NO. 13-1246

IN THE

UNITED STATES COURT OF APPEALS
FOR THE TWELFTH CIRCUIT

_____

NEW UNION WILDLIFE FEDERATION,
Petitioner-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 JIM BOB BOWMAN

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Jim Bob Bowman

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STATEMENT OF JURISDICTION

This action was brought in the United States District Court for the District of New Union under section 505 of the Clean Water Act ("CWA"), 33 U.S.C. § 1365 (2006), against Jim Bob Bowman ("Defendant-Appellee") for filling wetlands without a permit in violation of sections 301(a) and 404 of the CWA. 33 U.S.C. §§ 1311(a), 1344. The district court had subject matter jurisdiction over this CWA civil enforcement action pursuant to 33 U.S.C. §1319(b) and 28 U.S.C. §§1331 and 1355.

On June 1, 2012, the district court filed a Memorandum and Order entering final judgment against Appellants NUWF and NUDEP. The instant appeal is from the district court's grant of summary judgment to Bowman on the issues of: (1) standing of Appellant NUWF; (2) whether there is a continuing or ongoing violation as required by section 505(a) of the CWA for subject matter jurisdiction; (3) whether Appellant NUWF's citizen suit has been barred by Appellant NUDEP's diligent prosecution of Bowman as set out in section 505(b) of the CWA; and, (4) whether there is any violation of section 404 of the CWA.

Appellants each filed their own Notices of Appeal, which were both timely. *See* 28 U.S.C. § 2107(b). This Court granted the order of review on September 14, 2012, and has jurisdiction by reason of 28 U.S.C. § 1291.

ISSUES PRESENTED

I. Does NUWF have standing to sue Bowman for alleged violations of the CWA even though neither they nor their members have not suffered injury in fact?

II. Must NUWF's litigation be dismissed for lack of subject matter jurisdiction under section 505 of the CWA because there is no continuing or ongoing violation?

III. Whether NUWF's citizen suit has been barred by the diligent prosecution clause of the CWA because NUDEP's prosecution of Bowman has been diligent?

IV. Whether Bowman violated section 404 of the CWA despite the absence of an "addition" of a pollutant to "navigable water" when Bowman moved material from one part of a wetland to another part of the same wetland?

STATEMENT OF THE CASE

After significant field preparations, Jim Bob Bowman received a letter from the New Union Wildlife Federation ("NUWF"), a New Union not for profit corporation, which alleged Bowman had violated the CWA. (Appendix to Defendant-Appellee Jim Bob Bowman's Brief 4. ("Appellee's Appendix")) Shortly thereafter, Bowman received a similar letter from the New Union Department of Environmental Protection ("NUDEP"), which is the state entity authorized to enforce the CWA and its state law corollary in New Union. (Appellee's Appendix 4.)

Although maintaining he had not violated any laws, Bowman voluntarily resolved NUDEP's concerns by granting New Union a conservation easement over the portion of his property within 225 feet of the Muddy River. (Appellee's Appendix 4.) The conservation easement requires that Bowman allow the general public to enter the initial 225 feet of his property adjacent to the river for daily, recreational purposes. *Id.* (Appellee's Appendix 4.) In addition, Bowman agreed to create and maintain a permanent wetland on the seventy-five foot wide swath of land that acts as a buffer between his wheat field and the wooded area that abuts the Muddy River. (Appellee's Appendix 4.) This agreement was memorialized in an Administrative Order by NUDEP, to which Bowman voluntarily consented on August 1, 2011. (Appellee's Appendix 4.) On August 10, 2011, NUDEP filed suit in federal court against Bowman for the alleged CWA violations and subsequently filed a motion to enter a consent decree with terms identical to the Administrative Order. (Appellee's Appendix 5.) Bowman agreed to the motion and decree, but the consent motion is still pending. (Appellee's Appendix 5.)

Despite NUDEP's Administrative Order and pending litigation, NUWF initiated another lawsuit in federal court on August 30, 2011 against Bowman, alleging violations of the CWA and seeking civil penalties as well as the destruction of his wheat field. (Appellee's Appendix 5.) NUDEP intervened in the NUWF litigation and discovery was granted. (Appellee's Appendix 5.) Thereafter, the court entertained cross-motions for summary judgment. (Appellee's Appendix 5.)

The District Court granted Bowman's summary judgment motion and denied NUWF's summary judgment motions on four counts. (Appellee's Appendix 11.) First, the District Court concluded that NUWF lacked standing to maintain litigation against Bowman because there was no injury in fact. (Appellee's Appendix 6.) The District Court found that the field could not be seen from the Muddy River through the 150 foot wide strip of wooded lands that separate the field from the river and that the conservation easement created a recreational benefit to NUWF, as well as a likely environmental benefit. (Appellee's Appendix 6.)

Second, the District Court indicated a lack of subject matter jurisdiction under the citizen suit authorization in the CWA, which requires a continuing or ongoing violation of the CWA in order to maintain litigation. (Appellee's Appendix 7.) The District Court concluded that Bowman was not in violation of the CWA, and that the mere use and maintenance of the wheat field did not itself constitute a violation of the CWA. (Appellee's Appendix 7.)

Third, the District Court concluded that NUWF's lawsuit was barred by the terms of the CWA citizen suit provision, which prohibits citizen suits "if the 'State has commenced and is diligently prosecuting a civil . . . action in a court of the United States . . . to require compliance . . . " with the CWA." 33 U.S.C. § 1365(b)(1)(B). The District Court found that NUDEP was

diligently prosecuting the case against Bowman and so NUWF's lawsuit was barred. (Appellee's Appendix 7.)

Fourth, the District Court found that Bowman had not violated any provision of the CWA when preparing his wheat field. (Appellee's Appendix 8-9.) Specifically, the District Court found that merely moving soil from one area to another within the field does not constitute an "addition" of any pollutant into navigable waters. (Appellee's Appendix 9-10.) Likewise, the court found that Bowman's clearing of vegetation from the land, thereby changing the nature of the vegetation from living to dead, is immaterial to the alleged CWA violation. (Appellee's Appendix 10.) Therefore, the District Court concluded that NUWF could not demonstrate a necessary element of the CWA violation allegation and so granted Bowman's summary judgment motion on all four counts.

STATEMENT OF THE FACTS

Bowman owns 1000 acres of land in the State of New Union, upon a portion of which he grows winter wheat. (Appellee's Appendix 3, 5.) Bowman's land abuts the Muddy River for 650 feet. (Appellee's Appendix 3.) The river is navigable. (Appellee's Appendix 3.) For 150 feet from the entire shoreline, Bowman's property is covered with trees and vegetation characteristic of wetlands; the land more than 150 feet from the river is cleared to facilitate farming. (Appellee's Appendix 3-4.) Bowman's wetlands and the Muddy are hydrologically connected, and only parts of the wetlands are inundated each year when the river is high. (Appellee's Appendix 3.)

Bowman began clearing the vegetation from his land on June 15, 2011 and completed his farming preparations over the course of one month. (Appellee's Appendix 4.) Specifically, Bowman bulldozed together the vegetation from his property, burned the biological materials,

dug trenches, and then dispersed the ashes of the vegetation materials and soil within the field to level his property. (Appellee's Appendix 4.) To complete his wheat field, Bowman formed a drainage ditch that runs from the back of his property to the river. (Appellee's Appendix 4-5.) Bowman planted his property with winter wheat in September 2011, with the exception of the wooded lands and cleared areas within 225 feet of the Muddy River. (Appellee's Appendix 5.)

SUMMARY OF ARGUMENT

First, to bring a citizen suit a citizen-plaintiff must establish standing to bring either a direct claim or an indirect claim. NUWF lacks standing to bring direct claims against Bowman in the instant case because neither it nor its members have not suffered an injury in fact. NUWF lacks standing to bring indirect claims because its members do not have standing.

