C.A. No. 13-1246

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 DEPARTMENT OF ENVIRONMENTAL PROTECTION

Intervenor-Appellant

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JURISDICTIONAL STATEMENT

This action arises under the Clean Water Act ("CWA"), 33 U.S.C. §§ 1251 *et seq* (2006), a federal statute. The United States District Court for the District New Union had original jurisdiction over this claim in the first instance as a civil action arising under a law of the United States. 28 U.S.C. § 1331 (2006). The district court issued a final order on June 1, 2012, and Plaintiff-Appellant New Union Wildlife Federation ("NUWF" or "Appellant") and Intervenor-Appellant New Union Department of Environmental Protection ("NUDEP") timely filed a Notice of Appeal. The United States Court of Appeals for the Twelfth Circuit has proper jurisdiction to hear this appeal as a final decision of the district court. 28 U.S.C. § 1291 (2006).

STATEMENT OF THE ISSUES

1. Whether New Union Wildlife Federation has associational standing under Article III of the United States Constitution to sue Jim Bob Bowman for violating the CWA because NUWF has members who allege recreational, aesthetic, environmental, and economic injuries due to Bowman's dredge and fill of the wetlands on his private property.

2. Whether there is an ongoing or "continuing violation" of the CWA, as required for subject matter jurisdiction under the section 505(a) citizen suit provision of the CWA, when Bowman ceased his land clearing activities and entered into a consent decree with the NUDEP before NUWF filed the current action.

3. Whether NUDEP's prosecution of Bowman qualifies as a "diligent prosecution," barring NUWF's citizen suit because NUDEP filed a suit in the Federal District Court of New Union against Bowman, prior to the filing of NUWF's section 505 citizen suit against Bowman.

4. Whether Bowman violated sections 301 and 404 of the CWA when he moved dredged and fill material within a wetland adjacent to a navigable water.

STATEMENT OF THE CASE

On July 1, 2011, NUWF sent notice of its intent to sue Bowman to the EPA, the State of New Union/NUDEP, and Bowman under section 505 of the CWA, 33 U.S.C. § 1365 (2006). (R.

4). [1] Shortly thereafter, NUDEP contacted Bowman with a notice of violation alleging violations of both state and federal law. (Id.) Bowman and NUDEP negotiated a settlement of NUDEP's claims and entered into a consent agreement which was incorporated into an administrative order consented to by Bowman on August 1, 2011 ("August 1 order"). (Id.)

On August 10, 2011, NUDEP filed a complaint against Bowman in federal district court under section 505 of the CWA. (R. 5.) On August 30, 2011, NUWF filed its own section 505 complaint seeking civil penalties and injunctive relief. (Id.)

On September 5, 2011, NUDEP filed a motion in its section 505 case to enter a decree, the terms of which were identical to the August 1 order. (R. 5.) This motion is still pending. (Id.) On September 15, NUWF and NUDEP each filed motions to intervene in the other party's section 505 case, and both motions were granted by the district court. (R. 5.) The same day, NUWF moved to consolidate the section 505 actions, and to oppose the entry of NUDEP's decree. (R. 5.) The district court declined to rule on both motions by NUWF. (R. 5.)

After discovery, NUWF and Bowman filed cross-motions for summary judgment. On June 1, 2012, the district court granted Bowman's motion and denied NUWF's motion on all counts. (R. 11.) The court held that: (1) NUWF lacked standing; (2) the district court lacked subject matter jurisdiction over Bowman's wholly past violations; (3) the district court lacked subject matter jurisdiction due to prior state action; and (4) there was no violation of the CWA. (R. 11.)

NUWF and NUDEP each filed a timely Notice of Appeal. (R. 1.) NUWF appeals all four holdings of the district court, asserting that: (1) NUWF has standing to bring a section 505

[1] "R." refers to the "Record," and is followed by the applicable page number. The record was issued to all parties on or about October 4, 2012, and includes the Twelfth Circuit Court of Appeals Order Number 12-1246 and the District of New Union Civil Order Number 149-2012.

citizen suit against Bowman; (2) A continuing violation of the CWA gives the district court subject matter jurisdiction over this claim; (3) NUDEP's prosecution of Bowman does not bar NUWF's citizen suit; and (4) Bowman violated section 404 of the CWA. (R. 1.)

This Court granted review on September 14, 2012. NUDEP hereby files its appeal, and asks this Court to reverse only two out of four of the district court's holdings, namely: (1) NUWF has standing to bring a section 505 claim against Bowman; and (2) that Bowman violated section 404 of the CWA. (R. 1.)

STATEMENT OF THE FACTS

The Muddy River runs along, and in certain areas forms the border between, the states of New Union and Progress. (R. 3.) Bowman owns one thousand acres of wooded or previously wooded wetland adjacent to the Muddy near the town of Mudflats, New Union. (Id.) Bowman's property includes 650 feet of Muddy River shoreline, and his entire property is within the hundred-year floodplain of the Muddy. (Id.) The Muddy is 500 feet wide and more than six feet deep where it borders Bowman's property. (Id.)

Bowman began to clear his property on June 15, 2011. (R. 4.) He used bulldozers to knock down trees and level other vegetation. (Id.) He pushed the debris into windrows, which he then burned. (Id.) Bowman next dug trenches and pushed the trees and remains of the leveled vegetation and ashes into them with the bulldozers. (Id.) He leveled the resulting field, again pushing soil from high portions of the field into the trenches and low lying portions of the field. (Id.) To drain the now cleared field into the Muddy, he formed a wide ditch or swale that ran from the back of his property to the river. (Id.) Bowman stopped this operation on or about July 15, 2011. (Id.)

When he cleared his land, Bowman left a strip of land approximately 150 feet wide adjacent to the Muddy shoreline to drain. (R. 4.) The strip runs along the 650-foot length of Muddy shoreline on his property. (Id.) This land would have been difficult to access with a bulldozer while still wet. (Id.) The 150-foot strip, along with a seventy-five foot buffer zone, ultimately became a conservation easement after Bowman entered into a settlement agreement with NUDEP. (R. 7.) The conservation easement is meant to be used for public recreational use. (Id.) Bowman is forbidden from developing the easement in any way other than maintaining the artificial wetland. (R. 7–8.) The agreement was incorporated into an administrative order on August 1, 2011. (R. 4.) In September 2011, Bowman sowed winter wheat on all of his property, except for the buffer zone and conservation easement adjacent to the Muddy. (R. 5.)

Three members of NUWF submitted affidavits and deposition testimony in this case. (R. 6.) All three use the Muddy River for recreational boating, fishing, and picnicking. (Id.) The members are aware of the valuable role that wetlands serve in maintaining the integrity of the Muddy River. (Id.) One of the members specifically testified to noticing visual differences in the level of pollution in the Muddy River before and after Bowman's land-clearing operations. (Id.) Another member noted dramatic changes in the wildlife population in the area. (Id.)

STANDARD OF REVIEW

The district court granted summary judgment to Bowman on all four issues now before this Court. 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). Judicial determinations are divided into three categories, whereby: questions of law are reviewable *de novo*; questions of fact are reviewable for clear error; and matters of discretion are reviewable for "abuse of discretion." Pierce v. Underwood, 487 U.S. 552, 558 (1988). While the

factual findings of the district court should stand absent clear error, this Court should review *de novo* the district court's grant of summary judgment and afford no deference to the district court's legal conclusions.

SUMMARY OF THE ARGUMENT

The district court erred by granting Bowman's motion for summary judgment on the issue of Article III standing. NUWF, through its members, has alleged concrete, imminent injuries caused by Defendant Bowman's actions and has established sufficient injury-in-fact, traceability, and redressability to meet the constitutional minimum for standing to sue in federal district court.

