Team Brief

Party:
New Union Department of
Environmental Protection
(Intervenor-Appellant)

UNITED STATES COURT OF APPEALS
FOR THE TWELFTH CIRCUIT

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

INTERVENOR-APPELLANT'S OPENING BRIEF ON APPEAL

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

Introduction

Over the course of a month in the summer of 2011, Jim Bob Bowman ("Bowman" or "Defendant") silenced a thriving wetland ecosystem. With bulldozers and time, he dug up the wetland, filled it in, and drained the remaining water, all without a permit or apparent concern for the wider ramifications of his actions. Bowman claims that these activities neither harmed the plaintiffs nor violated the Clean Water Act ("CWA" or "the Act"). Yet he does not dispute his activities, nor does he argue that they had no impact on the Muddy River. Indeed, he does not even attempt to dispute that his activities resulted in a near complete loss of a wetland, and thus the disruption of not one but two "waters" of the United States, namely the wetland property and the Muddy River that the wetlands filter and protect.

The New Union Wildlife Federation ("NUWF" or "Plaintiff") properly filed a complaint once its members recognized the effects of Bowman's actions. Bowman's activities left them less able to enjoy some of their favorite activities, including boating, fishing, swimming and frogging. The river became dirtier and frogs became scarce. Because of Bowman's wanton activities, the NUWF's members suffered not only from a loss of aesthetic enjoyment, but also from an increase anxiety about the condition of the river. That the court below found these injuries sufficient for standing is the result not of an appropriate recitation of the law, but rather of an apparent unfamiliarity with the great weight of authority on the issue of standing in the environmental context. Given the law and facts as they stand, summary judgment for Bowman is entirely inappropriate on this issue.

The lower court was correct, however, in finding that Bowman's activities are wholly past. Simply leaving material in the ground after discharge cannot create an ongoing violation, and Bowman has agreed to stop clearing his land. Indeed, neither side suggests that Bowman

will add more dredged or fill material in the future. These circumstances are not the type Congress intended to have citizens prosecute, as the Act's citizen suit provision expressly requires an ongoing violation. Even in the light most favorable to NUWF, no jury could find for them on this issue.

The court below was similarly correct in finding that the New Union Department of Environmental Protection ("NUDEP") is diligently prosecuting the CWA violation. As soon as the NUDEP learned of Bowman's actions, it began administrative and prosecutorial actions to stop and remedy Bowman's actions. Bowman and NUDEP entered into a settlement agreement under state law that required Bowman to halt all land excavation and land-clearing activities on his wetlands. It also required Bowman to restore and maintain a 225 foot wetland buffer zone between the Muddy River and the drained field, upon which Bowman was required to place a conservation easement. Today, the NUDEP continues to prosecute the case in federal court, where it has filed a motion in to enter a decree identical to this administrative order. Even with when viewed in the light most favorable the NUWF, NUDEP's prosecution of Bowman's case clearly meets the prima facie requirements for a showing of "diligent prosecution." It is therefore appropriate to find summary judgment against NUWF on this issue.

While a citizen suit is not appropriate under these circumstances, a State suit is essential. Indeed, the destructive land-clearing that Bowman undertook in his wetland property exemplifies the continuing need for proper agency enforcement of the CWA. The court readily, and correctly, found that the trees and vegetation Bowman buried constituted a pollutant under the meaning of the act. Yet it found that, because the material originated within the wetland, it could not be a pollutant under the Act. This finding failed to defer to regulatory authority, which clearly states that "redeposit" of native soils and vegetation, either as dredged or fill material,

constitutes the "addition" of a pollutant. It also ignores the great, indeed almost unanimous, weight of authority and the clear intention of the Act itself. Because of these errors, the court's finding on this issue must be overturned.

Statement of Facts

The defendant Bowman owns one thousand acres of wetland property near Mudflats, New Union, with 650 feet of shoreline on the Muddy River. The Muddy River is a federally navigable river that supports recreation, fishing, frogging and navigation activities. Both sides agree that the entire one thousand acres are wetlands, as determined by the Army Corps of Engineers' (the "Corps" or "the Army Corps") Wetlands Determinations Manual. Prior to the dates in question this property was wooded and supported trees, vegetation and other wetland species. It was also, and continues to be, hydrologically connected to the Muddy River.

Between June 15, 2011 and July 15, 2011, Bowman transformed all but a small strip of his land from wetland to dry field. To do so he bulldozed trees and other wetland vegetation, which he pushed into piles and burned. Bowman was unable to clear a 150 wide strip of land that ran along the 650 foot Muddy River shoreline, as he could not use a bulldozer on the saturated soil.

After removing and burning the trees and vegetation, Bowman dug trenches, which he filled with the remaining trees, vegetation and ashes. He covered these trenches with soil excavated from higher portions of the wetland. He also leveled the cleared area by pushing soil dug up from the trenches and removed from high portions of the field to low-lying areas of the wetland. Last, he dug a wide trench from the Muddy River to the back of the property to drain the wetland, including the remaining strip of land. He planned to clear this strip once it had

drained enough for working with a bulldozer. By September 2012, the wetland had drained such that Bowman was able to plant winter wheat.

According to the uncontested testimony of Dottie Milford, Zeke Norton, and Effie Lawless, members of the NUWF, the Muddy is used for recreational boating and fishing as well as picnicking on the shores. It is similarly uncontested that users of the river are aware of the destruction of wetland. Ms. Milford reports that the river looks more polluted than it did before Bowman destroyed the wetlands. Mr. Norton, a subsistence and recreational frogger, reports that frog populations have also declined in and around the cleared field. Finally, all three report anxiety about the pollution level of the river. Bowman does not contradict this testimony.

Argument

The district court's grant of summary judgment is reviewed de novo by this court. See e.g., Adickes v. S. H. Kress & Co., 398 U.S. 144, 153 (1970) (performing a de novo review of the District Court's grant of summary judgment).

