Team No. 53

C.A. 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 NEW UNION DEPARTMENT OF ENVIRONMENTAL PROTECTION

Intervenor-Appellant

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JURISDICTIONAL STATEMENT

This case involves an appeal from a judgment of the United States District court for the District of New Union. (R. at 1). The District court had proper subject matter jurisdiction over the case because the issues arise under the Clean Water Act (the "Act"), 33 U.S.C. §§ 1251 *et seq*, a law of the United States, and federal district courts have original jurisdiction over any civil action arising under the laws of the United States. 28 U.S.C. § 1331 (2006). The United States Court of Appeals for the Twelfth Circuit has proper jurisdiction to hear appeals from any final decision of the United States District court for the District of New Union. 28 U.S.C. § 1291 (2006).

STATEMENT OF THE ISSUES

I. Whether the New Union Wildlife Federation (NUWF) has standing to sue Jim Bob Bowman (Bowman) for violating the Act when asserting, on behalf of its members, injuries in fact which were traceable to Bowman's violation of the Act and which are redressable by the Court.

II. Whether there is a continuing or ongoing violation as required by § 505(a) of the Act for subject matter jurisdiction, when the activities that violated the Act occurred wholly in the past, are not likely to be continued or repeated in the future, and have been addressed by regulatory agency action.

III. Whether NUWF's citizen suit has been barred by the New Union Department of Environmental Protection's (NUDEP) diligent prosecution of Bowman as set out in § 505(b) of the Act, when as a state regulatory agency with enforcement authority under the Act NUDEP has investigated the allegations of violation, negotiated a settlement agreement, issued an administrative order, and entered a motion for decree incorporating that agreement and order before the District court.

IV. Whether Bowman violated the Act when he moved dredged and fill material from one part of a wetland adjacent to navigable water to another part of the same wetland, under regulations promulgated by the U.S. Environmental Protection Agency (EPA), which include sidecasting as a form of addition of a pollutant into waters of the United States.

STATEMENT OF THE CASE

The NUDEP filed suit under § 505 of the Act (the "citizen suit provisions") in the United States District court for the District of New Union against Jim Bob Bowman, alleging violations of §§ 301 and 404 of the Act. (R. at 5). The NUWF filed a separate suit under § 505, alleging the same violations of §§ 301 and 404. (R. at 3.) NUDEP filed a motion to enter a decree, the terms of which are identical to the administrative order previously issued by NUDEP to Bowman. (R. at 5). NUDEP and NUWF both filed motions to intervene in the other suit, and both motions were granted. (R. at 5). NUWF simultaneously moved to consolidate the cases, and to oppose the entry of the decree proposed by NUDEP. (R. at 5). The District court did not rule on any of the above motions other than granting NUDEP and NUWF intervenor status in the other's suits. (R. at 5). The Court ruled in NUWF suit, holding in abeyance the NUDEP suit. (R. at 5).

After discovery, all parties filed motions for summary judgment in NUWF suit. (R. at 5). On June 1, 2012, the District court granted Bowman's motion for summary judgment, and denied NUWF's summary judgment motion. (R. at11). NUDEP had joined Bowman's motion on two issues, and joined NUWF on the remaining two, so the District court granted in part and denied in part NUDEP's motion. (R. at 11). The District court held that: 1) NUWF lacked standing, because there was no injury to NUWF or its members that was fairly traceable to Bowman's action, and other injuries were too speculative to survive Article III review; 2) the District court lacked subject matter jurisdiction because the violation was wholly in the past; 3) the District court lacked subject matter jurisdiction because of the State's prior action; and 4) there was no

violation of the Act, because one of the elements necessary to find a violation of § 404 was missing (that of 'addition'). (R. at 11).

NUDEP and NUWF have each filed a separate Notice of Appeal, seeking review of the denial of their summary judgment motions. (R. at 1). NUDEP appeals the District court's ruling on issues 1 (NUWF's standing) and 4 (violation of the Act). (R. at 1). NUWF appeals the District court's ruling on all four issues. (R. at 1). This Court granted review of both petitions on September 14, 2012. (R. at 1).

STATEMENT OF THE FACTS

Bowman's Property and the Muddy River

Jim Bob Bowman owns one thousand acres of land adjacent to the Muddy River in the State of New Union. (R. at 3). All parties agree that the property is a wetland. (R. at 3-4). Bowman's one thousand acres is wholly within the one hundred year flood plain of the Muddy and includes 650 feet of shoreline (R. at 3). Each year, when the river is high, portions of the Bowman's property are inundated. *Id.* The property is hydrologically connected to the river. *Id.* Where the river borders Bowman's property, the river is 500 feet wide and six feet deep. *Id.*

Bowman's Land Clearing Activities

On June 15, 2011, Bowman began cleaning his land without a §404 permit. (R. at 4). He began by bulldozing trees and other vegetation into piles. *Id.* He then burned those piles and plowed and began digging trenches into which he pushed the burned ashes of the trees and vegetation. *Id.* Next, he leveled the field, pushing high portions of the field into low portions. *Id.* Finally, he formed a large ditch that ran from the back of

his property to the river to drain the field into the Muddy River. *Id.* Bowman left only a small strip of 150 feet wide along the river because it was too saturated level. *Id*.

