Team 52

CA. No. 13-1246

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

TABLE OF CONTENTS

TABLE OF AUTHORITIES

United States Supreme Court

United States Courts of Appeal

United States District Courts

Constitutional Provisions

Federal Rules of Civil Procedure

Statutes

Regulations

JURISDICTIONAL STATEMENT

This case involves an appeal from a judgment of the United States District Court for the District of New Union. Federal district courts have original jurisdiction over any civil action arising under the laws of the United States, including the Clean Water Act ("CWA"), 33 U.S.C. §§ 1331 (1980). This Court has jurisdiction under 28 U.S.C. § 1291 (2006) to hear all timely appeals from district courts within the Twelfth Circuit. While this Court has jurisdiction to hear this appeal, the District Court did not have subject matter jurisdiction to hear the case as will be explained below. Consequently, this Court lacks jurisdiction to hear this case on its merits.

STATEMENT OF THE ISSUES

I. Whether the New Union Wildlife Federation ("NUWF") has standing to pursue a citizen suit against Mr. Bowman for allegedly violating the CWA.

II. Whether Mr. Bowman's alleged violation of the CWA is a continuing or ongoing violation as required by Section 505(a) of the CWA for subject matter jurisdiction.

III. Whether NUWF's citizen suit is barred by New Union's Department of Environmental Protection's ("NUDEP's") diligent prosecution of Mr. Bowman as set forth in Section 505(b) of the CWA.

IV. Whether Mr. Bowman's moving of dredge and fill material from one part of a wetland adjacent to navigable water to another part of the same wetland constituted an "addition" and thus a violation under Section 301(a) of the CWA.

STATEMENT OF THE CASE

On July 1, 2012, NUWF sent a notice of its intent to sue Mr. Bowman under Section 505 of the CWA, 33 U.S.C. § 1365 (2006), to Mr. Bowman, the United States Environmental Protection Agency ("EPA" or "the Agency"), and the State of New Union/NUDEP. (R. at 4.)

NUDEP sent Mr. Bowman a notice of violation shortly thereafter, and NUDEP and Mr. Bowman entered into a settlement agreement. (*Id.*) Although Mr. Bowman maintained his did

not violate state or federal law, he entered into a settlement agreement with NUDEP, under which he agreed to cease clearing activities on his wetlands, to convey to NUDEP a conservation easement on the still wooded part of his property adjacent to the Muddy that he had not yet cleared plus an additional 75 foot buffer zone, and to construct and maintain a year-round wetland on that buffer zone. (*Id.*) The conservation easement allows public entry for appropriate, day-use-only, recreational purposes, requires Mr. Bowman to keep the easement area in its natural state, and forbids him from developing it in any way other than constructing and maintaining the artificial wetland. (*Id.*) The settlement agreement did not include a penalty. (*Id.*) NUDEP and Mr. Bowman incorporated their agreement into an administrative order, which Mr. Bowman consented to on August 1, 2012. (*Id.*) On August 10, 2012, after issuing the administrative order to Mr. Bowman, NUDEP chose to bring suit in federal court and filed a complaint against Mr. Bowman in the District Court under Section § 505 of the CWA. (R. at 5.)

On August 30, 2012, NUWF filed its own Section 505 complaint with the District Court seeking civil penalties and an order requiring Mr. Bowman to remove the fill material and restore the wetlands. (*Id.*) On September 15, 2012, it filed a motion to intervene in the NUDEP Section 505 action, to consolidate the NUDEP and NUWF actions, and to oppose entry of the decree proposed by NUDEP in the NUDEP action. (*Id.*) At about the same time, NUDEP filed a motion to intervene in the NUWF case, which the District Court subsequently granted. (*Id.*)

On September 5, 2012, in its own Section 505 case, NUDEP filed a motion to enter a decree, the terms of which are identical to the state administrative order. (*Id.*) Mr. Bowman consented to both the motion and the decree. (*Id.*) This motion is still pending. (*Id.*)

On November 1, 2012, at a status conference on both cases, the District Court notified the parties that it was not acting on any of the motions in either the NUDEP or the NUWF cases for

the present besides NUDEP's motion to intervene in the NUWF case; this was done without prejudice to NUDEP's rights to enforce violations of its proposed decree or of NUWF's rights to continue with its cause of action. (*Id.*) The District Court granted NUDEP's motion to intervene in NUWF's Section § 505 action. (*Id.*)

After discovery, the parties filed cross-motions for summary judgment. (*Id.*) Mr. Bowman filed a motion for summary judgment on four grounds: (1) NUWF lacked standing because neither it nor its members suffered an injury in fact fairly traceable to Mr. Bowman's alleged violations; (2) the District Court lacked subject matter jurisdiction because any violations are wholly past; (3) the District Court lacked subject matter jurisdiction because the State of New Union has already taken an enforcement action and fully resolved the violations; and (4) the District Court lacked subject matter jurisdiction because a key element of a CWA cause of action is not satisfied: addition. (*Id.*) NUWF filed a motion for summary judgment on one ground: Mr. Bowman violated the CWA because he added dredge and fill material to navigable waters from a point source without a Section § 404 permit. (*Id.*) NUDEP joined Mr. Bowman in his motion for summary judgment on the second (continuing violation) and third (diligent prosecution) issues and joined NUWF in its motion for summary judgment on the first (standing) and fourth (CWA violation) issues. (*Id.*)

The District Court held (1) that NUWF lacked standing to bring a citizen suit against Mr. Bowman pursuant to CWA § 505, *id.*, for a violation of §§ 301(a) and 404 of the CWA, *id.* §§ 1311(a), 1344; (2) that there is no continuing violation as required for subject matter jurisdiction under § 505(a) of the CWA, *id.* § 1365(a); (3) that NUWF's citizen suit is barred by NUDEP's diligent prosecution of Mr. Bowman under § 505(b) of the CWA, *id.* § 1365(b); and (4) that Mr.

Bowman did not violate § 404 of the CWA, *id.* § 1344, because he did not discharge dredged or fill material to a water of the United States. (R. at 1.)

Following the issuance of the Order of the District Court dated June 1, 2012, in Civ. 149-2012, NUWF and NUDEP each filed a Notice of Appeal. (R. at 1.) NUWF takes issue with all four of the District Court's holdings. (*Id.*) NUDEP takes issue with the decision of the District Court with respect to its holdings that NUWF did not have standing to bring its citizen suit and that Mr. Bowman did not violate Section 404 of the CWA, 33 U.S.C. § 1344. (*Id.*) This Court granted review on September 14, 2012. (R. at 2.)

STATEMENT OF THE FACTS

Mr. Bowman owns one thousand acres of land adjacent to the Muddy River ("the Muddy") near the town of Mudflats in the State of New Union. (R. at 3.) The Muddy is more than five-hundred feet wide and more than six feet deep where it borders Mr. Bowman's property. (R. at 3.) It is commonly used for miles both upstream and downstream of this point for recreational navigation. (R. at 3.) Mr. Bowman's thousand acres includes 650 feet of shoreline on the Muddy River. (R. at 3.) The property is wholly within the one-hundred year flood plain of the Muddy. (R. at 3.) Portions of the flood plain and Mr. Bowman's property are inundated every year when the river is high. (R. at 3.) Mr. Bowman's property is hydrologically connected to the Muddy and is covered with trees and other vegetation characteristic of wetlands. (R. at 3.)

On June 15, 2011, Bowman commenced clearing operations on his property. (R. at 4.) He cleared trees and vegetation, which he proceeded to burn and bury in his field. (R. at 4.) He then proceeded to level the field. (R. at 4.) Mr. Bowman left wooded a strip of land approximately 150 feet wide adjacent to the Muddy. (R. at 4.) He also formed a wide swale to drain the field into the Muddy. (R. at 4.) Mr. Bowman completed his work on or about July 15, 2011. (R. at 4.)

