TEAM NO. 51

MEASURING BRIEF

C.A. No. 09-1001
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

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The District Court properly held that it lacks subject matter jurisdiction over the claims brought by the New Union Wildlife Federation (NUWF) under the citizen suit provision of the Clean Water Act (CWA), 33 U.S.C. § 1251, *et. al.*, because NUWF has not established that there is a current and ongoing violation. *See infra* Part II. Further, because the New Union Department of Environmental Protection has diligently prosecuted the defendant, the District Court properly found that NUWF's suit is jurisdictionally barred. *See infra* Part III.

In the present case, the District Court granted a motion for summary judgment on behalf of Defendant Jim Bob Bowman on June 1, 2012. Thus, under 28 U.S.C. § 1291, the Court of Appeals has jurisdiction to hear the appeal of that final decision.

STATEMENT OF THE ISSUES

I. Whether Plaintiff, NUWF has alleged sufficient facts to establish standing to sue Jim Bob Bowman for violating the CWA.

II. Whether there is still a continuing or ongoing violation, as required by § 505(a) of the CWA for subject matter jurisdiction, where the NUDEP has negotiated a consent order with defendant requiring him to cease all activity and create and maintain a conservation easement.

III. Whether NUWF's citizen suit has been barred by NUDEP's diligent prosecution of Bowman where NUDEP has directed defendant to cease all activities and convey portions of his property in the form of a conservation easement.

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

STATEMENT OF THE CASE

NUDEP filed the present complaint, after issuing an administrative order, against Bowman under § 505 of the CWA. R. at 4. NUWF filed another complaint under the same statute, "seeking civil penalties and an order requiring Bowman to remove the fill material and restore the wetlands." R. at 5. NUDEP requested to intervene in NUWF's action and the United States District Court for the District of New Union granted the motion. R. at 5.

Bowman filed a motion for summary judgment on four grounds, as summarized by the District Court:

> 1) NUWF lacks standing because neither it nor its members suffered an injury in fact fairly traceable to Bowman's alleged violations; 2) [the District Court] lack[ed] subject matter jurisdiction because any violations are wholly past; 3) [the District Court] lack[ed] subject matter jurisdiction because the State of New Union has already taken an enforcement action and fully resolved the violations; and this Court lacks subject matter jurisdiction because a key element of a CWA cause of action is not satisfied: addition.

R. at 5. The District Court granted summary judgment to Bowman on all counts.

Both NUWF and NUDEP appealed to the United States Court of Appeals for the Twelfth Circuit. R. at 1. Appeal was granted on September 14, 2012. R. at 2.

STATEMENT OF THE FACTS

Defendant Jim Bob Bowman is the owner of a 1,000 acre property adjacent to the Muddy River in Mudflats, State of New Union. R. at 3. Bowman's property qualifies as a "wetland" under the U.S. Army Corps of Engineers' Wetlands Determination Manual. R. at 4. Bowman's private property includes 650 feet of shoreline along the Muddy River. R. at 3. The river is used for recreational navigation. R. at 3.

The present case contains two plaintiffs: NUDEP and NUWF. NUDEP is a state governmental agency authorized to administer the CWA, including the authority to issue

administrative orders, collect fines, and enter into appropriate consent decrees. R. at 4. Plaintiff NUWF is a not-for-profit organization under the laws of New Union. R. at 4. Three members of NUWF, Dottie Milford, Zeke Norton, and Effie Lawless, submitted affidavits in the present case in support of standing. R. at 6. All three members have testified that they use the river for recreational boating, fishing, and picnicking. R. at 6. Norton testified that he frogged on Bowman's private property for years, and acknowledged that the property was clearly posted with signs and he "supposed he might have been trespassing." R. at 6.

Between June 15 and July 15, 2011, Bowman conducted a land clearing operation on his property, which included leveling trees and vegetation, pushing those trees and vegetation into windrows, and burning the windrows. R. at 3. Bowman then pushed the remaining trees and vegetation, along with their ashes, into trenches. R. at 3. After leveling the field once more, Bowman formed a wide ditch or swale which drained the field into the Muddy River. R. at 3.

After Bowman had completed his land clearing operation, NUWF filed suit against him under § 505 of the CWA. R. at 4. After being notified of the NUWF suit, Bowman entered into a settlement agreement with NUDEP. The agreement required Bowman to convey a conservation easement to NUDEP and to construct and maintain a year-round wetland on a seventy-five foot buffer zone between the wooded conservation easement land and the newly cleared field. R. at 4. NUDEP issued an administrative order incorporating the agreement, to which Bowman consented on August 1, 2011. R. at 4.

STANDARD OF REVIEW

Since this appeal is from the District Court's grant of summary judgment, the standard of review is de novo. *Pellack v. U.S. Dept. of Justice*, 577 F.3d 736, 738 (7th Cir. 2009). Summary

judgment is appropriate where "there is no genuine issue as to any material fact." Fed. R. Civ. P. 56.

SUMMARY OF THE ARGUMENT

The District Court's holding should be affirmed in full. First, the District Court properly held that the plaintiffs lacked standing to bring suit because the members of the plaintiff organization failed to allege the direct, concrete injuries necessary to establish standing under Supreme Court precedent. *See Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 169 (2000); *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992) (*Defenders of Wildlife*). The Supreme Court has found standing for plaintiff environmental organizations when those organizations alleged significant injuries, such as the building of a resort in a pristine area, *Sierra Club v. Morton*, 405 U.S. 727, 728-29 (1972), or pollution accompanied by a reduction in property values. *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 182-83 (2000). The members of the plaintiff organization admitted in their affidavits that although they use the Muddy River for recreational boating and fishing, and use its banks for picnicking, they cannot see any difference in the land from the river or its banks. R. at 6. Such allegations fail to arise to the level of injury required for standing, and required the District Court to grant summary judgment to Defendant Bowman.

Second, the District Court correctly granted summary judgment because Bowman's alleged violations are wholly past. In order to defeat a defendant's motion for summary judgment, a plaintiff must establish either (1) that violations have continued on or after the date the complaint is filed, or (2) that there is a reasonable likelihood that the violations will reoccur in the future. *Chesapeake Bay Found. v. Gwaltney*, 844 F.2d 170, 171-72 (4th Cir. 1988). In the present case, plaintiff fails on both fronts. First, all alleged violations ceased when Bowman

settled with NUDEP. Further, plaintiff's creative theory that the continued presence in Bowman's land of dredged spoil and fill constitutes a continuing violation has been rejected by courts on legal and policy grounds. *See Conn. Coastal Fishermen's Ass'n v. Remington Arms Co.*, 989 F.2d. 1305, 1313 (2d Cir. 1993); *see also Bettis v. Town of Ontario, N.Y.*, 800 F. Supp. 1113, 1119 (W.D.N.Y. 1992); *see also United States v. Telluride Co.*, 884 F. Supp. 404 (D. Colo. 1995). Second, there is no reasonable likelihood that Bowman will engage in further violations since a governmental agency has issued an order requiring Bowman to cease his activities. Where a state engages in such a settlement, it is impossible for an individual to engage in the activities again. *Coon v. Willet Dairy, LP*, 5:02CV1195 (FJS/GJD), 2007 WL 2071746, at *2 (N.D.N.Y. July 17, 2007).

