C.A. No. 13-1246

IN THE

United States Court of Appeals
For the Twelfth Circuit

SPRING TERM, 2013

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 DEFENDANT-APPELLEE

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JURISDICTIONAL STATEMENT

Appellants New Union Department of Environmental Protection and New Union Wildlife Federation filed a Complaint in the United States District Court for the District of New Union under 33 U.S.C. § 1365 (2006).

On June 1, 2012, the district court granted Jim Bob Bowman's motion for summary judgment on all counts and denied NUDEP and NUWF's motions for summary judgment on all counts. The district court's order is a final decision. Jurisdiction to review the district court's decision is proper pursuant to 28 U.S.C. § 1291 (2006).

STATEMENT OF THE ISSUES

1. Whether Jim Bob Bowman violated the Clean Water Act when he leveled vegetation on his wetland property, discharged it without adding anything outside his wetland property where his property is subject to natural flooding and draining.
2. Whether there is a continuing or ongoing violation of the Clean Water Act, as required by § 505(a), in order to establish subject matter jurisdiction.
3. Whether a not for profit group concerned with wildlife protection has standing to bring a citizen suit against Jim Bob Bowman for an alleged violation of the Clean Water Act.
4. Whether NUWF's citizen suit has been barred by NUDEP's diligent prosecution of Jim Bob Bowman, pursuant to a settlement agreement, as laid out in § 505(b) of the Clean Water Act.

STATEMENT OF THE CASE

This is an appeal from an order entered by Judge Remus in the United States District Court for the District of New Union, rendered June 1, 2012, on Mr. Bob Bowman's motion for summary judgment against New Union Wildlife Federation (NUWF). R. at 11. The district court justified granting Mr. Bowman's summary judgment on four grounds. Specifically, the

district court opined that: 1) NUWF lacked standing, 2) the court lacked subject matter jurisdiction because Mr. Bowman's violations are wholly past; 3) the court lacked subject matter jurisdiction due to New Union Department of Environmental Protection's (NUDEP) prior state action; and 4) there was no violation of the Clean Water Act (CWA). R. at 11.

Mr. Bowman is the Appellee in this case. Mr. Bowman counters NUWF and NUDEP's arguments that NUWF has standing to bring a citizen suit and that his actions satisfied all the elements required for a violation of §§ 301(a) and 404. R. at 1-2. NUDEP joins NUWF on the CWA violation and standing issues. R. at 5. NUDEP joins Mr. Bowman on the continuing violation and diligent prosecution issues. R. at 5. Therefore, Mr. Bowman supports the result reached by the district court that granted him summary judgment.

STATEMENT OF THE FACTS

At issue in this case is a small tract of land that abuts the Muddy River. R. at 3. Jim Bob Bowman, Appellee, owns 1,000 acres of both wooded and cleared land that includes 650 feet of Muddy River shoreline. R. at 3. Muddy River stretches over 40 miles both upstream and downstream from Mr. Bowman's parcel of land. R. at 3. The 650-foot tract of land along the river, as it exists now, is in the process of becoming an ecologically rich, fully inundated wetland. R. at 6.

Mr. Bowman started land-clearing activities on June 15, 2011 in order to plant winter wheat seeds. R. at 4-5. The land-clearing activities did not occur along the banks of the Muddy River. R. at 4. Mr. Bowman left a 150-foot tract along Muddy River's bank clear. R. at 4. To make his land capable of cultivation, Mr. Bowman leveled vegetation and placed them into windrows, which he then burned. R. at 4. Mr. Bowman dug ditches on his land and leveled the vegetation and windrow remnants into them. R. at 4. After doing so, Mr. Bowman created a

swale that led from the back of his property to Muddy River, which he used to drain his land. R. at 4.

The New Union Department of Environmental Protection (NUDEP) notified Mr. Bowman that he had violated state and federal law. R. at 4. While Mr. Bowman maintains that he did not commit any violation of either state or federal law, he agreed to enter into a settlement with NUDEP. R. at 4. As part of the agreement, Mr. Bowman made the 150-foot tract along the Muddy River a conservation easement that he separated from his cleared land with a 75-foot buffer zone in lieu of penalty. R. at 4. The conservation easement will provide a year round wetland as opposed the partially inundated wetland that existed prior to Mr. Bowman's construction plans. R. at 4. NUDEP's expert has indicated that this conservation easement will provide a richer wetland habitat along the Muddy River than had previously existed. R. at 6. NUDEP also included in this agreement an administrative order, which Mr. Bowman consented to, on August 1, 2011. R. at 4. The administrative order was issued under a state statute that was virtually identical in relevant parts to §§309(a) and (g) of the CWA. R. at 6. NUDEP chose not to issue a penalty for Mr. Bowman's alleged violations. R. at 4. Nine days after issuing the order, NUDEP brought suit in federal court. R. at 5.

The New Union Wildlife Federation (NUWF) is a not for profit entity under the laws of New Union. R. at 4. NUWF's goals include the protection of fish, wildlife, and their habitats. R. at 4. NUWF alleged that their legal interests to Muddy Rivers were adversely affected through three affidavits from three of its members. R. at 6. These affidavits hinge on their recreational interests in Muddy River, as the three members all use it for boating, fishing, and picnicking on the banks. R. at 6. However, the three NUWF members do not indicate that the frequency or their enjoyment of these activities have been affected. R. at 6. One member, Dottie

Milford, alleges that the river appears different than it used to and is therefore worried about the river. R. at 6. Ms. Milford also expressed a generalized fear that more wetlands on the Muddy River will be cleared and drained. R. at 6. Another member, Zeke Norton, presented a grievance that he can no longer illegally use Mr. Bowman's private property to catch frogs. R. at 6.

SUMMARY OF THE ARGUMENT

This Court should affirm the district court's holding that granted Mr. Bowman summary judgment on all counts. First, New Union Wildlife Federation (NUWF) has failed to establish that Mr. Bowman satisfied the necessary elements for a Clean Water Act (CWA) violation. Mr. Bowman did not violate the CWA because he did not "discharge" pollutants in navigable waters. When Mr. Bowman cleared his land there was no "addition" of dredged or fill materials into waters of the United States. Even if this Court determines that Mr. Bowman discharged dredged or fill material, Mr. Bowman's activities are exempt from obtaining a § 404 permit under the "normal farming activities exemption." Mr. Bowman's land clearing and farming operations satisfy the definitions for "minor drainage" and "plowing," making any discharge of dredged or fill material exempt from § 404 permitting requirements.

Second, this Court does not have subject matter jurisdiction because Mr. Bowman's alleged violation is not continuous or ongoing. Mr. Bowman has agreed with New Union Department of Environmental Protection (NUDEP) not to clear any more wetlands on his propertt. As a result, Mr. Bowman is prohibited from any § 404 violation activities. NUWF may not obtain subject matter jurisdiction for its § 505 suit by alleging that illegal fill remains in Mr. Bowman's wetlands and thus is a continuous violations of the CWA. Consequently, Mr. Bowman is not continuously in violation § 404 and, even if Mr. Bowman did violate § 404, the

violation is wholly past; therefore, NUWF does not have matter jurisdiction for its § 505 citizen suit.

Third, NUWF does not have standing to bring suit in this Court. NUWF's interests in the suit are not germane to the organization. NUWF's purpose is "to protect the fish and wildlife of the state by protecting their habitats" while the interests NUWF represents in this litigation surround recreational boating and frogging. NUWF claims that their members have a recreational interest in the Muddy River and that interest was and will be adversely affected when Mr. Bowman placed fill material in the river. However, NUWF does not offer any concrete evidence that this interest has or will be actually affected, and have thus failed to establish injury-in-fact requisite for standing.