I. The court below erred in granting Bowman's motion for Summary Judgment on the issue of injury in fact because NUWF properly alleged that three of its members suffered injuries in fact that resulted from Bowman's environmental violations.

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, 560-61 (1992). To assert standing, an environmental group needs only to find a single person in its membership with a particularized interest (e.g. one who hikes, hunts, fishes, or camps in or near the affected area) resulting from Bowman's environmental violation. Sierra Club v. Morton, 405 U.S. 727 (1972).

The district court only evaluated the first prong of the standing analysis: injury in fact. When examining the injury in fact requirement, the Court examines two elements that an

individual asserting standing must meet: 1) the individual must "use the affected area by the challenged activity and not an area roughly 'in the vicinity' of it"; and 2) the individual must suffer an "actual or imminent" injury. See Lujan, 504 U.S. at 564-66.

Milford, Norton, and Lawless all satisfy the first element of the injury in fact analysis because they use the river in the vicinity of the Bowman property for recreational boating and fishing, often picnicking on its banks. Second, all three NUWF members properly alleged an actual or imminent injury. Milford observed the river is more polluted than before, which is an aesthetic injury. Norton hunts frogs and was injured by the decrease in the frog population in the surrounding area. Norton, Milton, and Lawless all alleged that they feel a loss resulting from the destruction in wildlife habitat. The district court erred in finding that an injury in fact did not exist, so this Court should reverse and remand for a finding on the other two prongs of the Lujan test.

A. The court below erred in finding no injury in fact existed because Milton, Norton, and Lawless all satisfy the first element of the injury in fact analysis, proximity to the environmental violation.

First, courts are fairly lenient when assessing proximity. In the Second Circuit, an individual who drove by the river on a regular basis had standing to file suit under the CWA. Friends of the Earth v. Consolidated Rail Corp., 768 F.2d 57, 61 (2d Cir. 1985) ("The individual affidavits that Sloop Clearwater submitted to the district court quite adequately satisfy the standing threshold . . . he passes the Hudson regularly and 'find[s] the pollution in the river offensive to [his] aesthetic values.'"). Furthermore, if the individual is not currently in the area affected by the challenged activity but has concrete plans to return to the area affected, that individual has standing. Lujan, 504 U.S. at 564.

The Supreme Court and Fifth Circuit placed lower limits proximity threshold requirement. The Supreme Court rejected the "animal nexus approach" when it held that a person who works with animals in one area of the world would not automatically have standing from an environmental violation that occurred in another part of the world. Lujan, 504 U.S. at 566. The Supreme Court also rejected the "vocational nexus" approach, which would grant standing to anyone who with a professional interest in any animal species affected by the environmental violation. Id. The Fifth Circuit also set useful limits on standing. Sierra Club v. City of Jackson, Miss., 34 F. App'x 151, *4 (5th Cir. 2002) (holding that a member of the Sierra Club who has not visited the river in the past fifteen years is too remote an example of harm); Friends of the Earth, Inc. v. Crown Cent. Petroleum Corp., 95 F.3d 358, 361 (5th Cir. 1996) (holding that a person who watched birds 18 miles and three tributaries away from the unlawful discharge was too far away to be injured).

Milford, Norton, and Lawless use the river in the vicinity of the Bowman property for recreational boating and fishing, often picnicking on its banks. Bowman did not dispute this fact. Therefore, by viewing all evidence in the light most favorable to the non-moving party, NUWF has met its burden. This recent and frequent use of the Muddy easily meets the proximity threshold limitations set forth by the Supreme Court and the Fifth Circuit. See Lujan, 504 U.S. at 566; City of Jackson, 34 F. App'x at *4; Friends of the Earth, 95 F.3d at 361.

B. The court below erred in finding that an actual or imminent injury did not exist because Milton properly alleged that the Muddy looked more polluted after Bowman's activities which creates both aesthetic and recreational harms.

Injuries sufficient to satisfy the Article III case or controversy requirement need not be large; even an “identifiable trifle” will suffice. United States v. Students Challenging Regulatory

Action Procedures (SCRAP), 412 U.S. 669, 689 n.14 (1973). In environmental cases, an injury in fact may be aesthetic rather than economic. Sierra Club v. Morton, 405 U.S. 727, 734 (1972).

Petitioners ask that this Court use the Third Circuit's decision in Pub. Interest Research Grp. of N.J. v. Powell Duffryn Terminals, Inc., 913 F.2d 64, 71 (3rd Cir. 1990) as persuasive authority for the immediate case. In Pub. Interest Research Grp. of N.J., the Third Circuit found that an organization had standing because its members asserted two injuries in fact resulting from the polluted look of the river. Id. First, even though no member boated in the river, several members asserted that they *would* boat, fish, or swim if the water were cleaner. Id. Second, a member asserted that he would "birdwatch more frequently and enjoy his recreation on the [river] more if the water were cleaner." Id. The Third Circuit found that these injuries were more than trifles and that the pollution interfered with the members' enjoyment of the river. Id. Since the defendant did not introduce any evidence to negate these claims, plaintiff satisfied its burden on injury in fact. See id.

Milford's testimony that the water looks more polluted shows two injuries in fact. First, a river that looks polluted is not as aesthetically pleasing as an uncontaminated river, which results in fewer walks and picnics or less enjoyable trips to the river. Bowman did not offer any evidence to show that the river did not look more polluted after his environmental violation, so NUWF satisfied it burden of showing an aesthetic injury occurred.