NUWF's Members and Their Use of the River and Bowman's Property

Three members of NUWF testify that they use the Muddy River, Dottie Milford, Zeke Norton, and Effie Lawless. (R. at 6). All use the river for recreational boating, fishing, and picnicking and that they are aware of the importance the wetlands in maintaining the health of the river. *Id.* They fear that the river is more polluted and feel a loss as a result of Bowman's destruction of the wetlands. *Id.*

Milford testified that the Muddy appears more polluted than in previous years. *Id.* Norton frogs the area, including Bowman's property, for recreational and subsistence purposes. *Id.* Norton testified that there are now no frogs in the drained field and very few in the 150 foot buffer between the river and the field. *Id.*

The Administrative Order and Settlement

On July 1, 2011, NUWF sent a notice to Bowman of its intent to sue under § 505 of the CWA, *Id.* § 1365. (R. at 4). NUDEP then contacted Bowman and sent him a notice informing him that he had violated state and federal law by clearing the field. *Id.* Despite maintain that he had not violated state or federal law, Bowman entered into a settlement agreement which was incorporated into an administrative order which Bowman consented to on August 1, 2011. *Id.* Bowman agreed not to clear any more wetlands, convey a conservation easement over the 150 foot wide strip of still wooded wetland, and maintain a year-round artificial wetland on a seventy-five foot wide strip between the wooded area and the field. *Id*. The conservation easement allows for public

entry and forbids development. *Id.* NUDEP included no administrative penalty in the order to Bowman. *Id*.

STANDARD OF REVIEW

Questions of law evaluated by this Court are reviewed *de novo*. *Theriot, Inc. v. U.S.*, 245 F.3d 388, 395 (5th Cir. 1998). Review of federal agency action is governed by the Administrative Procedure Act, 5 U.S.C. § 702 (2006), and can be overturned if the action "relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or to the product of agency expertise." *Motor Vehicle Mfrs. Ass'n of the U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983).

SUMMARY OF THE ARGUMENT

The District court was correct on two issues, and erred on two issues. The Court was correct to hold that the wholly past violation was not reviewable by the Court, and that the prior state action by NUDEP barred the Court from hearing NUWF's suit. The District court erred, however, in holding that NUWF lacked standing to bring their suit, and that there was no violation of the Act.

The district court erred in holding that NUWF did not have standing. The district court held that NUWF's members' injuries were speculative and that the members' injuries were not traceable to the Bowman's clearing of the field. NUWF has standing under to sue Bowman for under § 505 of the Act. First, plaintiffs allege a sufficient injury whenever plaintiffs suffer an injury that adversely affects the aesthetic value of the environment is lessened. Here, plaintiffs allege that they feel the Muddy River is more

polluted in the past and frogging opportunities have suffered. Second, Appellant's injury is fairly traceable to Bowman's conduct. Soon after Bowman's cleared of the wetland NUWF's members began suffering feeling the tangible and aesthetic impacts of the loss of a wetland. Finally, this injury is redressable by a favorable decision. The Supreme Court has held that civil penalties that discourage future destructive activity are sufficient to satisfy the redressbility prong. Here, NUWF seeks an injunction and civil penalties. NUWF has satisfied the requirements of Article III standing to sue Bowman for his alleged violation of the Act.

The District court was correct to hold that the violation of the Act was wholly in the past, and thus was not reviewable by the Court under the citizen suit provisions of the Act. The Supreme Court held in *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Foundation* that the citizen suit provision of the Act only applies to violations that are continuous or ongoing and requires a reasonable likelihood that a polluter will continue to pollute in the future. The Supreme Court further held in *Gwaltney* that once the appropriate regulatory agency issues a compliance order addressing the violation it is no longer a violation. Under the test described by the Supreme Court in *Bennett v. Spear* a final regulatory agency action that addresses the action and allows it is functionally a permit. Bowman ceased his actions before NUWF brought its suit, the NUDEP settlement agreement and administrative order resolves the violation and makes it unlikely that Bowman will continue to pollute in the future, and the NUDEP administrative order, which it sought to enter as a decree in federal court, is a final regulatory agency action. The District court was thus correct to hold that § 505 of the Act barred NUWF's, because there was no ongoing violation of the Act.

The District court was also correct to hold that NUDEP's prior state action barred NUWF's suit under § 505. The plain language of the Act prohibits a citizen suit when the State or Administrator is diligently prosecuting the violation. The Supreme Court held in *Friends of the Earth, Inc. v. Laidlaw Environmental Services (TOC)* that the purpose of the sixty day notice requirement of § 505 is to allow the polluter an opportunity to cease his violation, and to allow the State (or the Administrator) an opportunity to address the violation. The Supreme Court noted in *Gwaltney* that the Congressional purpose of the notice and restriction was to prevent interference with the government's ability and discretion to enforce the Act. Here, NUDEP diligently prosecuted the violation, and filed suit in federal court to complete that prosecution, all within forty days of receiving the notice of the violation. The District court was thus correct to hold that NUWF's suit was barred by the plain language of the Act.

Finally, the District court erred in holding that Bowman's redeposit of "dredged or fill material" was not an "addition" and thus not a "discharge of a pollutant" under § 404. Section 301(a) of the CWA prohibits the "discharge of any pollutant" by any person except in compliance with a §§ 402 or 404 permit. The CWA defines "discharge of a pollutant" to mean "any addition of any pollutant into the navigable waters from any point source." The district court held and Bowman does not dispute that he introduced a pollutant into navigable waters from a point source. Bowman disputes that his conduct constituted an "*addition*" of a pollutant.

The CWA was enacted to "to restore and maintain the chemical, physical, and biological integrity of the nation's water." While the CWA does not define the word "addition," Bowman stands behind the Unitary Waters Theory to suggest that only

foreign material may be considered an "addition." This interpretation is wrong because it ignores the interpretation of the word "pollutant." The CWA defines "pollutant" as, among other material, "dredged spoil" which is uncannily close to the "dredged…material" for which a § 404 permit is required. EPA further defines dredged material as to include any addition of dredged material, including redeposit into the waters the United States. Bowman's conduct falls squarely within the the Agency's interpretation of what constitutes an addition or redeposit of dredged material. The Court should defer to agency's interpretation under *Chevron* and overturn the district court's decision in regard to Bowman's alleged § 404 violation.

This Court should uphold the district court on the holding that the wholly past violation was not reviewable by the Court, and that the prior state action by NUDEP barred the Court from hearing NUWF's suit. This Court should overturn, however, the district court's holding that NUWF lacked standing and that there was no violation of the Act.