Second, courts lack subject matter jurisdiction to address NUWF's complaint because the Supreme Court held that the citizen suit provision of the CWA does not provide jurisdiction to address wholly past violations. All parties agree that Bowman's actions that allegedly violated the CWA ceased before NUWF filed its citizen suit. Because Bowman cannot violate the CWA based upon the current condition of his land, and because NUWF's suit addresses only wholly past violations, courts lack subject matter jurisdiction to hear the citizen suit.

Third, citizen suits for violations of the CWA are barred when the government has brought and is diligently prosecuting a claim. An action by the government may be challenged procedurally and substantively. Here, the consent order entered into by Bowman and NUDEP is both procedurally and substantively fair. Accordingly, NUDEP's prosecution is sufficiently diligent to bar NUWF's citizen suit.

Finally, to violate section 404 of the CWA, there must be an addition of a pollutant from a point source to navigable water. Here, Bowman made no "addition" to his wetlands during his

land clearing operations because he did not introduce any pollutants that came from outside the wetlands. Alternatively, there was no CWA jurisdiction over Bowman's wetlands because his land does not constitute "navigable water." Therefore, Bowman did not violate section 404 of the CWA and, accordingly, the district court's grant of summary judgment on all issues presented to this Court should be affirmed.

ARGUMENT

I. NUWF LACKS STANDING TO BRING SUIT AGAINST BOWMAN.

This Court must first determine whether NUWF has standing to bring a citizen suit against Bowman. Article III of the Constitution of the United States gives the federal judiciary jurisdiction over cases and controversies. U.S. Const. art. III. § 2. The case and controversy requirement requires a plaintiff to allege "such a personal stake in the outcome of the controversy as to warrant his invocation of federal-court jurisdiction and to justify exercise of the court's remedial powers on his behalf." *Warth v. Seldin*, 422 U.S. 490, 498-99 (1975) (internal quotations omitted). This requirement "is the threshold question in every federal case, determining the power of the court to entertain the suit." *Warth*, 422 U.S. at 498.

Standing may be established one of two ways: the plaintiff may assert standing through a direct claim, *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992); or, an organization may assert standing indirectly as a third party, *Hunt v. Washington State Apple Adver. Com'n*, 432 U.S. 333, 343 (1977). The party asserting federal jurisdiction bears the burden of establishing that they are the "proper party to invoke judicial resolution of the dispute and exercise the court's remedial powers." *Warth*, 422 U.S. at 518. Because the NUWF has failed to establish standing to bring both direct and indirect claims, this Court should affirm the decision of the district court.

A. NUWF Lacks Standing for a Direct Claim as an Organization Because Neither NUWF nor Its Members Have Suffered an Injury in Fact.

To establish standing, the party asserting standing must satisfy three elements. First, the party must show "an invasion of a legally protected interest which is (a) concrete and particularized; and (b) actual or imminent, not conjectural or hypothetical," *Lujan*, 504 U.S. at 560 (internal citations and quotations omitted). Second, there must exist "a causal connection between the injury and the conduct complained of. That is to say, the injury must be fairly . . . trace[able] to the challenged action of the defendant, and not . . . th[e] result [of] the independent action of some third party not before the court." *Simon v. Eastern Ky. Welfare Rights Organization*, 426 U.S. 26, 41-42 (1983) (internal citations and quotations omitted). Finally, "it must be 'likely,' as opposed to merely 'speculative,' that the injury will be 'redressed by a favorable decision.'" *Lujan*, 504 U.S. at 561. Although an organization need not show that the organization itself suffered particularized harm, to assert a direct claim "an association may have standing solely as the representative of its members." *Warth*, 422 U.S. at 511. This requires a showing that its members are "suffering immediate or threatened injury as a result of the challenged action of the sort that would make out a justiciable case had the members themselves brought suit," *ibid*, and that the nature of the claim does not make the individual participation of each injured party indispensible to resolution of the case. *Id*.

In order to establish an invasion of a legally protected interest, a plaintiff must allege facts showing an injury that is both qualitatively and temporally concrete. *Whitmore v. Arkansas*, 495 U.S. 149, 155 (1990). Aesthetic and environmental well-being have been recognized by the Supreme Court to be "important ingredients of the quality of life in our society, and the fact that particular environmental interests are shared by the many rather than the few does not make them less deserving of legal protection through the judicial process." *Sierra*

Club v. Morton, 405 U.S. 727, 734 (1972). "Injury in fact" in environmental cases is satisfied if a plaintiff adequately alleges an aesthetic or recreational interest in a particular place, or animal, or plant species and that that interest is adversely affected by the defendant's conduct. *Ecological Rights Found. v. Pac. Lumber Co.*, 230 F.3d 1141, 1147 (9th Cir. 2000) (citing *Friends of the Earth v. Laidlaw*, 528 U.S. 167, 182 (2000)); *Lujan*, 504 U.S. at 562-63; *Morton*, 405 U.S. at 734-735. In *Morton*, the Sierra Club brought suit against the United States Forest Service and Walt Disney Enterprises, Inc. seeking a declaratory judgment that Disney's proposed development of a national game refuge contravened several federal laws and regulations governing preservation of national parks, forests, and game refuges. *Id*. at 730. The Sierra Club based their standing argument on the fact that the Sierra Club is a membership corporation and has "a special interest in the conservation and the sound maintenance of the national parks, game refuges and forests of the country. *Id*. In denying standing, the court noted that the Sierra Club failed to allege that it or its members "[used] it in any way that would be significantly affected by the proposed actions of the respondents." *Id*. at 735.

In the present action, NUWF and its members' allegations of aesthetic impairment are anything but concrete, and the effect of Bowman's actions on NUWF and its members are not significant. In support of standing, the NUWF submitted affidavits from three of its members: Dottie Milford, Zeke Norton, and Effie Lawless. (Appellee's Appendix at 6.) All three testified that they use the Muddy for recreational boating and fishing, and picnic on its banks on or in the vicinity of Bowman's property. (Appellee's Appendix at 6.) All three, however, stated that they could not see any difference in the land from the river or its banks. (Appellee's Appendix at 6.) Indeed, the land abutting the river has not undergone any appreciable aesthetic change as Bowman agreed to convey a 150 foot wide conservation easement running the length of his

property to NUDEP in order to maintain the Muddy's visual appearance. (Appellee's Appendix at 4.) Bowman's conversion of his own property several hundred feet away from the Muddy has done nothing to prevent them from recreational boating and fishing, and has not impacted the visual appearance of the Muddy. (Appellee's Appendix at 6.) Indeed, the conservation easement now allows members of the public to engage in recreational activities on Bowman's property that were previously impossible. (Appellee's Appendix at 4.) While the law protects an interest in a place impaired by the conduct of another, Milford, Norton, and Lawless' inability to discern any cognizable difference in the Muddy's appearance and their ability to use the river and surrounding property for recreational activities following Bowman's actions makes their injury too abstract to assert a direct claim. Therefore, they lack standing.

Nor have NUWF's members asserted an injury in fact to support a direct claim of impairment from destruction of the wetlands. The "injury in fact" standard "requires more than an injury to a cognizable interest. It requires that the party seeking review be himself among the injured." *Lujan*, 504 U.S. at 563. In *Lujan*, two members of the Defenders of Wildlife organization brought suit against the Department of the Interior for funding programs that resulted in the loss of ability to view several species of animals abroad due to destruction of their habitats. *Id*. In ruling that the organization and its members did not have standing, the Supreme Court held that "[when] . . . a plaintiff's asserted injury arises from the government's allegedly unlawful regulation (or lack of regulation) of *someone else*, much more is needed." *Id*. at 562. While the *Lujan* court recognized that the viewing of endangered animals for aesthetic pleasure constituted a cognizable interest, the Court nonetheless held that they did not have standing because the members were not directly affected independent of their special interests. *Id*. at 562-63. In so holding, the Court noted that "[it] goes beyond the limit . . . to say that anyone who

observes or works with an endangered species, anywhere in the world, is appreciably harmed by a single project affecting some portion of that species with which he has no more specific connection." *Lujan*, 504 U.S. at 567.