Second, Milford uses this river for boating and fishing, both activities of which are impacted by Bowman's environmental violations. People fish less in a river that looks polluted and eat less of the fish caught for fear of contamination. Also, people spend less time boating on polluted rivers. This *real impact* on the use of the river results in a *tangible injury* that is subjectively and objectively justified. Bowman did not offer any evidence to show that a

polluted looking river would not implicitly affect recreational use of the river. By examining the evidence in the light most favorable to NUWF, one can easily infer that a polluted looking river will negatively impact people who use the river for recreational purposes. Overall, Milford's aesthetic and recreational harms are more than sufficient to show Milford suffered an injury in fact.

C. The court below erred in finding that an actual or imminent injury did not exist because Norton properly alleged that Bowman's activities reduced the surrounding area's frog population, which Norton hunted.

"The desire to use or observe an animal species, even for purely esthetic purposes, is undeniably a cognizable interest for purpose of standing." Lujan, 504 U.S. at 562-63. In the Eighth Circuit, a hunting club was granted standing when it speculated that open water dredging would eliminate nesting sites of a tern and would also threaten the habitat of a muscle. Sierra Club v. U.S. Army Corps of Eng'rs, 645 F.3d 978, 988 (8th Cir. 2011). The injury arose when the club's members asserted that the tern and muscle were endangered and that the protection of endangered species was very important to them. Id. Even though the extent of the impact to the tern and muscle were speculative and the members neither watched nor hunted these animals, the court still found standing.

Norton testified that he uses the river recreationally and has hunted frogs in "the area for years," so even if this court finds that an injury has not yet occurred, an imminent injury is implied in Norton's testimony. First, assuming *arguendo* that standing cannot result from trespassing, Norton still alleged an injury in fact. Norton frequently hunts frogs along the Muddy, particularly in the area on and surrounding the Bowman property. The fact that the frog population is mobile enough to move between Bowman's habitat and the habitat surrounding the Muddy allows Norton to show that a decrease in the frog population on the Bowman property

will result in a decrease in the from population in surrounding areas. Additionally, implicit to the NUDEP biologist's argument that the frog population will surpass its previous levels is the premise that the current frog population is smaller than before Bowman's environmental violations. The question of whether the wetland will eventually sustain a larger frog population is a question for remedies, not standing.

Second, even if the Court finds that Norton only hunted frogs on the Bowman property, Norton will suffer an imminent injury as soon as he hunts frogs in the area surrounding the Bowman property. Implicit in Norton's claim that he often hunts frogs in the area around the Bowman property is that he will continue to hunt frogs in the area around the Bowman Property. Furthermore, Bowman offered no evidence to show that Norton will not continue to hunt frogs in the area surrounding the Bowman property. Examining the evidence in the light most favorable to NUWF, NUWF alleged sufficient undisputed facts to show that Norton suffered an injury in fact.

D. The court below erred in finding that an actual or imminent injury did not exist because the court below erroneously decided that Milford, Norton, and Lawless' feeling of loss from the destruction of the wetlands was speculative.

Milford, Norton, and Lawless all properly alleged that they feel a loss from the destruction of the wetlands, thus satisfying the injury-in-fact requirement of standing. The importance of the injury-in-fact requirement is that the plaintiff suing because of an environmental violation must be injured in some way. This is a subjective standard. Even though no court has squarely addressed the issue of whether feeling a loss constitutes an injury in fact, courts routinely grant standing for purely psychological injuries. See, e.g., Friends of the Earth, 768 F.2d at 61 (granting standing to an individual who frequently drives by the river and finds its pollution offensive); Pub. Interest Research Grp., 913 F.3d at 71 (granting standing to an

individual who would bird watch more frequently if the water were cleaner). The courts also routinely grant standing to plaintiffs who allege injuries that are more speculative than feeling a loss from the destruction of the wildlife habitat. See, e.g., Sierra Club v. U.S. Army Corps of Eng'rs, 645 F.3d at 988 (granting standing to members of a hunting club that alleged the habitat of a mussel would be threatened if the environmental violation occurred); Pub. Interest Research Grp., 913 F.2d at 71 (granting standing to several group members that would boat, fish, or swim in the river if it were cleaner).

A closer examination of "feeling a loss" implies claims that other courts have recognized as an injury in fact. First, "feeling a loss" includes the implicit argument that the loss of the wetland will reduce habitat for animals, thus reducing the number of animals in the area. Courts recognize a loss that results from a decrease in the number of animals in an area from an environmental violation as an injury in fact. See Sierra Club v. U.S. Army Corps of Eng'rs, 645 F.3d at 988 (holding that the importance of the protection of endangered species was sufficient to grant standing when the habitat of these species was threatened by an environmental violation). One can easily reason that an individual, who believes the protection of animals is important and learns that habitat that contains animals was destroyed, would feel a loss.

Second, "feeling a loss" is similar to an aesthetic injury, which the courts recognize as an injury in fact. Sierra Club v. Morton, 405 U.S. at 734 (holding that an injury in fact may be aesthetic rather than economic). Aesthetic injuries result when people do not receive the same utility from an activity that takes place near the area of an environmental violation because the scenery is not as pretty. The present situation is analogous because a picnic on the banks of the Muddy or recreational boating on the Muddy would result in less utility for Milford, Norton, and Lawless because they know what lurks over the buffer zone: environmental destruction.

Whether it was the loss of habitat, the destruction of the vegetation, or the alteration of the natural state of the earth, all three plaintiffs feel a difference. The injury they suffer is real, even if it just barely meets the identifiable trifle standard. See SCRAP, 412 U.S. at 689 n.14.

Overall, plaintiffs ask this court to find that "feeling a loss" from the destruction of the wetlands constitutes an injury in fact because it is akin to subjectively valuing the protection of endangered species and the aesthetic value of the river.

II. The District Court correctly determined that Clean Water Act violations were wholly past because Defendant's discharge of the dredged material ceased prior to the claim's filing and the activity has no likelihood of reoccurrence.