ARGUMENT

1. NUWF has standing to sue Bowman for violating the Act when asserting, on behalf of its members, injuries in fact which were traceable to Bowman's violation of the Act and which are redressable by the Court.

In order to satisfy Article III's standing requirements, the Supreme Court has held that a plaintiff must show (1) it has suffered an "injury in fact" that is (a) concrete and particularized and (b) actual or imminent; (2) the injury is fairly traceable to the challenged action of the defendant; and 3) it is likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560–561 (1992); U.S. CONST. art. III. An association has standing to bring

suit on behalf of its members when its members would otherwise have standing to sue in their own right, the interests at stake are germane to the organization's purpose, and neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit. *Hunt v. Washington State Apple Advertising Comm'n*, 432 U.S. 333, 343 (1977).

The lower Court held that plaintiffs lack standing because 1) their injuries are speculative since the environment may be benefited rather than injured by the changes and 2) because plaintiffs' injuries were not traceable to the clearing of defendant's field. The lower Court's holdings stand in contradiction to established precedent. (R. at 6.)

a. To Establish Injury-In-Fact Appellants Must Show Their Members Have Suffered Injury to Their Aesthetic and Environmental Interests.

The court erred in holding that plaintiffs' injuries were speculative because the environment may improve and the aesthetics of navigational use of the river is unaffected. The elements of standing require proof of "*a harm suffered by the plaintiff*" (emphasis added). *Steel Co. v. Citizens for a Better Env't,* 523 U.S. 83, 101 (1998). Plaintiffs have met this requirement.

"Environmental plaintiffs adequately allege injury-in-fact when they aver that they use the affected area and are persons 'for whom the aesthetic and recreational values of the area will be lessened."' *Friends of the Earth, Inc. v. Laidlaw Envtl. Services (TOC), Inc.,* 528 U.S. 167, 183 (2000) (quoting *Sierra Club v. Morton*, 405 U.S. 727, 735 (1972). "These injuries need not be large, an 'identifiable trifle' will suffice." *U.S. v. Students Challenging Regulatory Agency Procedures* (SCRAP), 412 U.S. 669, 689 n. 14 (1973). In *Lujan v. Defenders of Wildlife,* 504 U.S. 555, 560 (1992), the Court held that

"the plaintiff must have suffered an 'injury in fact'" in order to have standing. The Court looked at whether the plaintiffs, not the wildlife they sought to protect, would be injured. See id. at 561-567. Citing *Sierra Club v. Morton*, the Court in *Lujan* said: "the desire to use or observe an animal species, even for purely esthetic purposes, is undeniably a cognizable interest for purpose of standing." 504 U.S. at 562-563. The Supreme Court's interpretation of standing, in contrast with the District court, does not place its focus on the ability to maneuver or navigate through the environment but, rather, on plaintiff's ability to appreciate the beauty of the environment. Here, plaintiffs have satisfied the injury-in-fact requirement if they show that their enjoyment of the waterway has been lessened.

Plaintiffs satisfy this requirement. They have shown that their members use or would use the river less and that their enjoyment of such use is adversely affected or interfered with as a result of Bowman's excessive land clearing operations. All plaintiffs testified that they are aware of the differences and feel a loss from the destruction of the wetlands, Milford testified that the Muddy River looks more polluted to her than in past years, and Norton testified that the area is no longer good for frogging as a result of Bowman's actions. (R. at 6.) The members' interests in the river are clearly interfered with by Bowman's unlawful discharges.

The Supreme Court has made clear that proof of harm to the waterway from illegal discharges is not needed for standing. In *Weinberger v. Romero-Barcelo,* 456 U.S. 305, 307-320 (1982), a citizen suit under the Clean Water Act, the Supreme Court proceeded on the issue of whether the district court should have enjoined continued operations pending receipt of an NPDES permit, even though the district court found no

harm to the waterway. The Court would not have proceeded without standing. See *Steel Co*., 118 S.Ct. at 1009-1016. Therefore, demonstrated proof of harm to the waterway is not a requisite for standing. As discussed above, plaintiffs must show proof of harm to the plaintiff.

Finally, the Court holding that the plaintiffs' injuries are speculative because the environment may improve is, paradoxically, speculative. The fact that the wetland may improve, is conjectural, and furthermore, courts are bound to determine standing at in light of the circumstances existing at the outset of the suit. *Steel Co.*, 523 U.S. at 102 (standing is a "threshold jurisdictional question"); *Laidlaw*, 528 U.S. at 170, 180 (declaring an obligation to determine whether the plaintiff had standing "at the outset of the litigation" and describing standing as an "initial" analysis); Put another way, standing is " '[t]he requisite personal interest that must exist at the commencement of the litigation.' " *Laidlaw*, 528 U.S. at 170 (quoting *Arizonians for Official English v. Arizona*, 520 U.S. 43, 68, n.22 (1997)) (emphasis added). As such, courts must assess standing in light of the circumstances in existence at the time the complaint was filed -- not in light of events subsequent to the commencement of the lawsuit. *Payne v. Travenol Labs*., 565 F.2d 895, 898 (5th Cir. 1978) (noting that the time "when the complaint was filed" is the "time crucial to the issue of standing"); see, e.g., *Steel Co*., 523 U.S. at 102 ("turn[ing] to the particulars of respondent's complaint to see how it measures up to Article III's requirements" (emphasis added)); *Lujan*, 504 U.S. 569, n.4 (focusing its standing analysis on the circumstances "when this suit was filed" (emphasis in original)); *Warth v. Seldin*, 422 U.S. 490, 517 (1975) (focusing on whether a plaintiff had standing "when this complaint was filed").