Third, the District Court correctly held that NUWF's suit is barred because NUDEP has already diligently prosecution the action by filing a complaint and reaching a settlement with Bowman. This Court must defer to the state agency's choice on how to prosecute Bowman. *See Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 890 F. Supp. 470, 486-87 (D.S.C. 1994). Further, a plaintiff group's disagreement with the state's chosen form of prosecution does not defeat a claim of diligent prosecution. *Karr v. Hefner*, 475 F.3d 1192, 1197 (10th Cir. 2007) (finding that diligent prosecution does not need "to be far-reaching or zealous. It requires only diligence. Nor must an agency's prosecutorial strategy coincide with that of the citizen-plaintiff."). Thus, the consent decree in the present case, combined with the need to promote agency settlements in CWA actions, dictate that this Court affirm the District Court and find that NUDEP has diligently prosecuted Bowman.

Finally, the District Court correctly held that Bowman did not violate the Clean Water Act because there was no "addition" of any pollutant to navigable waters from any point source.

The Court must show great deference to the Environmental Protection Agency's interpretation of the CWA; Both of the EPA's interpretations of the term "addition"--the "from the outside world" theory and the "unitary navigable waters" theory--preclude a finding that Bowman violated the Clean Water Act. For these reasons, the Court should affirm the District Court's holding in full.

ARGUMENT

I. NUWF DOES NOT HAVE STANDING TO SUE FOR BOWMAN'S ALLEGED CWA VIOLATIONS.

The District Court correctly granted summary judgment, finding that NUWF does not have standing. As plaintiff, NUWF bears the burden of establishing standing in order to survive a motion for summary judgment. *Celotex Corp. v. Catrett,* 477 U.S. 317, 322 (1986). *See* Fed. R. Civ. P. 56(c). To establish standing, a plaintiff must demonstrate: (1) that he has suffered injury in fact; (2) that the injury is fairly traceable to the actions of the defendant; and (3) that the injury will likely be redressed by a favorable decision. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992) (*Defenders of Wildlife*). In order for NUWF to establish standing, it must demonstrate that its members would have personal standing to bring the suit in their own right. *Sierra Club v. Morton*, 405 U.S. 727, 732 (1972).

Here, however, the three NUWF members upon whose affidavits the plaintiff claimed standing (hereafter, "affiants") failed to allege the direct, concrete injuries necessary to establish standing. According to the District Court, plaintiff testified that they were aware that the wetlands serve "valuable functions in maintaining the integrity of rivers," but did not allege any visible "difference in the land from the river or its banks." R. at 6. Furthermore, the affiants' additional allegations fail to establish the sort of injury that can be recognized under Supreme Court precedent, indicating that the plaintiff lacks standing in the present case. Thus, the District Court properly granted summary judgment for Bowman.

A. The Plaintiff's Alleged Injuries Are Not Actual, Concrete, and Specific Enough to Establish Standing.

In order to establish standing, a plaintiff must show that it has suffered an actual injury, and the injury must be stated in concrete and specific terms. *Defenders of Wildlife*, 504 U.S. at 562; *Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871, 889 (1990) (*Nat'l Wildlife*). Where a wildlife conservation group challenged a regulation under the Endangered Species Act of 1973, the Supreme Court found that, absent definite plans to return to the affected area, an increased rate of extinction among endangered and threatened species did not constitute an "actual or imminent" injury. *Defenders of Wildlife*, 504 U.S. at 559, 564, 562. *See also Summers v. Earth Island Inst.*, 555 U.S. 488, 496 (2009) (affidavit failed to establish standing when it referred specifically to a series of projects in the relevant area that would be affected by a challenged regulation, but did not assert "any firm intention to visit their locations").

Although NUWF claims that its members regularly return to the area in question, it has failed to show an actual harm to the environment to make out the actual injury required for standing. R. at 6. NUWF's claim is essentially the reverse of the plaintiff's claim in *Defenders of Wildlife* – a clear intent to return to the area in question, but a failure to show that the area is actually affected by Bowman's alleged CWA violations. Although one affiant alleged that the river "looked more polluted to her," all three admitted that they saw no visible "difference in [Bowman's] land from the river or its banks." R. at 6.

In addition to not properly alleging "actual injuries," plaintiffs also fail to establish that its members utilize the specific area in question such that they will actually be affected by Bowman's alleged violation. In *Nat'l Wildlife*, the Supreme Court found that affidavits from two members of the plaintiff organization were insufficient to establish standing when the members

claimed to use extremely large vicinities of land[1] without specifying what portion of the land was actually used and would be adversely affected by government action. 497 U.S. at 889. *See also Summers v. Earth Island Inst.*, 555 U.S. at 495 (the affidavit of a member of the plaintiff organization was insufficient to establish standing when affiant alleged "that he [had] visited many National Forests and plan[ned] to visit several unnamed National Forests in the future" but failed "to allege that any particular . . . project . . . [would] impede a specific and concrete plan . . . to enjoy the National Forests."). Similarly, affiants allege that they use the Muddy River, an area constituting "miles both upstream and downstream" from Bowman's property. R. at 3. Bowman's property only constitutes 650 feet and plaintiffs admit they use portions of the river beyond those adjacent to Bowman's property. R. at 3, 6.

As affiants are unable to allege any concrete and specific injury resulting from Bowman's alleged conduct, they instead claim to fear that the Muddy River "will be far more polluted if other adjacent wetlands are cleared and drained for agricultural uses." R. at 6. Such an attempt is futile. Because the affiants failed to allege any specific, identifiable changes to the area in question, they have not met the level of specificity required by *Nat'l Wildlife*. 497 U.S. at 889.

Lastly, unable to allege any past or present injuries, affiants have speculated that future injuries will result if other adjacent wetlands are cleared and drained. This argument also fails. Affiants' fears about possible future CWA violations cannot form the basis for standing in the present case. *City of Los Angeles v. Lyons*, 461 U.S. 95, 105 (1983). In *Lyons*, the Supreme Court held that a plaintiff who had once been subjected to a chokehold by the police did not have standing to challenge the general use of chokeholds. *Id*. Although plaintiff had standing to claim

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[1] One affidavit claimed the use of federal land within the vicinity of an affected area scaling "4500 acres" and the other claimed an injury based on changes to a 5.5 million acre area. 497 U.S. 871, 887 (quoting *National Wildlife Federation v. Burford*, 699 F.Supp. 327 (D. D.C. 1988)).

damages for having been illegally choked, he could not "establish a real and immediate threat" of being choked again; therefore, there was no case or controversy between the parties. *Id*. In the present case, the affiants claim to fear that other landowners in the area will clear their wetlands and drain them for agricultural uses. R. at 6. Even if these allegations were sufficient to establish standing, these hypothetical defendants are not before this Court. The affiants' fear about possible future violations by non-parties therefore does nothing to establish standing against Bowman.