NUWF must prove that a violation is ongoing in order to sustain a claim under § 505(a) of the CWA to satisfy the requirement for subject matter jurisdiction. To establish that a violation was ongoing at the time of the complaint, plaintiffs "may accomplish this either (1) by proving violations that continue on or after the date the complaint is filed, or (2) by adducing evidence from which a reasonable trier of fact could find a continuing likelihood of a recurrence in intermittent or sporadic violations." Chesapeake Bay Found. v. Gwaltney of Smithfield, 844 F.2d 170, 171-172 (4th Cir. 1988). Bowman's violations meet neither of the standards that NUWF must prove: 1) the activity ceased more than a month before NUWF filed the complaint and 2) a signed administrative order mandates the construction and maintenance of an artificial wetland on the property, meaning that no further violations are likely to take place.

A. Bowman terminated his illegal activity prior to the NUWF's filed complaint, making his violation past rather than ongoing.

Bowman's activities are wholly past because the integration of burned fill materials into the wetland represents an irreversible impact from a ceased activity. The Supreme Court has interpreted § 505(a) to be forward-looking: "the harm sought to be addressed by the citizen suit lies in the present or the future, not in the past." Gwaltney of Smithfield v. Chesapeake Bay

Found., 484 U.S. 49, 59 (1987). The harm caused by the destruction of Bowman's protected wetlands occurred during the activity (i.e. bulldozing and filling of trenches with burned fill material), and concluded on July 15, 2011. While Bowman continued harmful activities after receiving the initial notice from NUWF regarding the intent to sue under § 505 on July 1, 2011, the act of discharging was complete before the claim was filed on August 30, 2011.

Jurisdictions differ on whether the presence of illegal materials in a protected water constitutes an existing violation. City of Mt. Park v. Lakeside at Ansley, LLC, 560 F. Supp. 2d 1288, 1293 (N.D. Ga. 2008) ("The issue has split the lower courts."). While some courts consider the remaining presence of foreign materials in a wetland to be sufficient continuation, others conclude that a single instance of contamination is a past event, even if part of the material continues to leach into waterways. Sierra Club v. El Paso Gold Mines, 421 F.3d 1133, 1139-1140 (10th Cir. 2005). The majority of appellate courts side with the latter argument, that the violation has ceased when the materials are completely discharged from a point source.

NUWF contends that the violations continue due to the remaining fill material in the wetland. This interpretation focuses on the location the illegal discharge was deposited into, yet fails to consider that the materials were not being discharged from a point source, an essential element of the violation, at the time the claim was filed. While all parties agree that bulldozers, such as the one used by Bowman, are point sources, a field is too broad a space as to fall under the definition of a "point source." No continuing additions were being made from a point source; instead, NUWF seeks to meet the jurisdictional requirement of a continuing violation by resting on the residual effects of migration and decomposition from a past point source discharge. Unlike the Resource Conservation and Recovery Act (RCRA), the CWA does not allow charges to stand for completed pollution events. Aiello v. Town of Brookhaven, 136 F.

Supp. 2d 81, 121 (E.D.N.Y. 2001) ("It is RCRA, rather than the CWA, that appropriately addresses liability for ongoing contamination by past polluters."); see also Hamker v. Diamond Shamrock Chem. Co., 756 F.2d 392, 397 (5th Cir. 1985) ("Mere continuing residual effects resulting from a discharge are not equivalent to a continuing discharge.").

Section 402 violations focus on the point source of the pollutant, whereas "[§ 404] emphasizes the 'activity' giving rise to the discharge of dredged material." Sierra Club, 421 F.3d at 1145. Accordingly, "a Section 404 permit is required only when the party allegedly needing a permit takes some action, rather than doing nothing whatsoever." Froebel v. Meyer, 217 F.3d 928, 938 (7th Cir. 2000). A continuing violation under § 404 would consist of continuing activities that discharge additional dredge or fill material without obtaining proper permits. The activity in the present case consisted of bulldozing and depositing of fill materials into a wetland; Bowman ceased this activity on July 15, 2011, prior to the filing of NUWF's claim on August 30, 2011. Just as the point source discharge of a pollutant had been discontinued by the date of the filing, so had the activity of unpermitted active discharge of fill material.

The court below was correct in finding that the violation ceased to continue when Bowman no longer actively participated in the act of discharging, even if the materials he deposited passively remained in the wetland, a non-point source. "The present violation requirement of the Act would be completely undermined if a violation included the mere decomposition of pollutants." Conn. Coastal Fishermen's Ass'n v. Remington Arms Co., 989 F.2d 1305, 1313 (2d Cir. 1993). To assert that an irreversible addition constitutes a continuing violation would render the violation ongoing for all time and result in all violations being labeled "continuous," rather than the demarcation between past and ongoing sought by the Court in

Gwaltney. Accordingly, the court below properly ruled that Bowman's violation of the CWA had passed at the time the suit was filed.

B. Bowman's settlement and consent to NUDEP's administrative order illustrate that the past violation is unlikely to recur in the future.

NUWF has the "burden to establish standing by demonstrating that, if unchecked by the litigation, the defendant's allegedly wrongful behavior will likely occur or continue . . . ." Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc., 528 U.S. 167, 190 (2000). NUWF has failed to provide any evidence that Bowman has discharged or likely will discharge additional dredge material into the Property. Since the past violation, not only has Bowman not participated in any additional discharge activities, he instead consented to an administrative order prohibiting additional wetland depredation and agreed to construct and maintain a wetland and conservation easement on the property.

While NUWF may assert a good faith allegation of a future violation, once there is evidence that the defendant is unlikely to continue the discharge activity, a higher standard is needed than mere faith. Conn. Coastal Fishermen's Ass'n v. Remington Arms Co., 989 F.2d 1305, 1312 (2d Cir. 1993) ("But once a defendant has come forward with evidence showing there is no genuine factual dispute with respect to an element of plaintiff's claim . . . plaintiff must demonstrate more than good faith. It must present instead evidence from which a factfinder could find a likelihood of continuing violations."). No parties here are asserting that Bowman will disturb the property through discharge of additional dredge or fill material; the chance of further violations is remote at best. NUWF has failed to meet the burden of establishing that Bowman is likely to discharge pollutants or fill material into the wetlands in the future and no impartial factfinder could find a likely subsequent violation.

