Team # 46

C.A. No. 13-1246
Civ. No. 149-2012

IN THE UNITED STATES COURT OF APPEALS
FOR THE TWELFTH CIRCUIT

NEW UNION WILDLIFE FEDERATION,
Plaintiff – Appellant,

v.

NEW UNION DEPARTMENT OF ENVIRONMENTAL PROTECTION,
Intervenor – Appellant,

v.

JIM BOB BOWMAN,
Defendant – Appellee

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

Brief for JIM BOB BOWMAN, Defendant – Appellee

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JURISDICTIONAL STATEMENT

The District Court for the District of New Union has jurisdiction to hear civil suits arising under the Clean Water Act (CWA). 33 U.S.C. § 1311; 5 U.S.C. § 706. This Court has jurisdiction to hear appeals from any final decision of the District Court, which is within its circuit. 28 U.S.C. § 1291; 28 U.S.C. § 1294.

STATEMENT OF THE ISSUES

I. Whether NUWF has standing to sue Jim Bob Bowman for allegedly violating the CWA.

II. Whether there is a continuing or ongoing violation as required by § 505(a) of the CWA to establish subject matter jurisdiction.

III. Whether NUWF's citizen suit is barred under § 505(b) of the CWA by NUDEP's diligent prosecution of Mr. Bowman and resolution of the alleged violation.

IV. Whether Mr. Bowman violated the CWA when he moved "fill material" from one part of a wetland adjacent to navigable water to another part of the *same* wetland.

STATEMENT OF THE CASE

New Union Wildlife Federation ("NUWF" or "Appellant") and New Union Department of Environmental Protection ("NUDEP" or "Appellant") appeal the issuance of an order dated June 1, 2012 in Civ. 149-2012 by the District Court granting summary judgment in favor of Mr. Bowman with respect to the Courts holdings that (1) NUWF lacked standing to bring a citizen suit against Mr. Bowman, (2) there is no continuing violation as required for subject matter jurisdiction under the CWA's citizen suit provision, (3) NUWF's citizen suit is barred by NUDEP's diligent prosecution of Mr. Bowman, and (4) Mr. Bowman did not violate the CWA because he did not discharge dredge or fill material into navigable waters. R. at 1.

STATEMENT OF FACTS

Jim Bob Bowman lives near Mudflats in New Union on a one-thousand acre tract of wetland adjacent to the Muddy River. R. at 3. The Muddy River ("the Muddy") is five hundred

feet wide and serves as the border between Progress and New Union for over 80 miles. *Id*. Only 650 feet of Mr. Bowman's property adjoins the Muddy. *Id*. On June 15, 2012, Mr. Bowman removed vegetation, brush, and trees from his property to convert the woodlands into land that could be used for agriculture. R. at 4. Mr. Bowman burned the excess vegetation and pushed the ashes and remaining vegetation onto the low-lying portions of his field. *Id*. Mr. Bowman left the land untouched and the wetlands intact on the portion of his land adjoining the Muddy, which ran 150 feet inland from the river's shoreline and spanned the entire 650-foot strip of adjoining land. R. at 4.

On July 1, 2012, the New Union Wildlife Federation ("NUWF") filed an action under § 505 of the Clean Water Act ("CWA" or "the Act"), 33 U.S.C. § 1365, against Mr. Bowman for filling wetlands without a permit. *Id*. NUWF claimed that Mr. Bowman violated §§ 301(a) and 404 of the CWA. R. at 1. NUWF gave proper notice to Mr. Bowman and the New Union Department of Environmental Protection ("NUDEP"). *Id*. NUDEP subsequently intervened in the action. *Id*. Mr. Bowman maintains that he did not break state or federal law. *Id*. Nonetheless, Mr. Bowman entered into a settlement agreement with NUDEP that was subsequently formalized by NUDEP in an Administrative Order. *Id*.

Pursuant to the Administrative Order, Mr. Bowman agreed to cease land-clearing activities. R. at 4. Mr. Bowman additionally conveyed a conservation easement to NUDEP, which included the portion of land adjoining the Muddy that was not cleared and an additional 75-foot buffer zone separating the newly created easement from Mr. Bowman's field. *Id.* Mr. Bowman will construct and maintain the conservation, at his own expense, for year-round daytime use by public for appropriate recreational purposes. *Id*. NUDEP and Mr. Bowman

incorporated their agreement into an administrative order, to which Mr. Bowman consented on August 1, 2012. *Id*.

After issuing the administrative order, NUDEP decided to file suit against Mr. Bowman on August 10, 2012 for the alleged § 505 violations. R. at 5. NUWF also filed suit against Mr. Bowman alleging the same § 505 violations on August 30, 2012, seeking additional penalties and to require Mr. Bowman to remove the deposited material and further restore the wetlands. *Id*. On September 5, 2012, NUDEP filed a motion to enter a decree identical to the administrative order. *Id*. On September 15, 2012, NUWF filed a motion to intervene and consolidate with the NUDEP suit, but in opposition of the proposed NUDEP decree. *Id*. NUDEP subsequently filed a motion to intervene and consolidate with NUWF, which the District Court granted. *Id*. Although the District Court has not yet ruled on the motion, Mr. Bowman consented to both the motion and the decree. *Id*.

Three members of NUWF filed affidavits claiming injury from Mr. Bowman's alleged violations. R. at 6. All three testified that they not only use the Muddy for recreational boating and fishing, but also for picnicking on the banks of the river which includes the vicinity of Mr. Bowman's property. *Id.* But they conceded that no cognizable difference was observed in Mr. Bowman's land from the river or from the river banks. *Id*. While none of the three members produced scientific data showing actual damage to the river, they claimed to be "aware of the differences" and to "feel a loss" from the destruction of the wetlands. *Id*. The NUWF members also expressed fear that the Muddy would become more polluted if more of the adjacent wetlands were cleared. *Id*.

Zeke Norton admitted that he trespassed on Mr. Bowman's property, which contained proper "no trespassing" signage as required by state law, so that he could hunt for frogs. R. at 6.

Norton claimed that he used to find a dozen "good sized frogs" before Mr. Bowman's land was cleared but now he is "lucky" to find two or three frogs on the property. *Id*. Dottie Milford testified that she felt the Muddy looked more polluted to her after Mr. Bowman cleared his land. *Id*. In contrast to the NUWF members, a NUDEP biologist testified that the year-round partially inundated wetland in the buffer zone will actually provide for a richer wetland habitat than the former arrangement of the property once the wetland is fully established. *Id*.

Following Mr. Bowman's and NUWF's cross-motions for summary judgment, the District Court granted summary judgment for Mr. Bowman on four grounds: (1) NUWF lacked standing because neither it nor its members suffered injury-in-fact that is fairly traceable to Mr. Bowman's land clearing; (2) the District Court lacked subject matter jurisdiction because all violations were wholly past; (3) the District Court lacked subject matter jurisdiction due to prior state action; and (4) no violation of the CWA existed because a key element for a cause of action was not satisfied: "addition." *Id*.

STANDARD OF REVIEW

The Federal Courts of Appeals review a district court's grant of summary judgment *de novo*. *Perry v. Secretary, Fla. Dep't. Of Corrections,* 664 F.3d 1359, 1363 (11th Cir. 2011). Thus, when reviewing a motion for summary judgment, an appeals court must determine whether, upon review of the record in the light most favorable to the non-moving party, there is "no genuine issue as to any material fact and the movant is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c)(2). A fact is "material" if its existence or non-existence would affect the outcome of the suit under governing law. *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 248 (1986). Rules governing motions for summary judgment apply with equal force to cross-motions for summary judgment. *Wernicki-Stevens v. Reliance Standard Life Ins. Co.,* 631 F.Supp. 418,

422 (E.D. Pa. 2009). When ruling on cross-motions for summary judgment, the court considers each motion separately. *Id*.