However, federal courts must have both constitutional and statutory authority to exercise subject matter jurisdiction over a claim. As the district court recognized, the section 505 citizen suit provision of the Clean Water Act, 33 U.S.C. § 1365 (2006), requires that alleged violations of the CWA be continuous or ongoing at the time the suit is filed. Bowman's land clearing activities ceased prior to the filing of NUWF's section 505 suit, and he has consented to an order prohibiting future violations. The district court therefore correctly granted Bowman's motion for summary judgment on the issue of subject matter jurisdiction, correctly holding that the violation NUWF alleges is wholly past, rather than ongoing or continuous as required by Congress under the Act.

Likewise, the district court correctly held that NUDEP's actions to prosecute, negotiate settlement with, and file a section 505 suit against Bowman satisfied the Clean Water Act's "diligent prosecution" requirement. NUDEP possesses the primary responsibility for enforcing the Clean Water Act, and NUWF has not met its burden of showing that NUDEP has failed to diligently prosecute Bowman for his unpermitted land clearing activities. Allowing NUWF's suit

to proceed would expand the scope of the CWA's citizen suit provision beyond the supplementary role envisioned by Congress and supplant NUDEP's prosecutorial discretion and responsibility under the CWA.

Last, although NUWF has failed to show that the federal courts have subject matter jurisdiction to hear its section 505 claim, the district court erred in granting Bowman's motion for summary judgment, holding that Bowman did not violate sections 301(a) and 404 of the CWA. The district court improperly extended the definition of an element necessary for a violation from a different section of the CWA, and the district court's use of EPA's section 402 interpretation of "addition" would lead to illogical results in the context of section 404 litigation.

For the above-stated reasons, this Court should reverse the district court's holdings that NUWF has standing to bring a section 505 claim against Bowman, and that Bowman did not violate sections 301(a) and 404 of the CWA, and should affirm the district court's holding regarding there being no continuing violation and NUDEP's "diligent prosecution" of Bowman.

ARGUMENT

I. NEW UNION WILDLIFE FOUNDATION HAS PROPERLY ALLEGED ARTICLE III STANDING TO CHALLENGE BOWMAN'S DREDGE AND FILL ACTIVITIES IN FEDERAL DISTRICT COURT

Federal court plaintiffs must have both constitutional and statutory authority to bring a justiciable claim. Ins. Corp. of Ireland, Ltd. v. Compagnie des Bauxites de Guinee, 456 U.S. 694, 701–02 (1982). Section 505(g) of the Clean Water Act sets forth the statutory standing requirement for citizen suits brought to enforce CWA provisions. 33 U.S.C. §1365(g) (2006) (defining "citizen" as "a person or persons having an interest which may be adversely affected"). Congress has indicated that this provision confers standing to enforce the Clean Water Act to the full extent allowed by the Constitution. Middlesex Cnty. Sewerage Auth. v. Nat'l Sea Clammers

Ass'n, 453 U.S. 1, 16 (1981) (quoting senate conference report); see also Friends of the Earth, Inc. v. Gaston Copper Recycling Corp., 204 F.3d 149, 152 (4th Cir. 2000).

Article III of the United States Constitution sets forth the Constitutional standing requirement, restricting the availability of federal judicial review to "Cases" and "Controversies." U.S. Const. art. III, § 2. Interpreting this limitation, the Supreme Court has held that standing to bring a claim in federal court requires three elements: (1) injury in fact; (2) causation between the injury and the conduct complained of; and (3) redressability of the injury by a favorable decision. Lujan v. Defenders of Wildlife, 504 U.S. 555, 560 (1992). Standing doctrine stems from separation of power concerns, limiting judicial review to concrete factual contexts brought by personally affected parties rather than concerned bystanders or ideological plaintiffs. Valley Forge Christian Coll. v. Ams. United for Separation of Church & State, 454 U.S. 464, 472–73 (1982) ("[Constitutional standing doctrine] tends to assure that the legal questions presented to the court will be resolved, not in the rarified atmosphere of a debating society, but in a concrete factual context conducive to a realistic appreciation of the consequences of judicial action.").

An association or organization must meet three additional requirements to bring a suit on behalf of its members: (1) at least one member of the organization must otherwise have standing to sue in his or her own right; (2) the interest at stake must be germane to the organization's purpose; and (3) neither the claim asserted nor the relief requested may require the participation of individual members in the lawsuit. Friends of the Earth, Inc. v. Laidlaw Envt'l Servs., Inc., 528 U.S. 167, 181 (2000) (citing Hunt v. Wash. State Apple Adver. Comm'n, 432 U.S. 333, 343 (1977)). At the summary judgment phase, a plaintiff invoking federal jurisdiction bears the burden of setting forth specific facts, by affidavit or other evidence, establishing injuries

sufficient for standing and the justiciability of his or her claims. Id. at 561 (quoting Fed. R. Civ. P. 56(e)). Proof of the alleged injuries is not required to withstand summary judgment. Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Found., Inc., 484 U.S. 49, 65 (1987) (discussing Warth v. Seldin, 422 U.S. 490, 501 (1975) and United States v. SCRAP, 412 U.S. 669, 689 (1973)). Once the plaintiff meets this burden, the defendant must show that the plaintiff's allegations of injury "were in fact untrue" and that "the allegations were a sham and raised no genuine issue of fact" to prevail on summary judgment. Id. at 66.

Plaintiff NUWF has met its burden of establishing standing to bring its claim in federal court through the affidavits of NUWF members Dottie Milford and Zeke Norton. Milford and Norton articulate aesthetic, recreational, and environmental harms, caused by Defendant Bowman's actions and redressable by the civil penalties and court-ordered remediation sought, sufficient for Article III standing and federal court jurisdiction under the citizen suit provision of the CWA. Furthermore, the current litigation involves the quantity and condition of fish and wildlife habitat, which are interests at the core of NUWF's mission.

Conversely, Defendant Bowman has not demonstrated that the facts and allegations raised by Milford and Norton are untrue, as required for him to prevail on summary judgment. For these reasons, this Court should reverse the district court's holding as to NUWF's standing to invoke federal court jurisdiction and allow NUWF to prove the merits of its allegations at trial.

A. NUWF members have personally suffered legally cognizable injuries sufficient for Article III standing

Injury in fact has been the focus of standing jurisprudence in environmental cases. Ouachita Watch League v. Jacobs, 463 F.3d 1163, 1170 (11th Cir. 2006) ("In environmental suits, the injury-in-fact inquiry tends to be more searching than the causation or redressability considerations.") (citing cases). Plaintiffs seeking federal court review bear the

burden of showing a legally cognizable injury that is "(a) concrete and particularized, and (b) 'actual or imminent,' not 'conjectural' or hypothetical.'" Lujan v. Defenders of Wildlife, 504 U.S. 555, 560–61 (1992) (quoting Whitmore v. Arkansas, 495 U.S. 149, 155 (1990)). Furthermore, the party seeking review must "be himself among the injured." Id. at 563. The injury in fact requirement seeks to ensure that litigants themselves have "a direct stake in the controversy," to prevent litigation over mere "value interests of concerned bystanders." United States v. SCRAP, 412 U.S. 669, 687 (1973).

NUWF has met its burden of producing specific facts to show both requirements for injury-in-fact. First, NUWF members allege esthetic, recreational, and reasonable injuries of a legally cognizable type sufficient for standing. Second, far from ideological plaintiffs or "roving environmental ombudsmen," Friends of the Earth, Inc. v. Gaston Copper Recycling Corp., 204 F.3d 149 (4th Cir. 2000), NUWF members Norton and Milford personally suffered the alleged injuries. This Court should reverse the lower court's holding and find that NUWF has suffered an injury sufficient for standing.

> 1. The aesthetic, recreational, and environmental harms alleged by NUWF members Norton and Milford are legally cognizable injuries of a type sufficient for standing.