III. The court below correctly found that NUWF's citizen suit was barred by NUDEP's diligent prosecution of Bowman's environmental violation.

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). This is interpreted by courts to constitute a three-part test: "First, the state must have "commenced" an enforcement procedure against the polluter. Second, the state must be "diligently prosecuting" the enforcement proceedings. Finally, the state's statutory enforcement scheme must be "comparable" to the federal scheme promulgated in 33 U.S.C. § 1319(g)." Friends of the Milwaukee's Rivers v. Milwaukee Metro. Sewerage Dist., 382 F.3d 743, 755 (7th Cir. 2004) cert. denied, 544 U.S. 913 (2005) (citing McAbee v. City of Fort Payne, 318 F.3d 1248, 1251 (11th Cir. 2003)). The inclusion of this clause reveals that the purpose of the CWA is not to compensate private parties for past damages, but to remedy harms to the environment. See Meghrig v. KFC Western, Inc., 515 U.S. 479, 486 (1996). Citizen suits are meant "to supplement rather than to supplant government action." The Piney Run Pres. Ass'n v. The Cnty. Comm'rs of Carroll Cnty., MD., 523 F.3d 453, 456 (4th Cir. 2008) (quoting Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Found., Inc., 484 U.S. 49, 62 (1987)).

The CWA explicitly tries to prevent a citizen suit from supplanting the enforcement efforts of a state agency. First, the NUDEP commenced judicial enforcement of Bowman's violation in federal court before NUWF commenced its citizen suit. Second, the NUDEP diligently prosecuted Bowman's environmental violation because it filed a complaint in federal court and negotiated a binding consent decree. Third, the State's statutory enforcement scheme is comparable to the federal CWA because it contains a virtually identical enforcement provision and provision for the input of interested persons. The NUDEP did its job and there is simply no room for a citizen case in this situation.

A. NUDEP commenced an enforcement action against Bowman on August 10, 2012 when it filed a complaint in federal court, twenty days before NUWF filed a complaint.

The language of the CWA states "has commenced" which implies that the state enforcement action must start prior to the filing of the citizen suit. See § 505(b)(1)(B), 33 U.S.C. § 1365 (1982). A state action commences when notice and public participation protections become available to the public and interested parties. Friends of the Milwaukee's Rivers, 382 F.3d at 757. A judicial action commences the moment a complaint is filed in state or federal court. Id. at 756-57.

On August 10, 2012, twenty days before NUWF filed a complaint in federal court, the NUDEP filed a complaint in federal court. At this point, NUDEP's judicial enforcement action became public and the public and interested parties were put on notice that the NUDEP would be prosecuting Bowman's violation. Therefore, the NUDEP commenced enforcement action before the citizen suit commenced.

B. NUDEP diligently prosecuted Bowman's environmental violations by both negotiating an August 1, 2012 administrative order, by filing an August 10, 2012 complaint in federal court, and by securing an easement through a consent decree.

The burden of proving that the governmental agency has not diligently prosecuted the environmental violations falls on the citizen or organization seeking to supplement state enforcement action. See The Piney Run Pres. Ass'n, 523 F.3d at 459. Courts evaluate separately what constitutes "prosecution" and what constitutes "diligent." First, for an agency to be prosecuting, it must be prosecuting an enforcement action in a court of the United States, or a State. Jones v. City of Lakeland, Tenn., 24 F.3d 518, 522 (6th Cir. 2000) (en banc); Friends of the Earth v. Consol. Rail Corp., 768 F.2d 57, 63 (2d Cir. 1985). The Sixth Circuit slightly extended the Friends of the Earth analysis when it determined that a consent decree that is filed

with a chancery court, and provides an opportunity for public input, satisfies the judicial component of the diligent prosecution requirement. Jones, 24 F.3d at 524. Jones extended the range of what constitutes an "enforcement action" in the Sixth Circuit, and softened this formerly bright line rule. See id.

Second, "enforcement prosecution will ordinarily be considered 'diligent' if the judicial action 'is capable of requiring compliance with the Act and is in good faith calculated to do so.'" The Piney Run Pres. Ass'n, 523 F.3d at 459 (citing Friends of the Milwaukee's Rivers, 382 F.3d at 760). Furthermore, "a citizen-plaintiff cannot overcome the presumption of diligence 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." Id.

First, NUDEP's complaint satisfies the judicial prosecution component of the analysis. The NUDEP filed a complaint regarding Bowman's environmental violation in federal court on August 10, 2012, which culminated in a consent decree, the judicially enforced equivalent of the administrative order. The filing of the complaint provided an opportunity for public input, thus satisfying the judicial prosecution requirement.

Second, NUDEP's actions were diligent because its August 1, 2012 administrative order and August 10, 2012 complaint were calculated to require compliance. The Administrative Order required Bowman to deed a conservation easement to NUDEP, and the order was enforced with a complaint in federal court when Bowman did not fully comply. If this Court does not find that the administrative order was enforceable as originally drafted, then this Court can simply look to the complaint filed in federal court as evidence of diligent persecution. The complaint is discussed in detail below. See infra Part IV. NUWF contends that the lack of an administrative penalty shows that NUDEP was not diligent, but this is faulty because the conservation easement

extracted from the order is more than just a punitive punishment—the State of New Union can now preserve the land forever through its environmental easement. This may be worth more than the penalty NUDEP could have assessed.