Here, plaintiffs allege a present injury. Until the environment has improved, plaintiffs' injuries persist and are not speculative. The court must examine that injury in light of the current circumstances and find that plaintiffs have alleged an injury in fact.

b. Appellants' Injuries-In-Fact are Traceable to Bowman's Conduct

The second prong of the standing test requires that there be a causal connection between a plaintiff's injury and a defendant's conduct, such that the former may be "fairly traceable" to the challenged action of the defendant, as opposed to some third party not before the Court. *Lujan*, 504 U.S. at 560. The members have averred that they were injured because of the clearing of Bowman's field leading to less frogging opportunities, feeling that the Muddy River appears more polluted than in the past, decreasing their enjoyment of fishing, swimming or boating in waters drained by Muddy River. (R. at 6.) The causality between the injuries asserted by the members and Bowman's challenged activities is satisfied.

In tracing injuries from Bowman's activities, NUWF members need not prove causation with absolute scientific rigor. *Public Interest Research Group of New Jersey v. Powell Duffryn Terminals*, 913 F.2d 64, 72 (3d Cir. 1990). Nor must Appellants' members establish that Bowman's discharges are the source of the pollution causing such injuries, only that its discharges contribute to the problem. *Id.* Under the *Powell Duffryn* standard, Appellants must show that "a defendant has discharged some pollutant (2) into a waterway in which the plaintiffs have an interest that is or may be adversely affected by the pollutant and that (3) the pollutant causes or contributes to the kinds of injuries alleged by the plaintiffs." *Id*. at 72. In fact, in *Laidlaw*, the Supreme Court found that injury - fear of and disgust with polluted water - was fairly traceable to the defendant's

conduct even though the district court had determined there was no proof the defendant's pollution had harmed the environment and the plaintiff member - affiants testified that they did not actually use the river. *Laidlaw*, 528 U.S. at 183. Here, appellants actually testified to using the river. (R. at 6.) Appellants and their members submitted evidence to the district court that clearly met this standard.

Discharges from Bowman cause or contribute to the kind of harm Appellants have alleged.

c. The Act's Civil Penalty will Redress NUWF's Injuries

Finally, a plaintiff must allege sufficient facts to support the conclusion that his injury "will likely be redressed by a favorable decision by the court." *Laidlaw*, 528 U.S. at 185. He also "must demonstrate standing separately for each form of relief sought." *Id.* "The redressability requirement ensures that a plaintiff 'personally would benefit in a tangible way from the court's intervention.' " *Friends of the Earth, Inc. v. Gaston Copper Recycling Corp*., 204 F.3d 149, 162 (4th Cir. 2000) (quoting *Warth v. Seldin*, 422 U.S. 490, 508 (1975)). This benefit need not be monetary to be sufficiently tangible. *Laidlaw*,528 U.S. at 185-87. The Supreme Court has recognized that "to the extent [civil penalties] encourage defendants to discontinue current violations and deter them from committing future ones, they afford redress to citizen plaintiffs who are injured or threatened with injury as a consequence of ongoing unlawful conduct." *Id*. at 186.

Appellants' harm will be redressed by a favorable decision. Civil penalties levied against Bowman will discourage future violations of the Act. NUWF alleges that Bowman has lessened their aesthetic enjoyment of the river. (R. at 6). As discussed

above, the harm or threatened harm may be an " 'identifiable trifle.' " *U.S. v. Students Challenging Regulatory Agency Procedures* (SCRAP), 412 U.S. 669, 689 n. 14 (1973). Thus, as long as the relief NUWF seeks would redress the part of the harm caused by Bowman, that harm is, in fact, redressable to the extent required to demonstrate standing." *Am. Canoe Ass'n v. Murphy Farms, Inc.,* 326 F.3d 505, 520 (4th Cir. 2003). Thus, the Court should hold the harm alleged is redressable.

NUWF has satisfied the elements of Article III. Bowman's landclearing operations have adversely affected the members' enjoyment of the river and a favorable decision by this Court will redress their injury. The Court should hold that NUWF has standing to standing to sue Bowman.

2. There is a continuing or ongoing violation as required by § 505(a) of the Act for subject matter jurisdiction, when the activities that violated the Act occurred wholly in the past, are not likely to be continued or repeated in the future, and have been addressed by regulatory agency action.

The actions by Bowman and by NUDEP together render the violation of the Clean Water Act one that is wholly past, which places the violation beyond the reach of the citizen suit provision of the Act. The Act prohibits the discharge of dredged or fill material into a water of the United States without a permit issued by the Army Corps of Engineers or, as relevant here, by the State. 33 U.S.C. 1344. The Supreme Court held in *Gwaltney* that the citizen suit provision of the Act applies only to violations that are either continuous or ongoing. *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Found., Inc.,* 484 U.S. 49, 57 (1987). The Court specifically noted that this rule requires "a reasonable likelihood that a past polluter will continue to pollute in the future." *Id.* As

the Court then explained, once the relevant regulatory agency issues an appropriate compliance order for a violation of the Act, the action is addressed and is no longer a violation of the Act. *Id.* at 60-61. Once the order is issued, to allow a citizen suit to undo the Administrator's or the State's regulatory choices would be to curtail the agency's discretion to act in the public interest. *Id.* at 61. The Court has additionally held that a final regulatory agency action allowing the action, from which legal consequences flow and which determines legal rights and remedies, is functionally a permit. *Bennett v. Spear*, 520 U.S. 167, 170 & 178 (1997).

A violation of the Act is therefore only open to a citizen suit if the violation 1) is currently and 2) reasonably likely to be continuous or intermittent into the future, and 3) has not been addressed through a regulatory action by the Administrator or the State.

NUDEP does not dispute that a violation of the Act occurred. Indeed, NUDEP's actions in response to Bowman's placement of dredged and fill material are a direct result of that violation. However, NUDEP has diligently prosecuted an enforcement action against Bowman, including crafting a settlement agreement that penalizes Bowman for the violation by placing a public access conservation easement on his property, issuing an administrative order that incorporates the settlement agreement, and filing an action against Bowman in federal court to incorporate that order.

a. Bowman's action is not a current violation.

