of the § 404 permits; EPA's role is tantamount to any overseeing body rather than an administering agency, and thus, the court need not grant it deference.

The EPA developed its "from the outside world" definition for addition as a litigation position in *National Wildlife Federation v. Gorsuch* to help rationalize allowing dams to forego the § 402 permitting process, which does not suffice for deference. 693 F.2d 156, 161 (D.C. Cir. 1982). The definition is "entitled to respect," but need not be followed. "EPA's position is based on a series of informal policy statements and consistent litigation positions… such agency statements do not deserve broad deference." *Catskill Mts. Chapter of Trout Unlimited, Inc. v. City of New York*, 273 F.3d 481 at 490 (2d Cir. 2001). Additionally, the courts have held that the EPA need not apply the same exact definition evenly across its statutory regimes. In *Gorsuch*, the court held, "We . . . find no inconsistency in EPA's taking a broad view of its statutory mandate in some situations and a narrower view in others." 693 F.2d at 156 (internal quotation marks omitted). Merely because the outside world definition applies to § 402 does not mean it applies to § 404. Extracting the outside world definition from a litigation position in § 402 to apply to a § 404 case is therefore unnecessary.

Given that deference need not be given to the EPA's § 402 definition for addition since it was only developed as a litigation position by a body not administering § 404, this court may take a fresh look at determining whether the outside world definition can fairly and

independently apply to § 404, or whether a more liberal definition would be more appropriate.

C. Applying an outside world definition of addition to a § 404 case is illogical because fill material often originates inside the body of water being polluted.

Congress specifically designated § 404 to regulate fill material, rather than putting it under § 402, because fill material need not originate outside the body of water being polluted, and thus, the definition of added takes on a different meaning from § 402, where the pollutants are brought in from outside sources. In *U.S. v. Deaton*, the court found that sidecasting – an activity where excavated material from a wetland is deposited in that same wetland – requires a § 404 permit. 332 F.3d 698, 703 (4th Cir. 2003). Although sidecasting results in no net increase in the amount of material present in the wetland, it amounts to addition of a pollutant that was not present before. 33 U.S.C. § 1362 (2006) The court in *Deaton* explains that § 404 does not require a permit for "addition of material," but rather "addition of any pollutant." The court found that bringing in additional material was irrelevant since overturning dirt to create fill material can add a pollutant without adding to overall material. In the present case, the lower court flippantly describes *Deaton* as an "imaginative piece of verbal metaphysics," and did not find moving dirt a few feet within a wetland enough to meet the definition of "added." (R. at 10.)

The lower court fails to see how Deaton exemplifies why § 402 definitions cannot apply to § 404. (R. at 10.) The § 402 permitting scheme anticipates pollutants being added from external sources, but there is still a danger in water becoming polluted without the addition coming from the outside world. In *U.S. v. Cundiff*, the court holds that it is of no consequence that what is now a pollutant was previously present on the same property in a less threatening form. The court emphasizes that this version of addition can lead to environmental consequences since adding a pollutant without adding to the net material can still increase the overall pollution of navigable water. 555 F.3d 200, 214 (6th Cir. 2009). Thus, in order to regulate the potentially

devastating consequences of fill material, § 404 must not demand that a pollutant originate outside the body of water being polluted, since fill material often does not. Requiring an addition of pollutants from the outside world would therefore fail to regulate most instances of fill material.

D. Applying an outside world definition to § 404 could lead to detrimental environmental consequences, reading it out of statute and undermining the intention of the CWA.

An outside world definition of addition applied to § 404 would incapacitate it to regulate acts of pollution through fill material, defeating the purpose of the CWA and only leaving § 402 to regulate the addition of pollutants. The CWA has an interest in preventing activities of the sort Bowman perpetrated, as it aims to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a) (2006). Applying a § 402 definition of addition would undermine that interest, and if a "literal application of a statute will produce a result demonstrably at odds with the intentions of its drafters," a literal application should not be applied. *Greenfield Mills, Inc. v. Macklin*, 361 F.3d 934, 954 (7th Cir. 2004) (internal citation omitted). By leveling his field, Bowman participated in an activity almost identical to the sidecasting described in *Deaton*, and caused such environmental consequences as cautioned in *Cundiff* to appear. Bowman displaced the water in his wetland with dry land and cut down the vegetation, rendering an allegedly more polluted Muddy River and causing a depletion of local frog life. (R. at 6.) Bowman's activities are particularly threatening given his property's adjacency to the Muddy, which flows for at least 40 miles both upstream and downstream.[1] Since Bowman's suggested reading of addition is fundamentally at odds with the

[1] There are cases where shifting material in a wetland does not cause harm because of the isolated nature of that wetland, but this is not such a case. Dredged or fill material, which is typically deposited into wetlands for the sole purpose of staying put, does not normally wash

CWA's intention and would make § 404 a flaccid alternative to § 402, a less constraining definition of addition should be applied.