Since that time, he has placed the only remaining land he owns in the area in a conservation easement with NUDEP. (R. at 6.) His only activities since then have included planting wheat seeds and draining the property through the drainage swale he constructed earlier. (R. at 6.)

NUWF is a not-for-profit corporation organized under the laws of New Union. (R. at 4.) Its mission is to protect the fish and wildlife of the state by protecting their habitats. (R. at 4.) It is a membership organization funded by members' dues and contributions. (R. at 4.) Members elect its Board of Directors, the governing body of the organization, which in turn elects the officers, including the President. (R. at 4.) NUWF has presented affidavits from three of its members: Dottie Milford, Zeke Norton, and Effie Lawless. (R. at 6.) They state that they use the Muddy for recreational boating and fishing, often picnicking on its banks, on or in the vicinity of Mr. Bowman's property. (R. at 6.) They testified that they are aware that wetlands serve valuable functions in maintaining the integrity of rivers, including the Muddy, both acting to absorb sediment and pollutants and to serve as buffers for flooding. (R. at 6.) Although they admit that they cannot see a difference in the land from the Muddy or its banks, they claim to be aware of the differences, to feel a loss from the destruction of the wetlands, and to fear that the Muddy is more polluted as a result and will be far more polluted if other adjacent wetlands are cleared and drained for agricultural uses. (R. at 6.) Milford also testified that the Muddy looks more polluted to her than it did prior to Mr. Bowman's activities. (R. at 6.) In addition, Norton testified that he has trespassed on Mr. Bowman's property and frogged the area for years. (R. at 6.) Norton admitted at his deposition that Mr. Bowman's property was properly posted under state law against trespassing and he "supposed he might have been trespassing" when he had gone frogging there. (R. at 6.)

STANDARD OF REVIEW

This case involves an appeal from the District Court's grant of summary judgment. Summary judgment is appropriate if "there is no genuine issue as to any material fact and . . . the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). Therefore, the issues before this Court are questions of law and should be reviewed *de novo*. *Pierce v. Underwood*, 487 U.S. 552, 557 (1988). The mere scintilla of evidence supporting the nonmovant's case is insufficient to defeat a motion for summary judgment. *Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 252 (1986).*

SUMMARY OF THE ARGUMENT

Summary judgment was appropriate for at least three reasons. First, NUWF failed to demonstrate that it had standing to bring its claim. Second, this Court lacks subject matter jurisdiction. Third, Mr. Bowman did not violate Section 404 of the CWA.

First, this Court should affirm the grant of summary judgment barring NUWF's citizen suit claim under the CWA because NUWF lacks associational standing to bring its claim. More specifically, NUWF failed to show that: (1) at least one of its members must have standing to sue in their own right; (2) the interests it seeks to advocate are germane to its mission or purpose; and (3) the claim does not require participation by its individual members. *See Hunt v. Wash. State Apple Adver. Comm'n*, 432 U.S. 333, 343 (1977).

NUWF has failed to show that it has organizational standing because it has not shown that at least one of its members has standing to sue in their own right. Specifically, NUWF failed to show that (i) any of its members have suffered an "injury in fact" that is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical; (ii) the injury is fairly traceable to Mr. Bowman's clearing activities; and (iii) it is likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision. *See Lujan v. Defenders of*

Wildlife, 504 U.S. 555, 561 (1992). NUWF has failed to show an injury in fact because their alleged injuries are not actual or imminent but conjectural and hypothetical. Specifically, NUWF presented no specific material facts in its members' affidavits that Mr. Bowman's activities would stop the members from using the Muddy for normal activities. Even if Mr. Bowman's activities caused the members to fear to use the Muddy, their fear would not be a "reasonable fear." In addition, NUWF's assertion that one of its members would be deprived of an opportunity to trespass does not satisfy the injury in fact test. Furthermore, NUWF failed to meet its burden of showing that its harms are fairly traceable to Mr. Bowman's activities because the causal link between Mr. Bowman's activities and NUWF's alleged injuries is too attenuated. Additionally, NUWF has not shown that the alleged harm will likely be redressed by a favorable decision because there are no material facts to indicate that the Muddy will be improved if the requested relief is granted.

NUWF has also failed to show that it has organizational standing because the interests that NUWF seeks to protect are not germane to NUWF's mission. The interests that NUWF seeks to protect are not germane to NUWF's mission—the protection of fish and wildlife—because NUWF has claimed only that its members' aesthetic and recreational interests were harmed by Mr. Bowman's activities.

Finally, NUWF has failed to show that it has organizational standing because NUWF's claim asserted or the relief requested does require participation by NUWF's individual members. NUWF's claims require NUWF to bring its members into court because the claims rest on a fact-intensive inquiry, and the relief relies solely on its members' interests

Second, this Court lacks subject matter jurisdiction for two reasons. First, there is no continuing or ongoing violation as required by Section 505(a) of the CWA because Mr.

Bowman's activities did not constitute a violation of the CWA. Moreover, even if his activities were considered to be a violation, Mr. Bowman's land clearing activities occurred wholly in the past, and NUWF has not demonstrated any likelihood that the alleged violations will recur. Furthermore, the continued presence of dirt and decomposing vegetation does not constitute a continuing violation. To hold otherwise would completely undermine the limits that Congress placed on the CWA and eviscerate the continuing violation requirement. Second, this Court lacks subject matter jurisdiction because NUDEP has diligently prosecuted an action against Mr. Bowman. NUDEP and Mr. Bowman reached a settlement that will require Mr. Bowman to remain in compliance with the CWA. So long as the actions of NUDEP met the deferential requirements for establishing diligent prosecution, any additional citizen suits are barred. NUWF's dissatisfaction with NUDEP's prosecution is immaterial.

Third, summary judgment should be affirmed because, as there was no addition of a pollutant to the navigable waters, Mr. Bowman did not violate Section 404 of the CWA. Under *Chevron*, since Congress did define what constitutes an "addition," this Court should defer to EPA's interpretation so long as the interpretation is a "permissible construction." EPA has defined "addition" as occurring when a pollutant is "introduced from the outside world," not when a pollutant is moved within a wetlands. Because EPA's definition is not impermissibly unreasonable, administrative deference should be granted. Under EPA's definition of "addition," Mr. Bowman's clearing activities do not violate the CWA because he did not introduce pollutants into the navigable waters of the United States from the "outside world."

ARGUMENT

I. This Court should affirm the grant of summary judgment barring NUWF's citizen suit claim under the CWA because NUWF lacks associational standing to bring its claim.

Article III of the Constitution limits jurisdiction in federal courts only to "cases" and "controversies." *Id.* at 560. Article III articulates the "cases" and "controversies" requirement through the doctrine of standing "to identify . . . disputes which are appropriately resolved through the judicial process." *Id.* Standing is a threshold jurisdictional issue, so a party must present substantiated evidence to avoid summary judgment. *See id.* at 561. The Supreme Court has held that organizations who bring claims on behalf of their members must meet the elements of associational standing. *Hunt v. Wash. State Apple Adver. Comm'n*, 432 U.S. 333, 343 (1977). Specifically, the organization must show that: (1) at least one of its members must have standing to sue in their own right; (2) the interests it seeks to advocate are germane to its mission or purpose; and (3) neither the claim asserted nor relief requested requires participation by its individual members. *Id.*

A. Summary judgment should be affirmed because NUWF has not shown that at least one of its members has standing to sue in their own right.