B. Plaintiff Failed to Present Enough Proof to Establish Injury.

The Supreme Court has only found standing for plaintiff environmental organizations when they alleged harms greater than the ones at issue in the present case. Subsequently, circuit courts of appeals have relied on Supreme Court precedent to deny standing where plaintiff organizations have failed to allege an actual threat of injury.

In order to establish standing, the Supreme Court has required allegations of significant harm. *Sierra Club v. Morton*, 405 U.S. 727, 734-35 (1972) (acknowledging that building of the resort could amount to an injury in fact as required for standing because the resort would aesthetically harm the area). In finding that the harm alleged could amount to an injury in fact, the Court noted that the Sierra Club's complaint "alleged that the development 'would destroy or otherwise adversely affect the scenery, natural and historic objects and wildlife of the park and would impair the enjoyment of the park for future generations.'" *Id*. at 735.

But, absent a showing of direct injury, a special interest in the area will not be sufficient for standing purposes. *Didrickson v. U.S. Dept. of Interior*, 982 F.2d 1332, 1340-41 (9th Cir. 1992) (finding standing because in addition to a general interest in the area, plaintiff organization also alleged an increased killing of sea otters in an area that members frequented). Thus, it is

necessary for plaintiff to allege a direct injury. *Envtl. Def. Fund, Inc. v. Hardin*, 428 F.2d 1093, 1097 (D.C. Cir., 1970) (finding standing to challenge the use of DDT under the Federal Insecticide, Fungicide, and Rodenticide Act because plaintiffs showed that they unwillingly consumed pesticide residues accumulated in the environment).

Plaintiffs do not allege harm significant enough to establish standing. Although the three members of the plaintiff organization cannot see a difference in Defendant's land from their areas of recreation on the river or its banks, one member, Dottie Milford, testified that the Muddy River "look[ed] more polluted to her than it did prior to Bowman's activities." R. at 6. This vague statement falls beneath the standard required to establish standing. Unlike the harm alleged here, the injury in *Sierra Club v. Morton* dealt with a change that would be immediately visible to users of the area in question – the imposition of a new highway and ski resort on a previously undeveloped area. 405 U.S. at 728. Such drastic and immediately visible changes to a natural area are far different than one individual's subjective evaluation that an area "looks more polluted." This is especially true when that individual's statement is contradicted by other evidence in the record (the affiants' inability to see changes to Bowman's land from the river or its banks). *See* R. at 6.

There is one instance where the Supreme Court has found standing based upon a general aesthetic injury, but this case is both distinguishable and not applicable to the present facts. *See Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167 (2000). Plaintiff Friends of the Earth, Inc. (FOE) filed suit against Laidlaw, alleging noncompliance with a permit regulating pollutant discharge. *Id*. Plaintiffs submitted sworn statements alleging changes in the appearance and odor of the waterway, reluctance to purchase property in the area because of the increased pollution, and a reduction in property value in the area surrounding the facility. *Id.* at

181-83. The Court found that these statements "adequately documented injury in fact." *Id.* at 183.

Although the Court's approach to standing in *Laidlaw* has been described by some as novel,[2] *Laidlaw* did not overturn *Lujan* or substantially change the basic holdings in either *Defenders of Wildlife* or *Nat'l Wildlife*. *Laidlaw*, 528 U.S. at 169. The Court was careful to distinguish *Laidlaw* from its previous holdings by noting the strong evidence plaintiffs presented, evidence which was lacking in *Nat'l Wildlife*:

> Here, injury in fact was adequately documented by the affidavits and testimony of FOE members asserting that *Laidlaw*'s pollutant discharges, and the affiants' reasonable concerns about the effects of those discharges, directly affected those affiants' recreational, aesthetic, and economic interests. These submissions present dispositively more than the mere 'general averments' and 'conclusory allegations' found inadequate in *Lujan v. National Wildlife Federation* . . . .

Id. (internal citations omitted).

Like *Nat'l Wildlife*, the present case does not contain facts sufficient to establish standing. While the Court in *Laidlaw* did recognize general aesthetic harm as an injury, the plaintiffs in that case also alleged injuries based on diminished property value. The plaintiffs in both *Nat'l Wildlife* and the present case did not allege such injuries. Instead, they primarily alleged a general concern with the wetlands supported by only one affiant's vague statement. As made clear in *Laidlaw* and *Sierra Club*, such allegations fail to state the sorts of injuries required to establish standing. The injuries in *Laidlaw* and *Sierra Club* were widely recognized and would be immediately apparent to any visitor in the relevant area. 528 U.S. 167, 181-82 (2000); 405 U.S. 727, 735 (1972). The injuries in the present case, on the other hand, are either not legally cognizable or appear to be in mind of the plaintiff.

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[2] *See* John D. Echeverria, C*ritiquing Laidlaw: Congressional Power to Confer Standing and the Irrelevance of Mootness Doctrine to Civil Penalties*, 11 Duke Envtl. L. Rev. 287, 295 (2001).

The Courts of Appeals have rightly interpreted *Laidlaw* and *Sierra Club* as requiring proof of an actual injury to establish standing. Rather than simply giving a rubber stamp to plaintiffs who allege a vague injury, the courts have demanded that direct, concrete injuries be asserted. The Ninth Circuit, for example, found that a plaintiff lacked standing when plaintiffs were unable to show "at least reasonable probability of a threat to concrete interest." *Nuclear Info. & Res. Serv. v. Nuclear Regulatory Comm'n*, 457 F.3d 941, 953-54 (9th Cir. 2006). In addition, the Seventh Circuit found that plaintiffs did not establish standing where they submitted affidavits alleging that they bird watched in the relevant area, visited public parks, drank water from the lake, and ate fresh and ocean water fish. *Pollack v. U.S. Dept. of Justice*, 577 F.3d 736, 738, 743 (7th Cir. 2009). Other circuits have reached similar conclusions. *See Nat'l Ass'n of Home Builders v. E.P.A.*, 667 F.3d 6, 15-16 (D.C. Cir. 2011) (plaintiff did not have standing to challenge deprivation of a procedural right when it could not establish an injury traceable to the challenged action); *Mancuso v. Consol. Edison Co. of N.Y., Inc.*, 25 Fed. Appx. 12 (2d Cir. 2002) (plaintiffs did not have standing when they did not "reside, own property, or recreate in, on, or near [the affected area, and] they [did] not 'use' [the area] for any purpose other than to obtain evidence to support [the] lawsuit.").