The Supreme Court has recognized that harms to a plaintiff's aesthetic, recreational, or environmental interests are legally cognizable injuries sufficient for standing. Summers v. Earth Island Inst., 555 U.S. 488, 494 (2009) ("[I]f [harm to the forest or the environment] affects the recreational or even the mere esthetic interests of the plaintiff, that will suffice [as injury-in-fact for standing]."); Lujan, 504 U.S. at 562–63 ("[T]he desire to use or observe an animal species, even for purely esthetic purposes, is undeniably a cognizable interest for the purpose of standing.").

The gravity of the alleged injury is immaterial, so long as an "identifiable trifle" distinguishes the plaintiff from a person with a "mere interest in the problem." SCRAP, 412 U.S. at 689 n.14 (rejecting the government's invitation to limit standing to those who have been "significantly" affected by agency action). Furthermore, proof of actual harm is not required; threats or increased risk of harm can satisfy the standing doctrine's injury-in-fact requirement. See Friends of the Earth, Inc. v. Laidlaw Envt'l Servs., Inc., 528 U.S. 167, 181-83 (2000) (citizen affidavits attesting to reduced use of a waterway due to reasonable fear and concern of pollution "adequately documented injury in fact"); see also Gaston Copper at 159 ("[N]or has any circuit required . . . scientific proof where there was a direct nexus between the claimant and the area of environmental impairment."). In Laidlaw, the Supreme Court found that plaintiff Friends of the Earth's members demonstrated sufficient injury to establish standing despite the district court's explicit finding that defendant Laidlaw's mercury discharge violations "did not result in any health risk or environmental harm." 528 U.S. at 181 (quoting Friends of the Earth, Inc. v. Laidlaw Envt'l Servs., Inc., 956 F. Supp. 588 (D.S.C. 1997), vacated, 149 F.3d 303 (4th Cir. 2000), rev'd, 528 U.S. 167). In that case, Friends of the Earth members averred that they lived between one-quarter and twenty miles from the defendant Laidlaw's facility, used the affected river for recreational purposes, and that pollution from Laidlaw's discharges caused concern and caused them to curtail their previous activities on and around the affected water.

NUWF members Norton and Milford have alleged precisely the type of injuries found sufficient for standing by the Court in Laidlaw. Norton and Milford both use the Muddy River, the body of water that Bowman's property drains into, for recreational boating, fishing, and picknicking. Like the Friends of the Earth members found to have standing in Laidlaw, Norton and Milford are aware of the valuable role that wetlands serve in maintaining the integrity of the

Muddy, feel loss from the destruction of wetlands on the Bowman property, and fear pollution as a result. (R. 6). Though proof of harm to the environment is not required, Laidlaw, 528 U.S. at 181–83, Milford attests to noticing visual differences in the Muddy's pollution level before and after Bowman's unpermitted dredge and fill activities. Furthermore, Norton has noticed dramatic changes in the wildlife population through his subsistence and recreational frogging activities. These observations show that NUWF members' fears and concerns regarding pollution of the Muddy are reasonable and sufficient to show injury-in-fact required for standing in federal court.

In denying NUWF standing in the first instance, the district court in this case incorrectly characterized the nature of the injury alleged by Norton and Milford. In particular, Norton claims injury not from the "inability to continue illegal activities," (R. 6), but from harms to his environmental and recreational interests that are evidenced by the decline in wildlife that he has personally observed. Furthermore, the lower court's emphasis on "direct injuries" as opposed to "speculative" injuries, id., has no basis in the Supreme Court's standing jurisprudence. The Court has repeatedly held that harm to a plaintiff's recreational, aesthetic, or environmental interests can support standing to sue, without proof of actual harm to the waterway at issue. Requiring proof of actual harm or physical harm would raise the bar for justiciability above the requirements of Article III. This Court should find that NUWF members have properly alleged legally cognizable injuries sufficient for standing, and reverse the district court's holding to the contrary.

> 2. NUWF members Norton and Milford properly allege personally suffered injuries sufficient for injury-in-fact as required for Article III standing.

In addition to alleging a legally cognizable injury, a federal court plaintiff must also show that his or her injury is personally suffered to show injury-in-fact sufficient for standing. Lujan,

504 U.S.at 563 ("[T]he 'injury in fact' test requires . . . that the party seeking review be himself among the injured.") (quoting Sierra Club v. Morton, 405 U.S. 727, 734–35 (1972)). The relevant showing for standing, therefore, "is not injury to the environment but injury to the plaintiff." Laidlaw, 528 U.S. at 181. The Supreme Court has found injury in fact sufficient for standing when plaintiffs aver personal use of the affected area and lessened aesthetic and recreational values because of the challenged activity. Id. at 183 (citing Sierra Club, 405 U.S. at 735).

For example, in Sierra Club v. Morton, the Court held that plaintiff Sierra Club lacked standing to challenge the development of Mineral King mountain because no members had alleged personal use of the mountain. 405 U.S. at 727. On remand, however, the Court granted the Sierra Club standing due to its amended complaint alleging members' personal use of the mountain. Sierra Club v. Morton, 384 F. Supp. 219 (N.D. Cal. 1972). In this case, NUWF members Milford, Norton, and Effie Lawless all personally recreate on the Muddy on or in the vicinity of Bowman's property. Far from ideological plaintiffs, NUWF members have alleged personally suffered injuries from Bowman's activities and this Court should reverse the lower court's holding that they lack standing to sue in federal court.

B. The alleged injuries are "fairly traceable" to Bowman's activities and would be redressed by the remedies sought

Constitutional standing doctrine requires that a plaintiff alleging injury in fact show also that the injuries alleged are "fairly traceable" to the defendant's actions and would be redressed by the remedies sought. Lujan v. Defenders of Wildlife, 504 U.S. 555, 560 (1992).

The "fairly traceable" requirement serves to ensure that the injuries alleged are not "the result of the independent action of some third party not before the court." Lujan, 504 U.S. at 560 (alterations omitted) (quoting Whitmore v. Arkansas, 495 U.S. 149, 155 (1990)). In

environmental cases, the "fairly traceable" requirement can be said to fairly met when "a plaintiff has pointed to a polluting source as the seed of his injury, and the owner of the polluting source has supplied no alternative culprit." Friends of the Earth, Inc. v. Gaston Copper Recycling Corp., 204 F.3d 149, 162 (4th Cir. 2000). Here, NUWF members have pointed to Bowman's land clearing activities as the seed of their injuries, and Bowman has failed to supply an alternative polluting source. NUWF has properly shown traceability sufficient for Article III standing.

Furthermore, NUWF has shown that civil penalties and an order "requiring Bowman to remove the fill material and restore the wetlands," (R. 5), will redress the injuries alleged. As recognized in Laidlaw, Congress has found that civil penalties in CWA cases promote immediate compliance and deter future violations. 528 U.S. at 185. In addition, the order sought, requiring restoration of the wetlands to its pre-violation condition, would redress the ecological and aesthetic injuries alleged by Milford, Norton, and Lawless. NUWF has properly shown the requisite redressability for standing to sue in federal court.

NUWF members have properly shown both the traceability and redressability required for Article III standing and have therefore shown all the requirements for standing. This Court should reverse the district court's holding that NUWF lacks standing.

C. NUWF has associational standing based on the standing of its members

An association has standing to sue in federal court on behalf of its members when its members would have standing to sue in their own rights, the interest at stake is germane to the organization's purpose, and the members are not needed to assert the claim or relief requested. Laidlaw, 528 U.S. at 181 (citing Hunt v. Washington State Apple Adver. Comm'n, 432 U.S. 333, 343 (1977)). NUWF has met its burden of setting forth specific facts alleging

associational standing to sue on behalf of its members. As discussed above, NUWF members Milford, Norton, and Lawless allege injuries sufficient for Article III standing. Additionally, as the district court recognized, NUWF is a nonprofit corporation organized with the purpose of protecting "the fish and wildlife of the state by protecting their habitats, among other things." (R. 4). The ecological and wildlife interests at stake are germane to NUWF's habitat protection purpose, and Milton, Norton, and Lawless are not needed to themselves assert the claim or relief requested. Because NUWF has shown associational standing on behalf of Milton, Norton, and Lawless, this Court should reverse the district court's grant of Bowman's motion for summary judgment on the issue of standing.