Finally, NUDEP's diligent prosecution of Mr. Bowman bars NUWF's citizen suit. NUWF's citizen suit is barred because NUDEP commenced a civil action in the district court before NUWF filed its citizen suit. NUDEP is diligently prosecuting the enforcement action against Mr. Bowman because the proposed consent decree requires compliance with the CWA. Moreover, NUDEP issued Mr. Bowman an administrative order under a "virtually identical" statute to that of §§ 1319(a), (g) of the CWA. Therefore, NUWF's citizen suit seeks to remedy something that is already in the process of being remedied by NUDEP, and is therefore barred. NUDEP's decision to not assess penalties in its administrative order and consent decree was nothing more than a discretionary matter, to which this Court should defer.

ARGUMENT

Under Federal Rule of Civil Procedure 56, a "court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." There is "no genuine dispute as to a material fact" when the

party that will bear the burden of proof at trial "fails to make a showing sufficient to establish the existence of an element essential to [their] case." *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). The movant is then entitled to "judgment as a matter of law" because the non-movant "has failed to make a sufficient showing on an essential element of her case with respect to which she has the burden of proof." *Id.*

This Court should affirm the trial court's grant of summary judgment to Mr. Bowman because New Union Wildlife Federation (NUWF) has failed to establish that Mr. Bowman satisfied the necessary elements of a Clean Water Act (CWA) violation. Mr. Bowman did not violate the CWA because he did not "discharge" pollutants into navigable waters. NUWF does not have subject matter jurisdiction to bring this suit because the alleged violation is wholly past. Moreover, NUWF does not have standing to bring this § 505 CWA citizen suit because its members have not established that they have suffered an injury-in-fact that is traceable to Mr. Bowman's activities. Finally, NUWF's citizen suit is barred by New Union Department of Environmental Protection's (NUDEP) diligent prosecution of Mr. Bowman. Accordingly, this Court should affirm the trial court's grant of summary judgment to Mr. Bowman.

I. MR. BOWMAN DID NOT VIOLATE THE CLEAN WATER ACT.

Section 301 of the CWA makes the "discharge of any pollutant by any person" unlawful except when the CWA authorizes, such as through a permit. 33 U.S.C. §§ 1311(a) (2006) (§ 301: prohibiting discharges except when in compliance with specific sections of the CWA); 1344(a) (§ 404: providing for permitted discharges of dredged or fill materials into navigable waters). Section 404 of the CWA focuses on the discharge of dredged or fill material into waters of the United States, including wetlands, and establishes a permit program that the United States Army Corps of Engineers (USACE) or an approved State agency oversees. 33 U.S.C. § 1344.

The prima facie elements of a § 404 violation are satisfied when the defendant places dredged or fill material into navigable waters without a permit. *Id.*; *United States v. Brace*, 41 F.3d 117 (3rd Cir. 1994). When a defendant violates § 404 by not obtaining a permit, he/she also violates § 301 by discharging pollutants in a manner that does not comply with the CWA. 33 U.S.C. §§ 1311; 1344. Neither party disputes that Mr. Bowman has never obtained a § 404 permit, or that Mr. Bowman's property is a wetland that abuts a navigable waterway. However, Mr. Bowman did not, as the plaintiffs allege, discharge pollutants by adding dredged or fill material into navigable waters. Should this Court finds there was a discharge, the discharge was exempt as part of a normal farming activity. Thus, Mr. Bowman did not violate the CWA when he cleared his wooded property.

A. POLLUTANT, POINT SOURCE, AND NAVIGABLE WATERS.

The CWA defines "discharge of a pollutant" to mean "any addition of any pollutant to navigable waters from any point source," while "navigable waters" means "waters of the United States. 33 U.S.C. §§ 1362(12), 1362(7) (2006). The CWA defines pollutant as "dredged spoil (…) biological materials (…) rock, sand (…) and agricultural waste discharged into water. 33 U.S.C. § 1362(6) (2006). EPA defines dredged material as "material that is excavated or dredged from waters of the United States." 40 C.F.R. § 232.2 (2012). Fill material is "material placed in waters of the United States where the material has the effect of: (i) Replacing any portion of a water of the United States with dry land; or (ii) Changing the bottom elevation of any portion of a water of the United States," with examples of fill material including soil, wood chips, and excavation overburden. *Id.* No party contests that the vegetation that Mr. Bowman leveled, moved into windrows, and then burned constituted pollutants, satisfying the "pollutant" element of a CWA violation. R. at 8.

"Point source" means "any discernible, confined, and discrete conveyance (…) including (…) any ditch, channel (…) or vessel." 33 U.S.C. § 1362(14). A bulldozer that clears vegetation from a wetland and creates windrows can be a point source. *Avoyelles Sportsmen's League, Inc. v. Marsh*, 715 F.2d 897 (5th Cir. 1983); *United States v. Holland*, 373 F.Supp. 665 (M.D. Fl. 1973) (bulldozer is a point source). Mr. Bowman used a bulldozer to level trees and other vegetation, which he then pushed into windrows, and created a ditch or swale on his property that drained his field into the Muddy River. Thus, Mr. Bowman's activities leveling activities satisfy the "point source" element.

Navigable waters are "waters of the United States," and the USACE and the US Environmental Protection Agency (EPA) define "waters of the United States" to include wetlands adjacent either to waters used in interstate commerce or any interstate body of water. 33 C.F.R. § 328.3(a)(1), (a)(2) (2012); *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121 (1985) ("wetland" as defined by USACE regulations adjacent to navigable water is itself navigable water). Neither party disputes that Mr. Bowman's property is a wetland, or that it is adjacent to the Muddy River. R. at 4. The parties also agree that the Muddy River is navigable and supports recreational navigation. R. at 9. Moreover, the Muddy River is the border between the State of New Union and the State of Progress. R. at 3. Thus, the Muddy River is an interstate, navigable water, satisfying the "navigable water" element. As a result, Mr. Bowman 'moved' pollutants that passed through a point source into navigable waters, but as discussed in B *infra*, he did not "discharge" pollutants through his activities.

B. DISCHARGE.

The CWA defines "discharge of a pollutant" as "any *addition* of any pollutant to navigable waters from any point source." 33 U.S.C. § 1362(12) (2006) (emphasis added). The regulations

applicable to § 404 repeat this language, defining the discharge of dredged material to mean "any addition of dredged material into, including redeposit of dredged material other than incidental fallback within, the waters of the United States." 40 C.F.R. § 232.2 (2012). The discharge of fill material is "the addition of fill material into waters of the United States." *Id.* While the CWA does not define "addition," EPA has interpreted "addition" in its Water Transfer Rule, which is an adoption of the unitary waters theory:

> "Water transfer means an activity that conveys or connects waters of the United States without subjecting the transferred water to intervening industrial, municipal, or commercial use. This exclusion does not apply to pollutants introduced by the water transfer activity itself to the water being transferred."

40 C.F.R. § 122.3(i) (2012); originally published in NPDES Water Transfers Rule 73 Fed. Reg. 33, 697-708 (June 13, 2008).

The 11th Circuit held that the phrase "any addition of any pollutant to navigable waters from any point source" was ambiguous, and thus EPA's adoption of the unitary waters theory is a reasonable construction of the statute deserving *Chevron* deference. *Friends of Everglades v. S. Fla. Water Mgmt. Dist.*, 570 F.3d 1210 (11th Cir. 2009); *see also S. Fl. Water Mgmt. Dist. v. Miccosukee Tribe of Indians*, 541 U.S. 95, 109 (2004) (leaving unitary waters argument open on remand); *Chevron, U.S.A., Inc. v. Natural Res. Def. Council*, 467 U.S. 837 (1984) (when statute ambiguous, courts will defer to agency interpretation affording it presumption of permissible construction unless interpretation is unreasonable, arbitrary or capricious).