To show that one of the members has standing to sue in their own right, NUWF must show that at least one of its members has Article III standing. *See id.* The Supreme Court has held that the constitutional minimum for standing requires a plaintiff to show that (i) it has suffered an "injury in fact" that is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical; (ii) the injury is fairly traceable to the challenged action of the defendant; and (iii) it is likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision. *Lujan*, 504 U.S. at 561. The plaintiff bears the burden of establishing these elements. *Id.* Since these elements are "not mere pleading requirements but rather an indispensable part of the plaintiff's case, each element must be supported in the same way as any

other matter on which the plaintiff bears the burden of proof, *i.e.*, with the manner and degree of evidence required at the successive stages of the litigation." *Id.*

In this case, NUWF's allegation's fail to meet all three elements of Article III standing because (i) NUWF's alleged injuries are entirely conjectural and hypothetical; (ii) the link between NUWF's alleged harm and Mr. Bowman's activities is too attenuated; and (iii) there are no material facts to indicate the Muddy will be improved if the requested relief is granted.

i. *NUWF has failed to show an injury in fact because their alleged injuries are not actual or imminent but conjectural and hypothetical.*

To show an injury in fact, a plaintiff must show "an invasion of a *legally protected* interest which is (a) concrete and particularized and (b) actual or imminent and not just conjectural or hypothetical." *Lujan*, 504 U.S. at 560 (emphasis added). Courts have recognized that aesthetic, recreational, and emotional interests could be legally protected interests for the purposes of the injury in fact test. *Sierra Club v. Morton*, 405 U.S. 727, 735 (1972). However, a plaintiff who shows only a cognizable interest fails to satisfy the injury in fact test. *Lujan*, 504 U.S. at 563. In *Morton*, the Supreme Court denied standing to a plaintiff who challenged administrative actions that approved a ski complex being built in Sierra Nevada Mountains of California. 405 U.S. at 727. The Court denied standing because the plaintiff—despite having a special interest in the conservation and the proper maintenance of the national parks—failed to show an injury in fact; specifically, the plaintiff did not show that "its members use[d]. . . [the area] for any purpose much less that they use[d] it in a way that would significantly be affected by the proposed actions." *Id.* at 735.

Furthermore, the Supreme Court has held that affidavits that are not specific enough to show that members were "adversely affected or aggrieved" will fail to satisfy the injury in fact test. *Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871, 883 (1990). In *National Wildlife Federation*, the

plaintiff challenged the Department of Interior's choice to reclassify protected lands for use in the public domain. *Id*. at 875. The plaintiff claimed that this decision would harm its members' aesthetic and recreational enjoyment by opening the area up to mining activities. *Id*. at 884-88. The Supreme Court held that the affidavits did not show specific facts to support a finding of injury in fact. *Id.* at 889. Instead, the affidavits stated only that the members used "unspecified portions of an immense tract of territory, on some portions of which mining activity has occurred or probably will occur by virtue of the governmental action." *Id.*

Even when the injury in fact element is liberally construed, courts still require a showing by the plaintiff that they have been harmed. *Friends of the Earth, Inc. v. Laidlaw Environmental Services, Inc.*, 528 U.S. 167, 181-82 (2000) (finding that harm can equate to being prevented from doing an activity). In *Laidlaw*, members of the plaintiff's organization had used a river for swimming, fishing, and picnicking, but they no longer could engage in these recreational activities for fear that the water was polluted. *Id.* at 182. The Supreme Court held that the "reasonable fear" of mercury pollution was sufficient to show an injury in fact. *Id.* at 181.

Here, NUWF failed to show an injury in fact because the alleged harm is not actual or imminent. NUWF's evidence that individual members use the area on a regular basis alone is insufficient to satisfy the test for injury in fact because the harm is neither actual nor imminent. NUWF has offered no evidence to show that its members had any "reasonable fear" which would prevent them from using the area near Mr. Bowman's property. *See Laidlaw*, 528 U.S. at 181. Despite the observational conjectures made by NUWF's members in their affidavits about the harm Mr. Bowman caused by clearing his field, NUWF offered no evidence to show that his actions would stop the members from using the area for their normal activities. R. at 6. Unlike *Laidlaw*, where the plaintiffs stopped using the river for fear of mercury poison, NUWF's

individual members did not present any evidence to show that they changed their behavior after Mr. Bowman's land clearing activities. *See Laidlaw*, 528 U.S. at 181. Furthermore, even if NUWF claims that the affidavits of its members demonstrate that Mr. Bowman's activities caused them fear of using the Muddy, their fear would not be a "reasonable fear." Specifically, this fear is completely unreasonable because the constructed wetland will improve the environment of the surrounding area.

Furthermore, NUWF's claim is similar to the claim of the plaintiff in *National Wildlife Federation*, who failed to meet the injury in fact test because the affidavits presented by the plaintiff stated only that unspecified portions of a territory were used by its members on some portions of which mining activity had occurred or probably would occur. *See Nat'l Wildlife Fed'n*, 497 U.S. at 883. NUWF also fails to meet the injury in fact test because NUWF has not shown any material facts that prove that its members were harmed in a specific way. Specifically, the affidavits submitted by NUWF's members stated only that the natural beauty of the "unspecified portion of an immense area" would diminish and harm the recreational and aesthetic interests of its members. R. at 6. Like the immense tract of territory in *National Wildlife Federation*, the Muddy is more than five hundred feet wide and forms the border between New Union and Progress for at least forty miles. R. at 3. NUWF has presented only general evidence that its members used the Muddy for recreational fishing and boating and sensed that the Muddy was more polluted and harmed than before. R. at 6. Without more specific facts in NUWF's affidavits, the injury in fact test is not satisfied.

NUWF argues that the inability to catch frogs on Mr. Bowman's property is sufficient to prove injury in fact. However, as *Lujan* dictates, only "legally protected" interests are recognized under the doctrine of standing. *Lujan*, 504 U.S. at 560. Here, NUWF attempts to convince the

Court that the Court should recognize deprivation of an opportunity to trespass as an injury in fact. This interpretation of the law would eviscerate the doctrine of standing because it would allow anyone—regardless of the legality of the interest they seek to protect—to petition the courts for protection. Therefore, because NUWF has failed to prove any actual or imminent harm, NUWF has failed show that it passes the test for injury in fact.

Because NUWF has failed to bring forth any specific facts to demonstrate an injury to its members, summary judgment should be affirmed. The Supreme Court has stated that "a plaintiff raising only a generally available grievance about government—claiming only harm to his and every citizen's interest in proper application of the Constitution and laws . . . does not state an Article III case or controversy." *Lujan*, 504 U.S. at 573-74. Embracing the doctrine of the separation of powers, the Court noted that "[v]indicating the public interest (including the public interest in Government observance of the Constitution and laws) is the function of Congress and the Chief Executive." *Id.* at 576. Turning NUWF's "undifferentiated public interest in executive officers' compliance with the law into an 'individual right' vindicable in the courts [would be] to permit Congress to transfer from the President to the courts the Chief Executive's most important constitutional duty, to 'take Care that the Laws be faithfully executed.'" *See id.* at 577. Therefore, summary judgment must be affirmed.

ii. *NUWF failed to meet its burden of showing that its harms are fairly traceable to Mr. Bowman's activities because the causal link between Mr. Bowman's actions and NUWF's injuries is too attenuated.*

Even if NUWF had met its burden to show an injury in fact, summary judgment should still be affirmed because NUWF has failed to demonstrate any causal link between its members' alleged injury and Mr. Bowman's activities. The element of causation requires that "there must be a causal connection between the injury and the conduct complained of—the injury has to be

'fairly trace[able] to the challenged action of the defendant, and not . . . th[e] result [of] the independent action of some third party not before the court.'" *Lujan*, 504 at 560-61. The Third Circuit has further articulated the element of causation as the closeness in the link between the complained action and the injury. *Pub. Interest Research Group v. Powell Duffryn Terminals*, 913 F.2d 64, 71-72 (3d Cir. 1990). In *Powell Duffryn*, the plaintiff sought to stop a factory from repetitively polluting a river by discharging mercury—a chemical with known harmful effects—upstream, which would be carried downstream and harm the plaintiff. *Id.* at 71-73. The Third Circuit held that the harm was fairly traceable to the offending source because the causal link in the chain of causation shows a "substantial likelihood" that the injury occurred because of the defendant's actions. *Id.* at 72.