II. HOWEVER, THE COURT LACKS SUBJECT MATTER JURISDICTION OVER NUWF'S CLAIM BECAUSE DEFENDANT'S LAND CLEARING ACTIVITIES ARE WHOLLY PAST AND ANY CONTINUING EFFECTS OF HIS ACTIONS HAVE BEEN REMEDIED BY HIS CONSENT DECREE WITH NUDEP

Section 505(a) of the Clean Water Act authorizes civil actions brought by citizen plaintiffs for injunctive relief or civil penalties against "any person" who is "alleged to be in violation of . . . an effluent standard or limitation under [the] Act." Clean Water Act section 505(a), 33 U.S.C. § 1365(a) (2012). The Supreme Court has held that the citizen suit provision authorizes only prospective relief from present or future but not wholly past Clean Water Act violations. Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Found., Inc., 484 U.S. 49, 57 (1987) ("The most natural reading of 'to be in violation' is a requirement that citizen-plaintiffs allege a state of either continuous or intermittent violation-that is, a reasonable likelihood that a past polluter will continue to pollute in the future."). Subject matter jurisdiction is assessed "at the time of the action brought." Id. at 69 (Scalia, J., concurring) (quoting Mollan v. Torrance, 9 Wheat. 537, 539 (1824)). According to the Court in Gwaltney, Congress intended citizen suits to

"supplement rather than to supplant governmental action" within the Clean Water Act statutory framework. Gwaltney, 484 U.S. at 60.

The applicability of the "continuing violation" requirement to the unpermitted dredging and filling of wetlands is an issue of first impression in this circuit. Here, NUWF urges this Court to adopt the reasoning of the Second Circuit and a few district courts which have broadly construed "ongoing" violations for the purpose of determining subject matter jurisdiction under the Clean Water Act. NUWF argues that violations under CWA section 404 are "continuing unless and until the fill material is removed," while section 402 violations addressed in Gwaltney require a reasonable likelihood of future pollution because they are "irreversible." (R. 7.)

However, as the District Court correctly held, the continuing violation requirement for subject matter jurisdiction under the CWA does not differ between citizen suits alleging violations of section 404 and section 402. Furthermore, Bowman has demonstrated that his allegedly unpermitted dredge and fill activities ceased on or about July 15, 2011, and any future dredging or filling of wetlands on his property are precluded by the consent decree between Bowman and NUDEP on August 1, 2011. The violations alleged by NUWF in its August 10, 2011 complaint are therefore wholly past and cannot be reasonably expected to recur. (R. 4, 7.) For these reasons, this Court should affirm the District Court's grant of summary judgment to Bowman on the issue of whether NUWF has alleged a continuing violation sufficient for subject matter jurisdiction under the CWA.

A. NUWF has failed to allege a continuing or ongoing violation of either section 402 or 404 of the CWA as required by section 505 of the CWA

Since the Supreme Court's articulation of the "continuing violation" requirement in Gwaltney, 484 U.S. 49, 57 (1987), courts have broadly prohibited section 505 citizen suits against defendants where CWA violations have ceased, even where ongoing effects persist and

the defendant can remediate the ongoing effects. Conn. Coastal Fisherman's Ass'n v. Remington Arms Co., 989 F.2d 1305 (2d Cir. 1993) (lead shot deposited in a sound was not a continuing violation as it dissolved, despite possibility of clean-up); Friends of Santa Fe Cnty. v. LAC Minerals, Inc., 892 F. Supp. 1333 (D.N.M. 1995) (waste pile or "overburden" was not an ongoing violation though migration of residual contamination was possible). In this case, as the District Court correctly held, Bowman ceased land clearing activities on July 15, 2011, "and there is no reason to believe he will resume them." (R. 7.) This Court should affirm the District Court's grant of summary judgment to Bowman on the grounds that NUWF has failed to allege an ongoing or continuing violation of the CWA as required to invoke subject matter jurisdiction over its section 505 suit.

NUWF contends that this Court should adopt the reasoning from a line of out-of-circuit cases (the "Woodbury line" of cases) in which courts have held that the dredging and deposit of fill material into wetlands is an ongoing or continuing violation until the fill material is removed. (R. 7); North Carolina Wildlife Fed'n v. Woodbury, 1989 U.S. Dist. LEXIS 13915 (E.D.N.C. 1989); Sasser v. Adm'r, 990 F. 2d 127 (2d Cir. 1993); Stillwater of Crown Point Homeowner's Ass'n v. Kovich, 820 F. Supp. 2d 859 (N.D. Ind. 2011); Informed Citizens United, Inc. v. USX Corp., 36 F. Supp. 2d 375 (S.D. Tex. 1999). Concerned about giving landowners an incentive to conceal their dredge and fill activities, Informed Citizens United, 36 F. Supp. 2d at 378, these cases single out CWA violations involving the dredging and filling of wetlands due to the persistent effects of unpermitted fill material, Woodbury, 1989 U.S. Dist. LEXIS 13915 at *8 ("[I]t is not the physical act of discharging dredge wastes itself that leads to the injury . . . but the consequences of the discharge in terms of lasting environmental degradation.").

However, the Woodbury line of cases erroneously limits the continuing violation requirement in Gwaltney to discharged wastewater in violation of CWA section 402 as opposed to fill material in violation of section 404. Kovich, 820 F. Supp. 2d at 895 ("Gwaltney is distinguishable because the defendant in that case discharged wastewater in violation of CWA § 402, not fill material in violation of CWA § 404."). This false distinction ignores the fact that plaintiffs often bring section 505 citizen suits alleging violations of both sections 402 and 404 of the Clean Water Act, where the unpermitted violation can be characterized both as a discharged pollutant and as deposited fill material. See, e.g., Conn. Coastal v. Remington, 989 F.2d 1305 (2d Cir. 1993) (plaintiffs alleged that defendant gun club lacked permits under both sections 402 and 404 to discharge lead shot and clay fragments); Friends of Santa Fe Cnty v. LAC Minerals, Inc., 892 F. Supp. 1333 (D.N.M. 1995) (plaintiffs alleged that defendant corporations discharged waste pile in violation of both sections 402 and 404).

Furthermore, exempting wetland fill material cases from the continuing violation requirement rests on a faulty assumption that pollutants regulated under section 402 of the CWA do not have ongoing or lasting effects and cannot be remediated. Woodbury, 1989 U.S. Dist. LEXIS 13915 at *7 (characterizing Gwaltney as a citizen-suit "for past discharges which are not susceptible to remedial efforts" as opposed to a violations "having persistent effects that are amenable to correction" that should constitute continuing violations of the CWA "until remedied"); City of Mountain Park, GA v. Lakeside at Ansley, LLC, 560 F. Supp. 2d 1288, 1296 (2008) (adopting the Woodbury approach because deposited fill materials may have years or decades of "roughly the same net polluting effect."). This distinction cannot justify a departure from the Supreme Court's holding in Gwaltney because many non-fill-material pollutants that require a CWA permit often have ongoing or lasting effects and are often susceptible to

remediation. See, e.g., Remington, 989 F.2d 1305 (decomposition of lead and clay shot fragments were not a continuing violation); Wilson v. Amoco, 33 F. Supp. 2d 969 (D. Wyo. 1998) (migration of residual contamination from discharge of hazardous contaminants did not constitute a continuing violation); Rutherford Oil v. United States, 756 F. Supp. 2d 782 (S.D. Tex. 2010) (prop washing that disturbed and redeposited soil and other materials in Galveston Bay had ongoing effects and could be remediated but did not constitute a continuing violation).

Even if a distinction could be made between fill and non-fill pollutants based on ongoing or lasting un-remediated effects, Bowman has consented to construction of a new, year-round, partially-inundated wetland on his property that will "provide richer wetland habitat than the former, occasionally-inundated wetland presently occupied by the field." (R. 6.)