E. The lower court's emphasis on the unitary navigable water theory is erroneous since the Water Transfer Rule is entirely inapplicable to Bowman's activities and activity regulated under § 404, according to the EPA.

The lower court attempts to bolster its use of the § 402 outside world definition of addition by citing its application in the Water Transfer Rule and the unitary navigable waters theory, though this ignores the EPA's explicit exemption of § 404 from this rule. (R. at 9.) The EPA stated that the Water Transfer Rule has no effect on the § 404 permit program since it implies that dredged material never requires a permit unless the dredged material originates from a water body that is not a water of the U.S. Water Transfers Rule, 40 C.F.R. § 122.3(i) (2008). While the lower court assumes it is following the EPA's objectives, it is actually disregarding their exemption of § 404 from the Water Transfer Rule.

Beyond the EPA's objections to employing the Water Transfer Rule to § 404 cases, Bowman's activities are simply not water transfer. Bowman pushed soil from high portions of his wetland to low portions, altering the bottom elevation and disproportionately adding dry land. (R. at 4.) At no point was water brought in from a different water source. Between not having water transfer involved in Bowman's activities and the EPA's warning that the Water Transfer Rule should not apply to § 404 cases, the lower court was remiss in holding a § 404 violation to the requirements of the Water Transfer Rule.

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downstream, and thus does not normally constitute an "addition to navigable waters" within the meaning of the permit requirements of the CWA when deposited in upstream isolated wetlands. 33 U.S.C. § 1344 (2006). The geographical positioning of Bowman's wetland, with the Muddy at least 40 miles both down and upstream, means pollutants on the wetland will likely compromise the river when the fill material naturally washes downstream and it would be detrimental to apply an outside world definition of addition.

This court should reverse the lower court's granting of summary judgment since the appropriate interpretation of addition is a genuine issue of material fact disputed in the present case. The lower court erred in its belief that deference to the EPA's outside world definition of addition was necessary since that definition arose from a litigation position in a § 402 case and the EPA is not even the administering agency of § 404. This court should recognize that to impose an outside world definition on a permitting scheme regulating fill material would be illogical as it would demand an external source of a polluting material that originates in a water source. The resulting environmental consequences would counteract the intentions of the CWA. Lastly, the lower court erred in its assessment of the Water Transfer Rule since the EPA explicitly stated that that rule should not apply to § 404 cases. By applying the appropriate definition of addition, the court should recognize that Bowman's activities constituted a § 404 violation since it met the legal standard of "any addition of any pollutant into navigable waters from any point source."

CONCLUSION

NUDEP joins NUWF in arguing that the District Court erred in granting summary judgment against NUWF for failing to allege sufficient injury in fact. NUWF has, on behalf of its members, shown sufficient injuries in fact fairly traceable to Bowman's actions and likely to be redressed by a favorable decision by the court. It has both constitutional and representational standing to sue Bowman for violating the CWA and the court should REVERSE its grant of summary judgment against NUWF. The court, however, lacks subject matter jurisdiction to hear a case brought under § 505 of the CWA, as Bowman's violations were wholly past as of July 15, 2011. Thus, the court should AFFIRM its grant of summary judgment against NUWF on this issue. NUWF is further barred from bringing its citizen suit by NUDEP's diligent prosecution of

Bowman as set out by § 505(b) of the CWA. NUDEP met the required time constraints necessary for diligent prosecution, addressed the problem raised in the notice, and fell within the discretion of the enforcing agency. The court should also AFFIRM its grant of summary judgment against NUWF on this issue. Finally, Bowman's activities in moving dredged and fill material from one part of a wetland adjacent to navigable water to another part of the same wetland met the standard of addition, and therefore constituted a § 404 violation. The District Court erred in granting deference to the EPA's outside world definition of addition in a case involving fill material, creating a result that undermines the intention of the CWA. By applying the appropriate definition of addition, the court should find that addition was met and therefore Bowman's actions did constitute a § 404 violation. The court should REVERSE its grant of summary judgment against NUWF on this issue.

Respectfully Submitted

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