SUMMARY OF THE ARGUMENT

The District Court correctly held that standing for NUWF could not be based on injury to interests predicated on the complainant's illegal activities and that Appellants failed to allege specific, concrete, and particularized injury to the NUWF members when the members had mere knowledge of a violation, rather than having personally experienced an injury from a violation. Appellants failed to specifically allege a downstream injury or allege injury fairly traceable to Mr. Bowman's actions that was redressible, but merely alleged being in the vicinity of Mr. Bowman's property.

The District Court properly held that NUWF's citizen suit was barred due to NUDEP's diligent prosecution of Mr. Bowman. Not only did the administrative order between NUDEP and Mr. Bowman halt the complained-of activity, the decree's provisions effectively prevent any further violation. Therefore, the decree is due significant deference.

The District Court properly held that NUWF failed to allege an "ongoing violation" as required by § 505 of the CWA. Mr. Bowman's land-clearing activities had wholly ceased at the time of NUWF's complaint and no grounds exist upon which to argue Mr. Bowman's polluting activity will resume in the future.

The District Court properly held that Mr. Bowman did not violate § 301 or § 404 of the CWA when he moved "fill material" from one part of his wetlands to another part of the same wetland because no "addition" occurred.

ARGUMENT

I. NUWF LACKS STANDING TO BRING A CITIZEN SUIT BECAUSE NO NUWF MEMBER ALLEGED A SPECIFIC, CONCRETE, AND PARTICULARIZED INJURY TO ANY LAWFUL INTEREST THAT IS FARILY TRACEABLE TO MR. BOWMAN'S ACTIONS AND REDRESSIBLE BY JUDICIAL RECOURSE.

NUWF lacked standing as a group because no individual member of NUWF would have possessed standing to sue independently. No individual member was adversely affected or aggrieved by Mr. Bowman's actions alleged to have violated the CWA. An environmental group has standing to bring suit on behalf of its members when "(1) its members would have standing to sue in their own right, (2) when the interests are germane to the organization's purpose, and (3) neither the claim asserted nor the relief requested requires participation by individual members in the lawsuit." *Hunt v. Washington State Apple Adver. Comm'n*, 432 U.S. 333, 343 (1977); *Friends of the Earth, Inc. v. Laidlaw Envtl. Services (TOC), Inc.*, 528 U.S. 167, 169 (2000). In this case, only the first element of this standing inquiry, whether an individual member has standing to sue in his/her own right, is in dispute.

In order for a NUWF member to have standing to sue, the member must show that he/she:

> (1) has suffered an "injury in fact" that is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical; (2) the injury is fairly traceable to the challenged action of the defendant; and (3) it is likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision.

Laidlaw, 528 U.S. at 180-81; *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560–561 (1992). Trespassers do not suffer legal injuries when their use of the property is changed because a trespasser has no right to be on the land. *See Conserv. Council of N.C. v. Costanzo*, 505 F.2d 498, 502 (4th Cir. 1974).

A. NUWF stated general grievances in its complaint, which are insufficient to establish standing, rather than alleging concrete and particularized injuries specific to NUWF members.

Appellant has not alleged a specific, concrete, and particularized individual injury to any of its members as a result of Mr. Bowman's actions. However, Appellant claims knowledge of a violation, injury to a trespasser, injury to the environment, and alleges that NUWF members used an unspecified portion of an 80-mile river to support standing. Various members alleged that they use the Muddy for a variety of activities including recreational boating and fishing. R. at 6. Further, the NUWF members allegedly possess knowledge of the river and how Mr. Bowman's activities damaged the river's ecosystem. *Id*. While the NUWF members allege that they were harmed aesthetically, such allegations are simply speculative because they fail to claim any *specific injury* resulting from Mr. Bowman's activity.

1. Under *Costanzo*, the impaired use of Mr. Bowman's property did not cause Mr. Norton injury when his presence thereon was the result of unlawful trespass.

Trespassers suffer no injury from a change in their use of a property - a change that would be otherwise sufficient on land open to the public to establish injury in fact for purposes of standing. *Costanzo*, 505 F.2d at 502. In *Conservation Council of North Carolina v Costanzo* the Fourth Circuit held that a plaintiff who is a licensee or trespasser suffers no injury due to impairment of their use of a property, and therefore to the extent standing is predicated upon said plaintiff's recreational use as either a licensee or a trespasser, the plaintiff does not have standing. *Id.* at 502. The desire to use or observe an animal species is a cognizable interest for standing, even if the desire is purely aesthetic. *Defenders of Wildlife*, 504 U.S. 562-63; *Salmon Spawning & Recovery Alliance v. U.S. Customs & Border Prot.*, 550 F.3d 1121, 1131 (Fed. Cir. 2008).

Mr. Norton admitted to have trespassed for the purpose of hunting frogs on Mr. Bowman's posted property. R. at 6. If Mr. Norton had not trespassed on Mr. Bowman's property, he likely would have had a cognizable standing claim by virtue of his desire to hunt or observe frogs. However, because Mr. Norton had no ability to legally use Mr. Bowman's property as a member of the public, and instead used the property as a trespasser, he suffered no individual injury sufficient to establish standing based on changes to Mr. Bowman's property under *Costanzo*. The District Court's reasoning, which follows that of *Costanzo*, should be upheld.

2. NUWF members did not allege specific, concrete, and particularized facts in order to demonstrate injury caused by Mr. Bowman's activities.

The standing doctrine ensures that the resources of the federal courts are devoted to disputes where there is a concrete stake, rather than plaintiffs suing on any generalized grievances. *Laidlaw*, 528 U.S. at 170. While general allegations of injury may suffice for pleadings, at summary judgment the plaintiffs must set forth "specific facts" to support their claims. *Id. at* 198 (quoting *Defenders of Wildlife*, 504 U.S. at 560). Article III of the U.S. Constitution requires a plaintiff to allege facts that demonstrate that the plaintiff has sustained a concrete and particularized individual injury, rather than injury to the public or environment. *Id.* at 180-81. For an individual to show a concrete and particularized injury, he must allege *specific* facts demonstrating that his aesthetic, recreational or economic interests were lessened in value. *Sierra Club v. Morton*, 405 U.S. 727, 734, 738 (1972). Aesthetic injuries must be to the individual rather than to the environment in order to be afforded the protection of the judicial process. *Summers v. Earth Island Inst.*, 555 U.S. 488, 494 (2009).

The NUWF members failed to allege specific aesthetic or recreational injury in their affidavits. In fact, all three members conceded that their aesthetic experience of the river was unaffected since the conservation easement shielded the view of Mr. Bowman's field from the

river. R. at 6. Moreover, the plaintiffs failed to show that their picnicking, bird-watching, or aesthetic experiences on the Muddy were harmed in any measurable way. The three NUWF members stated only that they felt like they were harmed by Mr. Bowman's actions; however, the members could not identify a single specific, concrete, and particularized factor that contributed to their injury in any way or prevented their previous activities. *Id.* That the NUWF members merely *felt* as though they were harmed by Mr. Bowman's activities is a prototypical general averment that the aesthetic value of the river was actually reduced. The allegation constitutes a general averment because it is not supported by specific facts that show any injury to the plaintiffs.

Mere knowledge of a violation is insufficient to confer standing under Article III of the U.S. Constitution. *Pub. Interest Research Group of New Jersey, Inc. v Magnesium Elektron, Inc.* 123 F.3d 111, 120 (3d Cir. 1997). The Third Circuit held in *Magnesium Elektron* that knowledge of polluted waters is an injury that the public suffers making it a general grievance insufficient for the individual concrete and particularized injury required for standing. *Id*. Similarly, the Eighth Circuit decided that a business group lacked standing because the group failed to allege specific facts as to how the injury to the business association was different than the injury to the other 1.4 million members of the public who used the sewer system at issue. *United States v. Metro. St. Louis Sewer Dist.*, 569 F.3d 829, 835 (8th Cir. 2009). It is well settled that a plaintiff must show individualized injury rather than injury to the environment at large to gain standing in federal court. *Laidlaw*, 528 U.S. at 169. In *Cantrell v. City of Long Beach*, the plaintiffs had standing to challenge actions on a military base, which was private property that they were not authorized to enter, because they were able to view the birds that nested there from a public place. *Cantrell v. City of Long Beach*, 241 F.3d 674, 680 (9th Cir. 2001).