This Court should likewise require greater proof of actual injury than what NUWF has presented, and should deny standing accordingly. The affiants' inability to see any change to Bowman's property, combined with only a vague allegation of some slight difference in the Muddy River, show that the plaintiff has not sustained an actual injury that can be traced to Bowman's alleged CWA violation. Like the plaintiff in *Nuclear Info. & Res. Serv.*, NUWF has not alleged a concrete interest that was injured by Bowman's actions. *See* 457 F.3d at 952. In the same way that the plaintiffs could not trace a potential health risk to the alleged action, the

plaintiffs in the present case cannot establish that Bowman's alleged CWA violation will in any way impact their enjoyment of the Muddy River.

And like the plaintiff in *Pollack*, NUWF appears to be seeking "'the simple satisfaction of seeing the [environmental] laws enforced.'" *See* 577 F.3d at 743 (quoting *Jaramillo v. FCC*, 162 F.3d 675, 677 (D.C. Cir. 1998)). Affiants fail to allege an injury that amounts to anything more significant than the injury that the court rejected in *Pollack*. The plaintiff in *Pollack* was unable to demonstrate that his bird watching interest along a vast area of land would be impacted by a gun range in one portion of the shoreline. Similarly, affiants are unable to demonstrate that their general enjoyment of a miles long river would be impacted by activities along a small 650 feet portion of land.

C. Plaintiff Cannot Establish Standing Because There is No Legally Cognizable Interest in Illegal Frogging.

Finally, although Mr. Norton alleges that there is a reduction in the number of frogs on Defendant's property, the District Court correctly noted that the plaintiff cannot have a legally cognizable interest in an illegal activity. *See Bennis v. Michigan*, 516 U.S. 442, 446 (1996) ("[A] long and unbroken line of cases holds that an owner's interest in property may be forfeited by reason of the [illegal] use to which the property is put . . . ."); *Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations*, 413 U.S. 376, 389 (1973) ("Any First Amendment interest which might be served by advertising an ordinary commercial proposal . . . is altogether absent when the commercial activity itself is illegal and the restriction on advertising is incidental to a valid limitation on economic activity."). While the Supreme Court has recognized aesthetic interests and "environmental well-being" as legally cognizable interests, it has required that the plaintiff be among those who are actually injured in order to establish standing. *Sierra Club v. Morton*, 405 U.S. 727, 734-35 (1972). Mr. Norton is simply not among those who are actually injured by

the alleged reduction in the number of frogs on Bowman's property, since Mr. Norton is not a person who had the legal authorization to be on the property in the first place.

While it is true that the conservation easement will now allow Mr. Norton to legally frog on Bowman's property, R. at 8, plaintiff will not be able to establish standing on the basis of this newly acquired legal right to enter the premises. Because the conservation easement was instituted after Bowman's alleged CWA violations had already taken place, and any reduction in the number of frogs on the property will presumably already have occurred before the conservation easement was instituted, plaintiff will be unable to establish that there has been a change in the condition of the land during the time of Norton's legally cognizable interest. There will therefore be no changes in the property of the sort that were seen in *Sierra Club* or *Laidlaw*. *See* 528 U.S. 167, 183 (2000); 405 U.S. 727, 735 (1972).

For the above reasons, this Court should affirm the District Court and hold that NUWF does not have standing to sue Bowman.

II. THE DISTRICT COURT CORRECTLY GRANTED SUMMARY JUDGMENT BECAUSE BOWMAN'S ALLEGED VIOLATIONS ARE WHOLLY PAST.

Section 505(a) of the Clean Water Act provides that "any citizen may commence a civil action on his own behalf – against any person . . . who is 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 standard of limitation." 33 U.S.C. § 1365(a). The Supreme Court has held that the proper interpretation of "to be in violation" precludes suits for wholly past violations. *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Found., Inc.*, 484 U.S. 49, 64 (1987) (*Gwaltney I*). The majority wrote:

> The most natural reading of "to be in violation" is a requirement that citizen-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.

> Congress could have phrased its requirement in language that looked to the past ("to have violated"), but it did not choose this readily available option.

Id. at 57.

Thus, to defeat a defendant's motion for summary judgment, a plaintiff must allege in good faith that defendant is engaged in a continuous or ongoing violation. *Gwaltney I*, 484 U.S. at 57. A plaintiff can establish this "either (1) by proving violations that continue on or after the date the complaint is filed, or (2) by adducing evidence from which a reasonable trier of fact could find a continuing likelihood of a recurrence in intermittent or sporadic violations." *Chesapeake Bay Found. v. Gwaltney*, 844 F.2d 170, 171-72 (4th Cir. 1988) (*Gwaltney II*). *See also Sierra Club v. Union Oil Co. of Cal.*, 853 F.2d 667, 669 (9th Cir. 1988) ("[T]o invoke federal jurisdiction under Section 505(a) of the Clean Water Act, a citizen plaintiff must 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." (quoting *Gwaltney I*, 484 U.S. at 57)). Congress acknowledged this reading of the continuous violation when passing the statute. *Gwaltney I*, 484 U.S. at 62 ("[T]he two provisions share the common central purpose of permitting citizens to abate pollution when the government cannot or will not command compliance.").

In the present case, NUWF has not alleged any facts that support a finding that Bowman is engaged in an ongoing or continuous violation. In fact, it is clear from the record that all of Bowman's alleged violations are wholly past. Therefore, this Court should affirm the District Court for two reasons. First, any alleged violations, if true, occurred before the date in which NUWF filed suit, and second, there is no likelihood that Bowman will engage in any further violations.

A. Bowman's Alleged Section 404 Violations All Occurred Prior to NUWF's Suit.

The District Court correctly concluded that Bowman's alleged violations are wholly past and therefore jurisdictionally barred under Section 505(a). Here, all "acts on which the complaint is based either occurred wholly in the past, or simply could never have constituted violations of the Act in the first place." *See Bettis v. Town of Ontario, N.Y.*, 800 F. Supp. 1113, 1119 (W.D.N.Y. 1992) (rejecting the continued presence of fill as a reason for a continued violation).[3] NUWF did not file its complaint until August 30, 2011. R. at 5. Bowman ceased all operations approximately two months before on July 1, 2011. R. at 4. He has not resumed operations since that date. Thus, there is no continuing violation because Bowman has not discharged dredged spoil or fill since the filing of plaintiff's complaint. *See Bettis*, 800 F. Supp. at 1119.

Since the record clearly shows that Bowman is not currently violating Section 404, plaintiff is now asking this Court to create a new category of continuous violations that would be in direct tension with the statute's purpose. This argument fails, however, for two reasons: (1) the continued presence of dredged spoil and fill materials does not constitute an ongoing violation and (2) to recognize the presence of fill and dredged material as a continuing violation would obviate § 505(a)'s jurisdictional requirement.

