Team 54

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 THE NEW UNION WILDLIFE FEDERATION
Plaintiff-Appellant

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JURISDICTIONAL STATEMENT

This Case involves an appeal from a judgment of the United State District Court for the District of New Union. A-1. The district court had proper subject matter jurisdiction over the case because the issues arise under the Clean Water Act (CWA), 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. Id. § 1291.

STATEMENT OF THE ISSUES

I. Did NUWF's members suffer an injury in fact fairly traceable to Bowman, in order to establish standing to sue Jim Bob Bowman for violating the CWA?

II. Do violations, unaddressed by the Administrator of the CWA, with current and future consequences to the navigable waters constitute a continuous violation for the purposes of the Clean Water Act?

III. Is a citizen suit barred when the Administrator of the CWA has an unrelated agreement with a violator of the CWA that is unlikely to prevent future violations?

IV. Does the release of a pollutant from a point source into navigable water without a permit violate the CWA?

STATEMENT OF THE CASE

Appellant New Union Wildlife Federation (hereinafter "NUWF or "Appellant") filed a citizen suit against Appellee Jim Bob Bowman (hereinafter "Bowman" or "Appellee") for filling wetlands without a permit in violation of §§ 301(a) and 404 of the Clean Water Act (hereinafter "CWA" or "the Act"), seeking civil penalties and an order requiring Bowman to remove the fill material and restore the wetlands. A-3. This action was brought under § 505 of CWA, the

citizen suit provision. A-3. The New Union Department of Environmental Protection (hereinafter "NUDEP" or "Intervenor") had also filed a § 505 complaint. A-5.

On September 5, 2011, NUDEP filed a motion in its case to enter a decree identical to the terms of state administrative order it had issued and Bowman had consented to on August 1, 2011. A-4-5. On September 15, 2011, NUWF filed motions to intervene in NUDEP's action in accordance with Fed. R. Civ. P. 24, consolidate the NUDEP and NUWF actions, and an opposition to entry of the decree proposed by NUDEP in the NUDEP action. A-5. Subsequently, NUDEP filed a motion to intervene in the NUWF case, which the District Court granted at a status conference on November 1, 2011. A-5. During that same status conference on both cases, the District Court decided, without prejudice, not to act on any of the other motions brought by NUDEP or NUWF. A-5.

After discovery, both parties (NUWF and Bowman) filed cross-motions for summary judgment. A-5. NUWF filed its motion on the ground that Bowman had violated the CWA because he had added dredge and fill material to navigable waters from a point source without a § 404 permit. A-5. Bowman filed his motion on four grounds. A-5. The first alleges that NUWF lacks standing because neither it nor its members suffered an injury in fact fairly traceable to Bowman's alleged violations. A-5. The subsequent three grounds argue lack of subject matter jurisdiction because 1) any violations are wholly past; 2) the State of New Union has already taken an enforcement action and fully resolved the violations; and 3) the addition element of a CWA action is not satisfied. A-5. NUDEP joined NUWF in its motion for summary judgment on the standing and CWA violation issues, while joining Bowman in his motion for summary judgment on the continuing violation and diligent prosecution issues. A-5.

In an Order of the District Court dated June 1, 2012, Appellee's motion for summary judgment was granted and NUWF's motion for summary judgment was denied on all counts. A-11.

NUWF and NUDEP filed timely Notices of Appeal with the United States Court of Appeals for the Twelfth Circuit with NUWF appealing Appellee's summary judgment on all counts and NUDEP appealing Appellee's summary judgment on the standing and CWA violation issues. A-1. The Court of Appeals granted certiorari to review the claims on September 14, 2012. A-2.

STATEMENT OF THE FACTS

The Muddy River forms the border between the states of New Union and Progress. A-3. Appellee Jim Bob Bowman owns property that includes 650 feet of shoreline to the Muddy River, in addition to wooded and previously wooded land adjacent to the river. A-3. Both parties agree that the shoreline portion of Bowman's property is a wetland, as determined by the U.S. Army Corps of Engineers' Wetlands Determination Manual. A-3-4. These wetlands are hydrologically connected to the Muddy River and are, along with the rest of Bowman's property, wholly within the river's one hundred year flood plain, portions of which (including portions of Bowman's property) are inundated every year when the river is high. A-3. Bowman's property is covered with trees and other vegetation characteristic of wetlands and is located near the town of Mudflats in the State of Union. A-3. The river is more than 500 feet wide and more than six feet deep where it borders Bowman's property and is commonly used at this point for recreational navigation. A-3.

Bowman began clearing trees and other vegetation from his wetlands on June 15, 2011. A-4. He used a bulldozer to knock down trees, level other vegetation, and push the trees and vegetation into windrows. A-4. Bowman then burned the windrows. A-4. Next, he used a

bulldozer to dig trenches and pushed the trees and leveled vegetation remains and ashes into them. A-4. He leveled the resulting field, again pushing soil from high portions of the field into the trenches and low lying portions of the field. A-4. Finally, he formed a wide ditch or swale to drain the field into the Muddy. A-4. Bowman did not obtain a permit to perform his land clearing operation. See A-1. Bowman completed this work on or about July 15, 2011. Bowman left a strip of land approximately 150 feet wide adjacent to the Muddy to clear after it had drained because it was the most difficult part of the property to work with the bulldozer, especially when it was saturated. A-4.

NUWF is a not for profit corporation organized under the laws of New Union. A-4. Its purpose is to protect the fish and wildlife of the state by protecting their habitats, among other things. A-4. It is a membership organization funded by members' dues and contributions. Members elect its Board of Directors, the governing body of the organization, which in turn elects the officers, including the President. A-4. NUWF sent Bowman a notice of its intent to sue under § 505 of CWA on July 1, 2011, shortly after its members became aware of Bowman's activities, but before he had completed his work. A-4. The validity of the notice is not contested. A-4.

NUDEP contacted Bowman shortly thereafter and sent him a notice of violation informing him that he had violated both state and federal law by clearing the field. A-4. On August 1, 2011, Bowman consented to an administrative order from NUDEP, agreeing not to clear more wetlands in the area and to convey a conservation easement to NUDEP on the still wooded part of his property adjacent to the Muddy that he had not yet cleared plus an additional seventy-five foot buffer zone between that wooded area and the new field. R at 4. The conservation easement allows public entry for appropriate, day-use-only, recreational purposes,

requires 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. A-4. Within the order, Bowman also agreed to construct and maintain a year-round wetland on that seventy-five foot buffer zone. A-4. In September 2011, Bowman observed that the field had sufficiently drained to plant and sowed it with winter wheat. A-5. NUDEP did not include any penalties within the administrative order, even though the statute authorizes such penalties up to $125,000. A-4.

NUWF submitted affidavits from three of its members, Dottie Milford, Zeke Norton, and Effie Lawless who all use the Muddy for recreational boating and fishing, often picnicking on its banks, on or in the vicinity of Bowman's property. A-6. They testified 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 serving as buffers for flooding. A-6. They are aware of the differences and feel a loss from the destruction of the wetlands, fearing 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. A-6. Although they cannot see a difference in the land from the river or its banks, Milford testified that the Muddy looks more polluted to her than it did prior to Bowman's activities. A-6. In addition, Norton testified that he has frogged the area for years. A-6. While it is unclear whether Norton's frogging was authorized on Bowman's property, he noted that the property had been especially good for frogging. A-6. Norton could always count on getting a dozen good sized frogs in the right season. A-6. Now there are no frogs in the drained field and he is lucky to find two or three good sized frogs in the remaining woods and buffer area within the easement ordered by NUDEP. A-6. The effect of Bowman's land clearing

activity on the frog habitat is unclear. A-6. One NUDEP biologist testified that the new ordered buffer zone, once in place, will provide a richer habitat for frogs. A-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. First Options of Chi., Inc. v. Kaplan, 514 U.S. 938, 939 (1995). Under the de novo standard, a reviewing court should make an independent determination of the issues and should not give any special weight to the [prior] determination of the lower court. Doe v. Archdiocese of Portland, 469 F. App'x 641, 642 (9th Cir. 2012) (quoting United States v. First City Nat'l Bank of Houston, 386 U.S. 361, 368 (1967)).

SUMMARY OF THE ARGUMENT

The District Court erred in granting summary judgment and holding that NUWF did not have standing, that the violation was not continuing or ongoing as required by § 505(a) of the CWA, that NUWF's citizen suit was been barred by NUDEP's diligent prosecution of Bowman as set out in § 505(b) of the CWA, and that Bowman was not in violation of CWA when he moved dredged and fill material from one part of a wetland adjacent to navigable water to another part of the same wetland.

1. The District Court erred in holding that New Union did not have standing. The court found that none of NUWF's members had suffered an injury in fact, which is required to establish Article III individual standing. However, while only one injury in fact is required to satisfy the first prong of the test for a member's individual standing, all three members interests

are directly affected by Bowman's violation and, therefore, constitute injuries in fact. Additionally, those injuries, or the kind of injuries alleged by NUWF members, were caused by Bowman's destruction of the wetlands and the discharges of pollutants, making them fairly traceable to Bowman's violation. Both the injunctive relief and civil penalties sought would deter further violation and as such, meet the redressability requirement of individual standing for the NUFW members. In terms of organizational standing for NUWF, as a not for profit environmental organization the subject of this environmental suit under the CWA is germane to the organization's purpose. Finally, since NUWF's members are not seeking personal damages, the relief sought does not depend on the participation of the members.

2. The court erred in finding no continuous violation because the Muddy River is currently experiencing the negative effects of losing a wetland that is hydrologically connected to it. These effects are above and beyond those that were addressed in the consent decree with NUDEP, and will only continue to worsen in the future. Further, Bowman continues to violate the Act by farming on the land wetland without a permit. Draining the land removes his activities from exemptions provided under the Act and makes any farming activity a current violation of the CWA.