In the present action, NUWF's members' only claim of impairment is the members' ambiguous allegation that they feel a loss from the destruction of the wetlands, and they are concerned that the Muddy will become polluted as a result. (Appellee's Appendix at 6.) While the members undeniably have a cognizable interest in preventing destruction of the wetlands, they are not among those injured by Bowman's actions in clearing and draining the field. As stated above, they have suffered no loss of aesthetic quality because they cannot see a difference from the river or its banks. (Appellee's Appendix at 6.) Furthermore, there's no allegation that the members use the wetlands or observe it for aesthetic pleasure. Rather, the only injury alleged is that they are "aware" of the loss of the wetlands and are concerned of future harm if more clearing is done in the future. (Appellee's Appendix at 6.) These allegations are clearly not concrete in quality, nor are they concrete in a temporal sense.

The amorphous injuries that arise out of awareness that the wetland is changed are not qualitatively sufficient to constitute injury in fact because NUWF and its members have failed to establish any impairment of aesthetic appreciation or recreational uses of the wetlands or the Muddy. The complaint of future damage if more wetlands are cleared is nothing more than a red herring, as NUWF members are simply complaining of speculative injuries that might occur due to some later action. "A plaintiff must allege that he has been or will in fact be perceptibly harmed by the challenged agency action, not that he can imagine circumstances in which he could be affected by the agency's action." *United States v. Students Challenging Regulatory Agency Procedures (SCRAP)*, 412 U.S. 669, 688-89 (1973). These allegations are insufficient to

satisfy the injury in fact requirement, and, as such, are insufficient to confer standing upon NUWF.

The only direct injury alleged is that one of the NUWF's members, Norton, can no longer illegally trespass upon Bowman's land to go frogging. (Appellee's Appendix at 6.) Norton testified that he has frogged on the Bowman property for years for recreational and subsistence purposes, and that the Bowman property was especially good. (Appellee's Appendix at 6.) Since Bowman cleared the field, however, Norton testified that there are no frogs in the drained area and there are very few in the remaining woods. (Appellee's Appendix at 6.) Norton also testified that Bowman properly posted signs putting Norton on notice that trespassing onto the property for any purpose was impermissible. (Appellee's Appendix at 6.) As trespassing is illegal, however, there is no *legally* protected interest at issue because Bowman has no right to break the law. Because there is no legally protected interest at issue, NUWF and Norton have no standing to bring a direct claim based upon the loss of frogging.

As an organization, the NUWF has failed to allege any harm suffered directly by the organization or to any special interest in conserving the Muddy. The record exhibits a complete absence of any facts indicating that Bowman's actions affected a particular interest of the organization. Indeed, the only injuries alleged by NUWF are suffered by their members. (Appellee's Appendix at 6.) Because the NUWF has alleged no particularized injury as an organization, NUWF lacks standing to bring direct claims against Bowman. Accordingly, this Court should affirm the holding of the district court below.

B. NUWF Lacks Indirect Standing.

The Supreme Court has also recognized that organizations have standing "to bring suit on behalf of its members when: (a) its members would otherwise have standing to sue in their own

right; (b) the interests it seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit." *Hunt*, 432 U.S. at 343. Individuals have standing in their own right under Article III if they meet the three *Lujan* elements. *Ecological Rights Found.*, 230 F.3d at 1147. The "injury in fact" requirement in environmental cases is satisfied if an individual adequately shows that she has an aesthetic or recreational interest in a particular place, or animal, or plant species and that that interest is impaired by a defendant's conduct. *Id*.

As to the first element, NUWF has not established that its individual members have standing to sue. As the above *Lujan* framework states, a plaintiff must allege an injury in fact. *Lujan*, 504 U.S. at 560. As stated in Part A, the individual members have failed to demonstrate an injury in fact, and, as such, lack standing. *See supra* Part I.A. Because their individual members lack standing, NUWF itself lacks standing. Therefore, the district court's holding should be affirmed.

II. THE DISTRICT COURT CORRECTLY DISMISSED NUWF'S CITIZEN SUIT FOR LACK OF JURISDICTION BECAUSE ANY ALLEGED VIOLATIONS WERE WHOLLY PAST.

Section 505 of the CWA provides district courts with jurisdiction over citizen suits to enforce the substantive requirements of the Act. 33 U.S.C. § 1365. However, a court's jurisdiction in citizen suits is subject to three fundamental limitations. First, the plaintiff must provide adequate notice to the defendant and relevant regulatory bodies of the alleged violation. 33 U.S.C. § 1365(b). Second, civil actions may be initiated against any person "who is alleged to be in violation of . . . an effluent standard or limitation" under the CWA. 33 U.S.C. § 1365(a)(1). Third, no jurisdiction exists for a citizen suit if the EPA Administrator or state

regulator "has commenced and is diligently prosecuting a civil or criminal action . . . ."[1] 33 U.S.C. §§ 1365(a), (b)(1)(B); *see also* 33 U.S.C. § 1319(g)(6). This Court should uphold the district court's determination that it lacked subject matter jurisdiction over NUWF's citizen suit because it found that Bowman was not in violation of the CWA when NUWF initiated the suit and any future violations were improbable.

A. Courts Lack Jurisdiction to Hear Citizen Suits That Only Allege Wholly Past Violations of the CWA.

In *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Foundation, Inc.* (*Gwaltney II*), 484 U.S. 49 (1987), the Supreme Court confirmed that the phrase "alleged to be in violation" limits district court jurisdiction over citizen suits, effectively removing jurisdiction over suits regarding "wholly past violations" of the CWA. *Id.* at 67; *see also* 33 U.S.C. § 1365(a)(1). Specifically, the Supreme Court stated that the structure of the citizen suit provision "make plain that the interest of the citizen-plaintiff is primarily forward-looking." *Gwaltney II*, 484 U.S. at 59. Accordingly, the Twelfth Circuit should uphold the district court's conclusion that NUWF's lawsuit addresses only wholly past violations, if any violations at all, and so affirm that court's grant of summary judgment for Bowman.

In *Gwaltney II*, the Supreme Court definitively interpreted the jurisdictional limit of § 1365 in light of a three-way circuit split. 484 U.S. at 56. The Fifth Circuit had previously held that "a complaint brought under § 1365 must allege a violation occurring at the time the complaint is filed." *Hamker v. Diamond Shamrock Chemical Co.*, 756 F.2d 392, 395 (5th Cir. 1985). However, the Fourth Circuit rejected the *Hamker* interpretation, believing jurisdiction existed for citizen suits to address "unlawful conduct [that had] occurred only prior to the filing

[1] *See infra* discussion Part III "NUWF's citizen suit is barred by NUDEP's diligent prosecution of Bowman's alleged CWA violations."

of a lawsuit." *Chesapeake Bay Foundation, Inc. v. Gwaltney of Smithfield, Ltd.* (*Gwaltney I*), 791 F.2d 304, 309 (4th Cir. 1986). Furthermore, the First Circuit concluded that jurisdiction exists under § 1365 when "the citizen-plaintiff fairly alleges a continuing likelihood that the defendant, if not enjoined, will again proceed to violate the [Clean Water] Act." *Pawtuxet Cove Marina, Inc. v. Ciba-Geigy Corp.*, 807 F.2d 1089, 1094 (1st Cir. 1986). The Supreme Court declared that the qualification in § 1365 was ambiguous and stated that, "[t]he 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." *Gwaltney II*, 484 U.S. at 57.