In this case, NUWF has failed to show that the clearing of Mr. Bowman's field is fairly traceable to any injury by its members. Unlike *Powell Duffryn*, where pollution that occurs upstream naturally will find its way downstream to cause the harm, the causal link here is too attenuated to show a "substantial likelihood" that the clearing of Mr. Bowman's field was the cause of NUWF's alleged injuries. *See id.* NUWF has failed to offer any evidence of how the chain of causation started with Mr. Bowman clearing his field to the alleged injuries.

Furthermore, unlike the mercury discharged in *Powell Duffryn*, which had known harmful effects, Mr. Bowman's activities did not release any harmful chemicals. *See id.* In *Powell Duffryn*, the court needed only to follow the mercury's effects to trace the harm. *Id.* In the present case, NUWF would have had to demonstrate when the harm started to occur and trace it to its members. NUWF has not done so. Therefore, NUWF has not met the element of causation because it cannot show that the alleged injuries share a causal link to Mr. Bowman's activities.

iii. *NUWF has not shown that the alleged harm will likely be redressed by a favorable decision because there are no material facts to indicate the Muddy will be improved if the requested relief is granted.*

Even if NUWF had met its burden to show an injury in fact and causation, summary judgment should still be affirmed because the evidence fails to show that a favorable court decision would likely redress NUWF's aesthetic, recreational, or environmental interests. A citizen-plaintiff must show that the injury "is likely to be redressed by a favorable decision." *Valley Forge Christian Coll. v. Ams. United for Separation of Church & State, Inc.*, 454 U.S. 464, 472 (1982).. The Supreme Court explained that the requirement of redressability limits the federal judicial power "to those disputes which confine federal courts to a role consistent with a system of separated powers and which are traditionally thought to be capable of resolution through the judicial process." *Id.* (quoting *Flast v. Cohen*, 392 U.S. 83, 97 (1968)). Based on separation of power concerns, courts have strictly interpreted the element of redressability. *See, e.g.*, *Lujan*, 504 U.S. at 561-62 (maintaining that an environmental group had no standing to seek invalidation of a Department of Interior rule limiting consultations under the Endangered Species Act because other agencies might not abide by the determination, and the foreign project probably would go ahead regardless); *State ex rel. Sullivan v. Lujan*, *Wyoming ex rel. Sullivan v. Lujan*, 969 F.2d 877 (10th Cir. 1992), 882 (10th Cir. 1992) (deciding that Wyoming did not have standing to contest a federal land exchange involving coal lands in which Wyoming had a royalty interest because there was "only speculation and surmise that the State ever will receive any such royalties"). Furthermore, while the Supreme Court has held that plaintiffs can establish redressability if civil penalties are sought because those penalties deter future violations, "there may be a point at which the deterrent effect of a claim for civil penalties becomes so insubstantial or so remote that it cannot support citizen standing." *Laidlaw*, 528 U.S. at 184-86.

NUWF cannot show that it would be likely as opposed to speculative that NUWF's alleged injury would be redressed if the requested relief is granted. It is purely speculative that any further action taken by Mr. Bowman will further improve the quality of the Muddy. On the contrary, the evidence has shown that these interests will be improved if this Court affirms the District Court's decision. The constructed wetland on Mr. Bowman's property will likely improve the environment by creating a richer wetland habitat. R. at 6. Without a further a showing of any beneficial effects that a requested order would have on altering the Muddy, the element of redressability is not satisfied. Furthermore, NUWF has not demonstrated that any civil penalties against Mr. Bowman would deter future violations. Because Mr. Bowman has already placed the still-wooded part of his property in a conservation easement, there is no risk that he will ever engage in land clearing activities again. R. at 4. Any further attempts to deter him would be redundant. Therefore, because the remedy that NUWF seeks would fail to redress NUWF's alleged injury, summary judgment must be affirmed.

B. Summary judgment should be affirmed because the interests that NUWF seeks to protect are not germane to NUWF's mission.

Under the germaneness element, courts will inquire into whether the interests the plaintiff seeks to remedy are central to the purpose of that organization. *Hunt,* 432 U.S. at 343. In *Hunt*, the plaintiff, a Washington State Apple Advertising Commission, sought to overturn a North Carolina statute which prohibited the display of any state grades on closed containers shipped into the State. *Id.* at 335.The plaintiff alleged that this restriction would cause harm to Washington apple growers by costing them money to remove the grades from the containers, limiting their advertising, and causing them to lose customers within North Carolina. *Id.* at 343-44. The Supreme Court found that the plaintiff had standing because the plaintiff's effort to

promote the industry's right to advertise their grading system was essential to the plaintiff's purpose of helping growers sell their apples. *Id.* at 344.

In this case, NUWF's mission as an organization is to protect the habitats of fish and wildlife. R. at 4. The interests that NUWF seeks to protect are not germane to NUWF's mission because NUWF has claimed only that its members' aesthetic and recreational interests were harmed by Mr. Bowman's activities. NUWF's claim that its members sensed that the Muddy would be adversely affected by Mr. Bowman's activities is irrelevant.

Furthermore, the injuries in *Hunt* are not analogous to the alleged harm in this case. Unlike the plaintiff in *Hunt*, whose purpose it was to protect apple growers from direct economic harms, NUWF has failed to bring forth any evidence that fish and wildlife would be injured by Mr. Bowman's activities. In *Hunt*, the Supreme Court reasoned that the plaintiff's attempt to remedy the injuries would positively benefit the apple growers it sought to protect. *See Hunt*, 432 U.S. at 344. While NUWF's mission is related to protecting the Muddy, without first proving how this action would harm the fish and wildlife, the germaneness requirement is not met. Unlike the statute in *Hunt*, which directly has an economic impact on the apple growers, no effect on the fish and wildlife has been shown. Thus, NUWF's interest in protecting the habitat of fish and wildlife is not germane to its organization's purpose because NUWF has failed to show any harm to the habitat and the State's fish and wildlife.

C. Summary judgment should be affirmed because neither the asserted claim nor the relief requested requires participation by NUWF's individual members.

In addition to failing to present any material facts which would prove germaneness, NUWF has also failed to show that the requested relief does not require individual participation by its members. The Supreme Court has held that "so long as the nature of the claim and of the relief sought does not make the individual participation of each injured party indispensable to

proper resolution of the cause" then this element is satisfied. *Warth v. Seldin*, 422 U.S. 490, 511 (1975). In *Hunt*, the Supreme Court found that the NUWF had associational standing because none of the relief sought by NUWF required individualized proofs and the claim could be resolved in a group context. *Hunt*, 432 U.S. at 344. The Court reasoned that declaratory and injunctive relief requested attempted to avoid the plaintiff's harms, and there was a financial nexus between the plaintiff's interests and that of its members. *Id.* Similarly, the courts have held that, although individual participation by an association's membership may be unnecessary when the relief sought is injunctive, conferring associational standing would be improper for claims requiring a fact-intensive-individual inquiry. *Pa. Psychiatric Soc'y v. Green Spring Health Servs.*, 280 F.3d 278, 286 (3d Cir. 2002)

Here, NUWF's claim requires participation by NUWF's individual members. The relief sought by NUWF is not analogous to the relief requested by the plaintiff in *Hunt*. Unlike the plaintiff *Hunt*, who was asking for only generalized forms of relief, NUWF in the present case is also asking for civil penalties. Even assuming that NUWF is able to meet its burden to all other elements of standing, NUWF is still required to bring its members into court to access civil penalties. NUWF does not present any facts to show that its interests would also be negatively affected by the outcome of this case. Unlike the link established between the plaintiff and its members in *Hunt*, NUWF relies solely on its members' interests to request a relief for civil penalties. Furthermore, individual participation is necessary because NUWF's claims rest on a fact-intensive-individual inquiry. Therefore, NUWF has failed to offer any material facts which would prove that the claim or relief sought does not require individual member participation.