3. The court erred in finding that NUDEP diligently prosecuted Bowman's violations. Diligent prosecution takes place when an Administrator institutes an action in court that will rectify a violation. The court proceedings only cover subsequent or related violations if the actions taken in the proceedings are capable of bringing a violator in conformity with the CWA. The action taken in this case is not sufficient to bring Bowman into conformity with the CWA therefore his current violations have not been diligently prosecuted.

4. Bowman's use of earthmoving equipment and land-clearing filled wetlands with biological mater and was a discharge of pollutants subject to regulation under section 404 of the clean water act. An individual responsible for a "discharge of pollutants" into "waters of the United States" from a "point source" is subject to the permit provisions of the CWA.

Bowman's re-deposits of effluent resulted in the "addition" of the pollutants. The district court incorrectly found that a re-deposit is not an addition. Indeed, even if defendant had merely moved materials and re-deposited them elsewhere, that activity would change the character of the removed materials and result in the addition of a pollutant. The applicable regulations state, and the courts have repeatedly held, that the filling of a wetland through the removal and redeposit of materials therein is a discharge of dredged materials. 33 C.F.R. § 323.2(d)(1) (2011); 40 C.F.R. § 232.2 (2011).

I. THE NEW UNION WILDLIFE FEDERATION HAS STANDING TO BRING AN ACTION AGAINST THE APPELLEE BECAUSE ITS MEMBERS SATISFY THE REQUIREMENTS FOR INDIVIDUAL STANDING, THE INTERESTS AT STAKE ARE GERMANE TO NUWF, AND THE RELIEF REQUESTED DOES NOT REQUIRE THE PARTICIPATION OF NUWF'S MEMBERS IN THE LAWSUIT.

The text of the CWA provides that any citizen may commence a civil action on his own behalf. 33 U.S.C. § 1365 (2006). The statute defines "citizen" as a "person or persons having an interest which is or may be adversely affected." Id. § 1365(g). Further, the Act defines person as "an individual, corporation, partnership, association, State, municipality, commission, or political subdivision of a State, or any interstate body." Id. § 1362. These definitions would allow an organization, such as NUWF individual standing to sue under §1365, as long as Constitutional requirements are met. See U.S. Const. art. III, § 2, cl. 1; 33 U.S.C. § 1365.

However, an organization can also have standing to sue on behalf of its members under Article III. Friends of the Earth, Inc. v. Laidlaw Envtl. Serv. (TOC), Inc., 528 U.S. 167, 168-69 (2000). Suits by associations on behalf of its members have special features, advantageous both to the individuals represented and to the judicial system as a whole. Auto. Workers v. Brock, 477 U.S. 274, 289 (1986). These special features include: (1) the ability of "an association suing to vindicate the interests of its members [to] draw upon a pre-existing reservoir of expertise and capital," and (2) the fact "that the primary reason people join an organization is often to create an effective vehicle for vindicating interests that they share with others." Id. at 289–90. The very forces that cause individuals to band together in an association will provide some guarantee that the association will work to promote their interests." Id. at 290.

An organization has standing on behalf of its members when (1) its members would otherwise have standing to sue in their own right; (2) the interests at stake are germane to the organization's purpose; and (3) neither the claims asserted nor the relief requested requires the

participation of individual members in the lawsuit. Laidlaw, 528 U.S. at 169. Plaintiff NUWF satisfies all three parts of this test. See id.

A. The first prong of the organizational standing test is satisfied because NUWF's members suffered injuries in fact, traceable to the Appellee and redressable by the remedies sought, as required to have standing to sue in their own right.

In order for a member of an organization to have standing to sue in his/her own right, s/he must meet Constitutional requirements for standing. U.S. Const. art. III, § 2, cl. 1; Laidlaw, 528 U.S. at 168-69. Current jurisprudence has delineated a three-part test for individual standing. Lujan v. Defenders of Wildlife, 504 U.S. 555, 560 (1992). The member must (1) have suffered an injury-in-fact that is (2) fairly traceable to the defendant's conduct and (3) is likely to be redressed by a favorable decision. Id. These three factors are satisfied within the affidavits of Plaintiff NUWF's members, Dottie Milford, Zeke Norton, and Effie Lawless, showing that each member suffered recreational, aesthetic, conservational, and economic harms caused by Mr. Bowman that would be remedied by injunction and civil penalties sought in this suit. See id.; Sierra Club v. Morton, 405 U.S. 727, 735 (1972); A-6.

1. NUWF satisfies the injury in fact requirement for standing because the aesthetic, recreational, conservational, and economic harms suffered by members of the environmental organization constitute more than mere general averments and conclusory allegations.

To constitute an injury-in-fact, the harm experienced may be aesthetic, recreational, conservational, or economic in nature. Sierra Club, 405 U.S. at 738. 'Injury in fact' reflects the statutory requirement that a person be 'adversely affected' or 'aggrieved,' and it simply serves to distinguish a person with a direct stake in the outcome of a litigation-even though small-from a person with a mere interest in the problem. United States v. Students Challenging Regulatory Agency Procedures (SCRAP), 412 U.S. 669, 690 n. 14 (1973). For that reason, these injuries need not be large, an 'identifiable trifle' will suffice. Pub. Interest Research Grp. v. Powell

Duffryn Terminals, 913 F.2d 64, 71 (3d Cir. 1990); see SCRAP, 412 U.S. at 690 n. 14. The fact that these particular interests are shared by the many rather than the few, also does not make them less deserving of legal protection through the judicial process. Sierra Club, 405 U.S. at 734.

The members of NUWF have experienced aesthetic, recreational, conservational and economic harms as a result of Bowman's conduct. A-6; see id. at 735. In terms of aesthetic harms, NUWF member, Dottie Milford testified that the Muddy River "looks more polluted to her than it did prior to Bowman's activities." A-6. A similar aesthetic harm was deemed to be an injury in fact by the Supreme Court in Laidlaw. See 528 U.S. at 181. In that case, a member of the plaintiff organization attested that when he occasionally drove over the river in question "it looked and smelled polluted." This harm was found to be sufficient, despite the absence of a discernible effect on water quality. See id.

NUWF member, Zeke Norton experienced an economic harm due to a substantially negative effect that Bowman's actions have had on frogging in the area. A-6. Before Bowman's pollution of the river, Norton was able to count on getting a dozen good sized frogs, but now he is lucky to find "two or three good sized frogs." A-6. Aside from the recreational value of his frogging, Norton relies on frogging for subsistence. A-6. While the relative value of the economic harm may seem to be of little consequence, an economic harm does not need to exceed a certain value in order to satisfy the injury in fact requirement. See SCRAP, 412 U.S. at 690 n. 14. The Supreme Court has allowed important interests to be vindicated by plaintiffs with no more at stake in the outcome of an action than a fraction of a vote, a $5 fine and costs, or a $1.50 poll tax. Id.; see Harper v. Va. Bd. of Elections, 383 U.S. 663, 86 (1966) McGowan v. Maryland, 366 U.S. 420, 424 (1961).

In regards to recreational harms, all three NUWF members testified that they use the Muddy River for recreational boating and fishing and picnicking on its banks. A-6. They also fear that the Muddy is more polluted and will be far more polluted if other adjacent wetlands are cleared and drained for agricultural uses. A-6. Members of the plaintiff organization in Laidlaw experienced the same fears, which deterred them from fishing, camping, swimming, and picnicking in and near the river. See 528 U.S. at 184. One member attested that she would use the river in question for recreational purposes were she not concerned that the water contained harmful pollutants. Id. at 182. Even here, the court found an injury in fact, despite the fact that this member had never even engaged in recreational activities in the river in question. Id.

In the present case, the recreational harm to Dottie Milford, Zeke Norton, and Effie Lawless are far more direct, since they frequently used the Muddy River for recreational purposes prior to Bowman's conduct. See id.; A-6. It is reasonable to assume that their fear of increased pollution would decrease their use of the river in the future. Similarly, NUWF members experienced conservational harms since they were aware of the valuable functions of the wetlands in maintaining the integrity of the rivers, both acting to absorb sediment and pollutants and serving as buffers to flooding. See A-6. They are also aware of the differences and feel a loss from the destruction of the wetlands. A-6.

The reasonableness of the NUWF members' fear of pollution is far more reasonable and analogous to the fear experienced by members in the Laidlaw case, than in the case of Lyons where injury in fact was not found to exist. See Laidlaw, 528 U.S. at 184-85; Los Angeles v. Lyons, 461 U.S. 95, 107 n.8 (1983).

In Lyons, the plaintiff was denied an injunction against enforcement of a police chokehold policy because the threat that the policy posed to him was unrealistic. Los Angeles,

461 U.S. at 96. There was a low likelihood of reoccurrence of the alleged unlawful conduct and his subjective apprehensions were not reasonable enough to support standing. Id. at 107 n.8. But as the court stated in Laidlaw, there is nothing "'improbable' about the proposition that * * * pervasive illegal discharges of pollutants into a river would cause nearby residents to curtail their recreational use of that water way and would subject them to other economic and aesthetic harms." 528 U.S. at 184.

The District Court points to the illegality of Mr. Norton's frogging activities, since he was allegedly trespassing on Bowman's property. A-6. Similarly, all three NUWF members attested they engaged in recreational activities "on or in the vicinity of Bowman's property." A-6. These alleged acts of trespass do not negate the harms suffered to the NUWF members, and in fact, may actually bolster the Plaintiff's claim to injury in fact. See Burlison v. United States, 533 F.3d 419 (6th Cir. 2008). There is adequate evidence in the record to suggest that a public prescriptive easement and/or private prescriptive easement had ripened by the time this complaint was filed. See id.; Price v. Eastham, 254 P.3d 1121, 1127 (Alaska 2011); Eric M. Larsson, 42 Causes of Action 2d 111 (2009); Restatement of Prop.: Servitudes § 457 (1944).