After acknowledging the various interpretations, the Supreme Court unanimously concluded that plaintiffs may not maintain an action based on wholly past violations of the CWA and reversed the opinion of the Fourth Circuit. *Id.* at 67. Notably, Justice Scalia, joined by Justices Stevens and O'Connor, departed from the majority to clearly adopt the stringent standard of the Fifth Circuit, urging that the Court instruct lower courts to exercise jurisdiction under the CWA based on "whether [the defendant] was in fact 'in violation' on the date suit was brought." *Id.* at 69 (Scalia, J., concurring in part and concurring in the judgment). The Supreme Court later summarized the holding in *Gwaltney II*, "we have held that citizens lack statutory standing under § 505(a) to sue for violations that have ceased by the time the complaint is filed." *Laidlaw*, 528 U.S. at 175.

Accordingly, for the purpose of determining whether the courts have jurisdiction to hear NUWF's citizen suit, the Twelfth Circuit must first define any alleged violations within the context of the Act. Second, the Twelfth Circuit should identify when any alleged violations took place. Thereafter, the Twelfth Circuit must conclude that if the alleged violations occurred only

prior to the initiation of NUWF's citizen suit, courts lack jurisdiction to hear the complaint unless Bowman had polluted in the past and was likely to do so in the future.

B. Any Alleged Violation of the CWA Was Wholly Past When NUWF Commenced the Citizen Suit on August 30, 2011.

The CWA "makes unlawful the discharge of any pollutant into navigable waters except as authorized by specified sections of the Act." *Gwaltney II*, 484 U.S. at 52; s*ee also* 33 U.S.C. § 1311(a). Section 404(f) of the Act states in pertinent part that, "the discharge of dredged or fill material . . . from normal farming, silviculture, and ranching activities such as plowing, seeding, cultivating, minor drainage, harvesting for the production of food, fiber, and forest products, or upland soil and water conservation practices . . . is not prohibited by or otherwise subject to regulation . . . " with exception to the use of toxic materials. 33 U.S.C. § 1344(f)(1).

All parties agree that Bowman's activities on his land after August 30, 2011 included allowing his field to drain and planting wheat seeds. (Appellee's Appendix at 7.) Notably, the record is devoid of any description of drainage of the field on or after August 30, 2011. However, as the ditch was completed by July 15, 2011, it is likely that the majority of drainage from Bowman's wheat field occurred prior to August 30, allowing only minor drainage between the date NUWF's citizen suit was filed and the date in September when Bowman planted wheat seeds. Accordingly, both minor drainage and planting seeds are expressly exempted from CWA regulations as normal farming activities. *See* 33 U.S.C. § 1344(f)(1). Because Bowman's activities after August 30 do not constitute violations of the CWA, there is no jurisdiction to hear NUWF's citizen suit.

1. NUWF Ignores the Temporal Component of Statutory Standing.

While NUWF argues the relevancy of section 404(f)(2), two theories demonstrate that Bowman's actions do not present a violation of the CWA on or after August 30, 2011. First,

Bowman's prior vegetation clearing and land leveling activities were not regulated by the CWA. *See infra* discussion Part IV.B. Second, even if Bowman's actions were governed by section 404(f)(2), any regulated activity was discontinued by July 15 and therefore *wholly past* on August 30, 2011, effectively barring NUWF's citizen suit.

Section 404(f)(2) of the CWA states in pertinent part, "[a]ny 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 . . . shall be required to have a permit under this section." 33 U.S.C. § 1344(f)(2). Even assuming *arguendo* that Bowman's clearing of vegetation and leveling of his wheat field required a permit, two theories demonstrate that such a permit would be granted *for the activity* of clearing vegetation and leveling the field.

First, a plain reading of the text confirms that section 404 permits regulate activity and not a state of being. Specifically, section 404(a) states that, "[t]he Secretary may issue permits, after notice and opportunity for public hearings for the discharge of dredged or fill material into the navigable waters at specified disposal sites." 33 U.S.C. § 1344(a). While the CWA defines numerous words and phrases as terms of art, the Act does not define "discharge of dredged or fill material." For instance, the Act explicitly identifies as terms of art, "[t]he term 'discharge of a pollutant' and the term 'discharge of pollutants." 33 U.S.C. § 1362(12). Furthermore, the Act states that, "[t]he term 'discharge' when used without qualification, includes a discharge of a pollutant." 33 U.S.C. § 1362(16). In section 404(a) the term "discharge" is qualified by the

phrase "of dredged or fill material." 33 U.S.C. § 1344(a). Thus, the definition provided in § 1362(16) for the unqualified use of "discharge" is inapplicable.[2]

However, the term "discharge of fill material" is defined in the Code of Federal Regulations as, "the *addition* of fill material into waters of the United States. The term generally includes, without limitation, the following *activities*[] . . . ." 40 C.F.R. § 232.2 (2010) (emphasis added). Notably, the regulation further identifies the act of discharging as "placement" and "building." *Id.*

Finally, the Supreme Court has repeatedly indicated that section 404 permits authorize actions that are performed by a person or corporation. In *Coeur Alaska, Inc. v. Southeast Alaska Conservation Council*, 557 U.S. 261 (1991), the Court stated that, "the Corp issued Coeur Alaska a *permit to pump* the slurry into Lower Slate Lake." *Id.* at 267 (emphasis added). In *Rapanos v. United States*, 547 U.S. 715 (2006) the plurality stated that while the issue revolved around the scope of the Corps' authority, the issue commenced when "the Rapanos and their affiliated businesses, *deposited* fill material without a permit." *Id.* at 729 (plurality opinion). Likewise, Justice Kennedy identified that Rapanos "*filled* in 22 of the 64 wetlands acres on the Salzburg site . . . without a permit" and noted the "*construction work* [that was] again conducted in violation of state and federal compliance orders." *Id.* at 763 (Kennedy, J., concurring in the judgment) (emphasis added). Furthermore, in *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121 (1985) the Court characterized the section 404 issue both as "whether the Corps of Engineers may demand that respondent obtain a permit before *placing* fill material" and as the

[2] Upon initial review the unqualified term discharge, thus referencing a discharge of a pollutant or pollutants, is used with frequency in the CWA, including within §§ 1311(b)(1)(A)(ii), 1311(g)(4)(a), 1342(b)(1)(C)(iii), 1342(b)(8), and 1342(k).

authority of the Corps "to require landowners to obtain permits from the Corps before *discharging* fill material." *Riverside Bayview Homes*, 474 U.S. at 126 (emphasis added).

Accordingly, it is reasonable to conclude that section 404 regulates the activity of adding, discharging, or placing dredged or fill materials in regulated waters. While the presence of dredged or fill materials in the absence of a permit may implicate a violation of section 404, the mere presence does not alter the timing of the violation.