The NUWF members noted that they were "aware of differences and [felt] a loss from the destruction of the wetlands," though all three readily admit that they are unable to see any difference from the river. R. at 6. Such a "conclusory allegation" seeks to acquire standing from mere knowledge, which is a generalized grievance. The plaintiffs have endeavored to show that they know of an injury to the environment by intuition rather than showing an actual concrete individualized injury. Yet, injury to the environment alone is insufficient to establish standing. As was the case in *Metropolitan Saint Louis Sewer Dist.*, an injury that does not uniquely affect the plaintiff in any manner different from the environment is a generalized grievance. The allegation that the wetlands are being destroyed asserts an injury to the environment rather than an injury sustained by the plaintiff. Moreover, applying the reasoning in *Cantrell*, the plaintiffs have not suffered an aesthetic injury resulting from Mr. Bowman's actions because they cannot see Mr. Bowman's field from a public place.

Individuals may be directly injured when they change their recreational, economic, and aesthetic interests based upon knowledge of a violation and reasonable concerns about the effects of the violations on their activities. *Laidlaw*, 528 U.S. at 172. In *Laidlaw*, the Supreme Court found that a waste water treatment plant's mercury discharges into a river was sufficient to establish injury when people refrained from using the downstream portion of the river for recreational and aesthetic because the mercury discharges were a "reasonable concern" to the affiant's interests. *Id*. at 183-84. As a result, the affiants alleged that they had stopped fishing, picnicking, and bird-watching, because of their fear of the mercury discharge's effects. *Id*. at 181-82.

Here, Appellants do not assert any reasonable concerns regarding injury to their use of the river as a result of Mr. Bowman's action moving dirt and vegetation into the Muddy River.

All three members allege that they used the Muddy for recreational boating, fishing, and picnicking the vicinity of Mr. Bowman's property. R. at 6. While in *Laidlaw* citizens had reasonable concern when they stopped fishing and bird-watching for fear of mercury, a toxic substance, dirt and vegetation are not toxic substances and did not reasonably cause the members of NUWF to stop their activities. No NUWF member alleged that they changed their activities because of Mr. Bowman's actions, because they did not have any concerns about the injury to their activities.

Appellants must state that they were affected by actions in a specific area rather than generally averring that they were in the "vicinity" of the activity at issue. *Friends of the Earth, Inc. v. Gaston Copper Recycling Corp.*, 629 F.3d 387, 397 (4th Cir. 2011); *Defenders of Wildlife*, 504 U.S. at 565-66. *Lujan v. National Wildlife Federation* requires that plaintiffs allege damage to areas that they had actually used in order to survive summary judgment, rather than offering averments stating that members of the organization had used "unspecified lands" in the vicinity of "immense tracts of territory where the challenged action occurred." *Laidlaw*, 528 U.S. at 183 (citing *Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871, 889 (1990)). In *Pollack v U.S. Dept. of Justice*, the Seventh Circuit held that alleging use of a vast area of the Lake Michigan shoreline was not sufficient for standing in a CWA suit concerning lead discharges. *Pollack v. U.S. Dept. of Justice*, 577 F.3d 736, 742-43 (7th Cir. 2009). In *Pollack*, the affiant also claimed that he was damaged by the lead discharges, an argument that the court dismissed because he was located upstream of the discharges. *Id*. Finally, in a decision that contrasts with those preceding, the Ninth Circuit held that plaintiffs were harmed by copper discharges in a shipyard that contaminated fish in an adjacent bay because the discharge curtailed their activities on the bay. *Natural Resources Defense Council v. Sw. Marine, Inc.*, 236 F.3d 985, 994 (9th Cir. 2000).

Ms. Milford's allegation that the water looked more polluted than before Mr. Bowman's actions at an unspecified portion of an 80 mile river merely alleges a "vicinity" argument. The allegation does not specify where the damage occurred, but rather states that it occurred in the vicinity of an immense body of navigable water that is 500 feet wide and at least 80 miles long. R. at 3. Ms. Milford did nothing more than state that she used an area in the vicinity of Mr. Bowman's property on the massive Muddy River. Ms. Milford did not change her activities nor did she assert that she was downstream of Mr. Bowman's property or within a specific area that would be affected like the plaintiffs did in *Southwest Marine*.

B. NUWF failed to establish causation because Appellant has not alleged a legal activity that has been damaged by Mr. Bowman's activities.

None of the NUWF members alleged specific facts showing that Mr. Bowman caused any specific injuries by clearing his field. In order to establish standing, the injury in fact must be "fairly traceable to the defendant's allegedly unlawful conduct." *Defenders of Wildlife*, 504 U.S. at 590. The Ninth Circuit stated that there must be a causal link between the injury and the alleged wrongful conduct. *Southwest Marine*, 236 F.3d at 994-95. The Supreme Court held that allegations of damage to the environment are not sufficient to establish causation. *Defenders of Wildlife*, 504 U.S. at 566 (rejecting the "ecosystem nexus" by stating that if the Endangered Species Act allowed someone to sue because they use the same ecosystem, this would allow a cause of action for people who have no injury in fact). Under *Lujan v. National Wildlife Federation*, a person must have claimed an injury from environmental damage in the area affected by the challenged activity and not an area roughly "in the vicinity" of the activity. *See Nat'l. Wildlife Fed'n.*, 497 U.S. at 887-889; *see also Morton*, 405 U.S. at 735. In *Laidlaw*, the court reaffirmed its stance from *National Wildlife Federation* in which the court stated that

merely alleging presence in the vicinity of an immense tract of territory was not sufficient for standing. *Laidlaw*, 528 U.S. at 183.

NUWF failed to allege any causal connection that was fairly traceable from Mr. Bowman's actions to any of the alleged injuries because the affiants never specified where the river looked "more polluted." NUWF attempted to ignore this by simply alleging that Mr. Bowman's actions caused damage to the entire ecosystem. Ms. Milford, a member of NUWF, testified that the Muddy looked more polluted to her than before Mr. Bowman's activities, but she did not specify that the Muddy River looked more polluted downstream. R. at 6. Ms. Milford would have to allege that she noticed more pollution nearby or downstream from Mr. Bowman's property to eliminate potential intervening causes of pollution and to prove causation from Mr. Bowman's actions. Just as the Supreme Court rejected the "ecosystem nexus" in favor of requiring a cognizable injury to an individual to establish standing, here, Appellant's allegation that the ecosystem was damaged should be rejected in absence of specific injury to an individual.

C. The administrative order between NUDEP and Mr. Bowman intends to improve the wetlands while NUWF's desired remedy poses potential harm to the area.

For the court to offer judicial protection to a party's claim, the party must allege that their claim is likely to be redressed by the requested relief. *Defenders of Wildlife*, 504 U.S. at 590 (Blackmun, J., dissenting) (citing *Allen v. Wright*, 468 U.S. 737, 751 (1984)). Plaintiffs must allege a likelihood of future harm when seeking injunctive relief, rather than just speculation that the interest would be redressed by a favorable decision. *Defenders of Wildlife*, 504 U.S. at 560-61; *City of Los Angeles v. Lyons*, 461 U.S. 95, 101 (1983). In *Laidlaw*, the court permitted the concept of deterrence to be used in the standing analysis when it was aimed to prevent the defendant from continuing his actions in the future. *Laidlaw*, 528 U.S. at 186. In *Steel Co. v. Citizens for a Better Environment*, the Court stated that deterrence was a factor for injunctive

relief when the defendant's actions constitute either a continuing violation or an imminent threat of future harm exists. *Steel Co. v. Citizens for Better Env't*, 523 U.S. 83, 104-05, 108 (1998) (holding that the environmental group suffered no redressable injury when the defendant inaccurately reported information that the environmental group reported to its members because the injury had passed).