II. This Court lacks subject matter jurisdiction because there is no continuing violation as required by Section 505(s) of the CWA, and NUDEP had diligently prosecuted an action by reaching a settlement with Mr. Bowman.

A. There is no continuing or ongoing violation as required by Section 505(a) of the CWA because Mr. Bowman's alleged violation occurred wholly in the past.

Section 505(a)(1) of the CWA allows a suit to be filed only against those "alleged to be in violation" of the CWA. 33 U.S.C. § 1365(a)(1). Section 505(a) does not confer federal jurisdiction over citizen suits for "wholly past" violations. *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Found., Inc.*, 484 U.S. 49, 64 (1987). This requirement was put in place because citizen suits are meant to supplement rather than to supplant governmental action, and permitting citizen suits for wholly past violations of the CWA could "undermine the supplementary role envisioned for the citizen suit." *Id.* at 60-61 (stating that allowing citizen suits for wholly past violations would change the citizens' role "from interstitial to potentially intrusive").

Mr. Bowman's past actions did not constitute a violation of the CWA, as will be discussed at length in Section III below, and it is therefore impossible for him to still be "in violation" of the CWA. Alternatively, even if the Court were to find that Mr. Bowman's past actions constituted a violation, NUWF's citizen suit is barred because this alleged violation would be a "wholly past" violation. First, Mr. Bowman's land clearing activities occurred wholly in the past, and there is no likelihood that this alleged violation will recur. Second, the continued presence of dredged or fill material does not constitute a continuing violation.

i. *NUWF has failed to show that Mr. Bowman is "in violation" of the CWA because Mr. Bowman's land clearing activities occurred wholly in the past, and NUWF has not demonstrated any likelihood that the alleged violations will recur.*

For the continuing violation requirement of Section 505(a) to be met, 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." *Gwaltney*, 484 U.S. at 57.

On remand from *Gwaltney*, the Fourth Circuit stated that a citizen-plaintiff may prove ongoing violations "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); *see also Conn. Coastal Fishermen's Ass'n v. Remington Arms Co., Inc.*, 989 F.2d 1305, 1311 (2d Cir. 1993) ("*Remington*") (stating that in order to avoid dismissal of the suit, the citizen-plaintiff must either show that the defendant's violations continued subsequent to the date the complaint was filed or present proof from which a trier of fact could find a continuing likelihood that violations would recur). Furthermore, to survive summary judgment, a plaintiff's allegations of continuing violation must be made in "good faith." *Gwaltney* at 64.

A defendant may defeat a plaintiff's suit on a motion for summary judgment by demonstrating that the allegations of a continuing violation of the CWA were a sham. *Remington*, 989 F.2d at 1311. Once the defendant has shown that it is unlikely that the defendant will continue its illegal discharges, the plaintiff must demonstrate more than good faith; it must present instead "evidence from which a factfinder could find a likelihood of continuing violations." *Id.* at 1312. In order to avoid dismissal of the complaint, the plaintiff must demonstrate more than "some metaphysical doubt as to the material facts." *Matsushita Elec. Indus. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986).

The critical time for determining whether there is an ongoing violation is when the complaint was filed. *Remington*, 989 F.2d at 1311. Summary judgment is appropriate where a trial court can safely conclude that whatever continuing risk of pollution there may have been, it was at an end when the citizen suit was filed. *Id* at 1312.

NUWF has not shown that Mr. Bowman's alleged violation continued subsequent to the date the complaint was filed, nor has NUWF presented proof from which a trier of fact could find a continuing likelihood that the alleged violation would recur. *See id.* at 1311. Mr. Bowman finished his land clearing activities on July 15, 2011. R. at 4. Furthermore, no reasonable juror could find that he would likely violate the CWA in the future. He has placed the still wooded part of his property adjacent to the Muddy plus an additional 75 foot buffer in a conservation easement with NUDEP. R. at 4. The easement requires Mr. Bowman to keep the easement area in its natural state and forbids him from developing the land in any way other than constructing and maintaining the artificial wetland. Once Mr. Bowman demonstrated that it was unlikely that he would continue allegedly illegal discharges, NUWF was required to demonstrate more than good faith. *See Remington*, 989 F.2d at 1312. NUWF failed to do so because NUWF failed to present "evidence from which a factfinder could find a likelihood of continuing violations." *See id.* at 1312. Furthermore, while NUWF may try to claim that the drainage swale constructed by Mr. Bowman fulfills the continuing violation requirement, "agricultural stormwater discharges and return flows from irrigated agriculture" are not "point source" discharges within the meaning of the Act. *See* CWA § 502(14). Therefore, summary judgment was proper.

ii. *Mr. Bowman is not "in violation" of the CWA because the continued presence of dredged or fill material cannot constitute a continuing violation.*

The *Gwaltney* decision did not define the point at which an "ongoing" violation becomes "wholly past," and the issue has split the lower courts. *City of Mountain Park, GA v. Lakeside at Ansley, LLC*, 560 F. Supp. 2d 1288, 1293 (N.D. Ga. 2008). As the Twelfth Circuit has not addressed this issue, the Court should affirm the district court and adopt a more stringent interpretation of the "wholly past" language in *Gwaltney* in order to avoid undermining the continuing violation requirement of the CWA.

Several courts have read the "wholly past" language in *Gwaltney* stringently and have held that the mere migration, decomposition, and diffusion of pollutants do not constitute a continuing violation. For example, in *Remington*, the plaintiff argued that that the defendant gun club was "in violation" because lead shot previously deposited into adjacent waters was a point source which was discharging pollutants as it dissolved. 989 F.2d at 1313. The Second Circuit rejected the plaintiff's argument because "[t]he present violation requirement of the Act would be completely undermined if a violation included the mere decomposition of pollutants." *Id.* Similarly, in *Bettis v. Town of Ontario, N.Y.*, the court granted a motion for summary judgment, where the defendant excavated and filled wetlands before the filing of the complaint, because the alleged violation occurred wholly in the past. 800 F. Supp. 1113, 1119 (W.D.N.Y. 1992); *see also Hamker v. Diamond Shamrock Chem. Co., 756 F.2d 392, 397 (5th Cir. 1985) (dismissing citizen-plaintiff's complaint because "continuing residual effects resulting from a discharge are not equivalent to a continuing discharge")*; *Aiello v. Town of Brookhaven*, 136 F. Supp. 2d 81, 121 (E.D.N.Y. 2001) (finding that a defendant could not be held liable under CWA for the leaking of pollutants from a closed landfill); *Wilson v. Amoco Corp.*, 33 F. Supp. 2d 969, 975-76 (D.Wyo. 1998) (maintaining that the "migration of residual contamination from previous releases does not constitute an ongoing discharge" and that to hold otherwise would "undermine the CWA's limitations as set forth in the statute's definition of point source and the Supreme Court's holding in *Gwaltney"*); *Catchpole v. Wagner*, Civ. No. 09-5065, 2010 WL 2233678, *7 (W.D. Wash. June 1, 2010) (dismissing citizen-plaintiff's suit, where defendant had cleared away existing vegetation, overturned the top layers of the soil, leveled off minor elevations in the ground, and filled minor depressions, because the defendant's action occurred in the past, and the work resulted in a short-term, minimal environmental impact).