The 11th Circuit found that both the plaintiffs' and defendants' competing interpretations of "addition to navigable waters" were reasonable, and thus the statute was ambiguous. *Id.* at 1227. Plaintiffs argued that "to navigable waters" refers to each individual water body, and thus the statute means "any addition of any pollutant to *any* navigable waters." *Id.* at 1223. Consequently, the transfer of polluted water from one navigable water to another would be an

"addition" subject to a § 402 permit. *Id.* Conversely, the defendants' unitary waters theory posits that no "addition to navigable waters" occurs when one moves existing pollutants from one navigable water to another. *Id.* at 1218. All navigable waters are 'united,' and thus addition of pollutants into navigable waters only occurs upon the pollutant's *initial* entry into the waters, not upon successive transfers of the polluted water. The court found that both interpretations were reasonable, making the statute ambiguous, but because EPA's Water Transfer Rule adopted one of the reasonable interpretations, the rule itself was reasonable. *Id.* at 1227-28. Thus the court held that EPA's Water Transfer Rule adopting the unitary waters theory was entitled to *Chevron* deference because it was a reasonable interpretation of an ambiguous statute. *Id.* at 1228.

In *National Wildlife Federation v. Gorsuch*, EPA successfully argued that "addition" from a point source only occurs where the point source itself introduces pollutants "into water from the outside world." 693 F.2d 156, 175 (D.C. Cir. 1982). The court deferred to EPA's interpretation that dams discharging water that contained pollutants that the dams did not add were not subject to the § 402 permit program. *Id.* at 183.

Courts have held that using a bulldozer to clear and level wetland vegetation constitutes discharging fill material into wetlands, and that a defendant who fails to obtain a permit for these activities violates § 404. *See United States v. Pozsgai*, 999 F.2d 719, 721 (3d. Cir. 1993) (clearing and redepositing wetland vegetation using a bulldozer without necessary 404 permit); *Brace*, 41 F.3d at 120-21 (clearing, leveling, and draining wooded and vegetated wetland required 404 permit); *Avoyelles*, 715 F.2d at 900-1 (bulldozing and leveling wetland vegetation required 404 permit); *United States v. Cumberland Farms of Conn., Inc.*, 647 F.Supp. 1166, 1170 (D. Mass. 1986) (clearing vegetation and ditching wetland field with bulldozers required

404 permit). None of these decisions were made after EPA adopted the unitary waters theory in 2008 as the definition for "addition."

When Mr. Bowman cleared his land there was no "addition" of dredged or fill material into waters of the United States, thus he did not discharge any dredged or fill material or pollutants into waters of the United States. While the unitary waters theory and "from the outside world" language were both adopted in the § 402 context, their interpretation of "discharge" and "addition" is presumed to be applicable throughout the CWA, including § 404, unless Congress clearly provided otherwise. *See Kokoszka v. Belford*, 417 U.S. 642, 650 (1974) (when interpreting a statute, court will look at both the clause in which general words are used and at connection clause has with whole statute and policy of the law that its various provisions indicate). Congress has not explicitly provided for alternate definitions of addition in §§ 402 and 404, instead simply using "addition" in both sections. Cases like *Pozsgai, Brace, Avoyelles, and Cumberland*, holding that clearing and leveling wetlands constitutes a discharge, were decided before the EPA and the Eleventh Circuit adopted the unitary waters theory to be a reasonable interpretation of "addition." Accordingly, when the unitary waters theory of "addition" is applied to Mr. Bowman, his actions do not constitute an "addition," and he thus did not "discharge" pollutants as required by CWA §§ 301 and 404.

There is no indication in the record that the vegetation that Mr. Bowman cleared from his property was not always a part of the property. Thus the vegetation has always been a part of the waters of the United States, meaning it could not be added to the waters. The vegetation was initially added or "discharged" into the wetlands when the vegetation first started growing. There is nothing in the record to indicate that Mr. Bowman introduced the vegetation that he subsequently cleared. Instead this scenario is actually unlikely in light of section C, *infra*,

because if Mr. Bowman's farming activity was ongoing, he would not clear, level, and burn vegetation that he had planted if he planned to harvest and sell it. It makes no difference whether some of the plant life has now been moved around the property, burned, or started to decompose. Wetlands are a well-known source of peat, which is naturally decomposed plant matter from previous on-site vegetation. As a result, it is impossible for Mr. Bowman's actions to have created an "addition" of dredged or fill material into his wetlands. The earth, vegetation, and water have been and will continue to be part of the property, and were not added to his property or taken away from any other outside property. Consequently, Mr. Bowman's actions do not constitute an "addition" and are thus not a "discharge," meaning Mr. Bowman did not violate §§ 301 or 404 of the CWA.

C. SECTION 404 NORMAL FARMING ACTIVITY EXEMPTION AND RECAPTURE PROVISION.

Even if this Court finds that Mr. Bowman discharged dredged or fill material, the CWA does not require a § 404 permit for discharges of dredged or fill material from normal farming activities like plowing, seeding, cultivating, and minor drainage. 33 U.S.C. § 1344 (f)(1)(A) (2006). The defendant in a § 404 case has the burden to prove that their activities satisfy § 404(f)(1)(A) and also avoid "recapture" by 404(f)(2)(A):

> "Any discharge of dredged or fill material into the navigable waters incidental to any activity having as its purpose bringing an area of the navigable waters into a use to which it was not previously subject, where the flow or circulation of navigable waters may be impaired…shall be required to have a permit under this section…Activities which bring an area into farming…use are not part of an established operation. An operation ceases to be established when the area on which it was conducted has been converted to another use or has lain idle so long that modifications to the hydrological regime are necessary to resume operations"

33 U.S.C. § 1344 (f)(2)(A); 40 C.F.R. § 323.4 (a)(1)(ii) (2012); *Brace*, 41 F.3d at 124 (defendant has burden to satisfy 404(f)(1) and avoid recapture by 404(f)(2) by showing farming operation was established and ongoing); *Cumberland*, 647 F.Supp. at 1176 (same). Thus "normal farming

activities" that discharge dredged or fill material into navigable waters *that are also part of* an established or ongoing farming operation, *and* are in accordance with the definitions in 40 C.F.R. § 323.4 (a)(1)(iii), do not require a § 404 permit. 40 C.F.R. § 323.4(a)(1)(ii). "Plowing" means tillage and similar physical means used for breaking up and turning over soil for planting. 40 C.F.R. § 323.4 (a)(1)(iii)(D). While plowing will never involve a discharge if it occurs per its definition and is part of an ongoing farming operation, plowing *does not include* the distribution of soil and surficial materials in a manner which changes waters of the United States to dry land. *Id.* The definition for "minor drainage" includes discharging dredged or fill material that is incidental to connecting upland drainage facilities to waters of the United States in order to remove soil moisture from upland croplands, and construction of these facilities never involves a discharge and thus never requires a 404 permit. 40 C.F.R. § 323.4 (a)(1)(iii)(C)(1)(i) (2012).

In *Brace*, the defendant failed to establish that his land clearing activities were part of an ongoing farming operation. 41 F.3d at 125. The court interpreted the regulations to provide an exemption only when activities are part of an established farming operation at the cleared site in question. *Id.* Thus the court looked to the wetland site that was cleared and not to the surrounding land the defendant owned. *Id.* The defendant testified that for nine years before he cleared his wetlands, he did not grow any crops there, and his purpose in clearing was to drain the wetlands to make them suitable for row cropping. *Id.* As a result, the court held that the regulations do not consider a farming operation ongoing when the hydrological regime must be modified to resume operations. *Id.* at 126; *see also United States v. Akers*, 785 F.2d 814, 820-21 (9th Cir. 1986) (defendant argued he would be unable to farm unless he drained wetlands, which court interpreted as requiring hydrological alteration that ran afoul of regulations). Thus because the defendant's hydrological modifications were necessary to grow crops on the site and no crops

had been grown for over nine years, the defendant's activities were not part of an ongoing farming operation, and the defendant was thus required to have a § 404 permit. *Brace*, 41 F.3d at 126.