The relief requested by NUWF does not redress the organization's injuries. The administrative order between NUDEP and Mr. Bowman already operates to leave the area improved by protecting the wetland and, further, NUWF is concerned with future harm from parties other than Mr. Bowman. The three affiants feared that the Muddy River could become more polluted if other adjacent wetlands were filled in and were drained for agricultural purposes into the Muddy. R. at 6. This allegation does not allege an injury from Mr. Bowman's actions; rather an injury from future actions of third parties. In the case at hand, the actions that NUWF is attempting to deter are not those of Mr. Bowman, but are the actions of other unnamed parties not enjoined in the present suit. Additionally, the consent agreement will leave Mr. Bowman's wetlands in a better state than before the field was cleared. A NUDEP biologist testified that once the buffer zone and the partially inundated wetland are established, the improvements will provide a better habitat for frogs than existed before. R. at 6.

Because NUWF has failed to allege a specific, concrete, and particularized injury to a member with regard to a lawful activity and has not stated a judicial recourse able to redress their alleged injuries, NUWF lacked standing to bring this suit. Accordingly, this Court should affirm the District Court's grant of summary judgment in favor of Mr. Bowman on the issue of standing.

II. NUWF'S CITIZEN SUIT IS BARRED BECAUSE THE ADMINISTRATIVE ORDER BETWEEN NUDEP AND MR. BOWMAN REQUIRES COMPLIANCE WITH THE CWA, THUS CONSTITUTING DILIGENT PROSECUTION UNDER § 505(B).

Citizen suits are barred under the CWA if EPA or the State has already commenced, and is "diligently prosecuting," an enforcement action. 33 U.S.C. § 1365(b)(1)(B) (2006). The Supreme Court stated in *Chesapeake Bay Foundation v. Gwaltney of Smithfield, Ltd.* that the statutory bar "suggests that the citizen suit is meant to supplement rather than to supplant governmental action." *Chesapeake Bay Found. v. Gwaltney of Smithfield, Ltd.*, 484 U.S. 49, 60 (1987). The Act's legislative history, particularly the Senate Report, provides further guidance that such suits are only proper if Federal, State, and local agencies fail to exercise their enforcement responsibility. *Id.* (quoting S.Rep. No. 92-414, at 64 (1971)).

An enforcement action under the CWA will ordinarily be considered "diligent" if the judicial action "is capable of requiring compliance with the Act and is in good faith calculated to do so." *The Piney Run Preservation Ass'n v. The County Com'rs of Carroll County, MD*, 523 F.3d 453, 459 (4th Cir. 2008); s*ee Friends of Milwaukee's Rivers v. Milwaukee Metro. Sewerage Dist.*, 382 F.3d 743, 765 (7th Cir. 2004) (on remand, citizen suit may proceed if the District Court concludes there is a realistic prospect that violations due to the same underlying causes addressed by state enforcement will continue after planned improvements are completed).

The citizen-plaintiffs bear the burden of proving that the state agency's prosecution was not diligent; this burden is heavy because courts presume that enforcement agencies act with due diligence. *Friends of the Earth v. Laidlaw Envtl. Services (TOC), Inc.*, 890 F.Supp. 470, 487 (D.S.C. 1995). Government prosecution under § 505(b) need not be far-reaching or zealous. *Karr v. Hefner*, 475 F.3d 1192, 1197 (10th Cir. 2007). Moreover, an agency's prosecutorial strategy need not coincide with that of the citizen-plaintiff in order for the citizen's suit to be barred. *Id.*; *N&S Rivers Watershed Ass'n, Inc. v. Town of Scituate*, 949 F.2d 552, 558 (1st Cir. 1991) (lack of

diligence not shown merely because the State may not be taking the precise action a citizen-plaintiff desires).

A. The administrative order required immediate compliance and therefore the order is entitled to the high degree of deference typically afforded to such agreements.

Courts have adopted the view that administrative orders, or consent decrees, should be granted a substantial amount of deference to ensure that the government's ability to reach voluntary settlements with defendants is not undermined. *Karr*, 475 F.3d at 1197; *Piney Run*, 523 F.3d at 459; *Atl. States Legal Found., Inc. v. Eastman Kodak Co.*, 933 F.2d 124, 127 (2d Cir. 1991) (holding that a citizen suit should be dismissed if the state enforcement has caused the alleged violation in the citizen suit to cease without likelihood of recurrence). Consequently, the existence of an administrative order between a government agency and a defendant has barred citizen suits when the order has addressed the same violation complained of by the citizen-plaintiff and is capable of requiring compliance. *See, e.g.*, *Sierra Club v. ICG E., L.L.C.*, 833 F.Supp.2d 571, 578-79 (N.D.W.Va. 2011) (consent decree requiring compliance with effluent limits and imposing a small fine barred citizen suit under CWA); *see also Chesapeake Bay Found. v. Severstal Sparrows Point, L.L.C.*, 794 F. Supp. 2d 602, 614 (D. Md. 2011) (holding that consent decree bars citizen suit to the extent the decree covers citizen-plaintiff's claim).

The foregoing authority demonstrates the significant amount of deference many courts grant to enforcement agencies and administrative orders in particular. The administrative order at issue is clearly the type capable of requiring compliance as envisioned by the Courts in *Piney Run* and *Friends of Milwaukee's Rivers*. The decree not only necessitates immediate cessation of clearing activity, it further requires conveyance of a conservation easement and buffer zone. R. at 4. The latter two provisions elevate the agreement beyond merely bringing Mr. Bowman into compliance by providing for the future preservation of the remaining woodlands.

B. The adequacy of NUDEP's administrative order is reinforced by comparison to agreements held by Courts to constitute insufficient prosecution.

Conversely, administrative orders may not amount to diligent prosecution if the agreement does not address the same violation complained of by the citizen-plaintiff or fails to recoup the defendant's economic benefit obtained through the violation. *See Ohio Valley Environmental Coalition, Inc. v. Independence Coal Co., Inc.*, No. 3:10-0836, 2011 WL 1984523, *5 (S.D.W.Va. May 20, 2011) (consent decree did not amount to diligent prosecution of the specific violation at issue when the violation occurred subsequent to the agreement); s*ee also Laidlaw*, 890 F.Supp. at 497 (failure of State agency to recover a violator's economic benefit is strong evidence that the agency's prosecution was not diligent).

In *Laidlaw*, the defendant owned and operated a hazardous waste incinerator and, as part of its operation, discharged treated wastewater into navigable waters pursuant to an NPDES permit. *Id*. at 474. The Court focused on the fact that the defendant's business was perhaps able to absorb the fine imposed by a consent decree, which raised concern that a business may accept such a penalty as a business expense if offset by the economic benefit of noncompliance. *Id.* at 491-92. Thus, the Court reasoned that removing a violator's economic benefit is central to the enforcement provisions of the CWA. *Id.* at 497. Although the Court in *Laidlaw* determined that the consent decree did not amount to a diligent prosecution, its rationale seemingly suggests that an insufficient fine is not dispositive of an agency's diligence but rather is a factor to consider depending on the factual scenario. *Id.* 491-92, 498.

NUDEP's administrative order is unlike the inadequate agreement faced by the courts in *Independence Coal* and *Laidlaw*. Unlike the decree in *Independence Coal*, the violation complained of by NUWF is precisely that which was addressed by the administrative order at issue – Mr. Bowman's clearing activities and consequential violation of §505. The present matter

is also distinguishable from *Laidlaw* in that Mr. Bowman's activities were not for the benefit of a corporation standing to benefit from continually violating the CWA and absorbing resulting penalties. For this reason, no similar argument can be made regarding insufficiency of fines or failure to recoup economic benefit.