1. *The Continued Presence of Fill Does Not Constitute a Continuing Violation*.

Courts have found that the continued presence of pollutants in a wetland cannot by itself establish a continuing violation. Where plaintiffs alleged that a continuous violation existed because of previously deposited lead shot, the Second Circuit found that such a theory did not constitute a continuous violation. *Conn. Coastal Fishermen's Ass'n v. Remington Arms Co.*, 989 F.2d, 1305, 1313 (2d Cir. 1993). Like the plaintiffs in this case, the plaintiffs in *Remington*

[3] Bowman's alleged violations of Sections 301(a) and 404 are addressed in Issue 4 of this brief.

conceded that the defendant had shut down all operations and was not currently discharging pollutants. *Id*. Further, the plaintiffs in *Remington* attempted to argue that the continued presence of pollutants in the land would constitute a continuous violation. *Id*. at 1313. This theory, when applied to dredged spoil and fill, was rejected by the Western District of New York. *Bettis*, 800 F.Supp. at 1119 (finding no continuous violation because all addition of fill occurred years before plaintiffs filed suit). As the District Court found, "Plaintiff's continuing violation theory is ingenious but cannot be credited." R. at 7.

Plaintiff's reliance on cases where courts have found continuing violations based on the presence of dredged spoil and fill is misplaced. In *Gwaltney I*, Justice Scalia's concurrence explained that the continuous violations theory is based on the need for defendants to take remedial measures:

> When a company has violated an effluent standard or limitation, it remains, *for purposes of § 505(a), 'in violation' of that standard or limitation so long as it has not put in place remedial measures that clearly eliminate the cause of the violation*. It does not suffice to defeat subject-matter jurisdiction that the success of the attempted remedies becomes clear months or even weeks after the suit is filed. Subject-matter jurisdiction 'depends on the state of things at the time of the action brought.'

Gwaltney I, 484 U.S. at 69 (Scalia, J., concurring) (emphasis added).

Justice Scalia suggested that the case be remanded to determine "whether petitioner had taken remedial steps that had clearly achieved the effect of curing all past violations by the time suit was brought." *Id*. at 69-70. The main question in *Gwaltney I*, was whether there was a treatment plant capable of removing the pollutants. *Id*. at 53. If such a plan existed, then it would constitute proper remedial action and not be a continuous violation. In other words, neither the majority nor the concurrence suggests that a continuous violation exists if the pollutant remains in the land. They only suggest that some type of remedial action must be taken to cure the

violation. Thus, this Court must focus on whether Bowman has taken actions to remedy his alleged violation.

Courts have found the presence of fill and dredged spoil to be a continuing violation where the defendant has not taken any remedial measures. To recognize the presence of fill as a continuing violation where the defendant has taken remedial measures would be contrary to the Court's message in *Gwaltney I*. In particular, the District Court noted plaintiff's reliance on *Sasser v. Adm'r, U.S. E. P. A.*, 990 F.2d 127, 129 (4th Cir. 1993). But, in *Sasser*, the defendant failed to take any remedial measures to fix the problem. *Id*. at 128-29 ("Dr. Sasser's refusal to comply with these orders led to the issuance of a complaint."). To emphasize this point, the Fourth Circuit wrote that if Dr. Sasser had taken any remedial steps, then there likely would not have been a continuing violation. *Id*. 129 ("If the only violation of the Act had occurred in December 1986, Dr. Sasser would have at least a colorable argument against retroaction . . ."). The Ninth Circuit, when finding a continuous violation based on the continued presence of fill theory, relied on the defendant's failure to take remedial measures. *N.C. Wildlife Fed. v. Woodbury*, No. 87-584-CIV-5, 1989 WL 106517, at *2 (E.D.N.C. April 25, 1989) ("Treating the failure to take remedial measures as a continuing violation is eminently reasonable.").

Plaintiff's theory is incorrect because Bowman took serious remedial measures in the present case. The facts in this case are not like those in *Sasser* or *Woodbury* since Bowman, through his settlement, has taken remedial steps to fix the violation. He granted the state a conservation easement on the undeveloped land allowing for public entry. R. at 4. He also constructed and now maintains a year-round wetland on a 75-foot buffer zone area between his own land the undeveloped portion. R. at 4. All of these actions have been done at "considerable initial expense and indeterminable future expense" to Bowman, R. at 8, and qualify as the

remedial actions that were missing in *Sasser* and *Woodbury*. In short, Bowman is no longer discharging fill into the wetland. In fact, if anything, he is now doing the opposite by restoring the wetlands and making it a better place for those in the community.

2. *Public Policy Prohibits This Court From Recognizing the Ongoing Presence of Fill as a Continuing Violation Because it Would Obviate the CWA's Jurisdictional Requirement.*

Lastly, public policy prevents this court from recognizing the continued presence of dredged spoil and fill in the land as a continuing violation. To do so would completely obviate the jurisdictional requirement of Section 505. *See Remington*, 989 F.2d at 1313 ("The present violation requirement of the Act would be completely undermined if a violation included the mere decomposition of pollutants.").

If this Court finds that the continued presence of fill and dredged spoil constitutes a continuing violation, then it will be impossible for a citizen plaintiff's suit to be barred even when the defendant, such as Bowman in this case, takes extreme corrective action to remedy his or her violation. This point was emphasized in *United States v. Telluride Co.*, where the court considered the meaning of "continuing violation" in relation to the CWA's statute of limitations requirement. 884 F. Supp. 404 (D. Colo. 1995). The court wrote that "[i]t is undisputed the damaged caused by filling wetlands continues long beyond the actual discharge. Nevertheless, to adopt the government's position, would be to rob [the provision]. . . of any meaning in the CWA context." *Id*. at 408. Even though *Telluride* determined that the continued presence of fill is not a continuous violation for statute of limitations purposes, the reasoning is still instructive. In the same way that it would undermine the required statute of limitations, reversing the lower court and finding that that the continued presence of dredged spoil is a continuing violation would also cut against Section 505(a)'s jurisdictional requirement.

In addition, it is not clear from the record that the fill and dredged spoil can even be removed from Bowman's property. According to the District Court's finding of facts, the only portion of the property that has not been restored to wetlands status has now been completely drained and filled with wheat. Thus, it is unclear that there is still any fill or dredged spoil left, or if it has already washed away. Even if, as plaintiffs argue, the fill and dredged spoil could hypothetically be removed, such a task would be incredibly expensive and burdensome to Bowman. *See* R. at 8. Not only would he have to remove all of the planting that he has done, but he would also then have to pay to dig up to the soil and move it back to its original spot. Such an undertaking is especially burdensome considering the expensive actions he has already taken to restore other parts of the wetland to their original status.