2. NUWF Misconstrues Section 404 Violations as the Mere Presence of Fill.

The district court correctly found that while some courts have indicated that the presence of a pollutant in navigable waters is an ongoing violation, the "theory is ingenious but cannot be credited." (Appellee's Appendix at 7.) Specifically, NUWF contends that dicta from the Fourth Circuit should control the outcome of this case. In *Sasser v. Administrator, U.S. E.P.A.*, 990 F.2d 127 (4th Cir. 1993), the court stated that the defendant's section 404 violation "is a continuing one[;] [e]ach day the pollutant remains in the wetlands without a permit constitutes an additional day of violation." *Id.* at 129. However, the *Sasser* decision is distinguishable from this case because there, the court was addressing an action by the government to enforce the CWA via newly-authorized administrative penalties, not a citizen suit. *Id.*

In the seminal citizen suit case, the Supreme Court stated that, "it is little questioned that the Administrator [of the EPA] may bring enforcement actions to recover civil penalties for wholly past violations" because the EPA authority is granted by section 309, and not section 505—that authorizes citizen suits. *Gwaltney II*, 484 U.S. at 58. Likewise, when determining statutory standing in a citizen suit case under the CWA, the Supreme Court referenced its prior holding "that private plaintiffs, unlike the Federal Government, may not sue to assess penalties

for wholly past violations." *Laidlaw*, 528 U.S. at 708. Thus, the distinction between citizen suits and government action diminishes the persuasiveness of the *Sasser* dicta in this case.

Furthermore, in *Connecticut Coastal Fishermen's Ass'n v. Remington Arms Co., Inc.*, 989 F.2d 1305 (2d Cir. 1993), the Second Circuit squarely addressed the temporal nature of violations as demonstrated in this case. There, Connecticut Coastal Fisherman's Association brought a citizen suit against a company for its deposit of fill material into the Long Island Sound. *Id.* at 1311. There, both parties agreed that the corporation was no longer actively depositing fill material into the sound. *Id.* at 1312. The Second Circuit concluded that "[t]he present violation requirement of the Act would be completely undermined if a violation included the mere decomposition of pollutants." *Id.* at 1313. Thus, the Second Circuit held that the complaint "was directed at wholly past violations" and dismissed the suit for lack of subject matter jurisdiction. *Id.* The Twelfth Circuit should follow the Second Circuit, and similarly conclude that the mere presence of fill material does not satisfy the ongoing violation jurisdiction requirement for citizen suits identified in *Gwaltney II*.

Other circuits agree with the Second Circuit's decision in *Connecticut Coastal Fishermen's Ass'n* and have concluded that violations of the CWA are temporal because the prohibition on additions and discharges of pollutants without a permit specifically ban actions. *See Sierra Club v. Union Oil Co. of Cal.*, 853 F.2d 667, 671-72 (9th Cir. 1988) (acknowledging past violations but staying liability for wholly past violations unless and until citizen-plaintiff proves the existence of ongoing violations or the reasonable likelihood of continued violations); *Pawtuxet Cove Marina*, 807 F.2d 1089, 1094 (1st Cir.1986) (dismissing citizen suit for alleging wholly past violation because alleged violator was no longer in business); *Hamker*, 756 F.2d at 397 (dismissing suit for alleging only a single wholly past violation). Based on the prior

decisions of the First, Second, Fifth, and Ninth Circuits, and as indicated by the Supreme Court in *Gwaltney II*, the Twelfth Circuit should acknowledge that courts lack jurisdiction to address citizen suits alleging wholly past violations based on the activity of adding or discharging a pollutant.

To maintain its suit, NUWF must demonstrate violations of the CWA on or after August 30, 2011. *See Gwaltney II*, 484 U.S. at 57. However, NUWF has neither shown nor alleged that Bowman acted by discharging a pollutant, including dredged or fill material, without a permit or statutory authorization on or after that August 30, 2011. Rather, by date of filing Bowman had ceased all activities that could conceivably violate the CWA's prohibition on the discharge of a pollutant or fill material by any person except as authorized by statute, including sections 402 and 404. *See* 33 U.S.C. § 1311(a). Accordingly, the district court correctly found that it lacked jurisdiction to hear NUWF's citizen suit regarding wholly past violations relating to activities that were discontinued by July 15, 2011.

C. The District Court Correctly Concluded that Bowman is Unlikely to Violate the CWA in the Future.

Notwithstanding a lack of allegations of CWA violations on or after August 30, 2011, the district court appropriately concluded that Bowman was unlikely to violate the Act by adding or discharging pollutants or fill material into navigable waters in the future. In *Gwaltney II*, the Supreme Court stated that, "if the plaintiffs' 'allegations [of standing] were in fact untrue, then the [defendants] should have moved for summary judgment on the standing issue and demonstrated to the District Court that the allegations were sham and raised no genuine issue of fact.'" 484 U.S. at 66 (quoting *SCRAP*, 412 U.S. at 689). The Supreme Court further defined the standard in *Laidlaw*, stating that "a defendant claiming that its voluntary compliance moots a

case bears the formidable burden of showing that it is absolutely clear the allegedly wrongful behavior could not reasonably be expected to recur." *Laidlaw*, 528 U.S. at 709.

The district court found that Bowman's vegetation clearing and land leveling activities had ceased by July 15, 2011. (Appellee's Appendix at 4). Furthermore, the District Court acknowledged that all of Bowman's property in question was either currently in use as a wheat field, or subject to a voluntary, binding conservation easement with the New Union Department of Environmental Protection. (Appellee's Appendix at 7). Finally, the district court found that Bowman's farming activities on and after August 30, 2011, did not violate the CWA. (Appellee's Appendix at 7). Accordingly, because Bowman's wheat farming as of August 30 did not violate the CWA, and because any potential violations of the Act occurred prior to July 15, 2011 – more than one month prior to the initiation of NUWF's citizen suit, section 505 does not provide jurisdiction to address the lawsuit under the Supreme Court's holding in *Gwaltney II*. Therefore, the Twelfth Circuit must affirm the district court's dismissal of the citizen suit for lack of subject matter jurisdiction.

III. NUWF'S CITIZEN SUIT IS BARRED BY NUDEP'S DILIGENT PROSECUTION OF BOWMAN'S ALLEGED CWA VIOLATIONS.

The CWA provides any citizen a private right of action against any person alleged to be in violation of an effluent standard or an order issued by the Administrator or a state with respect to an effluent standard. 33 U.S.C. § 1365(a). A citizen suit is barred, however, where the administrator or a state has commenced and is diligently prosecuting an action against the violator to require compliance with the standard, limitation, or order. 33 U.S.C. § 1365(b)(1)(A). As stated in Part II.A., citizen suits may not be addressed to wholly past violations, nor seek to recover penalties that the government has chosen not to pursue. *Gwaltney II*, 484 U.S. at 60-61. Citizen suits are meant to supplement, and not supplant, government enforcement of the CWA.

Id. at 59-60. Congress included this diligent prosecution restriction in the CWA to avert the "obvious danger that unlimited public actions might disrupt the implementation of the act and overburden the courts." *Friends of the Earth v. Consolidated Rail Corp*., 768 F.2d 57, 63 (2d Cir. 1985).

In evaluating a consent decree for diligent prosecution, the court must examine both the negotiations of the consent order for procedural fairness and the substance of the consent order for substantive fairness and adequacy of the result. *United States v. BP Amoco Oil PLC*, 277 F.3d 1012, 1019-20 (8th Cir. 2002); *see also Laidlaw*, 890 F. Supp. at 489 (citing *SPIRG v. Fritzsche, Dodge & Olcott, Inc.*, 579 F. Supp. 1528, 1535 (D.N.J. 1984) ("An evaluation of 'diligence' measures comprehensively the process and effects of agency prosecution.")). The citizens initiating the suit bear the burden of proving that prosecution was not diligent, and this burden is heavy due to a presumption of prosecutorial diligence. *Laidlaw*, 890 F. Supp. at 486-487. The enforcement agency "must be given great deference to proceed in a manner it considers in the best interests of all parties involved." *Ark. Wildlife Fed'n v. ICI Americas Inc.*, 842 F. Supp. 1140, 1147 (E.D.Ark. 1993), *aff'd*, 29 F.3d 376 (8th Cir. 1994).