Prescriptive easement, like adverse possession, is a common law doctrine that nearly all U.S. jurisdictions recognize. See Eric M. Larsson, 42 Causes of Action 2d 111 (2009). While some small details, such as timing can vary among jurisdictions, nearly all jurisdictions require the same elements to be proven. See id. The distinction between public and private easement is that the enjoyment of a private easement is restricted to one specific person or a few specific people, while a public easement is for the benefit of an entire community. See 2 Am. Jur. Proof of Facts 3d §§ 125,197 (1988).

To establish a prescriptive easement, a claimant must prove use but not necessarily occupancy of the property claimed to be subject to the easement. Thomson v. Dypvik, 174 Cal. App. 3d 329, 335 (1985). The elements for private and public prescriptive easement are nearly identical, except that private prescriptive easement requires exclusivity of use (Norton's frogging), while public prescriptive easement necessarily requires that the use by non-exclusive, since the public use negates a presumption of grant to any individual user (the members' recreational use of the property). 2 Am. Jur. Proof of Facts 3d §§ 125, 197 (1988).

The shared elements for both types of easement require that use of the easement be open, notorious, adverse or under claim of right, continuous and uninterrupted for the statutory period. Id. The use by both Mr. Norton and the members was both open and notorious since there was no attempt to conceal the use and the acts of frequent frogging, boating, fishing and picnicking were enough to put Bowman on constructive notice. See id.; A-6. Additionally, the public and private uses were adverse, since they constituted actual invasion or infringement of the owner's rights such as would entitle the owner to a cause of action against the intruders. See 2 Am. Jur. Proof of Facts 3d §§ 125, 197 (1988). The public and private uses were continuous and uninterrupted, as Bowman never took action to interrupt the use, and the members used the land often. See id.; A-6. Finally, there is evidence in the affidavit that Mr. Norton, at least, has been frogging on Bowman's private property for years. A-6. If a public and/or private prescriptive easement had ripened, it not only provides more proof of an injury in fact, but also could affect the validity of the conservation easement that is the subject of NUDEP's agreement with Bowman. See Burlison, 533 F.3d 419.

While the District Court found that only Mr. Bowman's allegation was a direct injury, it offers no reasoning, analysis, or explanation as to why it came to such a conclusion. A-6. The

aforementioned aesthetic, conservational, recreational, and economic harms satisfy the requirements of an injury in fact since they all show that the members have a direct interest and concrete stake in Bowman's violation according to standards found in the cited case law. See Lujan, 504 U.S. at 560; Laidlaw, 528 U.S. at 168-69. However, only one of these harms is required to meet this standard in order to show that a NUWF member had adequate standing in his/her own right to satisfy the first prong of the organizational standing test. See Laidlaw, 528 U.S. at 168-69.

2. NUFW satisfies the second prong for standing because the injuries to NUFW were caused by, and therefore fairly traceable to, the illegal actions of Mr. Bowman.

The courts of appeal have held that to satisfy the fairly traceable prong, a plaintiff "must merely show that a defendant discharges a pollutant that 'causes or contributes to the kinds of injuries alleged by the plaintiff'." Natural Res. Def. Council v. Watkins, 954 F.2d 974, 980 (4th Cir. 1992) (quoting Pub. Interest Research Grp., 913 F.2d at 72). "[T]he 'fairly traceable' element does not require that plaintiffs 'show to a scientific certainty that defendant's effluent, and defendant's effluent alone, caused the precise harm suffered by the plaintiffs. Save Our Cmty. v. U.S. EPA, 971 F.2d 1155, 1161 (5th Cir. 1992); see also City of Reynoldsburg v. Browner, 834 F. Supp. 963, 970 (S.D. Ohio 1993) ("the plaintiff need only allege that there is a substantial likelihood that the defendants' conduct caused its harm").

Addressing the fairly traceable requirement in detail, the Court of Appeals for the Fourth Circuit has held en banc: "Rather than pinpointing the origins of particular molecules, a plaintiff "must merely show that a defendant discharges a pollutant that causes or contributes to the kinds of injuries alleged" in the specific geographic area of concern." Friends of the Earth v. Gaston Copper Recycling Corp., 204 F.3d 149, 161-162 (4th Cir. 2000) (quoting Watkins, 954 F.2d at

980). In this way, a plaintiff demonstrates that a particular defendant's discharge has affected or has the potential to affect his interests. Id. The members' statements, as well as the facts on record about Bowman's destruction of the wetlands, make clear that Bowman's effluent caused or at the very least contributed to the kinds of injuries alleged by the members in the flood plain of the Muddy River. See Gaston Copper, 204 F.3d at 161-62; Watkins, 954 F.2d at 980-81.

3. Redressability, while not raised by Bowman on appeal, is satisfied because both the injunctive relief and civil penalties sought provide a deterrent effect, making it likely, as opposed to merely speculative, that current violations will be abated and future ones prevented, while also serving the goals of retribution and restitution.

The redressability requirement ensures that a plaintiff "personally would benefit in a tangible way from the court's intervention." Warth v. Seldin, 422 U.S. 490, 491 (1975). A plaintiff seeking injunctive relief shows redressability by "alleg[ing] a continuing violation or the imminence of a future violation" of the statute at issue. Gaston Copper, 204 F.3d at 162. While the case of Steel Co. v. Citizens for a Better Env't held that private plaintiffs may not sue to assess penalties for wholly past violation, it did not address standing to seek penalties for violations ongoing at the time of the complaint. Gaston Copper, 204 F.3d at 162; see Steel Co. v. Citizens for Better Env't, 523 U.S. 83, 107 (1998).

As discussed below, a continuing violation did exist at the time the complaint was filed. Additionally, it can scarcely be doubted that, for a plaintiff who is injured or faces the threat of future injury due to illegal conduct ongoing at the time of suit, a sanction, like injunctive relief, that effectively abates that conduct and prevents its recurrence, provides a form of redress. Laidlaw, 528 U.S. at 185-86. Therefore, in this case, injunctive relief would redress the injury. See id.

Standing must be demonstrated separately for each form of relief sought. Laidlaw, 528 U.S. at 185. Plaintiff has standing due to redressability of injunctive relief, but also for that of civil penalties. See id. The Supreme Court has recognized on numerous occasions that "all civil penalties have some deterrent effect." Hudson v. United States, 522 U.S. 93, 102 (1997). More specifically, Congress has found that civil penalties in Clean Water Act cases do more than promote immediate compliance by limiting the defendant's economic incentive to delay its attainment of permit limits, they also deter future violations. Laidlaw, 528 U.S. at 185.

This congressional determination warrants judicial attention and respect. Id. For a plaintiff who is injured or threatened with injury due to illegal conduct ongoing at the time of suit, a sanction that effectively abates that conduct and prevents its recurrence provides a form of redress. Id. Civil penalties can fit that description. Id. Insofar as they encourage defendants to discontinue current violations and deter future ones, they afford redress to citizen plaintiffs injured or threatened with injury as a result of ongoing unlawful conduct. Id. at 169. The court need not explore the outer limits of the principle that civil penalties provide sufficient deterrence to support redressability, because the civil penalties sought here carried a deterrent effect that made it likely, as opposed to merely speculative, that the penalties would redress FOE's injuries. See Laidlaw, 528 U.S. at 169.

Senator Muskie's remarks in the Congressional Records suggest taking into account the profit to the defendant, the degree of harm to the public caused by the defendant's failure to comply with the act, as well as the necessity of vindicating the authority of the EPA when determining the correct assessment of civil penalties. 123 Cong.Rec. 39191 (1977). By taking these factors into consideration, the legislative history of the CWA clearly reveals that Congress wanted the district court to consider the need for retribution and deterrence, in addition to

restitution, when it imposed civil penalties. See Tull v. United States, 481 U.S. 412, 422–23 (1987); 123 Cong.Rec. 39191 (1977). Civil penalties in this case, would redress the injuries and meet the Congressional goals of the Clean Water Act. Laidlaw, 528 U.S. at 185.

B. The interests at stake are germane to NUWF's purpose as a not-for-profit environmental organization.

When determining germaneness, a court must determine whether an association's lawsuit would, if successful, reasonably tend to further the general interests that individual members sought to vindicate in joining the association and whether the lawsuit bears a reasonable connection to the association's knowledge and experience. Bldg. & Constr. Trades Council of Buff. v. Downtown Dev., Inc., 448 F.3d 138, 149 (2d Cir. 2006).

Courts have generally found the germaneness test to be undemanding and that too restrictive a reading of the requirement would undercut the interest of members who join an organization in order to effectuate an effective vehicle for vindicating interests that they share with others. Id. at 147; see Presidio Golf Club v. Nat'l Park Serv., 155 F.3d 1153, 1159 (9th Cir. 1998). It is highly unlikely the second prong of germaneness was meant to set a narrow perimeter of centrality of purpose. Bldg. & Const. Trades, 448 F.3d at 147; see Auto. Workers, 477 U.S. at 286. Rather, the Court used the word "germane," rather than the phrase "at the core of," or "central to," or some word or phrase indicating the need for a closer nexus between the interests sought to be protected by the suit in question and the organization's dominant purpose. Bldg. & Const. Trades, 448 F.3d at 148.