Overall, NUWF can simply not meet its burden of showing that the NUDEP was not diligently prosecuting the violation when the NUWF filed its complaint. That fact that NUDEP did not achieve the results that NUWF would like to have seen is not grounds to claim that an enforcement action was not diligent. See The Piney Run Pres. Ass'n, 523 F.3d at 459.

C. The State's statutory enforcement scheme is comparable to the federal CWA because NUDEP's authority to issue administrative orders to enforce environmental violations is virtually identical to CWA §§ 309(a), 309(g).

In its declaration of goals and policies, Congress recently stated, "It is the policy of the Congress to recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution." 33 U.S.C. § 1251. In addressing what constitutes a comparable state statute, the Eighth Circuit stated:

> The comparability requirement may be satisfied so long as the state law contains comparable penalty provisions which the state is authorized to enforce, has the same overall enforcement goals as the federal CWA, provides interested citizens a meaningful opportunity to participate at significant stages of the decision-making process, and adequately safeguards their legitimate substantive interests.

Lockett v. EPA, 319 F.3d 678, 684 (5th Cir. 2003) (citing Ark. Wildlife Fed'n v. ICI Ams., Inc., 29 F.3d 376, 381 (8th Cir.1994)). The most important feature of the above test is that the overall regulatory scheme affords a meaningful opportunity for participation. Ark. Wildlife Fed'n, 29 F.3d at 381-82. If fact, the Tenth Circuit only addresses the last three factors of the above test in its "rough comparability" analysis. See Paper, Allied-Indus., Chem. & Energy Workers Int'l Union v. Cont'l Carbon Co., 428 F.3d 1285, 1293-94 (10th Cir. 2005). Even though these two analyses are different, the application of the analyses is almost identical because courts do not

actually evaluate the goals of a state statutory scheme. Goals of the state statutory scheme are not as important as the statutory scheme itself.

This Court does not need to inquire how close a state statutory scheme must be to the CWA because State of the New Union's statutory scheme is identical in the four aspects cited in Lockett. First, SNU's statutory provision contains a section that is virtually identical to CWA § 309(g) which provides penalties for environmental violations, a meaningful opportunity for interested parties to participate in the decision making process, and safeguards the legitimate substantive interests of interested persons. CWA, §§ 309(g)(4)(A-C), 33 U.S.C. § 1319(g)(4)(A-C).

Even though courts do not actually examine a state's statutory goals, SNU's statute has the same overall enforcement goals of the federal CWA. The virtually identical goals to those of the federal CWA are incorporated into the statute that is virtually identical to § 309(a)(1) which states, " Whenever, on the basis of any information available to him, the Administrator finds that any person is in violation of any condition or limitation which implements section 1311, 1312, 1316, 1317, 1318, 1328, or 1345 of this title . . ." Section 1311(h) incorporates the goals of the CWA when its states, "Administrator determines necessary to allow compliance with . . . section 1251." Section 1251 is virtually identical to the provision of the CWA that states the enforcement goals of the statute. Regardless of how difficult it is to find the virtually identical goals of the state statutory scheme, the goals are not as important as the scheme itself and are not actually compared by the courts when conducting a "rough comparability" analysis.

Overall, this Court should find that the lower court correctly determined that NUWF's citizen suit was barred because of NUDEP's diligent prosecution. NUDEP's prosecution commenced ten days before NUWF filed a complaint in federal court, NUDEP negotiated a

favorable consent decree after bringing the violation to federal court, and NUDEP's authority derived from a state statutory scheme that is virtually identical to the federal CWA.

IV. The court below erred in granting Bowman's motion for summary judgment on the issue of subject matter jurisdiction because NUWF properly alledged that Bowman's actions constituted a violation of the Clean Water Act.

A prima facie violation of the CWA occurs when a defendant's activities result in (1) an addition (2) of a pollutant (3) into a navigable water (4) from a point source. See Avoyelles Sportsmen's League, Inc. v. Marsh, 715 F.2d 897, 922 (5th Cir. 1983). Neither side disputes that the "navigable water" and "point source" elements have been met, therefore the relevant inquiry is whether Bowman's activities constituted the "addition of a pollutant" without a permit. To do so, the reviewing court "must look beyond section 301(a) itself, to the statutory and regulatory definitions." Avoyelles, 715 F.2d at 922. If these regulations are reasonable and do not conflict with Congressional intent, the reviewing court must defer to them and apply them to the facts at hand.

While the court below correctly looked to the statutory definitions of the key words "addition" and "pollutant," it failed to look to the proper Army Corps construction of the statute's ambiguous terms. Instead, it erroneously interpreted these ambiguous terms by either supplying its own definitions or looking to EPA constructions developed in the context of section 402 rule-making and juridical review. However, applying EPA definitions that contradict Army Corps' reasonable regulatory constructions not only conflicts with basic rules of statutory interpretation but also results in an improper restructuring of the Act itself. Such application must therefore be rejected. Instead, the reviewing court must apply the Army Corp's regulations to Bowman's activities. Since Bowman's activities clearly resulted in the "addition" of "fill material" and likely the "addition" of "dredged material" as defined by these regulations, this

court should reverse the lower court's finding that no violation occurred, and instead grant summary judgment against Bowman on this issue.

A. The court below wrongfully relied on the EPA's definition of "addition" to find that Bowman's activities could not constitute a violation under § 301 of the Act.

As an initial matter, it is important to address the court below's assertion that the EPA's definition of "addition" must be applied to the analysis in this case. Implicit in this discussion is a rejection of the Corps' regulations, although these are neither discussed nor even mentioned in the lower court's discussion. However, this application contradicts rules of statutory construction, fails to properly to defer to Agency interpretation, and leads to the absurd result of reallocating regulatory authority and requiring the EPA to do what the Act expressly prohibits. For these reasons, this Court should reject its analysis and defer to the Corps' current regulatory interpretations.

i. Despite the lower court's contention, the presumption that two identical terms within a statute share identical meanings readily yields in the instant case, and does not require the application of the EPA's "unitary waters" and "outside world" definitions of "addition" to the § 404 context.