The administrative order between Mr. Bowman and NUDEP amounts to diligent prosecution of the violation underlying both the NUDEP and NUWF actions. The order's provisions are straightforward and effectively bring Mr. Bowman into compliance with the CWA. Consequently, NUWF's citizen-suit is barred under § 505(b). Accordingly, this Court affirm the District Court's grant of summary judgment in favor of Mr. Bowman on the issue of NUDEP's diligent prosecution.

III. NUWF FAILED TO ALLEGE AN ONGOING VIOLATION WITHIN THE MEANING OF § 505 WHEN MR. BOWMAN'S ACTIVITIES CEASED PRIOR TO NUWF'S COMPLAINT.

The CWA provides that a citizen may commence a civil action against any person who is alleged to be in violation of the Act's standards or limitations, or an order issued by an Administrator or a State with respect to such standards or limitations. 33 U.S.C.A § 1365(a)(1) (2006). In *Gwaltney*, the Supreme Court established that the statute's requirement that a defendant be "in violation" mandates that plaintiffs allege "a state of either continuous or intermittent violation—that is, a reasonable likelihood that a past polluter will continue to pollute in the future." *Gwaltney*, 484 U.S. at 57. Section 1365 of the Act does not permit citizen suits for wholly past violations. *Id.* at 64. Despite the Supreme Court's decision in *Gwaltney*, courts have since continued to debate when a CWA violation is continuous or intermittent "such that it can be characterized as an ongoing violation rather than a wholly past violation." *See Sierra Club v. El Paso Gold Mines, Inc.*, 421 F.3d 1133, 1139 (10th Cir. 2005).

Numerous Circuits both before and after *Gwaltney* express the view of many courts that the continued presence of discharged materials, or their continuing effects, after a defendant's violating activity has ceased does not constitute a continuing violation. *Conn. Coastal Fishermen's Ass'n v. Remington Arms Co., Inc.*, 989 F.2d 1305, 1312 (2d Cir. 1993) (presence of lead shot and clay target fragments in Long Island Sound did not constitute an ongoing violation); s*ee Sierra Club v. Union Oil Co. of Cal.*, 853 F.2d 667, 670 (9th Cir. 1988) (penalties cannot be assessed against a defendant in a §505(a) suit until the citizen-plaintiff proves the existence of ongoing permit violations or the reasonable likelihood of continuing future violations); *see Hamker v. Diamond Shamrock Chem. Co.*, 756 F.2d 392, 397 (5th Cir. 1985) ("continuing residual effects resulting from a discharge are not equivalent to a continuing discharge"); *see Bettis v. Town of Ontario, N.Y.*, 800 F.Supp. 1113, 1119 (W.D.N.Y. 1992) (citizen suit could not be brought when defendant unlawfully excavated and filled in a wetland years before citizen-plaintiff's complaint was filed).

On the other hand, a contrasting line of decisions has broadly interpreted what constitutes an "ongoing violation" for purposes of §1365, finding that a citizen suit may be brought under the CWA for past violations when a defendant fails to remove discharged material. *Sasser v. Adm'r, U.S. E.P.A.*, 990 F.2d 127, 129 (4th Cir. 1993) (permitting dredged and fill material to illegally remain in a wetland constitutes a continuing violation); *City of Mtn. Park, GA v. Lakeside at Ansley, L.L.C.*, 560 F.Supp.2d 1288, 1297 (N.D. Ga. 2008) (holding that the continuing presence of illegally discharged fill material can constitute an "ongoing violation" under *Gwaltney*); *N.C. Wildlife Fed'n v. Woodbury*, No. 87-584-CIV-5, 1989 WL 106517, *2 (E.D.N.C. April 25, 1989) ("Treating the failure to take remedial measures as a continuing violation is eminently reasonable").

Mr. Bowman ceased land-clearing activities on July 15, 2012, weeks before NUWF sent a notice of intent to sue and over a month before NUWF filed its §505 complaint with the District Court. R. at 4. The question presented on appeal is whether the District Court was correct in finding that plaintiffs did not allege a continuing violation under *Gwaltney* and that, consequently, the Court lacked subject matter jurisdiction under §1365 for a *wholly past* violation. Specifically, the matter addressed herein is that which courts have continued to debate following *Gwaltney*, whether the presence of dredged and fill material in a wetland after the cessation of a defendant's discharging activities constitutes an "ongoing violation" for purposes of §1365(a).

A. Strict construction of "ongoing violation" is proper because Mr. Bowman's violation is wholly past and NUDEP has implemented corrective measures.

In *Remington*, the Second Circuit provided a typical example of the position that a citizen suit cannot be brought for a past violation. In *Remington*, the defendant gun club's operations had ceased by the time the citizen plaintiff filed suit. *Remington*, 989 F.2d at 1305. Conceding that the complained of activities had ceased, plaintiff's argument hinged on the proposition that no evidence indicated that defendant's lead and clay discharges would not resume at a later date. *Id.* In other words, the plaintiff in *Remington* argued that *Gwaltney's* standard was satisfied merely by alleging a future violation in "good faith." *Id.* The Second Circuit, however, rejected plaintiff's position on grounds that the defendant provided evidence showing no genuine factual dispute that polluting activities would continue, specifically that the gun club made an irrevocable decision not to reopen, facilities were dismantled, and DEP had already issued an order addressing the plaintiff's complaint. *Id*. Perhaps most importantly, the Second Circuit reasoned that, "the present violation requirement of the Act would be completely undermined if a violation included the mere decomposition of pollutants." *Id.*

The Western District of New York's decision in *Bettis* is particularly relevant to the instant matter in that the case involved the alleged excavation and filling of wetlands. *Bettis*, 800 F.Supp. at 1119. In *Bettis*, the defendant Galvin was alleged to have unlawfully excavated and filled in wetlands between 1985 and 1987 though plaintiffs did not file their complaint until 1992. *Id.* at 1115, 1119. The court in *Bettis* held that the acts on which the complaint was based were either wholly past or did not constitute a violation of the CWA and, therefore, plaintiffs failed to allege an ongoing violation. *Id.* at 1119.

Like the defendants in the above discussed cases, Mr. Bowman's polluting activities wholly ceased prior to the filing of plaintiff's citizen suit. R. at 4. Furthermore, there is simply no evidence in the record upon which to posit Mr. Bowman's activities will resume in the future. Just as the court in *Remington* considered case specific factors in order to conclude that no likelihood of future violations existed, this Court should similarly consider the circumstances surrounding the cessation of Mr. Bowman's discharging activities to find that NUWF has not alleged an ongoing violation.

Mr. Bowman entered a settlement with NUDEP under which he agreed to: (1) cease land clearing activities, (2) create a conservation easement on the remaining wooded area of his property, and (3) create a buffer zone between the remaining wooded area and the new field. R. at 5. The second part of the agreement is perhaps most significant because Mr. Bowman originally planned to clear the land protected under the conservation easement. *Id.* However, due to NUDEP's intervention and the creation of an easement on the remaining wooded area, no land remains which Mr. Bowman is capable of clearing. Therefore, Mr. Bowman is not simply *unlikely* to resume land clearing, he is physically *prohibited* from doing so.

B. Broad construction of "ongoing violation" is unnecessary when NUDEP has effectively intervened and has eliminated the policy concerns underlying such construction.