Other courts have broadly interpreted what constitutes an ongoing violation and have held that an ongoing violation exists until the risk of continued violation has been completely removed. *See, e.g., Sasser v. Adm'r, U.S. E.P.A.*, 990 F.2d 127, 129 (4th Cir. 1993) (finding that an administrative complaint appropriately charged a continuing violation, where the defendant discharged dredged or fill material into a wetland, because each day that the pollutant remained in the wetland without a permit constituted an additional day of violation).

The Twelfth Circuit should adopt the more stringent interpretation and hold that the continuing violation requirement cannot be circumvented by plaintiffs who claim that the mere migration, decomposition, or diffusion of pollutants constitutes a continuing violation. To hold otherwise would undermine the limits that Congress placed on the CWA. First, the continuing violation requirement of the CWA would be "completely undermined if a violation included the mere decomposition of pollutants." *See Remington*, 989 F.2d at 1313. While it could be argued that decomposing pollutants are technically a continuing violation, this argument elevates form over substance and would completely eviscerate the continuing violation requirement.

Furthermore, to find that dirt and decomposing vegetation left in a wetland constitutes a "point source" would contravene the statute's definition of "point source." *See Wilson,* 33 F. Supp. 2d at 975. Specifically, Section 502(14) of the CWA defines the term "point source" to mean any discernible, confined, and discrete conveyance. 33 U.S.C. § 1362(14). The decomposing vegetation in Mr. Bowman's field hardly meets this definition. Therefore, the Twelfth Circuit should adopt the more stringent interpretation in order to avoid undermining the limits that Congress has placed on the CWA.

Under the more stringent interpretation, NUWF's case must be dismissed. Similar to *Bettis*, 800 F. Supp. at 1119, where the court found that the continuing violation requirement was

not met because the defendant's excavation and filling of wetlands had terminated prior to the filing of the complaint, this Court should find that the continuing violation requirement is not met because Mr. Bowman finished his land clearing activities on July 15, 2011, and the Complaint was filed after this date. R. at 4. Furthermore, Mr. Bowman's land clearing activities are analogous to those of the defendant in *Catchpole*, whose motion for summary judgment was granted because the defendant's actions—clearing away existing vegetation, overturning the top layers of the soil, leveling off minor elevations in the ground, and filling minor depressions—occurred wholly in the past, and the work resulted in a short-term, minimal environmental impact. *See* 2010 WL 2233678 at *7. Mr. Bowman's actions similarly occurred wholly in the past, and his construction of a wetland negates any potential environmental impact. Therefore, summary judgment should be affirmed.

B. NUDEP has diligently prosecuted an action against Mr. Bowman because NUDEP and Mr. Bowman reached a settlement that will require Mr. Bowman to remain in compliance with the CWA.

This Court lacks subject matter jurisdiction because NUDEP has diligently prosecuted an action against Mr. Bowman for the alleged violations of the CWA. A citizen cannot bring a suit if "the Administrator or State has commenced and is diligently prosecuting a civil or criminal action in a court of the United States, or a State to require compliance with the standard." 33 U.S.C. § 1365(b)(1)(B). This requirement is in place because citizens suits are meant "to supplement, rather than to supplant" government action. *Gwaltney*, 484 U.S. at 60. Once an agency addresses the alleged violation, "deference to the agency's plan of attack should be particularly favored." *N. & S. Rivers Watershed Ass'n v. Town of Scituate*, 949 F.2d 552, 557 (1st Cir. 1991) ("Scituate").

The diligent prosecution requirement "does not require government prosecution to be far-reaching or zealous." *Karr v. Hefner*, 475 F.3d 1192, 1197 (10th Cir. 2007). The threshold for establishing "diligent prosecution" requires that the government be only "diligent," and courts will generally defer to the state or relevant enforcement agency, such as EPA. *Id.* Citizen-plaintiffs must meet a high standard to demonstrate that the government has failed to prosecute a violation diligently. *Id.*

A citizen-plaintiff cannot establish a lack of diligent prosecution by "merely showing that the agency's prosecution strategy is less aggressive than he would like," or that it did not "produce a completely satisfactory result." *The Piney Run Pres. Ass'n. v. The Cnty. Comm'rs. of Carroll Cnty., Md.*, 523 F.3d 453, 460 (4th Cir. 2008); *see also Karr*, 475 F.3d at 1197 ("an unsatisfactory result does not necessarily imply a lack of diligence"). An agency's enforcement of the CWA will be considered diligent where the action "is capable of requiring compliance with the Act and is in good faith calculated to do so." *Piney Run*, 523 F.3d at 460. Moreover, the enforcement agency is not required to assess penalties for the prosecution to be considered diligent. *Friends of Milwaukee's Rivers v. Milwaukee Metro. Sewerage Dist.*, 382 F.3d 743, 763 (7th Cir. 2004) ("Diligence does not require penalties").

EPA has broad discretion in choosing the enforcement method to satisfy the diligent prosecution requirement. In *Karr*, a citizen suit was brought against local businesses that were allegedly polluting local waters from the construction and operation of oil and gas facilities. 475 F.3d at 1194. The Tenth Circuit dismissed the suit because EPA's investigation and decision to reach a settlement based on a consent decree with the defendants was "not only diligent, but vigorous and thorough." *Id.* at 1198. The court held that the state action "far surpassed the deferential standard" and that "EPA appears to have accomplished more through its consent

decree than [the p]laintiffs sought to achieve on their own." *Id.* at 1199. Similarly, in *Scituate* the First Circuit dismissed a citizen-suit because the state enforcement agency's issuance of mandatory and ongoing maintenance orders and an order to construct a new facility satisfied its mandate to diligently prosecute a CWA violation. 949 F.2d at 556. The court reasoned that the orders "represent[ed] a substantial, considered, and ongoing response to the violation and that the agency's enforcement action does in fact represent diligent prosecution." *Id.* at 557.

The citizen-plaintiff's lack of satisfaction is not an adequate basis for establishing a lack of diligent prosecution. In *Piney Run*, an environmental advocacy organization pursued an action against county commissioners for alleged violations of the CWA based on a treatment facility's discharge of wastewater into a local stream. 523 F.3d at 455. The Fourth Circuit held that the citizen-plaintiff's suit could not be brought on the basis that the actions levied by the state enforcement agency were not severe enough to satisfy the citizen-plaintiff. *Id.* at 461. In this ruling, the court found that the actions commenced by the state agency were enough to establish diligent prosecution, even though they levied daily penalties less than the fines imposed in analogous CWA cases and lacked a firm deadline for compliance. *Id.* Still, the court found that these considerations were not grounds to establish a lack of diligent prosecution, but were rather concessions on the part of the state agency in exchange for other obligations, which the court reasoned was "precisely the type of discretionary matter to which we should defer." *Id.*

The District Court properly granted summary judgment because NUDEP had already diligently prosecuted the issue. Similar to *Karr* and *Scituate,* where the circuit courts found that the agencies' investigation and negotiated settlements were enough to satisfy the deferential standard for diligent prosecution, NUDEP's quickly initiated investigation and settlement with Mr. Bowman meet the low threshold to establish diligent prosecution. *See Karr*, 475 F.3d at

1198; *Scituate*, 949 F.2d at 557. Also, similar to *Karr* and *Piney Run*, where the courts found diligent prosecution despite the lack of penalties, NUDEP chose not to pursue pure monetary penalties and, instead, gained a substantial conservation easement. *See Karr*, 475 F.3d at 1198; *Piney Run*, 523 F.3d at 459. Additionally, analogous to *Scituate*, where the First Circuit found that the ongoing maintenance reports which the sewage facility needed to file were demonstrations of ongoing diligence, Mr. Bowman agreed to construct and maintain year-round a wetland, a commitment that will cost Mr. Bowman substantial initial and ongoing expenses. *See Scituate*, 949 F.2d at 557. The construction of a new wetland is similar to the construction of the new facility in *Scituate*, which would serve as an example of NUDEP's "considered and ongoing" response. *See id.* The actions by NUDEP far exceed the threshold that other circuit courts have found satisfy the requirements for diligent prosecution.