In addition, to the extent that the Woodbury line of cases is based on a public policy concern that treating the dredge and fill of wetlands as a wholly past violation of the Clean Water Act would incentivize concealment of these activities from public and private scrutiny, Woodbury, 1989 U.S. Dist. LEXIS 13915 at *8, this concern exists for all alleged violations of the CWA. For these reasons, this Court should affirm the District Court's rejection of the Woodbury line of cases and hold that NUWF has failed to allege a continuing violation as required for this Court's subject matter jurisdiction over its Clean Water Act claim against Bowman.

B. Even if this court adopts the theory that dredge and fill of wetlands can constitute an ongoing violation, Bowman's consent decree with NUDEP constitutes remedial measures that prevent a finding of a continued CWA violation

Even if this Court adopts the reasoning of the Woodbury line of cases, and holds that continued presence of fill material *can* constitute a continuing violation for the purposes of

subject matter jurisdiction under the CWA, NUDEP's consent decree with Defendant Bowman constitutes remedial measures that prevent a finding of a continued CWA violation in this case.

In fact, the Supreme Court in Gwaltney articulated a concern with precisely this situation as an animating justification for the continuing violation requirement:

> Permitting citizen suits for wholly past violations of the Act could undermine the supplementary role envisioned for the citizen suit. This danger is best illustrated by an example. Suppose that the Administrator identified a violator of the Act and issued a compliance order . . . [and] agreed not to assess or otherwise seek civil penalties on the condition that the violator take some extreme corrective action, such as to install particularly effective but expensive machinery, that it otherwise would not be obligated to take. *If citizens could file suit . . . in order to seek the civil penalties that the Administrator chose to forgo, then the Administrator's discretion to enforce the Act in the public interest would be curtailed considerably*. . . Respondents' interpretation of the scope of the citizen suit would change the nature of the citizens' role from interstitial to potentially intrusive. We cannot agree that Congress intended such a result.

484 U.S. at 60–61 (emphasis added). In this case, prior to NUWF's filing of this section 505 action, NUDEP has agreed not to assess or seek civil penalties against Bowman in exchange for his conveyance of a 150 foot wide conservation easement to NUDEP and consent to construct and maintain a year-round wetland on an additional 75 foot wide section of his property at his expense. (R. 4.) The wetland Bowman will construct will "provide richer wetland habitat than the former, occasionally-inundated wetland presently occupied by the field." (R. 6.) As in Justice White's demonstrative example in Gwaltney, allowing NUWF subject matter jurisdiction to pursue this suit would intrude in NUDEP's discretion to enforce the Act in the public interest. This Court should uphold the District Court's holding that NUWF has not alleged an ongoing or continuing violation of the CWA sufficient for subject matter jurisdiction.

III. NUDEP'S PROSECUTION OF BOWMAN'S VIOLATIONS SATISFIES THE REQUIREMENT FOR "DILIGENT PROSECUTION" UNDER 33 U.S.C. § 1365(b)

This Court should affirm the district court's ruling because NUDEP possesses the primary responsibility for enforcing the Clean Water Act, and NUWF cannot show that NUDEP is not diligently prosecuting an action to require compliance against Bowman.

A. NUDEP possesses the primary responsibility for enforcing the CWA

Although the federal government, the states, and citizens share enforcement duties under the Clean Water Act, Congress mandates that states possess the primary responsibility for implementation of the Act. See 33 U.S.C. § 1251(b) (2006) ("It is the policy of the Congress to recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution, to plan the development and use (including restoration, preservation, and enhancement) of land and water resources…."). While a citizen may commence a civil action "against any person who is alleged to be in violation of an effluent standard or limitation … or an order issued by the Administrator or a State with respect to such a standard or limitation," 33 U.S.C. § 1365(a)(1), Congress has enacted a bar to citizen suits where "the [state agency] has commenced and is diligently prosecuting a civil or criminal action in a court of the United States, or a State to require compliance with the standard, limitation, or order…." 33 U.S.C. § 1365(b)(1)(B).

The congressional intent to give primary enforcement responsibility to the state is further demonstrated by the notice requirement for Clean Water Act citizen suits. Citizens wishing to bring suits against non-compliant polluters may not proceed until after sixty days of giving notice to the EPA, the relevant state agency, and the polluter. Id. § 1365(b)(1)(A). "[I]f EPA or [the state agency] commences a court enforcement action before or within sixty days after a citizen suit plaintiff's notice of intent to sue, the citizen suit is completely barred." Comfort Lake Ass'n v. Dresel Contracting, Inc., 138 F.3d 351, 356 (8th Cir. 1998). This notice and delay

scheme clearly embodies Congress' mandate that citizen suits under the Clean Water Act are meant to "supplement rather than to supplant" state action, and are only appropriate where the governing body fails to properly exercise its enforcement responsibility. Gwaltney v. Chesapeake Bay Found., 484 U.S. 49, 60 (1987).

In the instant matter, NUDEP has not failed to fulfill its enforcement responsibility. It commenced and is diligently prosecuting a judicial action to require compliance with the Clean Water Act, and the delegation of authority under the statute has functioned as envisioned by Congress. After receiving NUWF's Notice of Intent to Sue on July 1, 2011, NUDEP filed a complaint against Bowman in the district court under 33 U.S.C. § 1365 merely forty days later, on August 10. The action initiated by NUWF on August 30 was therefore barred. The filing of this action was an inappropriate second-guessing of the state's prosecutorial discretion, and this action would have supplanted, rather than supplemented the action commenced by NUDEP. The action by NUDEP has ultimately resulted in a settlement under a consent decree. The consent decree, which is still pending in the district court, mandates that Bowman not clear any more wetlands in the area. This mandate thus ceases any future violations of the Act.

B. NUWF cannot demonstrate that NUDEP is not diligently prosecuting Bowman for his CWA violations

The plaintiff bears the burden of proving that subject matter jurisdiction exists, so NUWF must demonstrate that NUDEP is not diligently prosecuting Bowman's violations of the CWA. Piney Run Pres. Ass'n v. County Comm'rs, 523 F.3d 453, 459 (4th Cir. 2008). In its order dated June 1, 2012, the district court held that NUDEP's actions meet the "diligent prosecution" requirement under 33 U.S.C. § 1365(b), and that NUWF's citizen suit was thus barred. The district court concluded that NUDEP properly commenced a civil action, and that it

diligently prosecuted that action by filing a complaint with the district court a month after receiving NUWF's notice letter, as well as by negotiating a settlement with Bowman.

A Clean Water Act judicial action to require compliance will ordinarily be considered "diligent" if the action "is capable of requiring compliance with the Act and is in good faith calculated to do so," and, diligence by the state agency is presumed. Id. at 459 (citing Friends of Milwaukee's Rivers v. Milwaukee Metro. Sewerage Dist. ("FMR I"), 382 F.3d 743, 759 (7th Cir. 2004)). In Piney Run, the citizen plaintiffs argued that the state environmental agency was not diligently prosecuting the county's violations. Id. at 458. The consent agreement at issue, entered into by the state environmental agency and the County, required (1) compliance with a new National Pollutant Discharge Elimination System ("NPDES") permit and (2) mandated civil penalties for non-compliance. Id. at 458–59. The consent agreement did not incorporate the citizen plaintiffs' preferred technology or penalties in the amount envisioned by the citizen plaintiffs. Id. The Fourth Circuit affirmed the district court's dismissal of the citizen plaintiffs' action, holding that the enforcement action satisfied the Clean Water Act's diligent prosecution requirement. Id. at 460. The court stressed that the consent agreement was clearly able to ensure compliance with the Act, id. at 460, and that if citizens could file suit seeking civil penalties forgone by the state agency, then "the agency's discretion to enforce the Act in the public interest would be curtailed considerably." Piney Run, 523 F.3d at 459-60 (citing Gwaltney, 484 U.S. at 61). The lessening of the fine by the state agency in exchange for other obligations, although conflicting with the wishes of the citizen plaintiffs, was "precisely the type of discretionary matter to which [courts] should defer." Id. at 461.