Plaintiffs emphasized at the District Court the broad rationale expressed by the Fourth Circuit's decision in *Sasser*, which stands in stark contrast to the previously discussed line of decisions by holding that merely allowing dredged and fill material to illegally remain in a wetland constitutes a continuing violation. *Sasser*, 990 F.2d at 129. Not only is *Sasser* an outlying decision when compared to other Courts of Appeals decisions, the case's facts distinguish the decision from the present matter. *Sasser* did not involve a question of subject matter jurisdiction for a §1365 citizen suit, rather the suit resulted from the defendant's *failure* to comply with the EPA's administrative orders demanding him to cease discharging activities and restore the wetland at issue. *Id.* at 128. Here, unlike *Sasser*, Mr. Bowman consented to the NUDEP's administrative order whereby he agreed to immediately cease his land clearing activities and take various conservation measures. Furthermore, no evidence in the record demonstrates that Mr. Bowman has not complied with the order.

Courts applying a broad construction of "ongoing violation" do so largely for policy concerns generated by a lack of prosecution. District court decisions like *City of Mountain Park* and *Woodbury* do not consider a government agency's intervention and implementation of corrective measures. *See, e.g.*, *City of Mtn. Park*, F.Supp.2d at 1289-91 (facts do not indicate previous intervention by a government agency); s*ee also Woodbury*, 1989 WL 106517, at *1 (ACOE investigation of peat mining operation concluded that property was not subject to CWA). *Woodbury* provides a prime example where the court found that public policy advanced its position, stating that "[i]f citizen-suits were barred merely because any illegal ditching and drainage of a wetland tract was completed before it might reasonably be discovered, violators would have a powerful incentive to conceal their activities from public and private scrutiny—

which would lead to serious problems in public and private enforcement." *Woodbury*, 1989 WL 106517, at *1.

The policy incentive underlying decisions like *Woodbury* is inapplicable in the present matter because an enforcing agency has already addressed Mr. Bowman's activities. Moreover, the policy rationale expressed in *Woodbury* is flawed for two reasons: (1) it fails to recognize the government's primary enforcement role and broader jurisdictional scope, and (2) the reasoning provides no compelling explanation of why violators would have a stronger incentive to conceal unlawful activities merely to avoid a citizen's suit. If the role of the citizen suit is secondary to the government's primary enforcement role, a violator is primarily incentivized to conceal illegal activity from the government regardless of a citizen's ability to file suit.

Strict construction of "ongoing" violation flows most logically from the language of § 505 and the Supreme Court's rationale in *Gwaltney*. Further, such construction is preferable since NUDEP diligently prosecuted Mr. Bowman and implemented corrective measures. For these reasons, this Court should affirm the District Court's grant of Summary Judgment on the ground that no ongoing violation exists.

IV. THE DISTRICT COURT PROPERLY DEFERRED TO EPA'S CONSTRUCTION OF THE TERM "ADDITION" WHEN DETERMINING THAT MR. BOWMAN'S LAND CLEARING DID NOT CONSTITUTE A "DISCHARGE OF POLLUTANTS."

Congress enacted the CWA in order to "restore and maintain the . . . integrity of the nation's waters." 33 U.S.C. § 1251(a). The Act is a congressional assignment of "a comprehensive regulatory program supervised by an expert administrative agency," the Environmental Protection Agency ("EPA"). *Coeur Alaska, Inc. v. Se. Alaska Conservation Council*, 557 U.S. 261, 298 (2009). Because Congress entrusted the Act's administration to a regulatory agency, this Court must apply the "two-step *Chevron* test" to interpret the CWA. See *Chevron, U.S.A., Inc.v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984); *ONRC Action v.*

U.S. Bureau of Reclamation, No. 97–3090–CL., 2012 WL 3526833, at *29 (D. Or. Jan. 17, 2012). Traditional maxims of statutory interpretation require a court to consider the plain text of the statute. In the event that a statute's language is ambiguous and unclear on a precise issue, the statutory interpretation maxims require the court to defer to EPA's "construction of the statute so long as it is reasonable." *See* 82 C.J.S. Statutes § 395.

Mr. Bowman did not violate § 301(a) of the CWA by declining to obtain a §§ 402 or 404 permit. 33 U.S.C. §§ 1311(a), 1342, 1344. Mr. Bowman did not violate § 301 of the Act because he did not "add" anything from the "outside world" to his wetland. *Id.* § 1362(6), (12). Mr. Bowman's land clearing included the burning of trees in order to dispose of excess biological waste and therefore his conduct fell within the scope of CWA § 402. *Id.* § 1342. In the alternative, even if Mr. Bowman's conduct is addressed by § 404, this Court must defer to EPA's recent construction of "addition" before finding a violation of the CWA. *Id.*

A. This Court should defer to EPA's interpretation of "addition" when faced with issues that Congress did not address.

Mr. Bowman did not discharge pollutants into his wetland as is prohibited by § 301(a). 33 U.S.C. § 1311 (a). Section 502(12) of the CWA defines "discharge of any pollutant," tautologically as "any *addition* of any pollutant" except in compliance with §§ 402 or 404. *Id.* §§ 1362(12), 1342, 1344 (emphasis added). The CWA does not define "addition," thus a court must apply general principles of statutory construction, "begin[ning] with the language of the statute" in order to discern its meaning. *El Paso Gold Mines, Inc.*, 421 F.3d at 1143. When a statute's language is *unambiguous*, courts should interpret the language in accordance with its plain meaning, which "is determined by reference to the language itself, the specific context in which that language is used, and the broader context of the statute as a whole." *Id.* If, however,

the language is *ambiguous*, "meaning it can be understood in two or more senses," the Court must defer to EPA's reasonable construction of the text. *Id.*

The use of "addition" in the CWA is ambiguous. "'Addition' is defined by Webster's New International Dictionary (2002) as 'the act or process of adding," but, the inquiry does not end, because Congress' intent must be reflected in applying the text. *El Paso Gold Mines, Inc.*, 421 F.3d at 1143. The CWA's "legislative history is silent" on the meaning of "addition" and the volume of conflicting decisions illustrate that the term is subject to multiple interpretations. *Id.*; *see United States v. Deaton*, 209 F.3d 331 (4th Cir. 2000) (finding the "[CWA]'s . . . use of the term 'addition' . . . unambiguous" and therefore "sidecasting" of dirt constituted an addition); *but compare United States v. Wilson*, 133 F.3d 251 (4th Cir. 1997) (holding, under the same facts as *Deaton*, that "sidecasting" in a wetland does *not* constitute an "addition" and if Congress intended "sidecasting" to be regulated under the Act it could redefine "discharge"). The term "addition" is ambiguous and this Court should defer to EPA's interpretation of the term throughout the CWA because EPA holds primary authority over the Act.

This Court should defer to EPA's construction of the terms used throughout the statute despite the fact that the EPA shares a small portion of its authority with the Army Corps of Engineers ("The Corps") under CWA § 404. Congress delegated primary authority over the Act to EPA, therefore this Court should defer to EPA's construction of the terms used throughout the statute. *See* 33 U.S.C. § 1361. Deference to EPA is especially necessary where both the statute's text and legislative history are silent.

The CWA establishes two mutually exclusive permit programs under §§ 402 and 404. *Coeur Alaska*, 557 U.S. at 273-74. EPA is responsible for issuing permits to regulate the discharge of pollutant waste under § 402, but shares authority with the Corps in issuing permits

for the discharge of dredge and fill material under § 404. *Id*. The two programs differ in overall objectives and in the types of regulated activities. *Id.* at 298-300; *see also El Paso Gold Mines*, 421 F.3d at 1145. Where § 402 focuses on preventing the degradation and contamination of the nation's waters, § 404 focuses on "the impact of a discharge on the receiving environment." *Coeur Alaska*, 557 U.S. at 298-300. Although the Corps is responsible for issuing § 404 permits, EPA retains significant substantive control over the terms of the program. *Id.* Congress requires EPA to establish guidelines that the Corps must follow and grants EPA veto power over permits issued in error. *Id.* at 269-70. Because EPA retains substantive control over the CWA in the law's entirety, this Court should defer to EPA's construction of ambiguous terms unless Congress has expressed otherwise.