NUWF's dissatisfaction with NUDEP's choice of penalty is not sufficient to demonstrate that the diligent prosecution requirements were not met. Akin to *Piney Run*, where the court found that the choice to forego full penalties was in exchange for greater promises, NUDEP chose to forego a monetary penalty in exchange for a more far-reaching penalty of gaining a conservation easement and new wetland on Mr. Bowman's property. *See* 523 F.3d at 461. The establishment of the easement and wetland will substantially diminish the agricultural and developmental value of Mr. Bowman's land and are implemented in the settlement in lieu of a civil monetary penalty, which will preserve the land in a natural state and achieve "more through its consent decree than [NUWF] sought to achieve on [its] own." *See Karr*, 475 F.3d at 1199.

NUWF's assertion of lack of diligent prosecution is without precedent or factual support. NUWF should not be allowed to supplant NUDEP's role in enforcing the CWA. As the action has been diligently prosecuted, summary judgment should be affirmed.

III. Mr. Bowman did not violate Section 404 of the CWA because there was no addition of a pollutant to the navigable waters.

Even if this Court were to find that NUWF has standing and this Court has subject matter jurisdiction, summary judgment should still be affirmed because Mr. Bowman did not violate Section 404 of the CWA because there was no "addition" of a pollutant to the navigable waters. Section 301(a) of the CWA prohibits "the discharge of any pollutant by any person," unless that discharge is "in compliance with a permit issued under § 402 or § 404." 33 U.S.C. § 1311. The Act has defined "discharge of a pollutant" to constitute "any addition of any pollutant to navigable waters from any point source." 33 U.S.C. §1362(12). The only issue in contention for this Court to decide is whether Mr. Bowman's act of pushing pollutants from one part of his own wetlands to another without a permit is an "addition" under the CWA. EPA can apply their definition of "addition" to Section 404 issues despite the definition only being used previously to address Section 402 issues because "the normal rule of statutory construction assumes that identical words used in different parts of the same act are intended to have the same meaning." *Sorenson v. Sec'y of Treasury*, 475 U.S. 851, 860 (1986) (internal quotations omitted).

As set forth more fully below, this Court should uphold the ruling of the District Court because EPA's definition of "addition" is entitled to *Chevron* deference, and, under this definition, Mr. Bowman did not violate the CWA.

A. Under *Chevron*, this Court should defer to EPA's interpretation of ambiguous terms of the CWA so long as the interpretation is a reasonable construction of the statute.

EPA's interpretations of terms, such as "addition," that Congress did not define in the CWA are accorded deference so long as they are "permissible constructions." *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 843 (1984). The Supreme Court has held

that "when Congress has directly spoken to the precise question at issue and their intent is clear, the courts and agency must give effect to the unambiguously expressed intent of Congress." *Id.* 467 U.S. at 838. However, if a statute is silent or ambiguous on an issue or definition of a term, a court must decide whether the agency's interpretation is based on a "permissible construction of the statute." *Id.* at 843. A "permissible construction" has been defined as a "reasonable choice" taken by the agency to fill the statutory gap left by Congress. *Id.* at 866.

A challenge to an agency's interpretation of a statutory gap cannot be sustained if it "centers on the wisdom of the agency's policy, rather than whether it is a reasonable choice." *Id*; *see also United States v. Mead Corp.*, 533 U.S. 218, 229 (2001). When evaluating the construction, courts should grant considerable weight and deference to "an executive department's construction of a statutory scheme it is entrusted to administer," such as EPA in its enforcement of the CWA. *Id.* at 844.

However, an agency is not guaranteed *Chevron* deference if "there is no indication on the statute's face that Congress meant to delegate the authority to [the agency]." *Id.* at 226. Deference is afforded only in cases where Congress has "delegated authority to an agency to make rules carrying the force of law," and the agency interpreting the statutory gap in question was granted the power to exercise that authority by Congress. *Id.* at 227. The agency charged with carrying out and enforcing the provisions of the CWA is EPA. 33 U.S.C. § 1319.

If terms of a statute are ambiguous or undefined, an agency is accorded deference to interpret them so long as there interpretation is a reasonable construction. In *Chevron*, the energy corporation Chevron brought suit challenging EPA's definition of "stationary source." 467 U.S. at 840-41. The Supreme Court held that EPA's definition of "stationary source" contained in the Clean Air Act was a permissible construction to fill the "statutory gap Congress left." *Id.* Similar

to the lack of "stationary source" definition in *Chevron*, Congress has left a statutory gap in the CWA by not defining "addition." In turn, EPA has filled in the statutory gap by defining "addition" as "pollutants from the outside world." National Pollutant Discharge Elimination System ("NPDES") Water Transfer Rule, 73 Fed. Reg. 33, 697 (June 13, 2008) (codified at 40 C.F.R. pt. 122). As the Court found in *Chevron*, unless there is a "clear affront to common English usage" that results in an "impermissible construction" by the agency, EPA has deference to define "addition." 467 U.S. at 866.

Chevron deference is given to an agency's permissible construction, so long as Congress granted the agency the force of law. In *Mead*, the Supreme Court held there are limits on *Chevron* deference such as when it appears that Congress did not delegate the authority to an agency to issue "classification rulings with the force of law." 533 U.S. at 229-30. Applying this reasoning, the Court decided that a tariff classification ruling by the U.S. Customs Service did not deserve judicial deference because there was "no indication that Congress intended such a ruling to carry the force of law." *Id.* at 219. Unlike the customs offices in *Mead*, EPA is the agency charged with enforcement of the CWA. *See* 33 U.S.C. § 1319. EPA and its subordinate state agencies, such as NUDEP, are the agencies back by Congress with the mission of enforcing compliance of environmental protection statutes, such as the CWA. *Id.* Because Congress granted EPA "the force of law" to carry out its agency operations, EPA is accorded *Chevron* deference to interpret undefined terms in environmental statutes. *Mead*, 533 U.S. at 227.

EPA's definition of "addition" is a permissible construction of a statutory gap in the CWA. In *Friends of Everglades v. S. Fl. Water Mgmt. Dist.*, the Eleventh Circuit found that, because there was no compelling argument or reasoning that EPA's definition of "addition" was unreasonable, deference to the agency must be given. 570 F.3d 1210, 1228 (11th Cir. 2009).

Directly analogous to EPA's definition in *Everglades*, the definition of "addition" is a reasonable and thus permissible construction of the statutory gap in the CWA. NUWF protests EPA's definition; however, it is not up to a court to evaluate the wisdom of the agency's decision, only its reasonableness. *Chevron,* 467 U.S. at 866. NUWF's claim lacks basis and reasoning that has not already been rejected by other courts to prove that EPA's definition of "addition" is unreasonable and impermissible. The challenge on this front must fail under *Chevron*. *Id.* This Court should uphold the ruling of the District Court because EPA's definition is a permissible construction to fill a statutory gap left by Congress.