The courts of appeal have found germaneness in a labor organization suing to stop development for environmental reasons. See id. at 147; see also Presidio Golf Club, 155 F.3d at 1153 (private golf course challenged construction of public golf clubhouse for environmental violations). As stated in the record, NUWF is a not for profit organization whose purpose is to

protect the fish and wildlife of the state by protecting their habitats, among other things. A-4. The destruction of wetlands habitats and pollution of waterways is directly related to this purpose. See Bldg. & Const. Trades, 448 F.3d at 148. As a result, the interests at stake here are germane to Plaintiff NUWF's purposes. See id.

C. The relief requested does not require individual participation by NUWF's members since NUWF's members are not seeking personal damages.

The purpose of the injunctive relief and civil penalties that plaintiffs seek is to force defendants to comply with the Act. See Laidlaw, 528 U.S. at 185. "Individual participation" is not normally necessary when an association seeks prospective or injunctive relief for its members, but indicated that such participation would be required in an action for damages to an association's members, thus suggesting that an association's action for damages running solely to its members would be barred for want of the association's standing to sue. United Food Comm. Workers v. Brown Grp., Inc., 517 U.S. 544, 546 (1996). Since NUWF is seeking injunctive relief and civil penalties (that would be paid to the U.S. Treasury), no participation of plaintiffs' individual members would be required in granting such relief. See id.

II. THIS COURT MAY HEAR NUWF'S CLAIM BECAUSE BOWMAN IS COMMITTING CONTINUOUS VIOLATIONS OF THE CLEAN WATER ACT.

In addition to the requirement that citizens actually be affected by the change in navigable waters of the United States, Congress placed other limits on the ability for citizen to sue for violations of the Clean Water Act. 33 U.S.C. § 1365(b). First, the citizen must provide the alleged violator, the State, and the Administrator with notice of their intent to sue. Id. Second, in order for a citizen suit to be valid, the alleged actor must currently be in violation of the Act or have a pattern of intermittent violations of the Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Found., 484 U.S. 49, 57 (1987). Finally, Citizens may not bring an action when

an Administrator or State is already "diligently prosecuting" the contested action. 33 U.S.C. § 1365(b)(2).

These restrictions ensure that citizens only act to "supplement rather than to supplant government action" in cases in which the Government fails to "exercise [its] enforcement responsibility. Gwaltney, 484 U.S. at 60. In this case, the appointed Administrator, NUDEP, has failed to fulfill their responsibilities under the Act and therefore Congress has empowered NUWF to seek Bowman's compliance with the act

A. Bowman's land-clearing activity is a continuing violation because the dredged and fill materials have a continuing negative effect on the Muddy River.

Bowman actions in clearing the land were two fold. First Bowman engaged in mechanized land clearing of a wetland area. 33 C.F.R. § 323.2(d)(iii). This was the offense for which Bowman and NUDEP entered into an agreement. However neither party has addressed the effects that the mechanized clearing had upon the wetland and Muddy River itself. The loss of the wetlands surrounding the Muddy on Bowman's property has caused the river to go through obvious physical changes. These changes are exacerbated by the dumping of refuse from the land clearing activities into the Muddy by the swale that Bowman placed through the wetland area. This unauthorized dumping without a permit constitutes an independent violation of the Act. 33 U.S.C. § 1344. The lower court found that this claim cannot be sustained because the placement of dredged fill material was one act and there can be no continuous violation for the mere placement of material. A-7. The lower court expressly rejected the reasoning of the 4th Circuit in Sasser v. Adm'r believing it an overbroad interpretation of the jurisdictional requirement of the Act. 990 F.2d 127 (4th Cir. 1993). However, the lower court misinterpreted the holding of Sasser. Indeed, the Fourth Circuit would agree with the lower courts finding that the mere presence of harmful materials in navigable waters would not create a continuous

violation. However, it cannot reasonably be argued that a violation is not continuous when that violation is still causing new negative effects on navigable waters. In Sasser, the Court found a continuous violation, as the Defendant's barriers were preventing navigable waters from being used for recreational purposes. United States v. Sasser, 738 F. Supp. 177, 178 (D.S.C. 1990). In this case, the presence of dredge and fill material will compromise the physical and biological integrity of the Muddy over time. See A-4. For that reason Bowman's action can be held as a continuous violation of the act until he removes the harmful substances. See 33 U.S.C. § 1251(a); Sasser, 990 F.2d at 127.

B. Bowman's changing of the "hydrological regime" make his farming activities a violation of the act.

Under normal circumstances, farming activity is recognized as exempt from regulation under the Clean Water Act. 33 C.F.R. § 323.4. Specifically, farmers are exempt from the permit requirements so long as their actions on navigable waters take place on established farming lands. Id. In order for a farming operation to be considered established, the land must be in continuous use and not require changes to the "hydrological regime" to be useful. Id. § 323.4(a)(1)(ii). Owners of properties covered under the Clean Water Act are included in these exemptions so long as farming activities can be done utilizing the existing land and landscape and without greatly changing the nature of the terrain. Id. In order to change the nature of the land itself, though, a farmer requires a permit. Id. Newly created farming activity or changes in the nature of the land remove farming from exempted status. Id.

In the present case, Bowman's actions fail at every stage of the inquiry and he is in clear continuous violation of the Act. See id. First, the farming activities Bowman conducted cannot be considered established as the land was not in continuous use for that purpose. 33 C.F.R. § 323.4(a)(1)(ii). Even if the Court were to find Bowman's actual farming activities exempted

under the act, the draining of the wetland area removes it from exemption. Id. The Act removes any exemption from farming activity when the farmer changes the nature of the land itself. 33 C.F.R. § 323.4(a)(1)(i). In this case, Bowman changed the very nature of the land itself, by draining it and removing the plants and animals that made it a wetland. A-4. The Environmental Protection Agency and the Army Corp of Engineers have recognized jointly that "conversion from a… wetland to crop production is not exempt". Environmental Protection Agency, Memorandum: Clean Water Act Section 404 Regulatory Program and Agricultural Activities, (1990). Because Bowman's land conversion removes his farming activities from exempted status, his sowing of winter wheat is a violation of the act and every normally exempted action taken to strengthen that crop is a further violation of the act. These continuous farming actions are sufficient to create a continuous violation for which the Appellant, NUWF, has the standing to sue. Gwaltney, 484 U.S. at 57.

III. A CITIZEN'S SUIT IS PROPER IN THIS CASE BECAUSE THE AGREEMENT BETWEEN BOWMAN AND NUDEP IS NOT SUFFICIENT TO BRING BOWMAN'S CONTINUOUS VIOLATIONS INTO CONFORMITY WITH THE ACT.

The Administrators of the Clean Water Act were intended to be the primary authorities of enforcement of the Act itself. See id. Therefore the "diligent prosecution" bar exists to ensure that citizens do not attempt to act as an enforcement authority in cases in which the Citizen does not agree with the Administrator on the appropriate remedy for the purpose of the Karr v. Hefner, 475 F.3d 1192, 1197 (10th Cir. 2007). A Citizen suit is proper in order to "abate pollution when the government cannot or will not demand compliance". Gwaltney, 484 U.S. at 62. In order to show that a citizen is barred from filing suit the Administrator must show that (1) it has commenced an action in a court of the United States and (2) that the action is calculated to require compliance with the Act and capable of obtaining such compliance. 33 U.S.C.

§ 1365(b)(1)(b); Friends of Milwaukee's Rivers v. Milwaukee Metro. Sewerage Dist., 382 F.3d 743, 759 (7th Cir. 2004).

While there are a broad range of avenues an Administrator may take that would fulfill the diligent prosecution requirement, the courts have made it clear that the Administrator must not only be concerned with present or past violations, but must choose a course that it believes will encourage future compliance. Friends of Milwaukee's Rivers, 382 F.3d 743 (rejecting the Milkwaukee Metropolitan Sewerage District's claim of diligent prosecution because the action taken was not sufficiently tailored to ensure eventual compliance with the Act). The Administrator in this case, NUDEP, has not taken sufficient action as to require eventual compliance with the Friends of Milwaukee's Rivers, 382 F.3d at 763. NUWF agrees that the NUDEP properly commenced action against Bowman, however, the action was not sufficiently calculated to bring Bowman into "eventual compliance." Id. If Bowman's actions were independent of any other environmental consequences, NUDEP's plan of action in this case would be sufficient to warrant a finding of diligent prosecution. Id. However the agreement in this case runs afoul of both the statute and congressional intent.

Congress's purpose in enacting the Clean Water Act was to "[restore and maintain] the chemical, physical, and biological integrity of the nation's waters." 33 U.S.C. § 1251(a). Chief among the "nation's waters" to be protected is the wetland. When dealing with wetland areas, though, the Federal permit issuing body, the Army Corp of Engineers, holds a strong presumption against granting permits to change wetlands. 33 C.F.R. § 336.1(c)(4). Wetlands are a valuable public resource and permits are only granted as a last resort in order to serve an interest of such great import that the wetland can be lost. Id.; 33 C.F.R. § 320.4(b). Further in

cases of such great losses, the Army Corp of Engineers holds a presumption that when wetlands are lost there should be compensatory mitigation. 33 C.F.R. § 332.1.

In this case, Bowman purposefully drained a wetland, in violation of the Act, and NUDEP has taken no action to restore that land as Congress requires. See 33 U.S.C. § 1251(a). Further, not requiring Bowman to return the land to its natural state, is not ensuring compliance with the act, it is actually tacit permission by NUDEP for Bowman to defy statute and the directives of the Federal Administrator. See id. § 1344; 33 C.F.R. § 336.1(c)(4). If NUDEP's decree is allowed to stand as diligent prosecution of this manner, then Bowman has the permission of the government of New Union to continue to use the land for his personal gain in a manner the violates the Act. 33 C.F.R. § 323.4(a)(1)(ii). Further his actions will continue to allow the Muddy River to deteriorate which is the antithesis of the wishes of Congress in the enforcement of the Act. See 33 U.S.C. § 1251(a). If it were not blatantly obvious that Bowman planned to continue to use this precious natural resource as farmland, NUDEP may have an argument as to the validity of their agreement. However, as we know Bowman's intent is to further destroy both the wetland and the Muddy River, allowing him to determine what happens to the acreage that he cleared wholly unacceptable. The Court must allow NUWF to present its case in order to find an alternative that is consistent with the purpose of the Act.