Because "discharge of any pollutant" is defined once under the CWA and no separate definition exists for "discharge of dredge and fill material," traditional tools of statutory interpretation suggest that Congress likely intended the definition to be applied consistently throughout the Act. *See* 33 U.S.C. § 1362; *see also Ratzlaf v. United States*, 510 U.S. 135, 143 (1994) ("Ascribing various meanings to a single iteration of [§ 502(12)'s addition requirement] – reading the word differently for each code section to which it applies – would open Pandora's jar. If courts can render meaning so malleable, the usefulness of a single . . . provision for a group of related code sections will be eviscerated and ... almost any code section that references a group of other code sections would become susceptible to individuated interpretation."). Because "addition" is ambiguous, this Court should defer to EPA's reasonable construction, as the expert regulatory agency Congress charged with the enforcement and effectuation of the CWA.

B. Mr. Bowman's land clearing activities, which disposed of biological waste remains from felled trees, should be evaluated under § 402 of the CWA.

Mr. Bowman's disposal of biological waste on his wetland should be assessed under CWA § 402 because the 2002 Joint Rule issued by EPA and the Corps violates the CWA. 67 Fed. Reg. 31129-01 (May 9, 2002). The Joint Rule should be found invalid for violating the CWA because the rule expands the Corps' § 404 jurisdiction by eliminating the "primary purpose" test from the Corps' "fill material" definition. *See generally* Nathaniel Browand, *Shifting the Boundary Between Sections 402 and 404 Permitting Programs by Expanding the Definition of Fill Material*, 31 B.C. Envtl. Aff. L. Rev. 617, 643–47 (2004). The "primary purpose" test for defining fill material reflected Congress' intended limited role for the Corps under the Act. *Id.* at 625. Because the test is "purpose based," parties, like Mr. Bowman, can identify the necessary permits for a project based upon the project's goal. *Id.* at 643. For example, if a project's *primary purpose* is to eliminate waste, a § 402 permit is needed, whereas, if the project's *primary purpose* is to fill in navigable waters with dry material in order to provide structure for building and development, a § 404 permit is required. *Id.* In stark contrast, the new rule expands the Corps' jurisdiction to include pollution enforcement, which is a role Congress intended for EPA, by creating two mutually exclusive permit programs. *Id.*

When the primary purpose test is applied to Mr. Bowman's conduct, his land clearing falls under § 402 permit authority. Under § 402, a pollutant must be added and no addition occurs when pollutants already in the water are moved within the same water body. *Catskill Mtns. Chapter of Trout Unlimited v. City of N.Y.*, 273 F.3d 481, 492 (2d Cir. 2001) (observing that "if one takes a ladle of soup from a pot, lifts it above the pot, and pours it back into the pot, one has not "added" soup or anything else to the pot . . . in requiring a permit . . . the EPA might as easily

require a permit for Niagara Falls"). Because Mr. Bowman did not "add" anything to his wetlands, he did not violate the CWA.

1. The 2002 Joint Rule issued by EPA and the Corps violates the CWA by expanding the Corps' § 404 jurisdiction.

The new "fill material" definition introduced by the 2002 Joint Rule issued by EPA and the Corps violates the CWA because it applies an "effects based" test instead of the "primary purpose" test, which thereby shifts pollution enforcement authority from EPA to the Corps. Browand, *supra*, at 643. Fill material is now defined as "material that is placed in waters of the United States where the material *has the effect of:* (i) replacing any portion of a water . . . with dry land; or (ii) changing the bottom elevation of any portion of a water." 33 C.F.R. § 323.2(e)(1) (2011) (emphasis added). The jurisdictional expansion caused by applying an "effects based" test to define fill material exceeds the Corps' agency authority because the Corps may now regulate pollution, which Congress instead intended the EPA to regulate. *See Massachusetts v. EPA*, 549 U.S. 497, 532 (2007) (explaining that the obligations of two regulatory agencies may at times overlap, but that does not mean they both cannot "administer their obligations and yet avoid inconsistency"). While certain activities will involve discharges that fall into a "legal zone," wherein the discharge could reasonably be classified as both fill material and pollutant, the EPA may not "shirk its environmental responsibilities [under § 402]" by refusing to regulate waste because it falls in this "legal zone." *Id.*; *see Coeur Alaska*, 557 U.S. at 291 (Breyer, J., concurring) (describing the grey area between §§ 402 and 404 permitting authority).

By standardizing the Corps' and EPA's definitions of "fill material" and "discharge of fill material" and eliminating the "primary purpose" test, the new rule expands the Corps' role under the CWA beyond that which Congress intended. *See* Browand, *supra*, at 643-47. Corps

regulations have defined "fill material" using the "primary purpose" test, which excludes "material that was discharged primarily to dispose of waste," since the CWA's enactment in 1977. *Id*. at 625. These historical definitions reflected the Corps understanding that, while "some discharges of solid waste materials technically fit the definition of fill material," Congress granted EPA broad authority under the CWA and intended EPA to regulate solid waste discharges under § 402. *Id.* Thus, the Corps respected the boundaries Congress drew between the two agencies under the CWA despite the fact that EPA disagreed with the boundaries of authority. *Id.*

Throughout the comment period of the joint rulemaking, several commentators raised concerns over the Corps' jurisdictional expansion. 67 Fed. Reg. 31129-01, 31132 (May 9, 2002). The Corps and EPA addressed the concerns offering explicit assurances that the "final rule does not modify any . . . section 404 jurisdictional terms or alter any procedures governing the individual or general permit processes." *Id.* However, the agencies "disagree[d] that the rule cause[d] an inappropriate expansion of § 404 jurisdiction." *Id.* Instead, the agencies believed that the "primary purpose" test in the prior definition created an escape hatch for regulated industries to avoid § 404, which the new uniform definitions resolved. *Id.* at 31130.

Coeur Alaska eliminated any question that, despite the agencies' assurances, the "effects based" definition had the effect of expanding the Corps' authority by eliminating any overlap had that previously existed between §§ 402 and 404. *See Coeur Alaska*, 557 U.S. at 301-03 (criticizing the interpretation of the agencies definitions as creating mutually exclusive programs where "[w]hole categories of regulated industries can thereby gain immunity from a variety of pollution control standards"); *see also Nw. Envtl. Def. Ctr. v. Envtl. Quality Comm'n*, 223 P.3d 1071, 1086 (Or. Ct. App. 2009) (holding that "[b]ecause the discharge of dredged material is

within the exclusive regulatory authority of the Corps, EPA lacks authority of the Corps," and thereby striking down a permit program established by the Environmental Quality Council); *see also Kentuckians for the Commonwealth, Inc. v. Rivenburgh*, 317 F.3d 425, 448–52 (4th Cir. 2003) (noting in dissent that the majority would have arrived at a different result under the primary purpose test of the 1977 regulations).

EPA violated the CWA by delegating its own pollution enforcement duty to the Corps. This delegation should be held invalid by this Court. *See Coeur Alaska*, 557 U.S. at 295 (Scalia, J., dissenting) (criticizing the majority's deference to the regulations as an "irrational fillip that an agency position which otherwise does not qualify for *Chevron* deference *does* receive *Chevron* deference if it clarifies not just an ambiguous statute but *also* an ambiguous regulation."). Because the primary purpose of Mr. Bowman burning trees and pushing the material into windrows was to *dispose* of the excess waste, Mr. Bowman's land clearing is governed by § 402.