It is a well-established rule of statutory interpretation, that the even where identical terms are used within the same statute, they do not necessarily share identical meanings. See Envtl. Def. v. Duke Energy Corp., 549 U.S. 561, 574 (2007) (rejecting Appeals Court decision that "mischaracterized that presumption as "effectively irrebuttable"). Instead, it is well understood that "[m]ost words have different shades of meaning and consequently may be variously construed, not only when they occur in different statutes, but when used more than once in the same statute or even in the same section." Id. (citing Atl. Cleaners & Dyers, Inc. v. United States, 286 U.S. 427, 433 (1932)). Moreover, "where the subject-matter to which the words refer

is not the same in the several places where they are used, […] the meaning well may vary to meet the purposes of the law." Atl. Cleaners, 286 U.S. at 433.

Particularly significant for analysis of CWA interpretations is the fact that "a given term in the same statute may take on distinct characters from association with distinct statutory objects calling for different implementation strategies." Duke Energy, 549 U.S. at 574. Indeed, the court in Nat'l Wildlife Fed'n v. Gorsuch implicitly applied this tenet when it found "no inconsistency in EPA's taking a broad view of its statutory mandate in some situations and a narrower view here, even though the same statutory terms are involved." 693 F.2d 156, 168 (D.C. Cir. 1982). Instead, it noted that "the factual contexts in which EPA has broadly construed the scope of the § 402 permit program are too disparate from this one to permit facile comparison. Gorsuch, 693 F.2d at 168.

The factual context in which the EPA has construed "addition" to mean "from the outside world" is sufficiently distinct from the context in which the Army Corps defines "addition" to warrant the conclusion that do not share the same meaning. The EPA's "outside world" definition pertains specifically to situations in which *water* is *transferred* between waterways without actually adding any new pollutants to the water because such pollutants "wound up where it would have gone anyway." Friends of Everglades v. S. Fla. Water Mgmt. Dist., 570 F.3d 1210, 1221 (11th Cir. 2009). This is a very different from the factual context in which the Army Corps defines "addition" to include the redeposit or sidecasting of "dredged" material. In such contexts, violators' activities "permanently change the area from wetlands into a non-wetlands," thereby fundamentally disrupting the "physical and biological integrity of the Nation's waters." Save Our Wetlands, Inc. v. Sands, 711 F.2d 634, 647 (5th Cir. 1983); Avoyelles, 715 F.2d at 923.

Moreover, as the plurality opinion in Rapanos v. United States, notes, dredged and fill material "is typically deposited for the sole purpose of staying put, does not normally wash downstream, *and thus does not normally constitute an "addition* ... to navigable waters" when deposited in upstream isolated wetlands." 547 U.S. 715, 744 (2006). The plurality further suggested that though § 402 pollutants need not be "emit[ted] *directly* into" waters to constitute "addition," "addition" in the § 404 context does require direct deposit. Rapanos, 547 U.S. at 743.

Given this reading, as well as the distinct statutory object of the two sections and the divergent factual contexts within which they are created and to which they apply, it is clear that the term "addition" takes on distinct meanings in the § 402 and § 404 contexts. The court's analysis that the EPA's definition of "addition" necessarily applies to § 404 clearly misapplies this principle, and should not be followed by this court.

ii. In applying the EPA's definition of "addition" embodied in the Water Transfer Rule to § 404, the court improperly failed to give the "substantial deference" afforded to the EPA's construction of this rule, which expressly bars its application to § 404.

The EPA's assertion that it Water Transfer Rule "has no effect on the 404 permit program" commands deference as a reasonable construction of the agency's own rules. National Pollutant Discharge Elimination System (NPDES) Water Transfers Rule, 73 Fed. Reg. 33697-01. It is well settled that an agency's "subsequent interpretation of [its] regulations," is due deference unless "plainly erroneous or inconsistent with the regulation[s]." Coeur Alaska, Inc. v. Se. Alaska Conservation Council, 557 U.S. 261, 263 (2009) (citing Auer v. Robbins, 519 U.S. 452 (1997)). As discussed above, it was reasonable for the EPA to find that the term "addition" need not by universally applied throughout the CWA. Moreover, it was reasonable for it to hold, as numerous courts have, that applying the "outside world" or "unitary water" definition to § 404

would either neuter or fully eliminate the "dredged" material provision from the Act. 73 Fed. Reg. 33697-01 (citing United States v. Hubenka, 438 F.3d 1026, 1035 (10th Cir. 2006); United States v. Deaton, 209 F.3d 331, 335-336 (4th Cir. 2000); Borden Ranch P'ship v. United States, 261 F.3d 810, 814 (9th Cir. 2001)). It does not matter whether the district court would have come to the same conclusion as the EPA. The only relevant inquiry is whether the construction is reasonable. Because it is, the court erred in failing to properly defer to the EPA construction and this court should not adopt its construction.

iii. Applying the EPA's "outside world" and "unitary waters" definitions of "addition" to § 404 leads to the "absurd result" of reallocating regulatory authority and requiring what the Act expressly prohibits.

The EPA's construction expressly limiting application of the Water Transfer Rule, and the "unitary waters" definition of addition, to § 402 is not only reasonable, but also necessary. As the Supreme Court recently explained in Coeur Alaska, the structure of the Act expressly bars the EPA from making direct or indirect permitting decisions under § 404(a) or § 404(b) of the Act. Specifically, the Act in § 402(a) states: "*[e]xcept as provided in ... [CWA § 404, 33 U.S.C. § 1344],* the Administrator may ... issue a permit for the discharge of any pollutant, ... notwithstanding [CWA § 301(a), 33 U.S.C. § 1311(a)]," thus "prohibit[ing] the EPA from permitting "discharges of dredge and fill material," that "falls under the Corps' § 404 permitting authority." 557 U.S. at 273.