Citizen plaintiffs must meet a "high standard to demonstrate that [a government agency] has failed to prosecute a violation diligently." Karr v. Hefner, 475 F.3d 1192, 1198 (10th Cir.

2007). Private citizens may only act where the EPA or state agency "has failed [to act], not where the [state agency] has acted but not acted aggressively enough in the citizens' view." Id. at 1197 (quoting Ellis v. Gallatin Steel Co., 390 F.3d 461, 477 (6th Cir. 2004)) (internal quotation marks omitted). In Karr, the citizen plaintiffs, landowners in Southeastern Oklahoma, alleged that the EPA did not diligently prosecute Clean Water Act violations against various oil companies. Id. at 1993-94. Despite the fact that the EPA's settlement with the oil companies did not comprise all of the sites, violations, and defendants contemplated by the plaintiffs' citizen suit, the Tenth Circuit "[did] not hesitate to hold that the EPA's prosecution against the [defendants] was diligent." Id. at 1198. The citizen plaintiffs desired harsher penalties, but the court acknowledged that "[a]n administrator unable to make concessions is unable to obtain them." Id. at 1197-98 (quoting Supporters to Oppose Pollution v. Heritage Grp., 973 F.2d 1320, 1324 (7th Cir. 1992)).

While diligence is presumed, it is not automatic. See Envt'l Conservation Org. v. City of Dallas, 529 F.3d 519, 528-29 (5th Cir. 2008) ("If a citizen-suit plaintiff demonstrates that there is a realistic prospect that the violations alleged in its complaint will continue notwithstanding the government-backed consent decree, then a less-than-diligent prosecution might have been shown."). "[A] diligent prosecution analysis requires more than mere acceptance at face value of the potentially self-serving statements of a state agency and the violator with whom it settled regarding their intent with respect to the effect of the settlement." FMR, 382 F.3d at 760. Courts have held that a presumption of diligence can be rebutted by a showing that the agency has engaged in "a pattern of conduct in its prosecution that could be considered dilatory, collusive or otherwise in bad faith." Coastal Fishermen's Ass'n v. Remington Arms Co., 777 F. Supp. 173,

183 (D. Conn. 1991) (quoting Connecticut Fund For Env't v. Contract Plating Co., 631 F. Supp. 1291, 1293 (D. Conn. 1986), aff'd in part, rev'd in part, 989 F.2d 1305 (2d Cir. 1993).

NUWF cannot show that NUDEP is not diligently prosecuting Bowman for his violations of the Clean Water Act. In addition to ceasing any future violations of the Act, Bowman further agreed to build a conservation easement on the still wooded part of his property adjacent to the Muddy River that he has not yet cleared, as well as maintain year-round an additional seventy-five foot buffer zone between the wooded area and the new field. This benefit to the people of New Union will come at his personal expense. In contrast to the wishes of the citizen plaintiffs, NUDEP chose not to assess an administrative penalty. The wishes of the citizen plaintiffs do not enter the discussion, however, as demonstrated in Karr. Similar to the situation in Piney Run, this is a solution that could not have come about if the demands of the citizen plaintiffs had been granted, as it is doubtful Bowman could afford to pay a penalty and undertake this project. The people of New Union have received a benefit, as the conservation easement allows public entry for appropriate daytime recreational purposes. In contrast, if Bowman merely paid a fine, as contemplated by the citizen plaintiffs, the fine would go to the United States Treasury, see Friends of the Earth v. Archer Daniels Midland Co., 780 F. Supp. 95, 101–02 (N.D.N.Y. 1992), and not to the benefit of the people of New Union. Bowman is required to keep the easement in its natural state, and he is forbidden from developing it in any way other than constructing and maintaining the artificial wetland for public enjoyment. This solution demonstrates the effectiveness of NUDEP possessing the primary enforcement responsibility under the Clean Water Act.

For these reasons, NUDEP satisfies the demands of the diligent prosecution bar of 33 U.S.C. § 1365(b)(1)(B), and this Court should affirm the holding of the district court, namely,

that NUWF's citizen suit is barred by NUDEP's diligent prosecution of Bowman's violations of the Clean Water Act.

IV. BOWMAN'S ACTIONS SATISFY ALL OF THE ELEMENTS REQUIRED FOR VIOLATIONS OF SECTIONS 301(A) AND 404 OF THE CLEAN WATER ACT

This Court should reverse the district court's ruling that Bowman did not violate sections 301(a) and 404 of the CWA. The district court improperly extended the definition of an element necessary for a violation from a different section of the CWA, and the district court's use of EPA's section 402 interpretation of "addition" would lead to illogical results in the context of section 404 litigation.

The goal of the Clean Water Act is to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a). To achieve this goal, section 301(a) of the Clean Water Act makes unlawful "the discharge of any pollutant by any person," except in compliance with a permit under schemes such as section 402 or 404 of the Act. 33 U.S.C. § 1311(a) (2012). Section 502(12) of the CWA defines "discharge of a pollutant" as "any addition of any pollutant to navigable waters from any point source." Id. § 1362(12). A pollutant may include "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(6). However, "addition" is not defined in the Clean Water Act, see 33 U.S.C. § 1362, nor in the corresponding regulations.

In addition to protecting the navigable waters of the United States, the Clean Water Act protects wetlands that are adjacent to navigable waters. United States v. Riverside Bayview Homes, Inc., 474 U.S. 121, 139 (1985) (holding that the Army Corps of Engineers "acted reasonably in interpreting the Act to require permits for the discharge of fill material into

wetlands adjacent to the "waters of the United States"). The Army Corps of Engineers recognizes the value of wetlands in its regulations. See 33 C.F.R. § 320.4(b)(1) ("Most wetlands constitute a productive and valuable public resource, the unnecessary alteration or destruction of which should be discouraged as contrary to the public interest."). Wetlands also "serve significant natural biological functions, including food chain production, general habitat and nesting, spawning, rearing and resting sites for aquatic or land species[.]" Id. § 320.4(b)(2)(i).

All parties agree that the dredge and fill material that Bowman moved on his property was a pollutant, that the bulldozers were point sources, and that the Muddy River constitutes a navigable water. (R. 8–9.) The district court highlighted the fact that "the same term used in different parts of the same statute has the same meaning, unless Congress clearly provides otherwise," (R. 9) (citing Sorenson v. Sec'y, 475 U.S. 851, 860 (1986)), and the court found that Bowman's actions did not amount to an "addition." (Id.) The court also incorrectly embraced the "outside world" and "unitary navigable waters" theories when it discussed the element of "addition." (R. 9.) Thus, the district court erred by not holding that Bowman violated sections 301 and 404 of the Clean Water Act when he moved dredged and fill material on the his property, a wetland adjacent to the Muddy River, without a section 404 permit from the Army Corps of Engineers.

A. The district court used the improper definition of "addition" in its decision

The district court cites Sorenson v. Secretary for the proposition that "the same term used in different parts of the same statute has the same meaning, unless Congress clearly provides otherwise." (R. 9) (citing Sorenson v. Sec'y, 475 U.S. 851, 860 (1986)). While the court acknowledged that "there are any number of decisions holding that land clearing activities violate the CWA without a [section] 404 permit," (R. 10), the court selectively chose to use the

EPA's theories and interpretations of "addition" that have developed through section 402 NPDES permit litigation. (Id.)