2. Mr. Bowman did not add pollutants to his wetlands when he moved material from one part of his wetland to another.

Under § 402, no "addition" occurs when polluted water is moved within the same body of water if the pollutant is not introduced by a point source. *Catskill Mountains*, 273 F.3d at 492. That is, to constitute an "addition" of a pollutant, the substance must be introduced from the "outside world." *Nat'l Wildlife Fed'n v. Gorsuch*, 693 F.2d 156, 165 (D.C. Cir. 1982). Courts have held that no addition occurs even when substances in the body of water are removed and returned to another part of the same body of water in different form. *Nat'l. Wildlife Fed'n v. Consumers Power Co.*, 862 F.2d 580, 585 (6th Cir. 1988) (holding that no addition occurred even though defendant's turbine "changed the form of the pollutant from live fish to a mixture of live and dead fish in the process" because the fish were already present in the water). Finally,

even water transferred from one body of water to a separate distinct body of water, as authorized by the NPDES Water Transfers Rule, does not constitute an "addition" when no pollutants enter the water during the transfer process. 73 Fed.Reg. 33697 (2008) (codified at 40 C.F.R. § 122.3(i) (2011)); *ONRC*, 2012 WL 3526833 at *28 (giving *Chevron* deference to EPA's Water Transfer Rule despite prior decisions rejecting the "unitary waters" theory of the new regulation). Because Mr. Bowman did not add anything from the outside world, he did not violate the CWA.

C. Mr. Bowman's land clearing did not violate the CWA § 404 permit because no "addition" of pollutants occurred when he simply moved biological materials about the wetland.

Mr. Bowman's land clearing did not violate the CWA because no "addition" of pollutants occurred. Because the CWA does not define "addition," this Court should defer to EPA's construction of the term in the context of the Act as a whole. Despite EPA's neglect to include "redeposit" within the scope of "addition" in limited situations for dredge material, redeposit should not apply to fill material "addition" because the term "fill" would then become superfluous. *See Bailey v. United States*, 516 U.S. 137, 146 (1995). Additionally, because only Congress may write new terms into a statute, the circuit courts have rejected and criticized as "recalcitrant" the Corps' attempts to expand the scope of regulated redeposit to include activities with *de minimis* effects and entire classes of activities Congress never intended to come under scrutiny. *Nat'l Ass'n of Home Builders v. U.S. Army Corps of Eng'rs*, *No. 01-0274* (*JR*), 2007 WL 259944, at *3–4 (D.C. Cir. Jan. 30, 2007).

Finally, the argument that the "outside world" theory and "water transfers" rule cannot extend to § 404 permitting because EPA has only applied these concepts to § 402 defies common sense because only the Corps has jurisdiction over dredge-and-fill permits. Thus, it follows logically that EPA would never apply the "outside world" or "water transfers" concepts to § 404. Moreover, the argument lacks legal support because at least one court has applied the "outside

world" theory under § 404 and another court expressed willingness to apply the "unitary waters" theory to § 404 if EPA adopted the theory in a formal rule. *See Froebel v. Meyer*, 13 F. Supp. 2d 843, 865 (E.D. Wis. 1998); *see Greenfield Mills, Inc. v. Macklin*, 361 F.3d 934, 947–48 (7th Cir. 2004).

Excluding "redeposit" from the scope of "addition of fill material," meaning that fill must come from the "outside world," does not read § 404 out of the CWA because once fill material is redeposited, it becomes dredge material. *See Froebel*, 13 F. Supp. 2d at 869. Thus, rather than reading the § 404 program out of the CWA, the "outside world" theory gives meaning to "fill" material. To find otherwise would require the illogical conclusion that both dredge and fill material are capable of being withdrawn and redeposited within a single water body. But such construction of the statute should be avoided because it would render the placement of "fill" material in the Act superfluous in conjunction with "dredge" material. *See Bailey*, 516 U.S. at 146 (stating principle that "we assume that Congress used two terms because it intended each term to have a particular, nonsuperfluous meaning"). The legislative history also negates interpreting "fill" as mere surplus because the drafters carefully chose the statutory terms and emphasized use of the definitions. *Gorsuch*, 693 F.2d at 173 n.52.

Further, the Corps attempts to expand its § 404 jurisdiction over redeposits despite Congress' intent has been repeatedly rejected by courts, suggesting that the use and addition of "redeposit" to the statute should be limited. *Nat'l. Ass'n of Home Builders*, 2007 WL 259944 at *3-4 (striking down the Corps' *Tulloch II* rule because it violated the CWA by defining "incidental fallback in terms of volume" and by requiring § 404 permits for all mechanized land clearing activities unless exempted by "project-specific evidence"); *Am. Min. Cong. v. U.S. Army Corps of Eng'rs*, 951 F. Supp. 267 (D.D.C. 1997) (invalidating rule defining discharges of

dredged material as "*any* addition of dredged material into, *including redeposit* of dredged material *within*, the waters") (emphasis added); *see also Wilson*, 133 F.3d at 259–60 (recognizing that "'addition' requires the introduction of new material into the area, or an increase in the amount . . . of material which is already present" and to hold otherwise would result in an over-inclusive interpretation that would criminalize "every artificial disturbance" to a wetland). Requiring "fill" to be from the "outside world" restores proper balance to § 404 "additions" of dredged material on one hand and fill material on the other.

At least one court has applied the "outside world" concept to a defendant's conduct under § 404 without reading the "dredge-and-fill" program out of the statute. *Froebel*, 13 F.Supp.2d at 865. In *Froebel*, the court noted that it would have reached the same result by evaluating the defendant's conduct under the general framework set forth in § 301(a) rather than under either specific permitting program. *Id.* The court stated that its' holding could be reframed as follows:

> A discharge of pollutants under § [301] must involve an "addition"; (2) an "addition" occurs when a point source introduces pollutants from the *outside world*; (3) redeposited sediment constitutes an "addition" in only certain limited circumstances; (4) those circumstances do not apply . . . (5) therefore there is no addition of pollutants under §[301].

Id. at 863 n.17. As *Froebel* acknowledges, "redeposit" applies in limited circumstances and the general rule is to apply an "outside world" theory of addition. *Froebel* illustrates the point that applying the "outside world" definition to fill material would not substantively change §404.

Finally, EPA's interpretation of "addition" embodied by the Water Transfers Rule deserves deference. *See Greenfield Mills, Inc.*, 361 F.3d at 947–48 (acknowledging "unitary waters" theory embodied in Water Transfers Rule and stating that "[i]f the EPA's position had been adopted in a rulemaking or other formal proceeding, deference of the sort applied in *Gorsuch* and *Consumers Power* courts might be appropriate").

Under *Chevron*, the agency's interpretation deserves a high degree of deference unless arbitrary or capricious. *ONRC,* 2012 WL 3526833 at *31-32. "The issue [for the court] is not whether the court would interpret the ambiguous statutory term in the same way or even whether the . . . interpretation is the best [one,]" rather, the court must decide whether the interpretation was reasonable. *Id.* (citing to *Chevron*). In *ONRC,* the court held that EPA's interpretation was reasonable because it reflected EPA's construction of "addition" intended under CWA § 502(12). *Id*. The court found that the rule reflected EPA's and Congress' position that, "although pollutants remain pollutants after they are discharged into the water[,] . . . pollutants may only be 'added' to the waters . . . once, at the point they are first introduced." *Id.* at *31. Further, the court in *ONRC* stated that the rule "seeks to define the point at which the addition of a pollutant first occurs." *Id.* at *31; *see Avoyelles Sportsmen's League, Inc. v. Marsh*, 715 F.2d 897, 914–16 (5th Cir. 1983) (noting that the Senate Committee explicitly and repeatedly recognized the essential goal of "controlling pollutants at the source"). Although the Water Transfers rule was issued under the NPDES program, "addition" is a broad statutory term that applies to both §§ 402 and 404 and the Court's application should be consistent across both programs.

Accordingly, Mr. Bowman's land clearing activities did not "add" pollutants to navigable waters within the meaning of the CWA and, therefore, do not constitute a violation of the Act.

CONCLUSION

For the aforementioned reasons, Jim Bob Bowman respectfully requests that this Court affirm the decision of the District Court for the District of New Union granting summary judgment to Appellee.

Respectfully Submitted,

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Counsel for Jim Bob Bowman

Dated: November 29, 2011