The Supreme Court has not addressed whether the existence of dredged and fill material in a wetland constitutes an ongoing violation. The New Union District court, in addressing the case below, held that it was not, in opposition to the Fourth Circuit Court of Appeals in *Sasser v. Adm'r, U.S. E.P.A.,* 990 F.2d 127 (4th Cir. 1993), (R. at 7).

'Current' is not defined in the statute. It is defined elsewhere as, "passing in time; belonging to the time actually passing; new, present, most recent." Webster's Unabridged Dictionary of the English Language (2001). This is an active definition, one that implies an ongoing activity at the time of the suit. What it is not is a passive definition reflecting a change that occurred wholly in the past. A current violation, then, is a violation that is ongoing at the time, not a new environmental baseline.

Bowman's actions are indeed a violation of the Act, and the State has diligently prosecuted that violation through administrative and legal venues. Bowman's actions, however, ceased by July 15, 2011, and, as the District court acknowledged, none of his actions since that time constitute the discharge of dredged or fill material into a water of the United States. (R. at 7). At the time NUWF filed its suit, Bowman's actions were entirely in the past and are no longer occurring. (R. at 7).

The Fourth Circuit's opinion in *Sasser* is factually distinguishable from the instant case. Dr. Sasser had sought a permit from the Corps and been formally denied. *Sasser*, at 128. He then began discharging dredged and fill material into water of the U.S. without a permit, and despite subsequent and repeated cease and desist orders from the EPA. *Id*., at 128-129. Unlike Dr. Sasser, Bowman ceased his operations prior to the initiation of enforcement actions by the State (R. at 4), and Bowman has voluntarily agreed to penalizing terms in the settlement agreement. (R. at 4). Bowman is, unlike Dr. Sasser, in compliance with a regulatory order which is functionally a permit under the *Bennett* test (see below). (R. at 4). The facts are therefore entirely dissimilar between the two cases.

Bowman's actions occurred entirely in the past, and are being addressed by a permit from the appropriate regulatory agency. The actions that caused the discharge of dredged and fill material ceased before NUWF filed their suit, and are not, therefore, current.

b. Bowman's conduct is not reasonably likely to occur in the future.

The Supreme Court has not articulated a specific standard to define 'reasonably likely to occur'. The Court has held that "mere voluntary cessation of allegedly illegal conduct" is not sufficient, but that the requirement is that the "allegedly wrongful behavior could not reasonably be expected to recur." *U.S. v. Concentrated Phosphate Export Ass'n, Inc.*, 393 U.S. 199, 203 (1968). The Court has also held that in a lawsuit to force compliance with a statute, the plaintiff must show that the "allegedly wrongful behavior will likely occur or continue and that the threatened injury is certainly impending." *Whitmore v. Arkansas*, 495 U.S. 149, 158 (1990). The Court's holdings thus support the principle that mere speculation that a certain behavior might recur is not sufficient to support a standard of reasonably likely to occur in the future, that there must be some reason to believe that the defendant will engage in the harmful conduct. *Laidlaw*, 528 U.S. at 190.

That reason is entirely lacking in the instant case. The settlement agreement (which Bowman agreed to), which was incorporated into an administrative order (which Bowman also agreed to), has been submitted to the District court as a motion to enter a decree. (R. at 5). The terms of that agreement/order/decree include a conservation easement with a public right of access to a portion of Bowman's property, and a requirement to construct and maintain an artificial wetland on the easement land, and

those terms are enforceable by the parties (Bowman and NUDEP) and by the District court. (R. at 4). Bowman voluntarily consented to these terms (R. at 4) and thus there is no reason to assume that he will violate them in the future. The NUDEP diligently prosecuted the violation and developed those terms as part of its remedial actions (R. at 4), and thus there is no reason to assume that the State would not enforce the terms in the future. There is no reason to believe that the District court would have any reason to deny the motion to enter the decree, which would give the court jurisdiction to enforce the terms in the future, and there is no reason to believe the court would not so enforce them. For there to be a future violation then would involve a deliberate and knowing act by Bowman to violate the settlement agreement, a failure by the State to enforce the administrative order, and a failure by the court to enforce the decree. Any one of those would be an extremely unlikely event; together they become a combination of events with such a low probability of occurrence that no court could find them to be reasonably likely to occur. Therefore, this element has not been met.

c. The violation was addressed by a regulatory action.

As explained above, the discharge of dredged or fill material into waters of the U.S. is prohibited without a permit. 33 U.S.C. 1344 (2006). Once the relevant regulatory agency issues an appropriate compliance order for a violation of the Act, the action is addressed and is no longer a violation of the Act. *Gwaltney* at 60-61. A final regulatory agency action allowing the action, from which legal consequences flow and which determines legal rights and remedies, is functionally a permit. *Bennett* at 170 & 178.

In the instant case NUDEP was in the process of diligently prosecuting the violation, leading to a final agency action addressing the violation of the Act by Bowman

when NUWF filed its suit, in violation of §505 of the Act (see Section III, below). (R. at 5). That action by the State addresses the violation and determines legal rights and remedies, and legal consequences flow from it (including enforceability by NUDEP and the District court). (R. at 5). That action thus meets the test of *Gwaltney* and *Bennett*, and therefore shows the violation has been addressed by agency action and which resolves Bowman's liability under the Act.

The settlement agreement and administrative order, as well as the decree that NUDEP seeks to enter before the District court, by their very terms and origin address Bowman's violation of the Act. (R. at 4). The agreement and order craft remedies specifically designed to address the effects of that violation, and to prevent their recurrence. (R. at 4). The agency action thus specifically addresses the violation.