A. NUDEP Diligently Prosecuted Bowman Because the Consent Order Settlement Process Was Not Unfair Toward NUWF.

NUWF has failed to show a lack of diligent prosecution because the process regarding the consent order settlement was not procedurally unfair. In determining procedural fairness courts may consider several factors. These factors include whether negotiations were at arm's length and in good faith, the time and effort expended in settlement negotiations, and the adversarial vigor of negotiations. *Ne. Iowa Citizens for Clean Water v. AgriProcessors, Inc*., 469 F. Supp. 2d 666, 673 (N.D. Iowa 2006) (addressing all three factors); *see also BP Amoco* 277 F.3d at 1020 (addressing good faith and arm's length dealing). Other factors that courts have

used are the timing of filing of the suit in relation to when notice was given, whether the prosecution or defense drafts and files the complaint, and the timing between the filing of the complaint and settlement. *Laidlaw*, 890 F. Supp. at 489. This is a factual inquiry, with a high degree of deference to the finder of fact. *Ark. Wildlife Fed'n*, 842 F. Supp. at 1147.

In *AgriProcessors*, the Iowa district court analyzed the above factors and found the consent order to be a product of procedurally fair settlement negotiations. 469 F. Supp. 2d at 673-74. In so finding, the court reasoned that the parties negotiated in good faith and at arm's length, that the settlement was the result of protracted and strenuous negotiations, and the process was characterized by "adversarial vigor." *Id*. at 673. *Cf. United States v. Telluride*, 849 F. Supp. 1400, 1403 (D.Colo. 1994) (declining to grant motion to enter consent decree because it was filed the same date as the complaint and relied heavily on the defendant's experts). In *Laidlaw*, the court analyzed a similar set of factors and arrived found the settlement procedurally defective. *Laidlaw*, 890 F. Supp. at 489-90. In finding that the consent order was procedurally defective, the court considered the facts that the complaint was filed on the last day of the statutory period to do so, the complaint was drafted by and filed at the defendant's request, and that the settlement was entered into one day after the lawsuit was filed. *Id*. at 489. In so ruling, however, the *Laidlaw* court discounted the impact of the first two factors and expressed the most concern at the timing of the settlement. *Id*. at 489-90.

Here, NUWF cannot make a showing that *any* factor exists, let alone enough to constitute an unfair process. First, the record is devoid of any facts or allegations that indicate that NUDEP and Bowman did not negotiate in good faith or at arm's length. Second, the negotiation process was entered into shortly after NUWF gave Bowman notice of the defects on his property on July 1, 2011, and did not conclude until the issuance of the administrative order on August 1, 2011.

(Appellee's Appendix at 5.) This is dissimilar to the less than 24 hours of negotiations in *Telluride* and *Laidlaw* in that month-long negotiations allowed the parties ample opportunity to consider all possible penalties and ensure a fair result. Third, Bowman did not draft the complaint against him, nor did he instruct NUDEP to institute this action against him. In fact, the District Court's order is quite clear that it was NUDEP who "chose to bring suit in federal court and filed a complaint against Bowman." (Appellee's Appendix at 5.) Finally, the lawsuit was filed on August 10, 2011, long before the end of the statutory period in which it was required to be filed. (Appellee's Appendix at 5.) In the absence of any of these factors, the consent order cannot be said to be procedurally unfair.

Furthermore, the fact that NUWF was not involved in NUDEP and Bowman's settlement discussions is not material to the determination of procedural fairness. This is because the CWA does not create a statutory right for citizen-plaintiffs to participate. *AgriProcessors*, 469 F. Supp. 2d at 673. In concluding that a prosecuting agency and defendant were free to negotiate with whomever they chose, the *AgriProcessors* court stated that the citizen-plaintiff was free at all times to attempt to settle its own complaint against the defendant. *Id*. at 674. Furthermore, the court reasoned that the citizen-plaintiff's interests were represented even though they were not personally at the negotiating table because the government "represents the interests of all citizens at the negotiating table." *Id*. (citing *United States v. Union Elec. Co.*, 64 F.3d 1152, 1170 (8th Cir. 1995)). Because the settlement is not procedurally defective, this Court should affirm the ruling of the district court.

B. NUWF and Its Members Cannot Overcome the Presumption of Diligence by Showing NUDEP's Prosecution was Less Aggressive Than Their Own.

Second, NUWF cannot show a lack of diligent prosecution because the result of the negotiations was not substantively unfair to NUWF. A citizen-plaintiff may not institute a

citizen suit "solely for the purpose of challenging the terms of a settlement reached by state officials so long as the settlement reasonably assures that the violations alleged in the citizen suit have ceased and will not recur." *Atl. States Legal Found., Inc. v. Eastman Kodak Co.*, 933 F.2d 124, 125 (2d Cir. 1991). Furthermore, a citizen-plaintiff cannot overcome the presumption of diligence of prosecution under the CWA provision barring citizens' suits when state is diligently prosecuting an enforcement action merely by showing that the agency's prosecution strategy is less aggressive than he would like or that it did not produce a completely satisfactory result. *Piney Run Preservation Ass'n v. Cnty. Com'rs of Carroll Cnty., Md.*, 523 F.3d 453, 459 (4th Cir. 2008).

A court should, however, review a consent decree for substantive fairness. *BP Amoco*, 277 F.3d at 1020. "Substantive fairness introduces into the equation concepts of corrective justice and accountability: a party should bear the cost of the harm for which is it legally responsible." *Id*. In evaluating substantive fairness, this Court should look to the civil monetary penalty imposed and the non-monetary terms of settlement that ensure future CWA compliance to determine if the terms are fair, reasonable and adequate. *AgriProcessors*, 469 F. Supp. 2d at 676. The simple fact that a settlement is less burdensome to the defendant than a remedy sought in a citizen suit does not establish that the state failed to diligently prosecute. *Conn. Fund for the Environment v. Contract Plating Co.*, 631 F. Supp. 1291, 1294 (D. Conn. 1986). In upholding the consent order, the *AgriProcessors* court found that the $600,000 civil penalty,[3] future environmental compliance audits, and an agreement that the defendant rectify any future issues was fair, reasonable and adequate. *AgriProcessors*, 469 F. Supp. 2d at 676.

[3] The $600,000 was apportioned as follows: $400,000 represents the economic benefit to the defendants from the CWA violations; $5,000 represents the economic benefit from Clean Air Act and Emergency Planning and Community Right-to-Know Act; and $195,000 is a collective gravity amount for the violations of the three Acts. *AgriProcessors*, 469 F. Supp. 2d at 674.

In the present case, NUWF has failed to show any substantive defects with the consent order. Although the consent order has no monetary civil penalties, this fact is not dispositive in the present case. In *AgriProcessors*, the monetary penalties were designed to recoup for the state the benefits of violating the several statutes and provide a deterrent against future violations; in the instant case, Bowman did not derive any monetary benefits from his alleged violations. *AgriProcessors*, 469 F. Supp. 2d at 676. Instead of monetary penalties, Bowman agreed to convey a substantial portion of his property to NUDEP in the form of a conservation easement. (Appellee's Appendix at 4.) In addition to serving as a penalty, this conveyance also acts as a buffer and is designed to prevent future injuries to the environment. (Appellee's Appendix at 4.) This absence of a monetary penalty is fair, reasonable, and adequate because Bowman did not gain any economic benefit from the alleged violations of the CWA. Similarly, the conveyance of land is fair, reasonable, and adequate because he lost control of a significant portion of his land as punishment for violating the CWA, and that land serves as a buffer preventing future CWA violations. While the penalties imposed by the consent order may not incorporate everything NUWF requests in its citizen suit, the penalties enforced are no less fair, reasonable, or adequate. Because the consent order is not substantively defective, this Court should affirm the district court's dismissal of NUWF's complaint.