Even if this Court determines that Mr. Bowman discharged dredged or fill material, he is exempt from obtaining a § 404 permit because his activities fall under the "normal farming activities" exception. Neither party disputes that Mr. Bowman cleared his property, but there is nothing in the record to indicate that his property was not part of an ongoing farming operation. While Bowman may have cleared parts of his property, other parts may have been and may still be in use as farmland, and he thus could have cleared vegetation to expand his already existing farmland. This Court should follow the court's analysis in *Brace* and analyze the existence of Mr. Bowman's farming operation on the entire cleared site at issue, his entire 1,000 acres. There is no indication that Mr. Bowman's clearing activities were necessary to an ongoing farming operation. Mr. Bowman's property is "wooded or previously wooded land" that is "wholly within the one-hundred year flood plain," and portions of the flood plain and Mr. Bowman's property are inundated every year. R. at 3. Unlike in *Akers*, where the defendant admitted that draining his property was required for farming, Mr. Bowman waited for his field to drain to plant his winter wheat crop. R. at 5. The record is unclear if this drainage occurred naturally every year in relation to the flux of the high river inundation, or if Mr. Bowman's actions caused the drainage. Mr. Bowman's land clearing was thus part of a potentially ongoing farming operation, and his land clearing was not necessarily required for his farming operation to continue.

Additionally, if Mr. Bowman's farming operation was ongoing, his land clearing and farming operations satisfy the definitions for "minor drainage" and "plowing," making any discharge of dredged or fill material in connection with these activities exempt from § 404

permitting requirements. Plowing activity does not include activity which distributes soil into waters of the United States and turns them into dry land. However, nothing in the record indicates that the wetlands on Mr. Bowman's property are "dry land"; instead the Muddy River inundates Bowman's property every year. Moreover, any drainage that occurred as a result of Bowman's actions falls under the "minor drainage" definition, which in connection with an ongoing farming operation, does not require a § 404 permit. If this Court finds that Mr. Bowman discharged dredged or fill material, this Court may still find Mr. Bowman's actions were part of an ongoing farming operation, and that his plowing and minor drainage actions comply with the regulations. There is no record evidence to indicate that Mr. Bowman needed to drain his wetlands to farm or that he was not farming or harvesting from his property prior to his June 15, 2011 clearing operations. This Court should find that any of Mr. Bowman's discharges of dredged or fill material are exempt from obtaining a 404 permit.

Under the EPA and the Eleventh Circuit's unitary waters theory, there is no indication that Mr. Bowman's actions constituted an "addition," or that he "discharged" anything from his property into waters of the United States. Should this Court find that Mr. Bowman discharged dredged or fill material, Mr. Bowman's discharges are exempt under the normal farming activities exemption and do not require a § 404 permit.

II. THERE IS NO CONTINUOUS OR ONGOING VIOLATION OF THE CLEAN WATER ACT TO GIVE THIS COURT JURISDICTION.

Section 505 of the CWA allows citizens to commence a civil action "against any person…who is alleged to be in violation of…an effluent limitation or standard[.]" 33 U.S.C. § 1365(a) (2006). In order to obtain subject matter jurisdiction, the Supreme Court has interpreted "alleged to be in violation" to require CWA citizen suit plaintiffs to allege continuous or intermittent violation, which means there is a reasonable likelihood that a past polluter will

continue to pollute in the future. *Gwaltney of Smithfield, Inc. v. Chesapeake Bay Found., Inc.*, 484 U.S. 49 (1987). As a result, citizen plaintiffs may not bring a § 505 action for a CWA violation that is "wholly past." *Id.* at 64. The Court supported its interpretation by referencing the "language and structure" of § 505, which made it clear that citizen plaintiffs have a forward-looking interest. *Id.* at 59. Section 505 requires notice to a potential defendant before commencing suit, which would be meaningless for violations that are "wholly past" because the purpose of notice is to allow the violator to come into compliance. *Id.* at 59-60. Moreover, Congress used the present tense throughout § 505 in phrases such as "alleged to be *in* violation," and by defining citizen as "a person having an interest which *is or may be* adversely affected." *Id.* (emphasis added). The Court found that "alleged to be in violation" permits citizens to abate pollution when the governmental enforcement entities are not pursuing enforcement. *Id.* at 62.

The Court also held that § 505 grants subject matter jurisdiction to citizen plaintiffs when they "make a good-faith allegation of continuous or intermittent violation[.]" *Id.* at 64. Section 505 does not require that a potential defendant "be in violation when suit is commenced, but rather that a defendant be alleged to be in violation." *Id.* To determine whether a violation is ongoing or continuous, courts look to whether the defendant had an ongoing duty that was violated on a continuing basis. *United States v. Rutherford Oil Corp.*, 756 F.Supp.2d 782, 792-93 (S.D. Tex. 2010). If a violator has ceased discharging, the violation will end and start the statute of limitations running. *Id.* at 793. A continuing violation may involve an ongoing failure to perform a statutory duty. *Newell Recycling Co. v. EPA*, 231 F.3d 204 (5th Cir. 2000). When characterizing a violation as continuous, courts must "distinguish between the present consequences of a one-time violation, which do not extend the limitations period, and a

continuation of a violation into the present, which does." *Nat'l Parks & Conservation Ass'n v. Tenn. Valley Auth.*, 502 F.3d 1316, 1322 (11th Cir. 2007).

Courts have held that each day a pollutant remains in a wetland without a § 404 permit constitutes a day of violation. *See Sasser v. Adm'r, U.S. E.P.A.*, 990 F.2d 127, 129 (4th Cir. 1993); *Cumberland*, 647 F.Supp. at 1183-84; *United States v. Ciampitti*, 669 F.Supp. 684, 700 (D. N.J. 1987). The *Sasser* court determined that the defendant's violation was continuous for purposes of imposing a civil penalty, but not for purposes of determining whether the defendant was in violation in order to grant subject matter jurisdiction. 990 F.2d at 129. Likewise, in *Cumberland* the court counted the days that illegal fill material remained in a wetland as days of violation in order to impose civil penalties. 647 F.Supp. at 1183. The defendant in *Cumberland* continued unpermitted fill activities despite requests and orders from enforcement authorities to stop. *Id.* at 1184. The court viewed this violation in the face of enforcement to determine the gravity of the civil penalty, but not to determine whether a violation was continuous for terms of subject matter jurisdiction. *Id.* In *Ciampitti*, the defendant's failure to remedy his environmental damage was a factor the court considered in assessing civil penalties. 669 F.Supp. at 699-700.

Should this Court find that Mr. Bowman's activities constitute a discharge of dredged or fill material in violation of the CWA, the violation is wholly past, and thus NUWF does not have subject matter jurisdiction for a § 505 suit. Mr. Bowman has refrained from clearing and agreed not to further clear wetlands on his property, and placed his remaining wooded property in a conservation easement that requires him to keep the easement in its natural state. R. at 4. As a result, Mr. Bowman is prohibited from taking any action in regards to his property that would result in a § 404 violation, and it is highly unlikely he will violate his settlement agreement in face of additional enforcement.

The fact that Mr. Bowman's fill remains in his wetland does not confer NUWF with subject matter jurisdiction under § 505. While various parties have cited the *Sasser*, *Cumberland*, and *Ciampitti* decisions for the proposition that fill remaining in a wetland constitutes a continuing violation, this interpretation misconstrues these courts' reasoning. None of these cases demonstrate that the CWA creates a continuing duty that can be violated until a defendant remedies discharges of dredged or fill material into wetlands. Instead, these cases stand for the position that when determining civil penalties, the duration of time that fill exists in a wetlands may be used to determine the extent of the penalty. Accordingly, each of these cases can be distinguished from the facts here because none of the parties in these cases referred to the existence of fill material in wetlands to imply a continuous violation to obtain subject matter jurisdiction. While the existence of fill in Mr. Bowman's wetlands may be used if and when a court finds that he violated § 404 in order to impose a civil penalty, NUWF may not obtain subject matter jurisdiction for its § 505 suit by alleging that illegal fill remains in Mr. Bowman's wetlands and thus is a continuous violation of the CWA.