The settlement agreement and administrative order also determines the legal rights and remedies of NUDEP and Bowman. (R. at 4). The terms of the agreement and order include descriptions of actions that Bowman must take to come into compliance with the Act, as well as penalties assessed to address his violation. (R. at 4). The parties to the settlement agreement and the administrative order, as well as the decree before the District court, are able to enforce the terms of the documents against any non-complying party. Legal consequences thus flow, and legal rights and remedies are thus determined by the agency action, and thus, under *Bennett*, the agency action is functionally a permit.

d. The Court should uphold the district court's decision that Bowman's conduct is not an ongoing violation.

A violation of the Act is only open to a citizen suit if the violation 1) is currently and 2) reasonably likely to be continuous or intermittent into the future, and 3) has not

been addressed through a regulatory action by the Administrator or the State. The violation of the Act by Bowman, as discussed above, is not current, is not reasonably likely to be continuous or intermittent into the future, and has been addressed through a regulatory action by the State. The citizen suit by NUWF thus fails on all three elements. The court below was therefore correct to hold that the violation is wholly past, and this Court should therefore uphold that decision.

3. Whether NUWF's citizen suit has been barred by the New Union Department of Environmental Protection's (NUDEP) diligent prosecution of Bowman as set out in § 505(b) of the Act, when as a state regulatory agency with enforcement authority under the Act NUDEP has investigated the allegations of violation, negotiated a settlement agreement, issued an administrative order, and entered a motion for decree incorporating that agreement and order before the District court.

The plain language of §505(B)(1)(b) precludes NUWF from filing an action under the Act, because the 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) (2006). Four elements are necessary under the language of the Act to bar a citizen suit: 1) commencement and 2) diligent prosecution of 3) a civil (or criminal) action in 4) a court of the United States. *Id.* The State has met each of those four elements. Therefore, the court below was correct to hold that NUWF's suit was barred by the State's diligent prosecution of Bowman.

Section 505 authorizes citizen suits against any person who is alleged to be in violation of an effluent standard or limitation under the Act, or against the Administrator of the Environmental Protection Agency (EPA) for failure to perform a non-discretionary duty under the Act. 33 U.S.C. §1365(a) (2006). The Act also requires a plaintiff to provide 60 days notice to the alleged violator, the Administrator, and the State before

filing an action. 33 U.S.C. §1365(b)(1)(A). The purpose of the notice is to allow the alleged violator an opportunity to abate its practices, and to allow the Administrator or the State to begin an enforcement action, before a private citizen's suit is brought. *Laidlaw*, 528 U.S. at 175. The bar on citizen suits when the government is acting to enforce the Act was crafted by Congress to prevent the government's ability and discretion to enforce the Act from being curtailed. *Gwaltney,* 484 U.S. at 61. A citizen suit is thus designed to "supplement rather than to supplant governmental action" when the government is prosecuting the action. *Id.* at 60.

'Commence' is not defined in the statute. It is defined elsewhere as "to begin; start." Webster's Unabridged Dictionary of the English Language (2001). Neither is 'diligent' or 'prosecuting' defined in the statute itself, nor is the term 'diligently prosecuting'. Diligent is defined elsewhere as, "careful, attentive, persistent in doing something." Black's Law Dictionary, 9th Edition (2009). Prosecute is defined as, "to commence and carry out a legal action." *Id.* To commence and diligently prosecute, then, is to begin and carefully, attentively, and persistently carry out a legal action.

The Act specifies that the State may bring a civil or criminal action to enforce the Act against an alleged violator. 33 U.S.C. §1319 (2006). The Act leaves to the discretion of the State whether to bring a civil action, a criminal action, or both. *Id.* Civil actions are enforceable only in courts of law (not courts of equity) and the remedies in civil actions are intended to punish culpable individuals, rather than to return to the *status quo ante*. *Tull v. United States*, 481 U.S. 412, 422 (1987).

A court of the United States is a "court having federal jurisdiction, including the U.S. Supreme Court, circuit courts of appeals, district courts, bankruptcy courts, and tax courts." Black's Law Dictionary (2010).

a. NUDEP commenced diligent prosecution.

Plaintiffs in this case appropriately provided a notice of intent to sue, under §1365(b)(1)(A), to the alleged violator, the State, and the EPA. (R. at 4). The State, acting through the New Union Department of Environmental Protection (NUDEP), upon receiving the notice investigated the facts and issued a notice of violation to Bowman. (R. at 4). NUDEP and Bowman entered into a settlement agreement that conveys a conservation easement to NUDEP, requires Bowman to construct and maintain a year-round wetland on that easement, allows for public access to the easement, and prohibits Bowman from any modifications to the easement other than those required to construct and maintain the wetlands. (R. at 4). The settlement agreement was completed and agreed to, as an administrative order issued to Bowman, thirty-one days after the plaintiffs' notice of intent. (R. at 4). Nine days after the settlement was finalized, NUDEP filed a complaint in federal court (forty days after the Notice of Intent was sent by NUWF), and twenty-six days after that moved to enter a decree identical to the administrative order. (R. at 5). Despite the ongoing State enforcement action, plaintiffs filed a separate citizen suit exactly sixty days after their notice of intent. (R. at 5).

The State's actions show that it did precisely what it was required to do under the Act. It took the notice of intent from the plaintiffs seriously, quickly investigated the allegations, crafted a complex administrative order to remedy the violations, including the acquisition of a conservation easement on the property which prevents the land owner

from developing the easement, and filed suit in federal court to enforce the order. The State accomplished this set of tasks within sixty days of its receipt of the notice of intent. (R. at 5). The State has thus met the four elements that bar a citizen suit such as plaintiffs'.

The State began an action to enforce the Act within thirty days of receipt of the notice, a fact found by the lower court. (R. at 4). The State thus met the first element (commencement).

b. NUDEP diligently prosecuted Bowman.