C. There Is No Reasonable Likelihood that Bowman Will Engage in Further Violations.

Not only is Bowman not engaged in an ongoing violation, but it is also impossible for a violation to occur in the future. Where a governmental agency has issued an order requiring a defendant to cease discharging materials into the ground, the Second Circuit has found that there is no longer a likelihood that discharges will occur in the future. *Remington*, 989 F.2d at 1312 ("[N]o fair-minded juror could find that there was a likelihood . . . that [defendant] would discharge lead shot in the future."). In addition, "when a state regulatory body charged with implementing [the] CWA and a violator enter into a consent order, the court should dismiss a citizen suit against the violator regarding the same subject-matter as long as the settlement reasonably assures that the violations have ceased and will not recur." *Coon v. Willet Dairy, LP*, 5:02CV1195 (FJS/GJD), 2007 WL 2071746, at *2 (N.D.N.Y. July 17, 2007). This same rationale has been utilized when examining whether there is a continuing violation for statute of limitations purposes. *Aiello v. Town of Brookhaven*, 136 F. Supp. 2d 81, 121 (E.D.N.Y. 2001).

Here, no fair-minded juror could find that Bowman will commit a future violation. Bowman entered into a settlement agreement with NUDEP, where he agreed to not clear more wetlands. In addition, any land that had not already been cleared has been conveyed to NUDEP in the form of a conservation easement. This consent order eliminates any possibility that Bowman's violations will continue.

For the above reasons, this Court should affirm the District Court and hold that there is not a continuing violation. Thus, plaintiff's suit is jurisdictionally barred.

III. NUWF'S CITIZEN SUIT IS BARRED BY NUDEP'S DILIGENT PROSECUTION.

The District Court correctly concluded that NUWF's suit is barred because "NUDEP has commenced a civil action in a court of the United States" and "diligently prosecuted that action by filing a complaint . . . a month after receiving NUWF's notice letter and by negotiating a settlement with Defendant within a month thereafter." R. at 7. This Court should defer to NUDEP's decision to reach a settlement with Bowman and affirm the District Court.

A. The Clean Water Act Bars Citizen Suits Where A State is Engaged in Diligent Prosecution.

The Clean Water Act provides that "[n]o action may be commenced . . . if the Administrator or State has commenced and is diligently prosecuting a civil or criminal action in a court of the United States." 33 U.S.C. § 1365(b)(1)(B). Thus, a citizen suit is only allowed "if the appropriate state or federal authorities have not acted within the sixty-day notice period." *Atl. States Legal Found., Inc. v. Eastman Kodak Co.*, 933 F.2d 124, 127 (2d Cir. 1991). *See also Chesapeake Bay Found. v. Am. Recovery Co., Inc.*, 769 F.2d 207, 208 (4th Cir. 1984) ("The sixty-day waiting period . . . gives the government the opportunity to act and to control the course of the litigation. . . . If the government delays, then the citizens may go forward.").

When challenging a state's diligent prosecution, not only does the plaintiff bear "the burden of proving that subject-matter jurisdiction exists," *Friends of the Earth, Inc. v. Laidlaw Envtl. Services, Inc.*, 890 F. Supp. 470, 486-87 (D.S.C. 1994) (citing *Evans v. B.F. Perkins Co.*, 166 F.3d 642, 647 (4th Cir. 1999)), but courts will also be highly deferential to the government's decision, *Laidlaw*, 890 F. Supp. at 487 ("Deference to governmental enforcement agencies is appropriate because the CWA delegates the primary enforcement responsibility to designated state and federal agencies."). If courts did not utilize such a highly deferential review, "then [the government's] discretion to enforce the Act in the public interest would be curtailed considerably." *Gwaltney I*, 484 U.S. at 61. In *Gwaltney*, the Supreme Court emphasized its narrow view of citizen suits:

> The bar on citizen suits when governmental enforcement action is under way suggests that the citizen suit is meant to supplement rather than to supplant governmental action. The legislative history of the Act reinforces this view of the role of the citizen suit. The Senate Report noted that '[t]he Committee intends the great volume of enforcement actions [to] be brought by the State,' and that citizen suits are proper only 'if the Federal, State, and local agencies *fail to exercise* their enforcement responsibility.'

484 U.S. at 61 (quoting S. Rep. No. 92-414, at 3730 (1971)).

A state's "diligent prosecution" does not need "to be far-reaching or zealous. It requires only diligence. Nor must an agency's prosecutorial strategy coincide with that of the citizen-plaintiff." *Karr v. Hefner*, 475 F.3d 1192, 1197 (10th Cir. 2007); *N. & S. Rivers Watershed Ass'n, Inc. v. Town of Scituate*, 949 F.2d 552, 558 (1st Cir. 1991) ("Merely because the State may not be taking the precise action Appellant wants it to or moving with the alacrity Appellate desires does not entitle Appellant to injunctive relief."); *Piney Run Pres. Ass'n v. Cnty. Comm'rs of Carroll Cnty., Md.*, 523 F.3d 453, 458 (4th Cir. 2008) ("[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."). A court will presume diligent prosecution where there has been a consent decree even though plaintiffs might disagree with the specific terms. *See, e.g., Piney Run*, 523 F.3d at 460 (finding diligent prosecution when consent decree required county to comply with thermal limitations even though plaintiffs disagreed); *Karr v. Hefner*, 475 F.3d 1192, 1194-95 (10th Cir. 2007) (finding diligent prosecution when a consent decree required a defendant to restore well sites and pay a $325,000 civil penalty). Here, plaintiff is asking this Court to ignore NUDEP's efforts because it merely disagrees with its choice of action. But, this Court should follow precedent and presume diligence on behalf of New Union.

B. NUDEP Has Diligently Prosecuted Bowman Through a Consent Decree.

Properly utilizing the highly deferential review, the District Court correctly found that NUDEP has diligently prosecuted Bowman. NUDEP's settlement with Bowman and the resulting consent decree go a long way towards correcting the original alleged violation at a great expense to Bowman. The decree provides that Bowman must remove the fill material, restore the wetlands, convey a conservation easement for public entry, and construct and maintain a year-round wetland. R. at 4. As the District Court found, these actions required a "considerable initial expense and an indeterminable future expense." R. at 8. Further, they will "preserve the viewscape of the Muddy River and enhance the wetlands environment on the site." R. at 8. Essentially, the state's consent order requires that the area end in a better state than it began. Courts have found that "when presented with a consent decree we must be particularly deferential to the agency's expertise." *Piney Run*, 523 F.3d at 459.