A particular term in a statute may take on distinct characteristics through its association with distinct statutory objects calling for different implementation strategies. Envt'l Def. v. Duke Energy Corp., 549 U.S. 561, 574 (2007). Although it is presumed that the same term carries the same meaning throughout one statute, that presumption is not irrebutable. Id. In Duke Energy, the issues was whether the term "modification" had to have the same meaning in the New Source Performance Standards ("NSPS") and Prevention of Significant Deterioration ("PSD") sections of the Clean Air Act, even where the "PSD language referred back to the section defining 'modification' for NSPS purposes." Id. at 576 ("[T]he cross-reference alone is certainly no unambiguous congressional code for eliminating the customary agency discretion to resolve questions about a statutory definition by looking to the surroundings of the defined term, where it occurs."). The Court held that EPA was not required to interpret the term congruently in its regulations, id., acknowledging that the

> natural presumption that identical words used in different parts of the same act are intended to have the same meaning ... is not rigid and readily yields whenever there is such variation in the connection in which the words are used as reasonably to warrant the conclusion that they were employed in different parts of the act with different intent.

Id.; see also Robinson v. Shell Oil Co., 519 U.S. 337, 343–44 (1987) (holding that each section of Title VII "must be analyzed to determine whether the context gives the term a further meaning that would resolve the issue on dispute").

As a general rule, however, the permitting schemes under section 402 and 404 are distinct and separate. Both section 402 and section 404 of the Clean Water Act govern the discharge of pollutants from point sources. See 33 U.S.C. §§ 1342, 1344. The NPDES permit program under

section 402 is administered by EPA, and the fill material discharge permitting scheme under section 404 is administered by the Army Corps of Engineers. United States v. Bay-Houston Towing Co., 33 F. Supp. 2d 596, 599 (E.D. Mich. 1999). In order to achieve the goals of the Clean Water Act, Congress gave "broad authority to both of these agencies" to enforce their provisions of the Act. United States v. Sinclair Oil, 767 F. Supp. 200, 203 (D. Mont. 1990). Pursuant to section 402, the EPA Administrator may issue permits "authorizing the discharge of pollutants in accordance with specified conditions." Gwaltney v. Chesapeake Bay Found., 484 U.S. 49, 52 (1987) (citing 33 U.S.C. § 1342). Under section 404, "[t]he Secretary [of the Army] may issue permits … for the discharge of dredged or fill material into the navigable waters at specified disposal sites." 33 U.S.C. § 1344(a). Fill material is material that is placed in waters of the United States which ultimately replaces a portion of a water with dry land, or material that changes the bottom elevation of a portion of a water of the United States. 33 C.F.R. §§ 323.2(e)(1)(i)–(ii). Dredged material is material "excavated or dredged from waters of the United States." 33 C.F.R. § 323.2(c).

Further emphasizing the difference between section 402 and 404 is the fact that section 404 specifically exempts discharge that is subject to regulation under section 402, 33 U.S.C. § 1344(f)(1), and section 402 specifically exempts pollutants that fall under the regulatory power of section 404. See Coeur Alaska, Inc. v. Southeast Alaska Conservation Council, 557 U.S. 261, 270 (2009) (citing 33 U.S.C. § 1342(a)) (EPA may "issue a permit for the discharge of any pollutant, except as provided in [CWA § 404]") (internal quotations and alterations omitted) (emphasis added). In Coeur Alaska, Inc. v. Southeast Alaska Conservation Co., the Supreme Court held that the Army Corps of Engineers, and not the EPA, has the authority to issue permits for fill material under section 404 of the Clean Water Act. Coeur Alaska, Inc., 557 U.S. at 275.

EPA's only role in section 404 enforcement is that it can veto a Corps permit, and prohibit the discharge, if it finds the plan to have "an unacceptable adverse effect on municipal water supplies, shellfish beds and fishery areas ..., wildlife, or recreational areas." 33 U.S.C. § 1344(c).

Thus, the district court should not have used the definition of "addition" from section 402. The court was addressing section 404, and not 402. All of the parties involved in the case have acknowledged that the pollutant at issue was fill material, (R. 8), and only the Army Corps of Engineers has permitting authority under section 404 for fill material. The section 402 cases and regulations upon which the district court relied for its definition were litigated and promulgated by EPA, and not the Army Corps of Engineers. (R. 8–10.) None of the section 402 NPDES cases cited by the district court focused on the discharge of fill material, and the district court acknowledged that "there are any number of decisions holding that land clearing activities violate the CWA without a [section] 404 permit." (R.10); see Borden Ranch P'ship v. United States Army Corps of Eng'rs, 261 F.3d 810 (9th Cir. 2001) ("[A]ctivities that destroy the ecology of a wetland are not immune from the Clean Water Act merely because they do not introduction of material from somewhere else."); Avoyelles Sportsmen's League v. Marsh, 715 F.2d 897 (5th Cir. 1983) (holding that the word "addition" may be reasonably understood to include "redeposit").

As demonstrated by the holding of the Supreme Court in Duke Energy, the differences between the section 402 and 404 permitting schemes are precisely the types of differences which would merit an incongruous definition of "addition" within the Clean Water Act. For these reasons, this Court should hold that the district court used an improper definition of "addition," and that Bowman did violate sections 301(a) and 404 of the CWA when he moved dredged and fill material within the wetland.

B. The district court's use of EPA's "outside world" and "unitary navigable waters" theories would lead to illogical results in section 404 litigation

In its decision below, the district court focused on the "outside world" and the "unitary navigable waters" theories. (R. 9–10.) These theories were developed in the context of highly fact-specific NPDES litigation under section 402, as polluters searched for ways to side-step NPDES permit requirements. In the context of section 404, however, these theories would lead to illogical and improper results, and would usurp the power of the Army Corps of Engineers to properly enforce the regulations regarding dredged and fill material it has developed.

The "outside world" theory of "addition" originated in National Wildlife Federation v. Gorsuch, 693 F.2d 156, 175 (D.C. Cir. 1982), and National Wildlife Federation v. Consumers Power Co., 862 F.2d 580 (6th Cir. 1988). In Gorsuch, the sole issue was whether under section 402, "certain dam-induced water quality changes constitute the 'discharge of a pollutant' as … defined in [section] 502(12) of the Act, 33 U.S.C. § 1362(12)." Id. at 161. National Wildlife Federation argued that the release of polluted water from the dam into the downstream river constituted "the 'addition' of a pollutant to navigable waters 'from' a point source." Id. at 165. In contrast, EPA argued that for "addition" to occur that "the point source must introduce the pollutant into navigable water from the outside world." Id. Although the district court found that EPA's "'overly literal and technical' construction was the 'more tortured' and was also the reading less consonant with Congress' zero-discharge goal," id. at 166 (citing Nat'l Wildlife Fed'n v. Gorsuch, 530 F. Supp. 1291, 1307 (D.D.C. 1982)), the District of Columbia Circuit Court of Appeals ("D.C. Circuit") held that because the EPA's interpretation of the term "discharge of a pollutant" was "reasonable, not inconsistent with congressional intent, and entitled to great deference," it must be adhered to, and reversed the holding of the district court. Id. at 183. In its conclusion, the court stressed the narrow scale of its holding:

> In closing, we emphasize the narrowness of our decision. It is not our function to decide whether EPA's interpretation of the term "discharge of a pollutant" is the best one or even whether it is more reasonable than the Wildlife Federation's interpretation. We hold merely that EPA's interpretation is reasonable, not inconsistent with congressional intent, and entitled to great deference[.]

Id.

Not heeding the Gorsuch court's warning, in Consumers Power Co., the Sixth Circuit Court of Appeals continued the D.C. Circuit's line of reasoning, and held that the "movement of pollutants already in the water is not an "addition" of pollutants to navigable waters of the United States." Consumers Power Co., 862 F.2d at 580. Both the Consumers Power Co. and Gorsuch courts utilized a five-element framework: (1) a pollutant must be (2) added (3) to navigable waters (4) from (5) a point source." Id. at 583 (citing Gorsuch, 693 F.2d at 165) (emphasis omitted). At issue was a hydroelectric facility, which generated power by pumping water through turbines and then back into Lake Michigan. Id. at 581. The live and dead fish pumped through the facility were pollutants under the CWA, id. at 583, so the court had to address whether the facility added pollutants from the outside world to Lake Michigan. Id. at 584. EPA again took the position that "for NPDES requirements to apply, dam-caused water quality changes must result from the addition of pollutants." Id. The court applied Chevron deference to the EPA's interpretation of the statute, and agreed with the District of Columbia Circuit that "EPA's definition of "added" as the introduction of a pollutant to water from the outside world is a permissible construction of "added," and that there are no compelling indications either in the statutory scheme, the legislative history, or anywhere else, that such a construction is wrong." Id. (citing Gorsuch, 693 F.2d at 175).