IV. BOWMAN DID NOT VIOLATE SECTION 404 OF THE CWA BECAUSE NO "ADDITION" OF A POLLUTANT WAS MADE TO "NAVIGABLE WATER."

Section 301(a) of the CWA prohibits the discharge of a pollutant by any person except in compliance with specified statutory sections, including section 404. 33 U.S.C. § 1311(a). Section 404 authorizes the U.S. Army Corps of Engineers ("Corps") to regulate "the discharge of dredged or fill material into the navigable waters" by providing permits to authorize those who discharge pollutants. 33 U.S.C. § 1344(a). The term "discharge" is defined as "any addition of

any pollutant to navigable waters from any point source." 33 U.S.C. § 1362(16). Therefore, to violate section 404 of the CWA, one must do the following without authorization from the Corps: (1) make an addition; (2) of a pollutant; (3) to navigable waters; and (4) from a point source. *Id.*

Here, Bowman made no "addition" of a pollutant to his wetlands during the land clearing operations, and, alternatively, Bowman's wetlands do not constitute "navigable water" to which the CWA applies. Therefore, the district court's decision that Bowman did not violate the CWA should be affirmed because NUWF and NUDEP fail to establish all of the section 404 requirements.

A. Bowman did not Violate Section 404 of the CWA Because No "Addition" of a Pollutant Occurred.

If a statute is silent or ambiguous on a specific question, a reviewing court must defer to any reasonable construction of that statute by the administering agency. *Chevron, U.S.A. v. NRDC*, 467 U.S. 837, 843 (1984). A court examining the legality of an agency's interpretation of a statute is to ask "whether the agency's answer [to the ambiguous question] is based on a permissible construction of the statute." *Id.* The agency's construction need only be a reasonable construction of the statutory question at issue, and does not need to be the one the court itself would adopt or the one the court feels would best implement congressional policy. *Id.* at 844-45.

Deference to an agency's interpretation of a statute is appropriate where Congress has authorized an agency to make rules carrying the force of law, and such authorization is apparent. *United States v. Mead Corp.*, 533 U.S. 218, 226-27 (2001). In Section 501(a) of the CWA, Congress expressly authorizes the Environmental Protection Agency ("EPA") to prescribe regulations which are necessary to administer the CWA. 33 U.S.C. § 1361(a); *see also Nat'l*

Wildlife Fed'n v. Consumers Power Co., 862 F.2d 580, 584 (6th Cir. 1988) ("EPA's construction is entitled to deference . . . [because] Congress generally intended that EPA would exercise substantial discretion in interpreting the Act.") (internal citations omitted).

Congress has not provided a definition of "addition" in the CWA. However, the EPA has defined what constitutes "addition," and its interpretation should be followed by this Court in accordance with *Chevron*.

1. No "Addition" Occurs Unless a Pollutant Comes From The "Outside World."

An "addition" only occurs if a point source physically introduces a pollutant from the "outside world." *Nat'l Wildlife Fed'n v. Gorsuch*, 693 F.2d 156, 175 (D.C. Cir. 1982). In *Gorsuch*, the plaintiff sought declaratory relief to require the EPA to issue NPDES permits for the construction of dams under section 402 of the CWA. *Id.* at 165. The EPA, however, argued that regulation of dams is not required because a dam does not "add" a pollutant from outside a body of water when the water travels through the dam. *Id.* at 175. The court held that the EPA's interpretation of "addition" was reasonable and that Congress likely gave the EPA discretion to define "addition" because it allowed the agency to define two other components of the section 402 permit program-"point source" and "pollutant." *Id.* Therefore, the required "addition" element of the CWA is not satisfied unless a source physically introduces a pollutant into water from outside that body of water. Id.

See also Consumers Power, 862 F.2d at 584 (agreeing with *Gorsuch* that the EPA's construction of "addition" is a permissible one which should be accorded deference); *United States v. Wilson*, 133 F.3d 251, 259-60 (4th Cir. 1997) ("[T]he movement of native soil a few feet within a wetland does not constitute the discharge of that soil into that wetland . . . . 'Addition' requires the introduction of a new material into the area, or an increase in the amount

of a type of material which is already present . . . . Were we to adopt so expansive a definition of 'discharge' that any movement of soil *within* a wetland constitutes 'addition,' we would not only flaunt the given definition of 'discharge,' but we would be criminalizing every artificial disturbance of the bottom of any polluted harbor because the disturbance moved polluted material about."); *Nat'l Min. Ass'n v. U.S. Army Corps of Engineers*, 145 F.3d 1399, 1404 (D.C. Cir. 1998) (holding, in accordance with *Gorsuch*, that the straightforward statutory term "addition" cannot reasonably be said to encompass the situation in which material is removed from a body of water and later returned back to its original location).

Here, Bowman made no "addition" of a pollutant to his wetlands because he redeposited the vegetation remains and soil into the very same wetlands that they came from. (Appellee's Appendix 4.) Bowman did this by merely pushing the vegetation remains and soil from one part of his wetlands to another. (Appellee's Appendix 4.) Nothing was introduced to the wetlands that did not already exist there. Therefore, because no pollutants from outside of the wetlands were deposited into the wetlands, Bowman made no "addition" of a pollutant to his wetlands during his land clearing operations.

2. An "Addition" Does Not Occur During Water Transfers.

In addition, water transfers—activities that convey waters of the United States without subjecting the transferred water to intervening industrial, municipal, or commercial use—are not subject to regulation under the National Pollutant Discharge Elimination System (NPDES) permitting program because they do not result in an "addition" of a pollutant. National Pollutant Discharge Elimination System (NPDES) Water Transfers Rule, 73 Fed. Reg. 33697-01 (June 13, 2008). Courts must give effect to the Water Transfer Rule, per *Chevron*, "[u]nless and until the EPA rescinds or Congress overrides the regulation." *See Friends of the Everglades v. S. Fla.*

Water Mgmt. Dist., 570 F.3d 1210, 1228 (11th Cir. 2009) (holding that the EPA's Water Transfer Rule, adopting the unitary waters theory, is a reasonable and permissible construction of the CWA's language which the court must follow).

As part of its reasoning behind the Water Transfer Rule, the EPA stated that "water will always contain intrinsic pollutants, but the pollutants in transferred water are already in 'the waters of the United States' before, during, and after the water transfer." National Pollutant Discharge Elimination System (NPDES) Water Transfers Rule, 73 Fed. Reg. at 33701 (citing Brief for the United States in *Friends of the Everglades*, 570 F.3d 1210; *see also S. Florida Water Mgmt. Dist. v. Miccosukee Tribe of Indians*, 541 U.S. 95, 109 (2004) (accepting the "unitary waters theory"). Therefore, no "addition" occurs because nothing is being added to "the waters of the United States" due to the water transfer. *Id.*.

To constitute a "water transfer" under the Water Transfer Rule, and be exempt from the requirement to obtain an NPDES permit, the water being conveyed must constitute "navigable water" under section 404 of the CWA prior to being discharged to the receiving water body. *Id.*; 33 U.S.C. § 1362(7). Section 404 of the CWA applies to "navigable waters," which is defined as "the waters of the United States." 33 U.S.C. § 1362(7). The Corps interpret "waters of the United States" to include rivers and wetlands "adjacent to" a river. 33 C.F.R. § 328.3(a)(1)(7).

Here, if the Court finds that both the Muddy and Bowman's wetlands constitute "navigable water," then a "water transfer" occurred and there was no "addition" of a pollutant under section 404 of the CWA. The "water transfer" occurred when the vegetation remains and soil excavated by Bowman from the wetlands were drained and transferred to the Muddy without being subject to any intervening use. (Appellee's Appendix 4.) Because any pollutants that may

have been transferred into the Muddy already existed in "navigable water," no "addition" of any pollutant occurred under the Water Transfer Rule.