B. Under EPA's definition of "addition," Mr. Bowman did not violate the CWA.

Mr. Bowman did not violate the CWA because there was no "addition" of pollutants to the navigable waters from the outside of the wetlands. In order to violate Section 301(a) of the CWA, there must be "discharge of a pollutant." 33 U.S.C. § 1311. The CWA has defined "discharge of a pollution" as "any addition of any pollutant to navigable waters from any point source." 33 U.S.C. § 1362. Congress did not define "addition" in the CWA. *Id.*

EPA has defined "addition from a point source" as "occurring only if the point source itself physically introduces a pollutant into water from the outside world." *Nat'l Wildlife Fed'n v. Gorsuch*, 693 D.2d 156, 175 (D.C. Cir. 1982); *see also Nat'l Wildlife Fed'n v. Consumers Power Co.*, 862 F.2d 580, 585 (6th Cir. 1988). "Addition" does not take place when a pollutant is "moved" from one part of the navigable waters to another. *Id.*; *see also Comm. to Save Mokelumne River v. East Bay Mun. Util. Dist.*, 13 F.3d 305, 308 (9th Cir. 1993) ("passing pollution" from one navigable waters to another is not "addition"). EPA has integrated this definition of "addition" into its Water Transfer Rule which incorporates the "unitary navigable waters theory," under which all navigable waters are one combined body for the purposes of

Section 301(a). *Everglades*, 570 F.3d at 1217. EPA's adoption of the "unitary navigable waters theory" has been recognized as being within its discretion under *Chevron*. *Id.* at 1217-20.

"Addition" occurs only if the pollutants are introduced from outside the navigable waters or wetlands. For example, in *Gorsuch*, an advocacy group sought a declaration that the EPA Administrator failed to regulate the discharge of pollutants from dams. 693 F.2d at 162. The group alleged that the dam was causing water quality changes when water was passing through it by dissolving "minerals and nutrients" in the water and altering of the oxygen and sediment levels. *Id.* at 161-64. The D.C. Circuit held there was no "addition" because the changes in the water were not resulting from the introduction or creation of a new pollutant to the water from the outside world. *Id.* at 175. Conversely, in *East Bay*, an environmental group brought action against a municipal utility district alleging violations of the CWA stemming from discharged pollutants without a NPDES permit from a local mining facility. 13 F.3d 305. The Ninth Circuit held that the case was distinguished from *Gorsuch* and *Consumers Power* because, instead of merely passing pollution from one body of navigable water into another, the source of pollution was "surface runoff that is collected and channeled by the defendants from the abandoned mine site." *Id.* at 308. Since the surface runoff was a pollutant that was "added" to the water by the mining facility, there was a violation of the CWA. *Id.* at 309.

"Addition" does not occur when pollutants are passed or moved from one part of the navigable waters or wetlands to another. In *Consumers Power*, environmental organizations brought suit against a power plant alleging violations of the CWA resulting from an underwater power turbine's discharge of dead fish remains. 862 F.2d 580 (6th Cir. 1988). The Sixth Circuit held that since the facility did not "create the fish that would become entrained in the process of generating electricity," the facility does not "add" pollutants from "the outside world." *Id.* at 586.

Conversely, in *United States v. Deaton*, the government brought an action against property owners for violating the CWA by discharging fill material from digging a drainage ditch into a regulation wetland and piled the excavated dirt on either side of the ditch, a practice known as "side-casting." 209 F.3d 331, 334 (4th Cir. 2000). The Fourth Circuit found that side-casting violated the Act because the removed soil became "dredged spoil," a classified pollutant, once removed from the ground and piled next to the ditch. *Id.* at 334-36.

This Court should uphold the ruling of the District Court because there was no "addition" of any pollutants to the navigable waters of the United States. Similar to *Consumers Power* and *Gorsuch*, where the circuit courts ruled that the point sources alteration of the biological composition of the water were not violations of the CWA, Mr. Bowman did not violate Section 301(a) because his activities merely altered the biological composition pollutants already present in the navigable waters. *See Consumers Power*, 693 F.2d at 174; *Gorsuch*, 862 F.2d at 586. Specifically, because the pollutants that Mr. Bowman was moving were already present in the wetlands, he was not "adding" or creating any new pollutants to the waters. *See Gorsuch*, 693 F.2d at 165. Thus, there was no "addition."

Much like the effect of the energy turbines in *Consumers Power*, which entrained live fish in an underwater power turbine and churned out dead fish remains, Mr. Bowman is merely moving pollutants already present in the navigable waters from one area to another, thus not creating or introducing any new pollutants to the system that were not previously there. *See* 862 F.2d at 585. More specifically, the pushing of the vegetation that was already in the wetlands into the water is merely an alteration, and an alteration is not an "addition" so long as the pollutants do not originate from outside the waters or wetlands. *Id.* Extending the reasoning of *Gorsuch*, where the D.C. Circuit held changes in characteristics of water such as its temperature

and sediment content were not "additions," Mr. Bowman's moving of dredged remains into the water were not "additions" because the fact that a point source may change the biological composition of the water does not constitute an "addition." *See* 693 F.2d at 175.

The key determinant that makes this case analogous to *Gorsuch* and *Consumers Powers* and distinguishes it from *East Bay* is the fact that the material Mr. Bowman moved was already present in the navigable waters of the United States. Unlike *East Bay*, where the Ninth Circuit found that there was an "addition" resulting from the mining facility channeling surface runoff into the river, Mr. Bowman's pollutants are not being "discharged" because they are not being introduced from outside the "navigable waters of the United States," a definition which includes Mr. Bowman's wetlands adjacent to the Muddy River. *See* 13 F.3d at 308. Since Mr. Bowman's wetlands were already a part of the "navigable waters" within its undisputed definition, his activities do not introduce any new pollutants that were not already present. Therefore, Mr. Bowman's actions do not satisfy the elements of "addition."

NUWF argues that, akin the Fourth Circuit's holding in *Deaton*, the remains of the land clearing project, which included dead vegetation and trees, were magically transformed into "dredged spoil" upon their clearance, and thus should now be classified as a pollutant that was "added" to the navigable waters by Mr. Bowman. *See* 209 F.3d at 336. The legal gymnastics of the Fourth Circuit's reasoning that side-casted soil is somehow transformed into a pollutant upon its excavation is not consistent with common sense or EPA's definition of "addition." Extending the logic of the Sixth Circuit's decision in *Consumer Powers*, where energy turbines transforming live fish into dead fish remains were not adding pollutants to the waters, Mr. Bowman's clearing, moving, and even killing of trees and vegetation may change the biological composition of the wetlands, but do not fit EPA's definition of "adding" pollutants to it. *See* 862

F.2d at 586. Furthermore, the Fourth Circuit's reasoning is faulty because the court sidesteps the "unitary water theory," which, although not yet codified in regulation at the time of the decision, had previously been used by EPA to define "addition." *Gorsuch*, 693 F.2d at 183. By not accounting for EPA's adopted definition of the ambiguous term, the court employed its own reasoning instead of the reasoning of the Agency, thus ignoring the key element of "addition," which requires that pollutants must be added or created by the point source.

For all these foregoing reasons, Mr. Bowman's activities do not meet the requirements to be considered "addition" under Section 301(a). Thus, there is no violation of the CWA.

CONCLUSION

This Court should affirm the District Court's decision for three separate reasons. First, NUWF failed to demonstrate that it had standing to bring its claim because it failed to establish that it had associational standing. Second, this Court lacks subject matter jurisdiction because there is no continuing violation as required by Section 505(s) of the CWA, and NUDEP had diligently prosecuted an action by reaching a settlement with Mr. Bowman. Third, Mr. Bowman did not violate Section 404 of the CWA because there was no addition of a pollutant to the navigable waters. For the forgoing reasons, Defendant respectfully requests that the District Court's summary judgment for Defendant should be affirmed.

Respectfully submitted,

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Counsel for Appellee