If Mr. Bowman failed to abide by § 404, he only did so when he actually discharged dredged or fill material into waters of the United States, but not after he finished clearing his property. Further, NUDEP negotiated a settlement agreement with Mr. Bowman where Mr. Bowman agreed not to clear more wetlands. R. at 4. If the fill material in Mr. Bowman's wetlands constituted a violation, this settlement would likely have discussed its removal or remediation. Instead, the settlement only requires Mr. Bowman to refrain from further clearing, which is the only way that Mr. Bowman could have violated § 404 under these facts. R. at 4. Finally, the Court in *Gwaltney* held that the citizen plaintiff's interest is forward looking, and that plaintiffs may obtain jurisdiction by making a good faith allegation of a continuing violation.

484 U.S. at 64. Here, Mr. Bowman cannot clear any more of his wetlands because of the easement, thus there is no way he could violate § 404 in the future. Consequently, Mr. Bowman is not continuously violating § 404, and if the Court finds that he did violate § 404, the violation was wholly past, and thus NUWF does not have subject matter jurisdiction for its § 505 citizen suit.

III. NUWF DOES NOT HAVE STANDING TO BRING SUIT.

Article III, § 2 of the United States Constitution requires that there be a "case or controversy" before an issue can be tried in the judicial system. This restrains the judicial power "to those disputes which confine federal courts to a role consistent with a system of separated powers." *Valley Forge Christian Coll. v. Ams. United for Separation of Church and State*, 454 U.S. 464, 472 (1982). Standing also ensures that "a party has a sufficient stake" in a controversy "to obtain judicial resolution." *Sierra Club v. Morton*, 405 U.S. 727, 732 (1972).

NUWF[1] is an organization seeking to sue under the citizen suit provision of the CWA. 33 U.S.C. §1365 (2006); R. at 4. An organization has representational standing to bring an action on behalf of its members if: (1) the interest of the suit is germane to the purpose of the organization, (2) the organization's members would otherwise have standing to bring suit in their own right; and (3) neither the claim asserted nor the relief requested requires participation of individual members of the organization in litigation. *Informed Citizens United, Inc. v. USX Corp.*, 36 F. Supp. 2d 375, 378 (S.D. Tex. 1999); *Hunt v. Wash. State Apple Advertisement Comm'n*, 432 U.S. 333, 342-43 (1977); *Save Our Cmty. v. U.S. E.P.A.*, 971 F.2d 1155, 1160 (5th Cir. 1992). Here, NUWF failed to satisfy the first and second prongs of this test. This Court

[1] NUDEP did not join NUWF on this issue. Mr. Bowman does not contest NUDEP's standing in the other claims.

should affirm the decision of the lower court and hold that NUWF does not have representational standing to bring a citizen suit for its members under the CWA.

A. NUWF DOES NOT HAVE REPRESENTATIONAL STANDING TO BRING SUIT BECAUSE THE INTERESTS OF THE SUIT ARE NOT GERMANE TO THE ORGANIZATION.

Where standing is required to ensure that an individual has a sufficient stake in the controversy at issue, it necessarily follows that an organization must share an interest in the controversy to participate. *See e.g. Morton*, 405 U.S. at 732. An organization's stake in the suit is readily established if the interests and purposes of the organization are germane to the interests of the suit. *Hunt*, 432 U.S. at 342. This requirement ensures that the organization will fully "vindicate whatever rights and immunities the association itself may enjoy" and in doing so, it represents the rights of its members. *Warth v. Seldin*, 422 U.S. 490, 511 (1975).

In *Environmental Protection Information Center v. Pacific Lumber Company*, a not for profit group had representational standing when suing a lumber company that raised creek sediment levels by 19,000 tons per year. 469 F. Supp. 2d 803, 809 (N.D. Cal. 2007). The group's goals were to promote "clean water and healthy watersheds through (…) strategic litigation." *Id*. at 817. The interests of the case concerned the health and clean water standards of a watershed. *Id*. The court held that the group's personal interests were directly in line with those of the lawsuit. *Id*.; *see e.g. Wis. Res. Prot. Council v. Flambeau Mining Co.*, No. 11-cv-45-bbc, 2012 F. Supp. 2d WL 5191992, at *3 (W.D. Wis. Apr. 13, 2012) (holding that an environmental organization had standing where their primary purpose was to educate the public on metallic mining and they brought suit against a metallic mine for water pollution); *cf Presido Golf Club v. Nat'l Park Serv.*, 155 F.3d 1153, 1159 (9th Cir. 1998) (holding that the germaneness inquiry need not be demanding).

NUWF simply cannot claim that the interests in this litigation are germane to the organization's goals and purposes. NUWF's purpose is "to protect the fish and wildlife of the state by protecting their habitats." R. at 4. In contrast, the interests NUWF represent in this litigation surround recreational boating and frogging. R. at 6. One member, Zeke Norton, claims an interest in his ability to frog for sustenance. R. at 6. It cannot follow that NUWF is both protecting wildlife while trying to enforce a suit that allows wildlife, natural to Muddy River, to be more readily killed for food and fun.

Moreover, the record indicates that the wildlife of the area will be benefitted as a result of Mr. Bowman's 150-foot tract of land that has since been fully-inundated and set aside as a conservation wetland. R. at 6. NUDEP, the intervening government party, presented expert testimony that this buffer zone Mr. Bowman provided will actually be a richer habitat than the one that existed previously. R. at 6. Through this litigation, NUWF hopes to reverse Mr. Bowman's actions that provide for a richer wildlife habitat. R. at 4. NUWF also seeks to protect Mr. Norton's interest in frogging. R. at 6. Mr. Norton's frogging interest is not even close to germane to NUWF's interests in protecting wildlife and its habitat. In fact, NUWF's goals are exactly opposite of those interests and actions they are taking in this litigation. NUWF thus fails to establish that they have standing to bring this suit as an organization.

B. NUWF DOES NOT HAVE STANDING TO BRING SUIT BECAUSE IT FAILED TO ESTABLISH THAT ITS MEMBERS WOULD OTHERWISE HAVE STANDING TO SUE INDIVIDUALLY.

NUWF also failed to meet the second prong that requires an organization to establish that its members have individual standing to bring this suit. An individual has standing where (1) the person has suffered an actual or imminent threat of injury that is neither conjectural nor hypothetical, (2) the injury is fairly traceable to the defendant's behavior, and (3) the individual's

injury will likely be redressed by a favorable decision. *Valley Forge*, 454 U.S. at 472. NUWF failed to establish that any of its members suffered an actual or imminent injury as a result of Mr. Bowman's land-clearing activity. NUWF also failed to prove that the members' alleged injuries are fairly traceable to Mr. Bowman's actions. NUWF has thus failed to establish injury-in-fact of its individual members and cannot sue in its representational capacity.

i. NUWF failed to establish that members have suffered an actual injury.

Actual injury-in-fact occurs where the plaintiff avers that they use the affected area and are persons for whom the aesthetic, economic, or recreational values in the area will be lessened. *Morton*, 405 U.S. at 738. NUWF claims that their members have a recreational interest in Muddy River and that the interests were adversely affected when Mr. Bowman violated the CWA by placing fill material in the river. R. at 5-6. However, NUWF does not offer any concrete evidence that this interest has been *actually* affected, if at all, and have thus failed to establish injury-in-fact requisite for standing. R. at 6.