IV. THE DISTRICT COURT ERRED BECAUSE THE BOWMAN'S USE OF EARTHMOVING EQUIPMENT AND WETLAND CLEARING, WHICH FILLED WETLANDS WITH BIOLOGICAL MATTER, RESULTED IN DISCHARGES OF POLLUTANTS SUBJECT TO REGULATION UNDER SECTION 404 OF THE CLEAN WATER ACT.

Congress intended the CWA to be a strong safeguard for the conservation of wetlands. This is codified by the statute's two stated goals: 1) to eliminate "the discharge of pollutants into navigable waters; and 2) to provide the protection and propagation of fish, shellfish, and wildlife for recreation in the Nation's waters." 33 U.S.C. §§1251(a)(1-2). In interpreting the CWA

courts have recognized this intention and interpreted the language broadly and aggressively in favor of these goals. See Solid Waste Agency (SWANCC) v. United States Army Corps of Eng'rs, 531 U.S. 159, 166 (2001); United States v. Riverside Bayview Homes, Inc., 474 U.S. 121, 132 (1985). One way courts can broadly read the CWA is by focusing on the impacts and environmental harm of activities rather than the nature of the activity itself. This court must continue this practice.

An individual responsible for a "discharge of pollutants" into "waters of the United States" from a "point source" is subject to the permit provisions of the CWA. 33 § U.S.C. 1362(12). These discharges must obtain and comply with a permit from the NPDES, or face liability. 33 U.S.C. §§ 1311(a), 1344. Here, Bowman failed to comply with the NPDES permit procedure prior to the discharge of pollutants into the Muddy River, which will continue to cause drastic environmental consequences.

A. The biological material Bowman moved on the wetlands are "pollutants."

The District Court correctly found that the biological material moved on the wetland are pollutants. A-8. Since Bowman does not challenge whether the excavated soil and plant life moved by a bulldozer can constitute a pollutant the issue has effectively been conceded on appeal. This Court should not revisit the matter.

Even if the matter is reviewed, courts have interpreted the definition of "pollutant" broadly. See, e.g., United States v. Deaton, 209 F.3d 331, 335–36 (4th Cir. 2000); United States v. Pozsgai, 999 F.2d 719, 724 (3d Cir. 1993), cert. denied, 510 U.S. 1110 (1994); United States v. Tilton, 705 F.2d 429, 430 (11th Cir. 1983); see also 33 C.F.R. § 323.2(c) (defining "dredged material" to mean "material that is excavated or dredged from waters of the United States"); 33 C.F.R. § 323.2(e) (defining "fill material" as "*any* material used for the primary purpose of replacing an aquatic area with dry land or of changing the bottom elevation of a[] waterbody")

(emphasis added) ; accord 40 C.F.R. § 232.2 (EPA definitions). Section 502(6) of the CWA defines "pollutant" to mean "dredged spoil, solid waste, incinerator residue, sewage, garbage, sewage sludge, munitions, chemical wastes, biological materials, radioactive materials, heat, wrecked or discarded equipment, rock, sand, cellar dirt, and industrial, municipal, and agricultural waste discharged into water." 33 U.S.C. § 1362. The statutory language makes it abundantly clear that the material used by the Bowman is a pollutant.

B. The bulldozers used by Bowman constitute a point source.

The term "point source" is defined in CWA § 502(14) to mean "any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal operation, or vessel or other floating craft, from which pollutants are or may be discharged." Courts have interpreted this term broadly. Examples have included analogous situations like: runoff from fields on which waste material had been sprayed, debris strewn on property that collected stormwater that flowed into a stream, and earth moving equipment. Deaton, 209 F.3d at 333 (sidecasting through the use of a backhoe, front-end loader, and bulldozer); United States v. Akers, 785 F.2d 814, 817–20 (9th Cir. 1986) (site preparation using a grader, tractor pulling discs, and a ripper), cert. denied, 479 U.S. 828 (1986); Avoyelles Sportsmen's League, Inc. v. Marsh, 715 F.2d 897, 922 (5th Cir. 1983) (landclearing using bulldozers and backhoes); see also In re Alameda County Assessor's Parcels, 672 F. Supp. 1278, 1284-1285 (N.D. Cal. 1987) (same); United States v. Larkins, 657 F. Supp. 76, 78 n.2, 85 (W.D. Ky. 1987) (same).

The District Court correctly found that the bulldozers used by the Bowman were point sources under the CWA. A-8. Bowman does not contend that the excavation tools were not point sources on appeal and thus this Court should not revisit the matter.

C. Bowman's cleared property is a navigable water.

The term "navigable water" is defined as "the waters of the United States" under § 502(7). 33 U.S.C. § 1326(7). Courts have interpreted that wetlands adjacent to navigable waters are also navigable waters. See Riverside Bayview Homes, Inc., 474 U.S. at 139. The District Court correctly found that Bowman's wetland property adjacent to the Muddy River is a navigable water. A-9. Bowman does not contend that his property is not a navigable water on appeal, and thus this Court should not revisit the matter.

D. Bowman's excavation activities resulted in the "addition" of pollutants to protected waters of the United States.

The District Court found Bowman's activity did not result in a "discharge of a pollutant" because it did not result in the "addition" of the pollutants to the protected wetlands. R at 10. This is incorrect in both law and fact. Bowman, acting without a NPDES permit, used a bulldozer to level a portion of his property populated by vegetation and used trenches to level and drain the effluent into the Muddy River. This conduct poses a drastic loop-hole in the NPDES permit procedure which, if not closed and regulated, would put wetlands in danger of careless activity by developers. This Court must adhere to the language and intention of Congress and protect the regulations of the CWA.

Unlike "pollutant", "point source", and "navigable water" the term "addition" is not defined in the statute. Instead, this Court must look to the plain meaning and context of the word and the intention of Congress. Under a reasonable conception of the term, Bowman has added to the wetland by leveling vegetation and incorporating it into the soil and river. The movement of biological material throughout the property and from Bowman's property to the Muddy River through swale is sufficient reason in itself to conclude the Bowman has made an "addition" to the wetland. The environmental effect does not change if the swale is bringing material from

inside the wetland or from miles away from the wetland. Riverside Bayview Homes, Inc., 474 U.S. at 139. However, even if this activity does not fall under the plain meaning of "addition," Congress's intent shows that it falls under the unwritten statutory definition.

First, even without looking at the legislative intent there are statutory clues, which help narrow the possible definition of "addition" absent a clear promulgated definition. Under these clues, the district court is incorrect in stating that there must be outside material to constitute an addition. The CWA defines "dredged material" as, "wetland soil, sediment, debris, or other material excavated from United States waters." 33 U.S.C. § 1362(12). The Corps defines the same term as "material that is excavated or dredged from waters of the United States. See 33 C.F.R. § 323.2(c) (2011). Dredging, the process of removing sediment from the bottom of a wetland to ensure clear passage for boats, was one of the actions Congress hoped to regulate with the CWA. See, e.g., Avoyelles Sportsmen's League, Inc., 715 F.2d at 923–24 & n.43. The CWA includes "dredged spoil," as well as rock, sand, and "cellar dirt," in its definition of "pollutant." 33 C.F.R. § 323.2(d)(1). From these two definitions, context shows that contents of a wetland change into a pollutant under the CWA once they have been disturbed. There is no material addition needed to become a regulated action under the CWA. If courts follow this reasoning then the requirement, of a pollutant to come from the outside world would not follow the statutory language. See United States v. M.C.C. of Fla., 772 F.2d 1501 (11th Cir. 1985); Avoyelles Sportsmen's League, Inc., 715 F.2d 897; but see Nat'l Mining Ass'n v. U.S. Army Corps of Eng'rs, 145 F.3d 1399 (1998). Because of this context and these definitions, incidental environment disturbances caused by development, incidental fallback, and other de minimis actions require a NPDES permit.

Further, an "addition" of pollutants into a navigable body of water occurs for purposes of §301(a) of the CWA when soil or vegetation on a wetland are dug up or excavated and "re-deposited" back into the same wetland. See M.C.C. of Fla., 772 F.2d at 1506 (addition of pollutants into a navigable body of water held to occur when propellers of a tug boat, a point source, cut into the bottom of that body of water, uprooting sea grass and digging up sediment on the bottom and depositing bottom sediment on adjacent sea grasses), vacated and remanded on other grounds, 481 U.S. 1034 (1987), readopted in relevant part, 848 F.2d 1133 (11th Cir. 1988); Rybachek v. U.S. EPA, 904 F.2d 1276, 1285 (9th Cir. 1990) (re-deposit into a stream of material excavated from the bed of that stream during placer mining held to be an "addition" of pollutants into stream under Clean Water Act); Greenfield Mills, Inc. v. Macklin, 361 F.3d 934, 948–49 (7th Cir. 2004); United States v. Sinclair Oil Co., 767 F. Supp. 200 (D. Mont. 1990). Re-deposits have been found to be an "addition" where parts of trees and vegetation, that were cut near the surface of a protected wetland, were raked by bulldozers into low areas. See Avoyelles Sportsmen's League, Inc., 715 F.2d at 920–25.

Second, Congress intended the CWA to be a statute which regulates the deposits or re-deposits of pollutants because of their harmful impact on wetlands. It does not matter whether the pollutant comes from an external source. It is irrelevant whether the deposit increases or decreases the net content of the material in the wetland. What matters is the impact the deposit has on the wetland and the environment. Bowman's choice to dig ditches or channels was made with the intention to avoid a federal permit. The action by Bowman falls under permit requirements because of the very result which occurred, a harming of the ecosystem of the Muddy River.