The State diligently (carefully, attentively, and persistently) prosecuted (carried out a legal action) against Bowman. The State developed a settlement with Bowman, which it then issued as an administrative order under the Act. (R. at 4-5). The order contains enforceable provisions that were developed to prevent future violations of the Act on the property. (R. at 4). The order conveys a conservation easement to the State, with provisions that protect the condition of the property. (R. at 4). The order requires construction and maintenance by Bowman of an artificial wetland. (R. at 4). The order allows public access to the easement, access which did not legally exist prior to the action, despite the continued (as plaintiff acknowledged) trespassing by plaintiffs' members. (R. at 4, 6). The State then filed a legal action in federal court to enter the administrative order. (R. at 5). The order shows a careful attention to the purposes of the Act and a means to accomplish those purposes. The State has thus met the second element (diligent prosecution).

c. NUDEP commenced a civil action against Bowman.

The administrative order is a civil instrument (R. at 5), subsequently to be entered as a decree by the District court, that punishes the violation through the loss of the conservation easement by Bowman to the State. Under the *Tull* test, the order does not have to, nor does it attempt to, return the condition of the property to a pre-violation condition. Rather, the order creates a structure which simultaneously punishes Bowman by reducing the uses to which his private property can be put and protects the property for the public benefit. The action filed by the State in the District court is a civil action (R. at 5), which the State in its discretion determined would meet the requirements of the Act. The State has thus met the third element (commenced a civil action).

d. NUDEP commenced the action in a court of the United States.

The fourth element is also satisfied. The District court is the 'United States District court for the District of New Union' (R. at 3), and thus plainly is a court of the United States. The State filed its action in the District court, thus meeting the fourth element (in a court of the United States).

e. The Court should uphold the district court's decision to that NUWF's suit is barred by NUDEP's diligent prosecution of Bowman

Four elements are necessary under the language of the Act to bar a citizen suit: 1) commencement and 2) diligent prosecution of 3) a civil (or criminal) action in 4) a court of the United States. The State has met each of those four elements. The court below was therefore correct to hold that NUWF's suit was barred by the diligent prosecution of Bowman by the State.

4. Whether Bowman violated the Act when he moved dredged and fill material from one part of a wetland adjacent to navigable water to another part of the same wetland, under regulations promulgated by the U.S. Environmental Protection Agency (EPA), which include sidecasting as a form of addition of a pollutant into waters of the United States.

Congress enacted the Clean Water Act in 1972 "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a). Section 301(a) of the Act prohibits "the discharge of any pollutant by any person" except in compliance with the Act. 33 U.S.C. § 1311(a). "[D]ischarge of any pollutant" is broadly defined to mean "any addition of any pollutant to navigable waters from any point source." 33 U.S.C. § 1362(12)(A). In turn, "pollutant" is defined to include not only traditional contaminants, but also solids such as "dredged spoil, ... rock, sand [and] cellar dirt." 33 U.S.C. § 1362(6). The Act defines "navigable waters" to mean "the waters of the United States, including the territorial seas." 33 U.S.C. § 1362(7).

The cornerstone of the CWA is 33 U.S.C. § 131(a), which imposes a blanket prohibition on the "discharge of any pollutant by any person," unless in compliance with the Act. "Discharge of a pollutant" means "any addition of any pollutant to navigable waters from any point source." 33 U.S.C. § 1362(12). Section 404(a) authorizes the Secretary of the Army (through the United States Army Corps of Engineers), or a state with an approved program, to issue permits "for the discharge of dredged or fill material into the navigable waters at specified disposal sites." 33 U.S.C. § 1344(a). EPA's present regulations, further define "discharge of dredged material" to expressly include redeposit of dredged or fill material: "the term discharge of dredged material means any *addition* of dredged material into, including redeposit of dredged material…within, the waters of the United States." 40 C.F.R. § 232.2 (2012) (emphasis added).

Although at one time the term "navigable waters" included only waters that were navigable in fact, *The Daniel Ball*, 77 U.S. (10 Wall.) 557, 563 (1870), "navigable waters" is a defined term in the Act that expressly includes all "waters of the United States." 33 U.S.C. § 1362(7). The Supreme Court has repeatedly recognized that, with this definition, Congress "evidently intended to repudiate limits that had been placed on federal regulation by earlier water pollution control statutes and to exercise its powers under the Commerce Clause to regulate at least some waters that would not be deemed 'navigable' under the classical understanding of that term." *U.S. v. Riverside Bayview Homes, Inc*., 474 U.S. 121, 133 (1985). As a result, the Corps and EPA have issued substantively equivalent regulatory definitions of "waters of the United States," compare 33 C.F.R. § 328.3(a), with 40 C.F.R. § 230.3(s), that define it to encompass not only traditional navigable waters of the kind susceptible to use in interstate commerce, but also tributaries of traditional navigable waters and wetlands adjacent to covered waters. See 33 C.F.R. § 328.3(a)(1), 328(3)(a)(5), 328(a)(7). The Supreme Court of the U.S. has subsequently visited the extent of the Act's reach and the agency regulations, but has not invalidated the underlying premise of regulation of navigable waters. *See*, *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers*, 531 U.S. 139 (2001); *Rapanos v. U.S.*, 547 U.S. 715 (2006) (both examining the reach of the Clean Water Act's regulatory authority and identifying what is and is not a navigable water under the Act).

a. Discharge constitutes the addition of a pollutant under the act according to EPA regulations and EPA's interpretation of pollutant; Bowman's interpretation reads the word "pollutant" out of the statute.

To find that Bowman violated the CWA, NUWF is required to prove that Bowman's activity constituted (1) an "addition" (2) of a "pollutant" (3) from a "point source," (4) into "navigable waters." *Avoyelles Sportsman's League, Inc. v. Marsh*, 715 F.2d 897, 922 (5th Cir. 1983); *National Wildlife Fed'n v. Gorsuch*, 693 F.2d 156, 165 (D.C. Cir. 1982). In this case, Bowman does not dispute elements (2) through (4): it is undisputed that the dredged material he deposited is a pollutant; that the bulldozer is a point source; that the area leveled was wetlands and thus within the meaning of "navigable waters;" and that he did not have a CWA permit. (R. 8-9.) The dispute is whether Bowman's redeposits constitute an "addition" of dredged or fill material.

b. Addition of a Pollutant Includes Activities like Sidecasting.