An individual establishes actual injury where their use of a waterway has been deterred or altered due to pollution. *See Flambeau Mining Co.*, 2012 F. Supp. 2d WL 5191992 at 4 (holding that plaintiff suffered injury where she no longer waded in affected river and had to change her canoe entry point); *Ecological Rights Found. v. Pac. Lumber Co.*, 230 F.3d 1141, 1144-45 (9th Cir. 2000) (holding that there was standing where plaintiff stopped visiting a creek and could no longer fish); *see also Friends of the Earth v. Gaston Copper Recycling Corp.*, 179 F.3d 107, 110-12 (4th Cir. 1999) (holding that plaintiffs did not suffer injury-in-fact where only one said they were "less likely to dive" out of concern for pollution but did not alter behavior).

The court in *American Canoe Association v. City of Louisa Water & Sewer Commission* found injury-in-fact where individuals could no longer use the river to fish, canoe, or swim. 389

F.3d 536, 540 (6th Cir. 2004). In *American Canoe*, a water treatment facility polluted the river to the point that the water appeared dark and oily. *Id*. at 540. Individuals testified that the river smelled distinctly of petroleum. *Id*. As a result, the individuals that used the river ceased all activities because the color, appearance, and odor detracted from their overall enjoyment. *Id*.

Here, NUWF members have unquestionably demonstrated that they maintain a legal interest in the river for various recreational purposes similar to those of the individuals in *American Canoe.* However, the generalizations made by NUWF members do not rise to the level of injury of those in *American Canoe*. NUWF members express a general "fear" and "feeling of loss." R. at 6. However, "concerns, standing alone, simply fail to establish that their legally protected interests were actually (…) adversely affected." *Gaston Copper*, 179 F.3d at 114; *Pub. Interset Research Grp. of N.J., Inc. v. Magnesium Elektron, Inc.*, 123 F.3d 111, 120 (3d Cir. 1997) (holding that knowledge of or concern for pollution with no other evidence of injury cannot establish standing). These generalizations of "fear" and "loss" are the conjectural statements that the standing requirement seeks to prevent litigation over. The record does not indicate that NUWF members have changed the frequency of their use of Muddy River due to these feelings. R. at 6. There is also no indication that any member has been deterred from using the Muddy River for recreational purposes. R. at 6. Therefore there was no actual injury to the recreational uses of Muddy River.

As the lower court noted, the only individual who had a recreational interest actually affected is Mr. Norton, who used Mr. Bowman's property to frog. R. at 6. The lower court is correct in its logic that "illegal activities cannot give rise to an injury to support standing." R. at 6. Mr. Norton's injury is insufficient to support standing because it does not concern the area in dispute. R. at 6.

Courts have held that in order to support standing, an individual must aver injury to his use of the affected area, not an area that is "in the vicinity." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 565-66 (1992); *Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871, 887-89 (1990). The court in *National Wildlife* affirmed the rule in *Lujan* that the "plaintiff claiming injury from environmental damage must use the area affected by the challenged activity and not an area" nearby. 497 U.S. at 888.

For example, in *Wilderness Society v. Griles* the court found that plaintiffs lacked standing where they expressed concern over multiple areas of land. 824 F.2d 4, 14 (D.C. Cir. 1987). The court held that the "absence of specificity regarding location dooms plaintiffs' claim of (…) injury." *Id*. at 15. Here, NUWF challenges Mr. Bowman's activity, claiming he illegally discharged fill material into Muddy River. R. at 5. The legal interest NUWF seeks to protect under the CWA, recreational use, exists only in the Muddy River. R. at 6. NUWF tacks on Mr. Norton's complaint that he can no longer enter Mr. Bowman's private property and frog. R. at 6. Mr. Norton's claim to his recreational frogging activity concerns Mr. Bowman's property, in the vicinity of Muddy River, not Muddy River itself. R. at 6. Mr. Norton is the only individual to assert an affected interest that could possibly be an actual injury so as to establish injury-in-fact. However, as the lower court noted, it is not a legal interest. R. at 6. Mr. Norton's interest does not concern the affected area that NUWF is bringing this CWA action. Therefore, NUWF has failed to establish actual injury to satisfy the standing requirement.

ii. NUWF failed to establish that its members suffered an imminent threat of injury.

Moreover, NUWF has failed to allege any threat of imminent injury. NUWF members assert that the Muddy River will be more polluted if other adjacent wetlands are cleared and drained for agricultural use. R. at 6. Injury must be in the form of an imminent threat, not a

hypothetical occurrence. *Defenders of Wildlife*, 504 U.S. at 560. A court will not find imminent injury if it requires a "multi-tiered speculation". *La. Envtl. Action Network v. Browner*, 87 F.3d 1379, 1383 (D.C. Cir. 1996).

In *GrassRoots Recycling Network Inc. v. USEPA*, plaintiff challenged EPA's proposed rule regarding landfill operations. 429 F.3d 1109, 1112 (D.C.Cir. 2005). Members of the group claimed imminent injury and alleged that if the rule passes, certain landfills could possibly become bioreactors. *Id*. As a result of this conversion, plaintiffs claimed that the market value of their homes would decline. *Id*. The court rejected that this "multi-tiered speculation" constituted any actual threat of injury because it required too many intervening steps. *Id*. at 1113 (citing *Browner*, 87 F.3d at 1383).

NUWF members claim imminent injury from the possible pollution of Muddy River by more agricultural clearing. R. at 6. In order for possible pollution to occur, it assumes that there are more agricultural riparian owners on either side of the 80 plus mile stretch of the Muddy River. It would then require any number of these hypothetical polluters to decide to clear and drain their wetlands in such a way as to pollute into the Muddy. As in *GrassRoots*, there must be some certainty to this string of intervening steps. This hypothetical line of possibilities is exactly the sort of frivolous complaint that the standing requirement in the CWA seeks to prevent from being litigated. Therefore NUWF has failed to establish any imminent threat of injury from Mr. Bowman's land-clearing activities.

iii. Even if injury is sufficient, the alleged injuries are not fairly traceable to Mr. Bowman's actions.

The only remaining interest to address is the alleged change in Muddy River's appearance. R. at 6. Aesthetic interests in an area may also give rise to standing. *Morton*, 405 U.S. at 738. NUWF presented the affidavit of Dottie Milford who claimed that "the Muddy

looks more polluted than it did prior to Mr. Bowman's activities." R. at 6. The record indicates that there is no *overall* aesthetic change because the conservation easement "shields the field from the river so that the aesthetics [are] (…) unaffected." R. at 6 (emphasis added). However, even if this Court finds Ms. Milford's generalization to be an actual injury to her aesthetic enjoyment, these generalizations are not fairly traceable to Mr. Bowman's conduct and is therefore insufficient to allege standing.

The question for traceability inquiry is "whether the alleged injury can be traced to the defendant's challenged conduct, rather than to that of some other actor not before the court." *Flambeau*, 2012 5191992 at 15 (citing *Ecological Rights Found.*, 230 F.3d at 1152). In order to establish this, plaintiffs must "show that the pollutants discharged cause or contribute to the kinds of injuries alleged." *Id*.

In *Public Interest Research Group of New Jersey, Inc. v. Powell Duffryn Terminals, Inc.*, the court held that pollution to a strait was traceable to a bulk liquid storage facility located on the strait. 913 F.2d 64, 68 (3d Cir. 1990). The plaintiff group stated that the water had an "oily or greasy sheen they found offensive." *Id*. at 73. The defendant's permit had limits on oil and grease and the EPA reported that the defendants discharged over those limits. *Id*. The aesthetic injuries were thus traceable to defendant's pollution. *Id*.