Similarly to the incident here, the principle that an "addition" occurs when there is a "re-deposit" of material from the same wetland is consistent with the interpretation of the CWA that a "discharge" does not have to involve the introduction of new material. This reasoning comes from the plain text of the statute. See Deaton, 209 F.3d at 331. This is because re-deposited material, even if there is no addition of outside material, can have drastic adverse impacts on the wetlands. The Fourth Circuit states in Deaton, "the statute does not prohibit the addition of material; it prohibits 'the addition of any pollutant.'" Id. When a wetland is excavated, pollutants that had been trapped may suddenly be released. The discharge of soil and biological material increases the amount of suspended sediments, which harms aquatic life. These facts are also similar to the process of deep ripping which is prohibited under the CWA without a permit. See Borden Ranch P'ship v. U.S. Army Corps of Eng'rs, 261 F.3d 810 (9th Cir. 2001). Deep ripping is a process which involves a bulldozer dragging metal prongs through a field to make the soil softer for agriculture. It is of no factual significance that biological material was previously present on the same property in a less threatening form if a change to that material will harm the environment after excavation.

Congress acted because it is important that all potential harmful wetland excavation or construction be regulated. The fragility of swamps, marshes, and bogs and their natural tie to other bodies of water make them a careful target for regulation. Any gap in regulation could potentially allow construction on wetland without a NPDES permit and endanger the ecosystem of the wetland. For this reason the US Army Corps of Engineers and EPA decided to implement and defend the "Tulloch Rule" which required a permit in the instances of de minimis or incidental fallback from backhoes or bulldozers. See Clean Water Act Regulatory Programs, 58 Fed. Reg. 45,008 (1993). The most significant features of this rule were codified at 33 C.F.R.

§ 323.2(d)(1)(iii). The EPA adopted a parallel rule, codified at 40 C.F.R. § 232.2(1)(iii). Although the "Tulloch Rule" shows the fragility of wetlands and Congress's regulatory intent, its sometime failure in the courts is not relevant here. See e.g., Nat'l Mining Ass'n, 145 F.3d at 1399. The action by Bowman is not an incidental fallback, but a re-deposit of a pollutant. However, the implementation of the rule displays the aggressive action taken to ensure the protection of wetlands.

Finally, even if this Court finds that Bowman's activity does not fall under the plain meaning of the word or the intent of Congress, the activity causes great environmental harm to wetlands and this Court must act to close this loop-hole. Wetlands serve vital ecological functions, such as filtering toxins from water, providing habitat to a variety of species, and slowing surface runoff to prevent flooding. See Riverside Bayview Homes, Inc., 474 U.S. at 134. For this reason, wetland degradation through the discharge of pollutants is considered to be among the most severe environmental infringements. See 33 C.F.R. § 230.1(d). Without action by this Court, wetlands will be open to developers without the oversight of the NPDES permit procedures. The environmental, economic, and recreational benefits of the wetlands are to be preserved for future generations through the constant recognition and improvement of the CWA. The actions taken by Bowman to bypass these requirements must not become a template for developers. The District Court summary judgment should be reversed.

CONCLUSION

For the foregoing reasons, the Appellant, NUWF, respectfully urges the Court of Appeals to reverse the District Court's summary judgment on the issues of standing, continuing violation, diligent prosecution, and violation of the Clean Water Act.

APPENDIX TABLE OF CONTENTS

UNITED STATES COURT OF APPEALS
FOR THE TWELFTH CIRCUIT

NEW UNION WILDLIFE FEDERATION,	:	
Plaintiff-Appellant,	:	
v.	:	
NEW UNION DEPARTMENT OF	:	
ENVIRONMENTAL PROTECTION,	:	**C.A. No. 13-1246**
Intervenor-Appellant,	:	
v.	:	
JIM BOB BOWMAN,	:	
Defendant-Appellee.	:	

ORDER

Following the issuance of the Order of the District Court dated June 1, 2012, in Civ. 149-2012, the New Union Wildlife Federation ("NUWF" or "Plaintiff") and the New Union Department of Environmental Protection ("NUDEP") each filed a Notice of Appeal. NUWF takes issue with the decision of the lower court with respect to its holding: that NUWF lacked standing to bring a citizen suit against Jim Bob Bowman ("Bowman" or "Defendant") pursuant to Clean Water Act (CWA) § 505, 33 U.S.C. § 1365 (2006), for a violation of §§ 301(a) and 404 of the CWA, *id*. §§ 1311(a), 1344; that there is no continuing violation as required for subject matter jurisdiction under § 505(a) of the CWA, *id.* § 1365(a); that NUWF's citizen suit is barred by NUDEP's diligent prosecution of Bowman under § 505(b) of the CWA, *id.* § 1365(b); and that 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. NUDEP takes issue with the decision of the lower court with respect to its holdings that NUWF did not have standing to bring its citizen suit and that Bowman did not violate § 404 of the CWA, *id.* § 1344.

Therefore, it is hereby ordered that the parties brief all of the following issues:

1. Whether NUWF has standing to sue Jim Bob Bowman for violating the CWA. (NUWF and NUDEP argue that NUWF does have standing and that the court below erred in granting the Bowman's motion for summary judgment on this issue; Bowman argues that

NUWF does not have standing and that the court below was correct in granting summary judgment on this issue.)

2. Whether there is a continuing or ongoing violation as required by § 505(a) of the CWA for subject matter jurisdiction. (NUWF argues that there is a continuing violation because dredge and fill material is still present in the former wetlands and that the court below erred in granting Defendant's motion for summary judgment on the issue; Bowman and NUDEP argue that the violations are wholly past because Bowman ceased his activities on July 15 and that the court below was correct in granting summary judgment on this issue.)

3. Whether NUWF's citizen suit has been barred by NUDEP's diligent prosecution of Bowman as set out in § 505(b) of the CWA. (NUWF argues that NUDEP's actions do not satisfy the diligent prosecution requirements of § 505 and that the court below erred in granting summary judgment on this issue; Bowman and NUDEP argue that NUDEP's prosecution of and consent decree with Bowman satisfy the requirements for diligent prosecution and the court below was correct in granting summary judgment on this issue.)

4. Whether Bowman violated the CWA when he moved dredged and fill material from one part of a wetland adjacent to navigable water to another part of the same wetland. (NUWF and NUDEP argue that Bowman's actions satisfy all of the elements required for a violation of §§ 301(a) and 404, including addition, and that the court below erred in granting summary judgment on this issue; Bowman argues that NUWF cannot satisfy the elements of a CWA violation and that the court below was correct in granting summary judgment on this issue.)

SO ORDERED.

Entered this 14th day of September, 2012.

[NOTE: No decisions decided or documents dated after September 1, 2012 may be cited either in the briefs or in oral argument.]

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW UNION

NEW UNION WILDLIFE FEDERATION,	:	
Plaintiff,	:	
v.	:	
NEW UNION DEPARTMENT OF	:	
ENVIRONMENTAL PROTECTION,	:	**Civ. No. 149-2012**
Intervenor-Plaintiff,	:	
v.	:	
JIM BOB BOWMAN,	:	
Defendant.	:	

The New Union Wildlife Federation ("NUWF" or "Plaintiff") filed an action under Clean Water Act (CWA) § 505, 33 U.S.C. § 1365 (2006), against Jim Bob Bowman ("Bowman" or "Defendant") for filling wetlands without a permit in violation of §§ 301(a) and 404 of the CWA. Id. §§ 1311(a), 1344. The New Union Department of Environmental Protection ("NUDEP") intervened in this action. After discovery, Plaintiff and Defendant filed cross motions for summary judgment. This Court grants Defendant's motion on all grounds and denies Plaintiff's motion on all grounds.

I. Findings of Fact

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

agree that the property is a wetland, as determined by the U.S. Army Corps of Engineers' (the Corp's) Wetlands Determination Manual.

On June 15, 2011, Bowman commenced land clearing operations. He used bulldozers to knock down trees, level other vegetation, and push the trees and vegetation into windrows. Bowman then burned the windrows. Next, he used a bulldozer to dig trenches and pushed the trees and leveled vegetation remains and ashes into them. He leveled the resulting field, again pushing soil from high portions of the field into the trenches and low lying portions of the field. Finally, he formed a wide ditch or swale that ran from the back of his property to the river in order to drain the field into the Muddy. Bowman completed this work on or about July 15, 2011. Bowman left a strip of land approximately 150 feet wide adjacent to the Muddy to clear after it had drained because it was the most difficult part of the property to work with the bulldozer, especially when it was saturated. This strip runs along the 650 foot length of river frontage on his property.

NUWF is a not for profit corporation organized under the laws of New Union. Its purpose is to protect the fish and wildlife of the state by protecting their habitats, among other things. It is a membership organization funded by members' dues and contributions. Members elect its Board of Directors, the governing body of the organization, which in turn elects the officers, including the President.

II. Procedural History

On July 1, 2011, shortly after its members became aware of Bowman's activities, NUWF sent a notice of its intent to sue Bowman under § 505 of the CWA, id. § 1365, the citizen suit provision, to Bowman, EPA, and the State of New Union/NUDEP. The EPA has properly delegated authority to implement the CWA to NUDEP. Bowman does not contest the validity of the notice.