The Clean Water Act defines the "discharge of a pollutant" as "any addition of any pollutant to navigable waters from any point source." 33 U.S.C. § 1362(12)(A). "Pollutant" includes not only traditional contaminants like "radioactive" or "chemical waste," but also basic solids like "dredged spoil, ... rock, sand [and] cellar dirt." 33 U.S.C. § 1362(6). Latching onto "addition," the district court held that the regulation defining a pollutant to include "sidecasting" goes beyond the authority the Act grants. (R. at 9-10.). In other words, the district court held that it is unreasonable for the agency to interpret "discharge of a pollutant" to cover situations not involving the introduction of foreign material into the area.

Sidecasting involves the addition of dredged or excavated dirt from a removal site (here, the ditches Bowman dug), to some disposal site (here, Bowman's own wetlands). (R. at 4). Sidecasting's purpose is to fill wetlands to dry them out. Although it is plausible to read "addition" as covering only completely foreign materials, that reading is foreclosed because "pollutant" is defined in the Act to specifically include "dredged spoil"- the district court would read that term out of the Act. (R. at 10.) Further, the Act is not concerned with mere "material," but instead with the addition of "pollutants"- material can be benign in one spot and seriously disruptive to the surrounding ecological system in another. As the Fourth Circuit has stated, once you have dug up something, it becomes

> "dredged spoil," a statutory pollutant and a type of material that up until then was not present [in the wetlands]. It is of no consequence that what is now dredged spoil was previously present on the same property in [a] less threatening form.... What is important is that once a material was excavated from the wetland, its redeposit in the same wetland added a pollutant where none had been before.

U.S. v. Deaton, 209 F.3d 331, 335 (4th Cir.2000); see also *Avoyelles Sportsmen's League, Inc.*, 715 F.2d at 920-21 (5th Cir.1983).

Finally, the district court's interpretation is at odds with EPA's interpretation of "discharge of dredged material." 40 C.F.R. § 232.2 expressly includes redeposits of dredged or fill material: "the term discharge of dredged material means any addition of dredged material into, including redeposit of dredged material…within, the waters of the United States." 40 C.F.R. § 232.2 (2012). Even if the statute was ambiguous on whether the prohibition on the "addition" of pollutants included sidecasting, the agency's interpretation is nevertheless a reasonable interpretation and must be accorded deference. *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.,* 467 U.S. 837, 843 (1984).

c. The EPA's interpretation of "Addition" and "Discharge" as including redeposits like sidecasting is reasonable.

EPA's interpretation of "discharge," which makes a redeposit, like sidecasting, an "addition" is reasonable. First, courts under a variety of circumstances have held that the redeposit of material within waters of the United States constitutes the "discharge" or "addition" of pollutants that is regulated by the CWA. See, e.g., *U.S. v. Huebner*, 752 F.2d 1235, 1243 (7th Cir. 1985) (the use of a bulldozer to move dirt within a wetlands to level the area constitutes a discharge); *Deaton*, 209 F.3d at 335 (4th Cir. 2000) (the redeposit of excavated material on the sides of an area being excavated -- a practice commonly referred to as "sidecasting" - is a discharge of a pollutant); *U.S. v. M.C.C. of Florida, Inc*., 772 F.2d 1501, 1506 (11th Cir. 1985) (the use of a boat's propellor to dredge and redeposit vegetation and sediment onto the adjacent sea grass beds constitutes the discharge of a pollutant). Indeed, one court has held that the backfilling of trenches excavated in wetland areas falls within the regulatory authority of CWA § 404. *U.S. v. Mango*, 997 F. Supp. 264, 285 (W.D.N.Y. 1998), reversed on other grounds, 199 F.3d 85 (2d Cir. 1999).

Further, EPA's interpretation of these terms as including Bowman's activity furthers the statutory purpose of the CWA. Congress declared that the purpose of the CWA is to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251. See also H. Rep. No. 92-911, 92d Cong., 2d Sess. 76-77 (1972), reprinted in 1 Legislative History 753, 763-64 (quoted in M.C.C. of Florida, 772 F.2d at 1506) ("The word 'integrity' as used is intended to convey a concept that refers to a condition in which the natural structure and function of ecosystems is

maintained.”). In this case, Bowman’s conduct destroyed the physical and biological integrity of 1000 acres of wetlands by excavating and redepositing thousands of tons of dredged material. (R. at 4.) Bowman’s conduct clearly did not maintain “the natural structure and function” of the wetlands. While NUDEP recognizes that the statutory purpose does not drive the result in this case, the fact that EPA's interpretation is consistent with the statutory purpose of the CWA is further support that the interpretation is reasonable. *Brotherhood of Locomotive Engineers v. Atchison, Topeka & Santa Fe R.R. Co*., 516 U.S. 152, 157 (1996) (statutory terms are to be construed in light of the statute's purpose).

For these reasons, Bowman’s redeposits are in violation of the CWA according to the EPA's interpretation of the terms “discharge” and “addition” the lower court’s decision should be overturned by this Court.

CONCLUSION

For the foregoing reasons, this court should overrule the district court in part and affirm in part. This court should overturn the decision that NUWF lacks standing to bring its claims against Bowman. NUWF’s members have suffered an injury in fact, traceable to Bowman’s actions that can be redressed by the court. In addition, the court should overturn lower court’s decision that Bowman did not commit a § 404 violation because Bowman’s redeposits constitute an addition. In contrast, however, this court should uphold the district court’s decision that there is no longer an ongoing or continuing violation because Bowman’s conduct has been addressed by action. Finally, this court

should uphold the lower court's decision that NUDEP's diligent prosecution of Bowman bars NUWF's citizen suit.

Respectfully submitted,

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Counsel for New Union Department of Environmental Protection