The aesthetic complaints averred here are in no way analogous to those in *Powell Duffryn*. Moreover, the aesthetic change cannot be fairly or even remotely traceable to Mr. Bowman's agricultural activities on his land. Ms. Milford testified that the "Muddy looks more polluted to her than it did prior." R. at 6. Ms. Milford does not assert any characteristics of the pollution, such as sediment increase or presence of fill material. R. at 6. Absent any specifics, it cannot be established that Mr. Bowman's activity contributed to the pollution alleged. The river

runs 40 miles in both directions – upstream and downstream – of Mr. Bowman's property. R. at 3. It is far too much of a stretch to trace a general "look" of pollution to Mr. Bowman specifically when there is 80 miles of River to trace and no characteristics to look for.

IV. NUWF'S CITIZEN SUIT IS BARRED BY NUDEP'S DILIGENT PROSECUTION OF MR. BOWMAN.

The CWA's citizen suit provision is "meant to supplement rather than to supplant governmental action." *Gwaltney*, 484 U.S. at 60 (quoting Federal Water Pollution Control Act Amendments of 1972, S. REP. NO. 92-414, (1972) (Conf. Rep.). Citizen suits are statutorily barred "if the Administrator or State has commenced and is diligently prosecuting a civil or criminal action in a court of the United States, or a State to require compliance with the standard, limitation, or order[.]" 33 U.S.C. § 1365(b)(1)(B) (2006). Additionally, to preserve the primacy of state enforcement authority, the CWA institutes a bar against citizen suits "with respect to which a State has commenced and is diligently prosecuting an action under a State law comparable to this subsection[.]" 33 U.S.C. § 1319(g)(6)(A)(ii) (2006). Citizen suits are "proper only when the Federal, State, and local agencies fail to exercise their enforcement responsibility." *Gwaltney*, 484 U.S. at 60.

First, NUWF's citizen suit is barred because NUDEP commenced a civil action in the district court before NUWF filed its citizen suit. NUDEP filed its enforcement action on August 10, 2012, twenty days before NUWF filed its suit with the district court. R. at 5. Second, on August 1, 2011, NUDEP issued Mr. Bowman an administrative order under a "virtually identical" statute to that of §§ 1319(a) and (g) of the CWA. NUWF's citizen suit seeks to remedy something that is already in the process of being remedied by NUDEP, an action comparable to 1319(g), and is therefore barred. Third, NUDEP is diligently prosecuting the enforcement action against Mr. Bowman because the proposed consent decree requires

compliance with the CWA. Specifically, the consent decree requires Mr. Bowman to cease further violations of § 404, deed a conservation easement over a large portion of his property, and construct and maintain a year-round wetland at his cost. R. at 7-8. Therefore, NUWF has not met its heavy burden to overcome NUDEP's presumption of diligence.

NUWF's reliance on the fact that NUDEP did not seek penalties in its administrative order and consent decree is misplaced. NUDEP's decision to not assess penalties in its administrative order and consent decree was nothing more than a concession to Mr. Bowman. Specifically, NUDEP's administrative order and consent decree required Mr. 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. R. at 7. NUDEP's decision not to assess Mr. Bowman penalties is the type of discretionary matter to which this Court should defer.

A. NUDEP COMMENCED A CIVIL ACTION IN COURT.

Before a citizen can commence a citizen suit, citizens are required to give 60-days notice of their intent to sue to the alleged violator as well as to the Administrator and the State. 33 U.S.C. § 1365(b)(1)(A) (2006). However, if "the Administrator or the State commences enforcement action within that 60-day period, the citizen suit is barred, presumably because governmental action has rendered it unnecessary." *Gwaltney*, 484 U.S. at 59 (citing 33 U.S.C. § 1365(b)(1)(B) (2006)). Citizen suits are not only barred when a State or Federal enforcement action is pending in court, but also when the enforcement action has been concluded "because reading § 505(b)(1)(B) only in the present tense would allow citizens to bring a private enforcement action against any alleged violator, as long as the citizen waited until the conclusion of the governmental action before bringing the citizen suit." *Friends of the Earth, Inc. v.*

Laidlaw Envtl. Servs. (TOC), Inc., 890 F. Supp. 470, 485 (D.S.C. 1995), *aff'd*, 528 U.S. 167 (2000).

Although the CWA does not define "commence," courts have generally adopted the Federal Rules of Civil Procedure (FRCP) Rule 3 definition of commence. *Clorox Co. v. Chromium Corp.*, 158 F.R.D. 120, 125 (N.D. Ill. 1994). Rule 3 states that "[a] civil action is commenced by filing a complaint with the court." FED.R.CIV.P. 3. Furthermore, the Senate Report accompanying the CWA citizen suit provision suggests the FRCP was the definition Congress intended. S. REP. NO. 92-414, at 3668, 3745 (1972) (Conf. Rep.). Specifically, the Senate report stated that "[t]he time between notice and *filing* of the action should give the administrative enforcement office an opportunity to act on the alleged violation. S. REP. NO. 92-414, at 3668, 3745 (1972) (Conf. Rep.) (emphasis in original).

Administrative orders that do not access civil penalties to a polluter can still serve to bar citizen suits under § 309(g)(6)(A) of the CWA. *N. and S. Rivers Watershed Ass'n, Inc. v. Town of Scituate*, 949 F.2d 552, 556 (1st Cir. 1991); *but see Washington Pub. Interest Research Grp.v. Pendleton Woolen Mills*, 11 F.3d 883, 885 (9th Cir. 1993). In *N. and S. Rivers*, the Massachusetts Department of Environmental Protection (DEP) issued an administrative order requiring the appellee to take steps in order to remediate issues with its sewage treatment facility. *Id*. at 553. Although the state act authorized the DEP to issue civil penalties, the DEP did not assess penalties to the appellee. *Id*. at 554. Two years after the DEP's administrative order, the appellant brought suit in the district court seeking civil penalties. *Id*. The appellant argued that the "section 309(g)(6)(A) limitation [did] not apply because the State did not commence and diligently prosecute a comparable civil penalty action." *Id*. at 555. However, the court held that:

> "It is enough that the Massachusetts statutory scheme, under which the State is diligently proceeding, contains penalty assessment provisions comparable to the

> Federal Act, that the State is authorized to assess those penalties, and that the overall scheme of the two acts is aimed at correcting the same violations, thereby achieving the same goals. What the Appellant's suit seeks to remedy is already in the process of being remedied by the State Administrative Order, an action comparable to section 309(g)." *Id*. at 556.

In the present case, on July 1, 2011, NUWF sent a notice of its intent to sue to Mr. Bowman, the EPA, and NUDEP. R. at 4. On August 10, 2011, NUDEP filed an enforcement action against Mr. Bowman in the district court. R. at 5. Under FRCP Rule 3, NUDEP commenced a civil action on August 10, 2011, when NUDEP filed the complaint in federal court. Despite NUDEP'S filing of the enforcement action, NUWF filed its own complaint in the district court seeking civil penalties against Mr. Bowman on August 30, 2011. R. at 5. As the Senate Report accompanying the CWA suggested, NUWF's notice was a signal for NUDEP to act on the alleged violation. Indeed, NUDEP acted on the alleged violation when NUDEP filed an enforcement action against Mr. Bowman in the district court. As in *Gwaltney*, NUWF's citizen suit was rendered unnecessary when NUDEP filed its enforcement action well within the 60-day period. Moreover, on September 5, 2011, NUDEP's filed a motion to enter a consent decree. R. at 5. Although Mr. Bowman consented to both the motion and the decree, the district court never ruled on the motion. *Id*. NUWF's citizen suit is barred regardless of whether the consent has been approved or is still pending. *Laidlaw*, 890 F. Supp. at 485; *aff'd*, 528 U.S. 167 (2000).