NUDEP contacted Bowman shortly thereafter and sent him a notice of violation informing him that he had violated both state and federal law by clearing the field. Although Bowman maintained he had not violated state or federal law, he entered into a settlement agreement with NUDEP, under which he agreed not to clear more wetlands in the area. He also agreed to convey to NUDEP a conservation easement on the 150 foot wide strip of still wooded property adjacent to the Muddy that he had not yet cleared plus an additional 75 foot buffer zone between that wooded area and the new field. He agreed to construct and maintain a year-round wetland on that 75 foot buffer zone. The conservation easement allows public entry for appropriate, day-use-only, recreational purposes, requires 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. NUDEP and Bowman incorporated their agreement into an administrative order issued by NUDEP to Bowman, which Bowman consented to on August 1, 2011. A state statute virtually identical in relevant parts to §§ 309 (a) and (g) of the CWA, *id.* §§ 1319 (a), (g), grants NUDEP authority to issue such administrative orders. Although the statute authorizes NUDEP to include an administrative penalty of up to $125,000 in such orders, NUDEP included no penalty is the order to Bowman.

On August 10, 2011, after issuing the administrative order to Bowman, NUDEP chose to bring suit in federal court and filed a complaint against Bowman in this Court under § 505 of the CWA. *See id.* § 1365(g) (defining "citizen as "a person or persons having an interest which may be or is adversely affected"); *id.* § 1362(5) (including "State, municipality, commission, or political subdivision of a State" within the definition of "person").

On August 30, 2011, NUWF filed its own § 505 complaint with this Court seeking civil penalties and an order requiring Bowman to remove the fill material and restore the wetlands. On September 15, 2012, it filed a motion to intervene in the NUDEP § 505 action, to consolidate the NUDEP and NUWF actions, and an opposition to entry of the decree proposed by NUDEP in the NUDEP § 505 action. At about the same time, NUDEP filed a motion to intervene in the NUWF case, which this Court subsequently granted.

On September 5, 2011, in its own § 505 case, NUDEP filed a motion to enter a decree, the terms of which are identical to the state administrative order. Bowman consented to both the motion and the decree. This motion is still pending.

Also in September 2011, Bowman observed that the field had sufficiently drained to plant and sowed it with winter wheat. The field includes all of his property except the 225 foot wide easement adjacent to the river.

On November 1, 2011, at a status conference on both cases, this 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. This Court granted NUDEP's motion to intervene in NUWF's § 505 action, the case which we address herein.

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

III. Standing

Under settled law, to have standing to sue, a plaintiff must prove: (1) an injury in fact (2) that is fairly traceable to the alleged violations and (3) that is redressable by the court. *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992). In environmental cases, injury in fact may be aesthetic rather than economic. *Sierra Club v. Morton*, 405 U.S. 727 (1972). Where an organization such as NUWF is a plaintiff, it must prove that it represents individual members who can demonstrate standing. In support of standing, NUWF submitted affidavits from three of its members, Dottie Milford, Zeke Norton, and Effie Lawless. Bowman deposed all three. In summary, the three testified that they use the Muddy for recreational boating and fishing, often picnicking on its banks, on or in the vicinity of Bowman's property. They testified 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 serving as buffers for flooding. Although they cannot see a difference in the land from the river or its banks, they are aware of the differences and feel a loss from the destruction of the wetlands, fearing 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. Milford testified that the Muddy looks more polluted to her than it did prior to Bowman's activities. In addition, Norton testified that he has frogged the area for years for recreational and subsistence purposes. The Bowman property had been especially good for frogging; Norton could always count on getting a dozen good sized frogs in the right season. Now there are no frogs in the drained field and he is lucky to find two or three good sized frogs in the remaining woods and buffer area. Norton admitted on cross-examination at his deposition that the Bowman property was properly posted under state law against trespassing and he "supposed he might have been trespassing" when he had gone frogging there.

These allegations do not constitute an injury in fact fairly traceable to the clearing of Bowman's field. The only direct injury is that one of NUWF's members can no longer illegally use the cleared area for frogging. The inability to continue illegal activities cannot give rise to an injury to support standing. Moreover, at a deposition, a NUDEP biologist testified that, once fully-established, the new, year-round, partially-inundated wetland in the buffer zone will provide richer wetland habitat than the former, occasionally-inundated wetland presently occupied by the field. Indeed, it will provide a higher quality habitat, and more of it, for frogs.

The remaining alleged injuries are only speculative. Indeed, considering the richer wetland habitat that will occur in the buffer zone, the environment may be benefitted rather than injured by the changes. And, as the three members of NUWF testified, the conservation easement effectively shields the field from the river, so that the aesthetics of navigational use of the river is unaffected.

IV. No Continuing Violation

The Supreme Court held in *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Foundation*, 484 U.S. 49 (1987), that § 505 of the CWA requires that alleged violations be continuing or ongoing as a matter of subject matter jurisdiction. Here Bowman's land clearing activities ceased on July 15, 2011 and there is no reason to believe he will resume them; he has placed the only remaining land he owns in the area in a conservation easement with NUDEP. His only subsequent activities have included planting wheat seeds and draining the property through the drainage ditch or swale he constructed earlier. Neither activity constitutes adding dredged spoil or fill to the property, nor do plaintiffs allege that they constitute such addition. Plaintiffs allege that the continued presence of dredged and fill material in the former wetland constitutes a continuing or ongoing violation and some courts have so held. *See Sasser v. Administrator*, 990 F.2d 127 (4th Cir. 1993). However, as Jim Bob Bowman testified at deposition on another matter, "that pig won't fly." The idea that a CWA violation continues unless and until it is undone is nonsense. That would render without meaning the jurisdictional requirement for a continuing violation, since all violations would be continuing. It would also obviate application of the statute of limitations, for it would never start to run.

Plaintiff responds that while § 404 violations are continuing unless and until the fill material is removed, § 402 violations, which *Gwaltney* addressed, are not. Plaintiff claims § 402 violations are irreversible because once pollutants are discharged into water they flow away and cannot be removed. That, however, depends on the facts; many § 402 violations involve the discharge of solids or sediment which settle on the water bottom below or shortly downstream from the outfall and can be removed. Indeed, a number of CERCLA sites involve removal of bottom sediment from former point sources, notably the Hudson River PCB site.

Plaintiff's continuing violation theory is ingenious but cannot be credited for it would obviate the continuing violation jurisdictional requirement articulated in § 505 of the CWA and recognized by the Supreme Court in *Gwaltney*.

V. Prior State Action

Section 505(b)(1)(B) of the CWA bars a citizen suit if the "State has commenced and is diligently prosecuting a civil . . . action in a court of the United States . . . to require compliance. . ." with the CWA. 33 U.S.C. § 1365(b)(1)(B). Here, NUDEP has commenced a civil action in a court of the United States. It diligently prosecuted that action by filing a complaint with this Court just a month after receiving NUWF's notice letter and by negotiating a settlement with Defendant within a month thereafter. The settlement, embodied in a consent decree submitted to this Court for approval, required Bowman to immediately cease further violations of § 404 and in lieu of a penalty, to deed a conservation easement over a large portion of his property, relinquishing its agricultural and development value, preserving it in a natural state, and opening it to appropriate public use. The decree also required Bowman to construct and maintain a year-

round, partially-inundated wetland at considerable initial expense and an indeterminable future expense. These measures will preserve the viewscape of the Muddy River and enhance the wetlands environment on the site. They will allow Mr. Norton to legally frog in an area that eventually will provide an enhanced environment for frogs. This Court finds that NUDEP's actions meet all of the requirements in the statute to bar NUWF's suit.

VI. Violation of § 404

Section 301(a) of the CWA prohibits "the discharge of any pollutant by any person," except in compliance with a permit issued under §§ 402 or 404 of the CWA. *Id.* § 1311(a). Section 502(12) of the CWA defines "discharge of a pollutant" to mean "any addition of any pollutant to navigable waters from any point source." *Id.* § 1362(12). Section 404 of the CWA authorizes the Corps to issue permits "for the discharge of dredged or fill materials into the navigable waters." *Id.* § 1344. Section 502 of the CWA defines "pollutant," navigable waters" and "point source," but does not define "addition." We will first determine if the three defined elements of the offense are met and then examine "addition." *Id.* § 1362.

A. Pollutant

Section 502(6) defines "pollutant" to mean a list of specific and general material, the first of which is "dredged spoil," *Id.* § 1362(6), uncannily close to the "dredged . . . material" the disposal of which the Corps is authorized to issue permits for. The CWA does not define "dredged spoil" or "dredged . . . material." *See* 33 U.S.C. § 1362. Dredging, however, is an activity that occurs on open water to excavate a channel or port docking area to make them available for commercial navigation. The activity in this case was moving soil and related material from one part of a field to another to clear it for agricultural use. Land clearing is not dredging, so we have no dredged spoil to discharge here. The CWA's definition of "pollutant" does not include "fill material." Of course, "fill material" may be composed of other pollutants. The tree and leveled vegetation remains, for instance, are "biological material," which is listed as a "pollutant." *Id.* No party contests that the material Bowman moved about the property included pollutants. This element is satisfied.

B. Point source

Section 502(14) defines "point source" as "any discernible, confined and discrete conveyance," including a list of examples not including "bulldozer." I*d.* § 1362(14). A bulldozer, however, is a mechanism designed to convey dirt and other material from one place to another. Other courts have held that bulldozers are point sources. *See Avoyelles Sportsmen's League, Inc. v. Marsh*, 715 F.2d 897, 927 (5th Cir. 1983). No party contests that the bulldozers were point sources. This element is satisfied.

C. Navigable waters

Section 502(7) defines "navigable waters" as "the waters of the United States," a singularly unhelpful definition. 33 U.S.C. § 1362(7). Contemplating Bowman's former woods does not conjure up the image of navigable waters, supporting waterborne transportation. Nor does it conjure up the image of the Nation's waters. However, the Supreme Court has held that wetlands adjacent to navigable waters are themselves navigable waters. *See United States v. Riverside Bayview Homes*, 474 U.S. 121, 139 (1985). All the parties agree that the Muddy River is navigable water; indeed, it supports recreational navigation. All the parties also agree that Bowman's former woods met the Corp's Wetlands Delineation Manual criteria for wetlands and that the former woods therefore are wetlands. This element is satisfied.