B. Alternatively, Even If There Was An "Addition" of Pollutants, Bowman Did Not Violate Section 404 of the CWA Because His Wetlands Did Not Constitute "Navigable Water."

The Corps interpret "waters of the United States" to include rivers and wetlands "adjacent to" a river. 33 C.F.R. § 328.3(a)(1)(7). However, "*only* those wetlands with a continuous surface connection to bodies that are 'waters of the United States' in their own right, so that there is no clear demarcation between 'waters' and wetlands, are 'adjacent to' such waters and covered by the [CWA]." *Rapanos*, 547 U.S. at 742 (plurality opinion).

1. Under *Rapanos*, Bowman's Wetlands Are Not "Navigable Water" Because the Wetlands Lack a Continuous Surface Connection With the Muddy River.

The CWA does not apply to wetlands which merely have a remote hydrologic connection to "waters of the United States." *Id.* at 741-42. In *Rapanos*, the plaintiff sued the defendants for violation of section 404 of the CWA after the defendants allegedly discharged fill material into protected wetlands located nearby a body of navigable water. *Id.* at 715. The defendants contended that the CWA did not apply to the wetlands, despite the hydrologic connection between the wetlands and navigable water nearby. The court agreed with the defendants and held that wetlands are covered by the CWA only if: (1) the body of water adjacent to the wetland constitutes "wate[r] of the United States;" and (2) the wetland has a continuous surface connection with that water, making it difficult to determine where the "water" ends and the "wetland" begins. *Id.* at 742. Because the wetland at issue only had an intermittent, physically remote hydrologic connection to waters of the United States, it lacked the necessary connection to covered waters to establish the significant nexus required for coverage under the CWA. *Id.*

Here, the CWA does not apply to Bowman's wetlands because the wetlands lack a continuous surface connection with the Muddy. There is an insufficient surface connection between the wetlands and the Muddy exists because only portions of the wetlands are inundated every year when the Muddy is high. (Appellee's Appendix 3.) As in *Rapanos*, the hydrological connection between the wetlands and the Muddy, (Appellee's Appendix 3), is insufficient for the wetlands to be covered by the CWA. Therefore, because the wetlands lack a continuous surface connection with the Muddy, the wetlands are not "adjacent to" the river and, thus, not covered by section 404 of the CWA.

2. The *Rapanos* Plurality Opinion is Controlling Because it Constitutes a Logical Subset of Justice Kennedy's Concurring Opinion and, Thus, is The Narrowest Ground.

The Court's holding in *Rapanos* was not a single majority opinion. *Rapanos*, 547 U.S. at 715. Instead, the judgment was sustained by a plurality opinion authored by Justice Scalia and joined by the Chief Justice, Justice Thomas, and Justice Alito; and by a separate opinion, authored by Justice Kennedy, concurring in the judgment. *Id.*

In contrast to the plurality, Justice Kennedy's concurrence approaches the jurisdictional question of CWA using a broader test, termed a "significant nexus." *Id.* at 759 (Kennedy J., concurring in the judgment). A significant nexus is present if the wetland or waterbody, either by itself or in combination with similar wetlands or waterbodies in the same region, significantly affects the physical, biological, and chemical integrity of the downstream traditional navigable waterway. *Id.* at 780.

Because *Rapanos* is a split decision, this Court must apply the rule for interpreting split Supreme Court decisions set forth in *Marks v. United States*, 430 U.S. 188 (1977). According to *Marks*, the controlling opinion of a split decision comprises the opinion of those Justices

concurring in the judgment on the narrowest grounds. *See Marks*, 430 U.S. at 193. The narrowest grounds assessment requires a "logical subset analysis." See *United States v. Johnson*, 467 F.3d 56, 63-64 (1st Cir. 2006) (citing *King v. Palmer*, 950 F.2d 771, 781 (D.C. Cir. 1991)). To constitute as the narrowest ground, the plurality opinion must reach the same result as the concurring opinion for "less sweeping reasons." *Id.*

Here, the plurality's test in *Rapanos* is the logical subset of Justice Kennedy's test and should, therefore, be followed. Where CWA jurisdiction exists under the plurality's test, the same will be true under Justice Kennedy's test. *See Rapanos,* 547 U.S. at 756-57 n.15. However, Justice Kennedy's "significant nexus" test produces a whole new set of outcomes not contained in the plurality test. Therefore, the *Rapanos* plurality is controlling under *Marks*.

In addition, Justice Kennedy's approach is an unworkable standard and should, therefore, be dismissed. *See United States v. Chevron Pipe Line Co.*, 437 F. Supp. 2d 605, 613 (N.D. Texas 2006). In *Chevron Pipe Line*, the Corps sued the defendant for discharging oil into a drainage ditch that flowed only during significant storm events. *Id.* at 607. The court looked to *Rapanos* for guidance in determining the scope of federal jurisdiction of the CWA, and observed that Justice Kennedy "advanced an ambiguous test" which "leaves no guidance" on how to determine what a "significant nexus" is. *Id.* at 613. Therefore, instead of relying on the Kennedy opinion, the court based its decision on existing Fifth Circuit precedent and "the Supreme Court's plurality opinion in *Rapanos v. United States*" and found that "absent actual evidence that the site of the farthest traverse of the spill is navigable-in-fact or adjacent" thereto, there is no CWA jurisdiction. *Id.* at 615.

CONCLUSION

For the foregoing reasons, this Court should affirm the district court's ruling granting summary judgment for Bowman.

Dated: November 29, 2012

Respectfully submitted,

Counsel for Defendant-Appellee,
Jim Bob Bowman

NO. 13-1246

IN THE

UNITED STATES COURT OF APPEALS
FOR THE TWELFTH CIRCUIT

NEW UNION WILDLIFE FEDERATION,
Petitioner-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

APPENDIX FOR DEFENDANT-APPELLEE JIM BOB BOWMAN

TEAM #7
Counsel for Appellee,
Jim Bob Bowman

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Defendant-Appellee.	**:**	

ORDER

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

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

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

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

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

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

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

SO ORDERED.

Entered this 14th day of September, 2012.

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

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW UNION

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

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

I. Findings of Fact

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

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

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

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

II. Procedural History

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

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

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

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

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

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

On November 1, *2011*, at a status conference on both cases, this Court notified the parties that it was not acting on any of the motions in either the NUDEP or the NUWF cases for the present besides NUDEP's motion to intervene in the NUWF case; this was done without prejudice to NUDEP's rights to enforce violations of its proposed decree or of NUWF's rights to continue with its cause of action. This Court granted NUDEP's motion to intervene in NUWF's § 505 action, the case which we address herein.

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

III. Standing

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

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

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

IV. No Continuing Violation

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

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

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

V. Prior State Action

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

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

VI. Violation of § 404

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

A. Pollutant

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

B. Point source

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

C. Navigable waters

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

D. Addition

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

Alternatively, EPA has interpreted "addition" in its Water Transfer Rule to incorporate the "unitary navigable waters" theory, under which all navigable waters are one for the purposes of § 301(a) of the CWA. National Pollutant Discharge Elimination System (NPDES) Water Transfer Rule, 73 Fed. Reg. 33,697 (June 13, 2008) (codified at 40 C.F.R. pt. 122). Bowman argues that EPA did so in a regulation, entitling its interpretation to *Chevron* deference, as recognized by the Eleventh Circuit in *Friends of the Everglades v. South Florida Water*

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

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

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

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

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

1. Plaintiff lacks standing;

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

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

4. There is no violation of the CWA.

SO ORDERED.

Romulus N. Remus

United States District Judge

June 1, 2012