There mere fact that New Union chose to forgo civil penalties, in lieu of these considerable and costly corrective measures, does not remove the presumption of diligent

prosecution. *See Williams Pipe Line Co. v. Bayer Corp.*, 964 F. Supp. 1300, 1324 (S.D. Iowa 1997) (finding that the CWA allows the administrator "to implement corrective steps that, in his expert judgment, adequately address a violation."); *Conn. Fund for Env't v. Contract Plating Co., Inc.*, 631 F. Supp. 1291, 1294 (D. Conn. 1986) ("The mere fact that the settlement reached in the state action was less burdensome to the defendant than the remedy sought in the instant action is not sufficient in itself to overcome the presumption that the state action was diligently prosecuted.").

In fact, the Supreme Court rejected this argument as running counter to the statute's legislative intent:

> Suppose further that the Administrator agreed not to assess or otherwise seek civil penalties on the condition that the violator take some extreme corrective action, such as to install particularly effective but expensive machinery, that it otherwise would not be obliged to take. If citizens could file suit, months or years later, in order to seek the civil penalties that the Administrator chose to forgo, then the Administrator's discretion to enforce the Act in the public interest would be curtailed considerably. The same might be said of the discretion of state enforcement authorities. Respondents' interpretation of the scope of the citizen suit would change the nature of the citizens' role from interstitial to potentially intrusive. We cannot agree that Congress intended such a result.

Gwaltney I, 484 U.S. at 60-61. Such "penalties are by no means a requirement for compliance to be assured." *Friends of Milwaukee's Rivers v. Milwaukee Metro. Sewerage Dist.*, 382 F.3d 743, 762 (7th Cir. 2004) (finding diligent prosecution when the government chose capital improvements over civil penalties).

It is possible that Bowman's settlement with New Union and the present and future costs of Bowman's corrective actions will far surpass the maximum $125,000 administrative penalty. Here, it is clear that NUDEP is diligently prosecuting Bowman and this Court should affirm the lower court's ruling and bar NUWF's challenge.

C. Public Policy Requires This Court to Affirm the District Court Because Agencies Need Discretion in Order to Execute Their Respective Enforcement Strategies.

Aside from the fact that precedent clearly shows that New Union's actions qualify as diligent prosecution, public policy dictates that a governmental settlement be enough for diligent prosecution. Any "failure to defer to its judgment can undermine agency strategy. If a defendant is exposed to a citizen suit whenever the EPA grants it a concession, defendants will have little incentive to negotiate consent decrees." *Karr*, 475 F.3d at 1197. Succinctly put, "an Administrator unable to make concessions is unable to obtain them." *Supporters to Oppose Pollution, Inc. v. Heritage Grp.*, 973 F.2d 1320, 1324 (7th Cir. 1992).

The current case illustrates this point precisely. Here, Bowman refutes that he ever violated the Clean Water Act. If New Union did not have the ability to negotiate a settlement with Bowman, then the relief would rest on a successful jury trial initiated by the plaintiffs. Not only would this be costly, but it would also not guarantee success. Further, if Bowman was under the impression that he could still be subject to suit after entering into a consent decree with the state, he would likely not settle. In such a situation, he could continue his land clearing activities and there would not be the immediate relief that the state provided in this case.

For the above reasons, this Court should affirm the District Court and hold that NUDEP has diligently prosecuted Bowman. Thus, plaintiff's suit is jurisdictionally barred.

IV. JIM BOB BOWMAN DID NOT VIOLATE THE CLEAN WATER ACT BECAUSE THERE WAS NO ADDITION OF ANY POLLUTANT TO NAVIGABLE WATERS FROM ANY POINT SOURCE.

Section 301(a) of the CWA prohibits the "discharge of any pollutant" except in compliance with a permit issued under various sections of the statute. 33 U.S.C. § 1311(a). "[D]ischarge of a pollutant" is defined as "any addition of any pollutant to navigable waters from any point source." 33 U.S.C. § 1362(12). All the parties agree that Bowman's activities satisfied

the statutory elements of "pollutant," "point source," and "navigable waters." R. at 8-9. The final element, "addition," was left undefined by the statute. It is clear, however, from interpretations set forth by the EPA, which is entitled to great deference when interpreting the CWA, that Bowman's activities did not constitute an "addition" and thus no permit was required. First, the EPA has defined "addition" to mean "from the outside world." Bowman merely moved materials from one part of the wetland to another part of the same wetland, which is not an "addition." Second, the EPA has defined "addition" in light of the "unitary navigable waters" theory, which holds that all navigable waters are one for purposes of Section 301(a). Here, Bowman has only transferred pollutants from one navigable water to a second navigable water. Because these navigable waters were always one, this activity cannot be an "addition." For these reasons, this Court should affirm the District Court and hold that Bowman has not violated the CWA.

A. This Court Should Show "Great Deference" to the EPA's Construction of the CWA.

The Supreme Court has held, while specifically discussing the Clean Water Act, that a court faced with a problem of statutory construction should show "great deference to the interpretation given the statute by the officers or agency charged with its administration." *Env't Prot. Agency v. Nat'l Crushed Stone Ass'n*, 449 U.S. 64, 83 (1980) (citation omitted). The Administrator of the EPA has statutory authority to issue regulations and guidelines regarding the Section 404 permitting program. *See, e.g.*, 33 U.S.C. § 1344(b)-(c). Because Congress has explicitly delegated authority to the EPA, its regulations must be given controlling weight unless they are arbitrary, capricious, or manifestly contrary to the statute. *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 843-844 (1984).

Despite this, NUWF has attempted to avoid proper deference to established agency interpretation of the Clean Water Act by arguing that the EPA's constructions of the term

"addition" apply only to Section 402 and not to Section 404. R. at 9. Similarly, some courts have ignored the EPA's interpretations when construing the terms of the Clean Water Act. Not only do these decisions fail to accord proper deference to the EPA, they also ignore the rules of statutory construction and the text of the CWA itself.

As a general principle of statutory construction, the same word used in different parts of the same statute has the same meaning. *Sorenson v. Sec'y of the Treasury of the U.S.*, 475 U.S. 851, 860 (1986). Ignoring this basic canon would produce absurd results. For example, the CWA prohibits "the discharge of any pollutant" without a permit. 33 U.S.C. § 1311(a). There are exemptions for compliance with any of six other sections in the statute. *Id.* NUWF argues that "addition" holds different meanings under the Section 402 exemption and the Section 404 exemption. Perhaps two definitions of "addition" may reasonably be managed and applied by the courts. Unfortunately for NUWF's argument, there is more than one exemption and more than one element in this provision. Thus, under NUWF's argument, there would be unique meanings for "addition," "pollutant," "point source," and "navigable waters" under each of the six statutory provisions: Section 302, Section 306, Section 307, Section 318, Section 402, and Section 404. In fact, there would be a total of twenty-four different definitions just to apply Section 301(a). Moreover, multiple exemptions are often at play in the same cause of action. *See, e.g., United States v. Bay-Houston Towing Co.*, 33 F. Supp. 2d 596 (E.D. Mich. 1999) (asserting violations of both Sections 402 and 404). By giving the same term different meanings in different parts of the same statute, even on this small scale, this Court would create enormous administrative issues for judges working with the CWA. The rule laid out in *Sorenson* is meant to avoid this absurdity and confusion in the absence of clear congressional intent.