D. Addition

The CWA does not define "addition." EPA and the Corps do not define "addition" in their regulations. EPA has defined "addition" in various contexts as "from the outside world." *Nat'l Wildlife Fed'n v. Gorsuch*, 693 F.2d 156, 175 (D.C. Cir. 1982). Here, Bowman pushed pollutants from one part of his former woods/wetlands to another part of his former woods/wetlands. Bowman did not add the pollutants from outside his former woods/wetlands, thus not meeting EPA's definition of "addition." NUWF protests that EPA developed its "outside world" definition as a litigation position in § 402 cases and has never applied it to § 404 cases. But the same term used in different parts of the same statute has the same meaning, unless Congress clearly provides otherwise. *See Sorenson v. Sec'y of the Treasury*, 475 U.S. 851 (1986). Congress did not provide otherwise in the CWA; it did not indicate that "addition" means one thing for § 402 and another thing for § 404. NUWF argues that Congress did so provide, for applying the "outside world" definition to § 404 would read the dredge and fill permit program out of the statute, contrary to congressional intent. NUWF's argument is plainly not the case; the "outside world" definition of "addition" would not read § 404 out of the statute. Under the "outside world" definition, the dredged spoil or fill material must come from somewhere other than the wetland into which it is being placed to require a § 404 permit. This is not an unreasonable way to read § 404, particularly in recognition of its original intent to provide a permitting scheme for disposal of dredged spoil from dredging harbors and navigation channels at a considerable distance from their point or origin. *United States v. Bay-Houston Towing Co., Inc.*, 33 F. Supp. 2d 596, 604 (E.D. Mich. 1999). That reading of § 404 may result in a narrower application of its permitting program, but it would not read the program out of existence.

Alternatively, EPA has interpreted "addition" in its Water Transfer Rule to incorporate the "unitary navigable waters" theory, under which all navigable waters are one for the purposes of § 301(a) of the CWA. 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). Bowman argues that EPA did so in a regulation, entitling its interpretation to Chevron deference, as recognized by the Eleventh Circuit in Friends of the *Everglades v. South Florida Water*

Management District. 570 F.3d 1210 (11th Cir. 2009). The Eleventh Circuit's decision is particularly relevant because petitions for judicial review of that rule have been consolidated in the Eleventh Circuit. NUWF argues EPA's interpretation of "addition" is not entitled to deference because the rule itself does not define "addition" or even use the word, and therefore was not an interpretation of the CWA made in a formal administrative proceeding. *See United States v. Mead Corp.*, 533 U.S. 218 (2000). But EPA's interpretation of "addition" in the preamble to the proposed and final rule was the very basis of its rule and was subject to the public comment that was a part of the rulemaking.

Under EPA's interpretation, transferring pollutants from one navigable water to a second navigable water does not add those pollutants to the second navigable water because the first and second navigable waters were always one; the pollutants were always in navigable water and therefore could not be added to the second navigable water. NUWF answers that EPA stated the unitary navigable waters theory had "no effect on the § 404 permit program" because the definition of "pollutant" specifically included "dredged spoil," and therefore "explicitly forbade discharges of dredged material except as in compliance" with a § 404 permit. The inclusion of "dredged spoil" in the definition of "pollutant," however, explicitly forbids nothing; it only satisfies one of the four requisite elements. It has nothing to do with "addition." NUWF may argue that the unitary theory applies only to § 402 and not to § 404. But, again, words used in a statute have the same meaning unless Congress explicitly provides otherwise and it has not here. *See Sorenseon v. Sec'y of the Treasury of the U.S.*, 475 U.S. 851 (1986).

Finally, NUWF cites *United States v. Deaton*, 209 F.3d 331 (4th Cir. 2000), in which the defendant argued that he added nothing to a wetland when he dug a drainage ditch in a wetland and sidecast soil removed from the ditch to the adjacent wetland, since the soil was already in the wetland. The government argued and the court held that the defendant removed soil from the ditch but returned dredged spoil to the wetland, adding a pollutant to the wetland where there had been no pollutant before. This imaginative piece of verbal metaphysics only masks reality: nothing is added when a defendant moves soil, no matter what you call it, a mere few feet within a wetland. And under EPA's unitary navigable water theory it doesn't matter that defendant moved the soil more than a few feet within the wetland. Nor does it matter that the defendant's actions changed the nature of some of the material from living to dead. *See Nat'l Wildlife Fed'n v. Consumers Power Co.*, 862 F.2d 580 (6th Cir. 1988).

To be sure, there are any number of decisions holding that land clearing activities violate the CWA without a § 404 permit. None of them, however, analyzed the full ramifications of EPA's "outside world" interpretation of "addition," and none of them considered EPA's "unitary navigable waters" theory as it applies to "addition." Once these two agency interpretations of "addition" are considered, it is clear Bowman added nothing to his wetland when he moved material from one part of field-in-preparation to another part of the field-in-preparation. Therefore, this element is not satisfied.

For the reasons stated above, this Court grants Defendant's motion for summary judgment on all counts and denies Plaintiff's motion for summary judgment on all counts:

1. Plaintiff lacks standing;

2. This Court lacks subject matter jurisdiction because all violations are wholly past;

3. This Court lacks subject matter jurisdiction due to prior state action; and

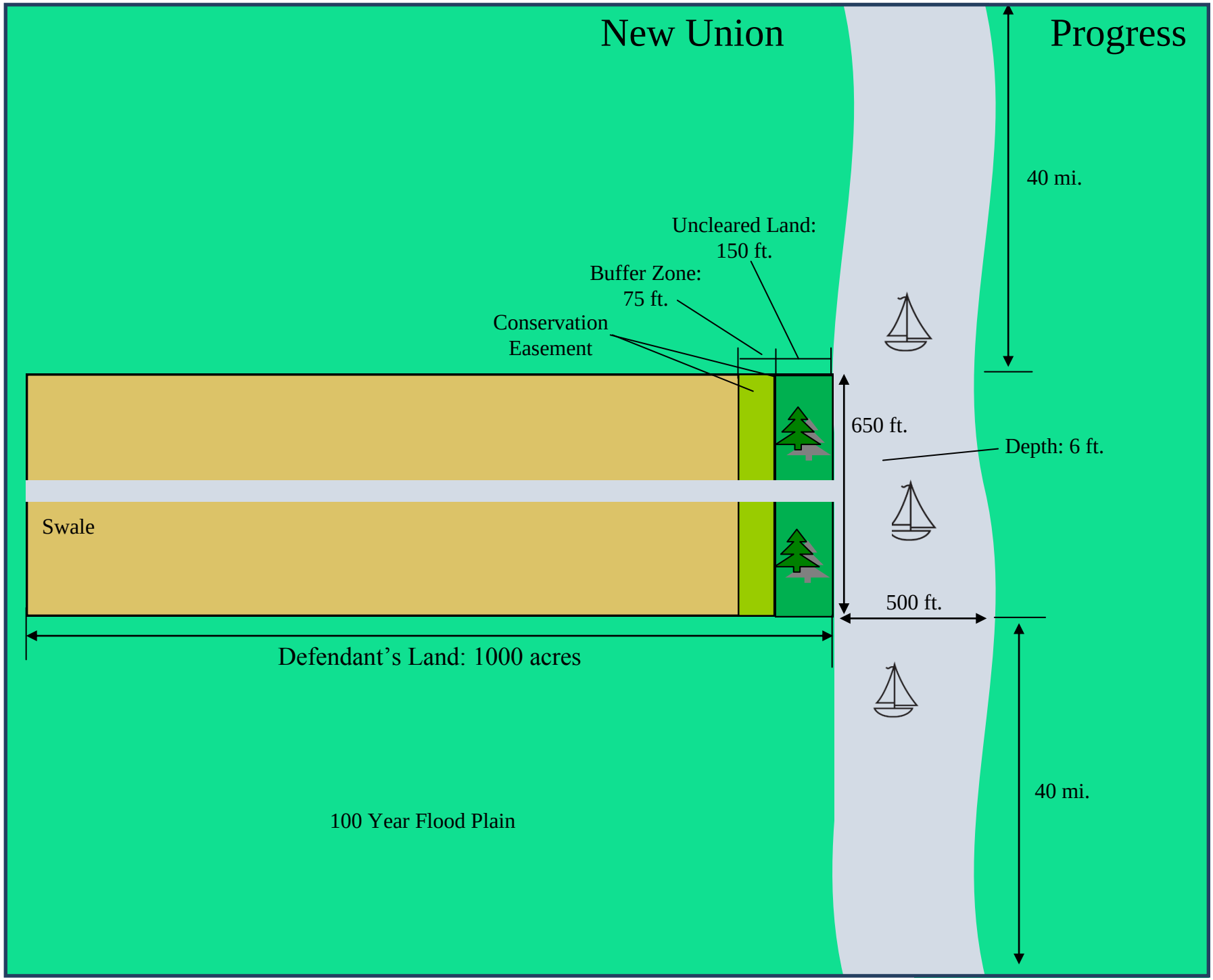
4. There is no violation of the CWA.

SO ORDERED.

Romulus N. Remus

United States District Judge

June 1, 2012


New Union
Progress
40 mi.
Uncleared Land:
150 ft.
Buffer Zone:
75 ft.
Conservation
Easement
650 ft.
Depth: 6 ft.
Swale
500 ft.
Defendant's Land: 1000 acres
40 mi.
100 Year Flood Plain