Furthermore, NUWF's citizen suit is barred under 33 U.S.C. § 1319(g)(6)(A)(ii) because NUDEP commenced and is diligently prosecuting an action under a state law that is comparable. NUDEP's state statute is virtually identical in relevant parts to 1319(g) of the CWA. R. at 4. Therefore, as in *N. & S. Rivers*, NUDEP's state statute is comparable to the CWA because both statutes are aimed to correct the same violations and achieve the same goals. NUWF's reliance on the fact that NUWF's citizen suit is not barred because NUDEP's administrative order and

consent decree did not issue Mr. Bowman an administrative penalty is misplaced. As in *N. & S. Rivers*, NUDEP issued an administrative order requiring Mr. Bowman to take steps in order to remediate issues with his field. Similar to the state statute in *N. & S. Rivers*, NUDEP's state statute authorized NUDEP to issue administrative penalties of up to $125,000. As in *N. & S. Rivers*, NUDEP did not include penalties in the administrative order. R. at 4. As in *N. & S. Rivers*, what NUWF citizen suit seeks to remedy is already in the process of being remedied by NUDEP, an action comparable to 1319(g) and is therefore barred.

B. NUDEP IS DILIGENTLY PROSECUTING AN ACTION.

Diligent prosecution of an action "does not require government prosecution to be far-reaching or zealous. It requires only diligence." *Karr v. Hefner*, 475 F.3d 1192, 1197 (10th Cir. 2007). Enforcement actions are diligent if the action requires compliance with the CWA. *Sierra Club v. ICG E., LLC*, 833 F. Supp. 2d 571, 578 (N.D. W. Va. 2011) (quoting *The Piney Run Pres. Ass'n v. The Cnty Comm'rs*, 523 F.3d 453, 459 (4th Cir. 2008)). Additionally, citizen plaintiffs "bear a heavy burden when challenging the diligence of a prosecution; merely showing that the government's prosecution is less aggressive than plaintiffs would prefer is insufficient to overcome the presumption." *Gwaltney*, 484 U.S. at 60.

In *ICG*, the plaintiffs sent a notice to the defendant, informing the defendant of the plaintiff's intentions to file a civil complaint against the defendant at the end of the statutory 60-day waiting period. *ICG*, 833 F. Supp. 2d at 576. Three days before the expiration of the statutory waiting period, the West Virginia Department of Environmental Protection (WVDEP) filed suit against the defendant. *Id.* Six months after WVDEP filed the suit against the defendant, WVDEP released a proposed consent decree that would conclude the matter. *Id*. Although the court noted that "[i]t [was] undisputed that WVDEP was prosecuting an action

against defendant in state court at the time plaintiffs filed their complaint," the plaintiffs argued that the proposed consent decree was not capable of requiring the defendant's compliance with the CWA and that WVDEP acted in bad faith. *Id*. at 578. Specifically, the plaintiffs argued that "(1) the fine it imposes for defendant's past violations is extremely small, and (2) it grants yet another deadline extension in a continual series of such extensions." *Id*.

However, the court concluded that the proposed consent decree is capable of requiring compliance because the decree required that the "defendant immediately take measures to ensure compliance with all effluent limits and sets out a detailed plan to ensure compliance for the outfalls at issue in this litigation." *Id*. The court dismissed the plaintiff's argument about the size of the fines because "[a]lthough the fine is less than plaintiffs would have imposed themselves, that fact alone does not render WVDEP's prosecution lacking in diligence." *Id*. at 579. In response to the plaintiffs contention that the decree grants another extension for the defendant, the court held that WVDEP did not act in bad faith because the "suit did not languish for a long period of time without action; only six months passed between the time the complaint was filed and lodging of the Draft Consent Decree." *Id*.

As in *ICG*, NUDEP's consent decree requires compliance with the CWA because the decree requires Mr. Bowman to immediately take measures to ensure compliance with the CWA. R. at 4. The consent decree requires Mr. Bowman to cease further violations of § 404, deed a conservation easement over a large portion of his property, and construct and maintain a year-round wetland at his cost. R. at 7-8. NUWF's reliance on the fact that NUDEP did not issue an administrative penalty in the consent decree does not show a lack of diligence by NUDEP. As in *ICG*, the fact that the NUWF would have imposed a penalty does not render NUDEP's prosecution lacking diligence. NUWF bears a heavy burden of challenging the diligence of

NUDEP's prosecution and this cannot be overcome by simply showing that NUDEP's prosecution strategy is less aggressive than what NUWF would have done. *Gwaltney*, 484 U.S. at 60.

C. DEFERENCE SHOULD BE GIVEN TO NUDEP'S CONSENT DECREE.

Congress statutorily declared that "[i]t 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[.]" 33 U.S.C. § 1251(b) (2006). "Deference to governmental enforcement agencies is appropriate because the CWA delegates the primary enforcement responsibility to designated state and federal agencies." *Laidlaw,* 890 F. Supp. at 487; *aff'd*, 528 U.S. 167 (2000). Additionally, deference should be given to an agency's expertise when the agency and a polluter enter into a consent decree to cure violations of the CWA. *Piney Run*, 523 F.3d at 459. When an agency "chooses to enforce the CWA through a consent decree, failure to defer to its judgment can undermine agency strategy. If a defendant is exposed to a citizen suit whenever the EPA grants it a concession, defendants will have little incentive to negotiate consent decrees." *Karr*, 475 F.3d at 1197; *see Gwaltney*, 484 U.S. at 60-61. However, allowing an agency to compromise "does not strip citizens of their role in helping to bring about remedies for CWA violations. Indeed, the Department of Justice's regulations entitle citizens to comment on pending environmental consent decrees." *Karr*, 475 F.3d at 1198; *see* 28 C.F.R. § 50.7(a) (2012).

In *Piney Run*, the Piney Run Preservation Association (the Association) challenged the district court's ruling that found that the Maryland Department of the Environment (MDE) was diligently prosecuting a CWA enforcement action against the County Commissioners of Carroll

County (the County). 523 F.3d at 459. On appeal, the Association challenged whether or not the MDE's consent judgment was "in good faith calculated to require the County's compliance with the Act." *Id*. at 460. The Association pointed to the fact that the "daily fine established in the Consent Judgment [was] lower than the fine imposed in the prior CWA litigation." *Id*. However, the court held that MDE's decision to order a lower daily fine did not "establish a lack of diligence on MDE's part." *Id*. In regards to the fine, the court stated, "MDE's agreement to accept a lower daily fine in the Consent Judgment appears to be nothing more than a concession on the part of MDE in exchange for other obligations that are imposed on the County. As we have noted, this is precisely the type of discretionary matter to which we should defer." *Id*. at 461.

If this Court permits Mr. Bowman to be exposed to NUWF's citizen suit, defendants similar to Mr. Bowman will have "little incentive to negotiate consent decrees." *Karr*, 475 F.3d at 1197. Given the fact that NUDEP's consent decree is still pending, NUWF still has an opportunity to comment on the decree. 28 C.F.R. § 50.7(a) (2012). However, as in *Piney Run*, deference should be given to NUDEP's consent decree. Since the EPA has properly delegated authority to implement the CWA to NUDEP, failure to defer to NUDEP's judgment can undermine NUDEP's strategy. R. at 4; *Karr*, 475 F.3d at 1197. NUWF's reliance on the fact that NUDEP did not issue an administrative penalty in the consent decree is irrelevant. As in *Piney Run*, NUDEP's consent decree appears to be nothing more than a concession on part of NUDEP in exchange for other obligations that are imposed on Mr. Bowman. NUDEP's consent decree requires Mr. 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. R. at 7. The consent decree also required Mr. Bowman to "construct and maintain a year-round, partially-

inundated wetland at considerable initial expense and an indeterminable future expense." R. at 8. As in *Piney Run*, NUDEP's consent decree is the type of discretionary matter to which this Court should defer.

CONCLUSION

For the foregoing reasons, that Mr. Bowman did not violate the CWA; that subject matter jurisdiction is not present; that NUDEP's diligent prosecution bars NUWF from bringing this citizen suit, Mr. Bowman prays that this Court find that the district court properly rendered summary judgment in favor of Mr. Bowman and affirm the judgment.