Moreover, the structure of the CWA supports the application of this general rule. There is only one statutory definition of "the discharge of any pollutant" given under Section 502(12). Neither Sections 402 nor 404 offer their own unique definitions of "discharge of any pollutant" or the element of "addition." *See also* David Eng, Note, *Watering Down the Clean Water Act: A Critique of the NPDES Water Transfers Rule*, 36 Wash. U. J.L. & Pol'y 179, 198 (2011) (reading the Clean Water Act to apply the same statutory definition of "addition" to Sections 402 and 404). And, as the Court of Appeals for the District of Columbia Circuit observed, Congress could have effected the broader definition of "addition" that NUWF argues for by choosing language that prohibited, for example, "all pollution released through a point source." *Nat'l Wildlife Fed'n v. Gorsuch*, 693 F.2d 156, 176 (D.C. Cir. 1982). Instead, Congress chose to prohibit the "addition" of pollutants from a point source. *Id.* There is simply nothing in the text of the Clean Water Act to indicate that, for some reason, one single element of this term varies depending on where it appears in the statute.

Thus, under the great deference due agency interpretation, this Court should evaluate the Clean Water Act violations allegedly committed by Bowman in light of the EPA's long line of comments on the meaning of the statutory element of "addition."

B. Moving Materials from One Part of a Wetland to Another Part of the Same Wetland Cannot be an "Addition" According to the EPA's "From the Outside World" Theory.

The term "addition" is not defined in the CWA. The EPA's "longstanding position," however, has been to define addition as meaning "from the outside world." Nat'l Pollutant Discharge Elimination Sys. (NPDES) Water Transfer Rule, 73 Fed. Reg. 33,697, 33,701 (June 13, 2008) (codified at 40 C.F.R. pt. 122). Thus, addition from a point source only occurs if "the point source itself physically introduces a pollutant into water from the outside world." *Nat'l*

Wildlife Fed'n, 693 F.2d at 175. The EPA has specifically rejected the argument that "the outside world" merely means anywhere outside the body of water receiving the pollutant. *Id. See also United States v. Wilson*, 133 F.3d 251, 259 (4th Cir. 1997) (holding that "addition" under Section 404 necessarily requires either the introduction of new material into the area, or an increase in the amount of a type of material which is already present).

Although some jurisdictions have rejected the "outside world" theory, they did so prior to the promulgation of the 2008 regulation. Because the EPA's interpretation had not yet been formalized, these courts were able to reasonably argue that the interpretation was therefore not entitled to Chevron deference. Alison M. Dornsife, Comment, *From a Nonpollutant into a Pollutant: Revising EPA's Interpretation of the Phrase "Discharge of Any Pollutant" in the Context of NPDES Permits*, 35 Envtl. L. 175, 178 (2005) (discussing cases rejecting the "outside world" theory before the EPA promulgated a formal regulation).

In *Avoyelles Sportsmen's League, Inc. v. Marsh*, the Fifth Circuit refused to defer to the EPA's "outside world" theory when interpreting Section 404. 715 F.2d 897 (5th Cir. 1983). In a footnote, the court claimed that requiring pollutants to come from outside sources would "effectively remove the dredge-and-fill provision from the statute" because dredged materials necessarily come from the water itself. *Id*. at 924 n.43. As a preliminary matter, this point is moot because the District Court has held that Bowman's land clearing activities did not constitute dredging. R. at 8. Even on its own merits, however, the court's conclusion is incorrect. The term "dredged material" is not defined in the CWA. The court cited only to subsequent regulations that defined "dredged material" as material that is excavated or dredged from waters of the United States. 33 C.F.R. § 323.2 (2008). This does not preclude the excavation of material from one property and its subsequent transport and disposal at another property. Indeed, CWA

prosecutions have been brought where fill material came from the outside world. *Wilson*, 133 F.3d at 258 (discussing prosecution for violation of Section 404 where defendants had used trucks to transport "large quantities of non-native fill materials" from outside their wetlands). The same is true of dredged material, though the District Court found that it is not present in this case.

Here, Bowman's point source, his bulldozer, did not introduce any pollutant from the outside world. He merely pushed biological material from one part of his property to another part of his property. Because Bowman's activities did not result in the addition of any pollutant, he was not required to obtain a permit under Section 301(a) and was not in violation of the CWA.

C. Under the EPA's "Unified Navigable Waters" Theory, Transferring Pollutants from One Navigable Water to a Second Navigable Water is Not an "Addition" Under the Clean Water Act.

Even if this Court does not apply the "from the outside world" theory, Bowman's activities still did not violate the CWA under the alternative "unitary navigable waters" theory. This theory was set forth in a 2008 EPA regulation, which was issued in response to the confusion that had been created by conflicting judicial approaches to defining the term "addition." *See generally* National Pollutant Discharge Elimination System (NPDES) Water Transfer Rule, 73 Fed. Reg. 33,697. Under the "unitary navigable waters" theory, when water is transferred from one navigable water to another, there is no addition because "the pollutant at issue is already part of 'the waters of the United States' to begin with." *Id.* at 33,701. Or, as the District Court put it, under this theory "all navigable waters are one." R. at 9. Thus, under the unitary navigable waters theory, it is not an "addition" to move existing pollutants from one navigable water to another. *Friends of the Everglades v. S. Fla. Water Mgmt. Dist.*, 570 F.3d 1210, 1217 (11th Cir. 2009). Some pre-*Everglades* cases fail to adopt the unitary navigable

waters theory. The EPA regulation, however, had not been promulgated at that time and those earlier decisions and they are not precedent against it. *Id.* at 1218.

The Supreme Court explained the unitary waters theory by way of a metaphor: "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." *S. Fla. Water Mgmt. Dist. v. Miccosukee Tribe of Indians,* 541 U.S. 95, 110 (2004). This is precisely the case with Bowman's activities. The parties agree that both the Muddy River is navigable water and that Bowman's former woods are wetlands. R. at 9. Wetlands adjacent to navigable waters are themselves navigable waters. *See United States v. Riverside Bayview Homes*, 474 U.S. 121, 139 (1985). Here, Bowman has merely moved biological material, such as trees and leveled vegetation remains, from one navigable water, his property, to another navigable water, the Muddy River.

For the above reasons, this Court should affirm the District Court and hold that Jim Bob Bowman did not violate the Clean Water Act when he moved dredge and fill material from one part of a wetland adjacent to navigable water to another part of the same wetland.

CONCLUSION

For the foregoing reasons, Respondent respectfully requests that this Court affirm the district court's grant of summary judgment on all claims.