In Catskill Mountains Chapter of Trout Unlimited, Inc. v. City of New York, the Second Circuit Court of Appeals agreed with the Gorsuch court that for a discharge of a pollutant to be an "addition," the point source must introduce the pollutant from the outside world, provided that

"'outside world' is construed as any place outside the particular water body to which pollutants are introduced." Catskill Mountains Chapter of Trout Unlimited, Inc. v. City of New York, 273 F.3d 481, 491 (2d Cir. 2001). Thus under its understanding of "addition," the court held that "the transfer of water containing pollutants from one body of water to another, distinct body of water is plainly an addition and thus a 'discharge' that demands an NPDES permit." Id. at 491.

The "unitary waters theory" maintains that it is not an "addition" for purposes of the CWA, and thus no National Pollutant Discharge Elimination System ("NPDES") permit is required, to "move existing pollutants from one navigable water to another." Friends of the Everglades v. South Fla. Water Mgmt. Dist., 570 F.3d 1210, 1217 (11th Cir. 2009). Under this theory all navigable bodies of water are treated as one, and thus, an "addition" occurs only "when pollutants first enter navigable waters from a point source, not when they are moved between navigable waters." Id.; see also South Fla. Water Mgmt. Dist. v. Miccosukee Tribe of Indians, 541 U.S. 95, 105–06 (2004).

In 2008, EPA issued a regulation stating that "water transfers are not subject to regulation under the National Pollutant Discharge Elimination System (NPDES) permitting program." NPDES Water Transfers Rule, 73 Fed. Reg. 33,697 (June 13, 2008). Even though the regulation addressed water transfers, it also mandated that "[c]onveyances that remain within the same water of the U.S., therefore, do not constitute water transfers under this rule, although movements of water within a single water body are also not subject to NPDES permitting requirements." Id. at 33,699 (emphasis added).

In Friends of the Everglades v. South Florida Water Management District, the issue before the Eleventh Circuit was whether it would constitute an "addition" for purposes of section 402 of the CWA to move "an existing pollutant from one navigable water body to

another." Friends, 570 F.3d at 1216. Runoff water which contained toxic pollutants was stored in canals separated from Lake Okeechobee and then was pumped through the Herbert Hoover Dike by pump stations. Id. at 1214. Environmental groups sought an injunction to force the local water district to obtain a NPDES permit before it could continue pumping the water into Lake Okeechobee. Id. Despite expressing concern regarding the "unitary waters theory," id. at 1217 ("The unitary waters theory has a low batting average. In fact, it has struck out in every court of appeals where it has come up to the plate."), the court held that the pumping of the water did not necessitate a NPDES permit. Id.

The "outside world" theory would trample the discretion of the Army Corps of Engineers' in administering the section 404 permitting scheme if applied to section 404 actions, and would lead to illogical results. The definition of "dredge" allows the Corps to designate material as pollutants that do not necessarily contain any added elements from the outside world. See 33 C.F.R. § 323.2(c) ("The term dredged material means material that is excavated or dredged from waters of the United States."). In contrast to the materials regulated under the NPDES program, under section 404, the transformation of a non-pollutant into a pollutant occurs as soon as the soil is moved. See United States v. Deaton, 209 F.3d 331, 335 (4th Cir. 2000) ("The idea that there could be an addition of a pollutant without an addition of material seems to us entirely unremarkable, at least when an activity transforms some material from a nonpollutant into a pollutant, as occurred here."); Avoyelles Sportsmen's League, Inc. v. Marsh, 715 F.2d 897, 923–25 (5th Cir. 1983) (interpreting the term "addition" to include "redeposit" of trees and vegetation that had been dredged from or excavated from the wetland itself). When it addressed the Fourth Circuits treatment of Deaton, the district court stated that "nothing is added when a defendant moves soil, no matter what you call it, a mere few feet within a wetland." (R. 10.)

Protecting a wetland is not like protecting a body of water; this transformation from non-pollutant to pollutant not an "imaginative piece of verbal metaphysics," but it is plausible, when what is at stake serves "significant natural biological functions, including food chain production, general habitat and nesting, spawning, rearing and resting sites for aquatic or land species[.]" 33 U.S.C. § 320.4(b)(2)(i). Applying the "outside worlds" theory to Bowman's property would have disastrous effects. The entire property is considered a wetland, (R. 3–4), so as a matter of law, nothing on his property would constitute being from the "outside world." Bowman would be able to push whatever he wanted, even with a bulldozer or any point source, around his property or into the Muddy River without a section 404 permit under this theory.

The "unitary navigable waters" theory would also have disastrous effects on the preservation of wetlands. If this theory were to be applied to section 404, no permit would be needed to add dredged spoil or fill if it was moved within or between navigable waters or wetlands adjacent to navigable waters. This would greatly frustrate the original intent of the 404 permitting scheme "for disposal of dredged spoil from dredging harbors and navigation channels at a considerable distance from their point or origin." Bay-Houston Towing Co., 33 F. Supp. 2d at 604. Thus, if the pollutant came out of any wetland or navigable water body, it could be placed in any wetland or navigable water body without a section 404 permit.

Not all of the CWA treats the navigable waters of the United States as one unitary body of water, and this construction of "addition" conflicts with every section of the CWA that contemplates local permitting schemes. See Miccosukee Tribe of Indians, 541 U.S. at 107–09. For example,

> under the Act, a State may set individualized ambient water quality standards by taking into consideration "the designated uses of the navigable waters involved." 33 U.S.C. § 1313(c)(2)(A). Those water quality standards, in turn, directly affect local NPDES permits; if standard permit conditions fail to achieve the water

> quality goals for a given water body, the State must determine the total pollutant load that the water body can sustain and then allocate that load among the permit holders who discharge to the water body.

Miccosukee Tribe of Indians, 541 U.S. at 107. Similarly, wetlands cannot be treated as a "unitary navigable water" because permits for their protection are contemplated and allocated on a case-by-case, local review basis. See 33 C.F.R. § 320.4(a)(1). The Army Corps of Engineers considers

> [a]ll factors which may be relevant … including … conservation, economics, aesthetics, general environmental concerns, wetlands, historic properties, fish and wildlife values, flood hazards, floodplain values, land use, navigation, shore erosion and accretion, recreation, water supply and conservation, water quality, energy needs, safety, food and fiber production, mineral needs, considerations of property ownership and, in general, the needs and welfare of the people.

Id. Having the ability to introduce non-native pollutants into any wetland, as long as they came from a wetland, would prove disastrous and frustrate local protection efforts. This construction of "addition" simply cannot be used, and the district court erred in not using the construction of the statute used by the numerous courts that have held that moving fill material within a wetland constitutes discharge of a pollutant under section 301(a) of the CWA.

Therefore, because Bowman did not possess a permit issued by the Army Corps of Engineers pursuant to section 404 of the Clean Water Act, and he discharged fill material into a wetland adjacent to a navigable water of the United States using a point source, the district court erred in holding that Bowman did not violate 301(a) of the Clean Water Act, and this Court should reverse the holding of the district court.

CONCLUSION

For the reasons stated above, this Court should reverse the district court's holdings that NUWF has standing to bring a section 505 claim against Bowman, and that Bowman did not violate sections 301(a) and 404 of the CWA, and should affirm the district court's holding regarding there being no continuing violation and NUDEP's "diligent prosecution" of Bowman.