It may not be unreasonable for the Corps to hold, as the lower court does, that the "unitary waters" or "outside world" does not contradict § 404 of the Act, but that is not the issue in this case. Instead, the court's holding requires the Army Corps' to adopt the EPA's definitions, thus removing the Corps' authority to interpret § 404. Applying the "unitary water" definition of addition to § 404, as the lower court demands, would "impl[y] that dredged material

never requires a permit unless the dredged material originates from a waterbody that is not a water of the U.S." This means that the EPA, in promulgating its Water Transfer Rule, has permitted nearly all discharges of "dredged" material. The court's reading thus violated the Act's express prohibition against such action by the EPA, and "in effect reallocated the division of responsibility that the Corps and the EPA had been following." Coeur Alaska, 557 U.S. at 273. As such a result is patently improper, the lower court's finding on the term "addition" must be rejected.

B. The lower court failed to properly defer to the Army Corps' reasonable regulatory interpretation of the key statutory terms. Properly applying these regulations clearly shows that Bowman's activities resulted in the "addition" of "dredged" or "fill" material, and makes summary judgment for Bowman inappropriate.

i. This Court must reject the lower court's finding that no "addition" occurred because Bowman's activities clearly fall within the Army Corps definition of "addition of dredged materials."

"A court may not substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator of an agency." Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 844 (1984). Moreover, "[a]n agency's construction of a statute it is charged with enforcing is entitled to deference if it is reasonable and not in conflict with the expressed intent of Congress." United States v. Sinclair Oil Co., 767 F. Supp. 200, 203 (D. Mont. 1990) (citing United States v. Riverside Bayview Homes, Inc., 474 U.S. 121, 131 (1985); accord Avoyelles, 715 F.2d at 910; United States v. Larkins, 657 F. Supp. 76, 82 (W.D. Ky. 1987), aff'd, 852 F.2d 189 (6th Cir.1988), cert. denied, 489 U.S. 1016 (1989)). Because "Congress delegated broad regulatory authority to [the Corps] under the Clean Water Act . . . courts have uniformly shown great deference to agency interpretations of the Act." Sinclair Oil Co., 767 F. Supp. at 203 (citing Rybachek v. United States EPA, 904 F.2d 1276, 1284 (9th

Cir.1990); see also EPA v. Nat'l Crushed Stone Ass'n, 449 U.S. 64, 83 (1980) (requiring deference to agency interpretation of CWA). The court below failed to grant the regulatory interpretations this deference on the issue of whether Bowman's activities violated the CWA and must be reversed.

The Army Corps defines the term "discharge of dredged material," as "any *addition* of dredged material into, *including redeposit of dredged material* other than incidental fallback within, the waters of the United States." 33 C.F.R. § 323.2. Examples of such "addition" include "redeposit other than incidental fallback, of dredged material, *including excavated material*, into waters of the United States which is incidental to any activity, including *mechanized landclearing*, *ditching*,…or other excavation. 33 C.F.R. § 323.2. The reasonableness of this interpretation is evidenced by the agreement among "nearly every other circuit to consider the question" that "addition of any pollutant" includes the "sidecasting" and "redeposit of dredged or excavated material." Deaton, 209 F.3d at 336-37 (citing Avoyelles, 715 F.2d at 923-25 (interpretation of "addition" to include "redeposit" of trees and vegetation dredged or excavated from the wetland itself is consistent with both the purposes and legislative history of the CWA); United States v. M.C.C. of Fla., Inc., 772 F.2d 1501, 1506 (11th Cir.1985) (redeposit of spoil churned up by tugboat propellers constituted the discharge of a pollutant under the CWA), vacated and remanded on other grounds, 481 U.S. 1034 (1987), readopted in relevant part, 848 F.2d 1133 (11th Cir.1988); Rybachek, 904 F.2d at 1285 (dirt and gravel extracted by gold miners and redeposited into the stream bed from which it was extracted constituted an "addition" of a pollutant under the CWA); see also United States v. Bay-Houston Towing Co., 33 F. Supp.2d 596, 606 (E.D.Mich.1999) (adopting reasoning of Judge Payne's Wilson opinion). But cf. Nat'l Mining Ass'n v. U.S. Army Corps of Eng'rs, 145 F.3d 1399,

1404, 1406 (D.C. Cir. 1998) (concluding that "incidental fallback" of dredged material into waterway does not constitute the addition of a pollutant, but distinguishing between incidental fallback and sidecasting).

As discussed above, this regulation is not impacted by the EPA's "unitary waters" or "outside world" definitions, and despite the court's arguments to the contrary, remains a reasonable interpretation that is due deference. For this reason, court decisions continue to hold that "sidecasting" and "redeposit" of materials into the same wetlands from which they were "dredged" or "excavated" constitutes the "addition of a pollutant" under the meaning of § 301 and § 502(12). See Gulf Restoration Network v. Hancock Cnty. Dev., LLC, 772 F. Supp. 2d 761, 770-71 (S.D. Miss. 2011); Nw. Envtl. Def. Ctr. v. Envtl. Quality Comm'n, 232 Or. App. 619, 623, 223 P.3d 1071, 1074 (2009) (dredging which "discharged [native sediments] back into the stream" required a § 404 permit); United States v. Bedford, 2009 WL 1491224 (E.D. Va. May 22, 2009); United States v. Cundiff, 555 F.3d 200, 204 (6th Cir. 2009); Greenfield Mills, Inc. v. Macklin, 361 F.3d 934, 948 (7th Cir. 2004) ("broad[] definition of "addition" employed by the courts in…§ 404 cases" reasonable and should be followed).

Under the plain language of the Army Corps regulations, and even the plain language of the statute, Bowman's activities clearly discharged dredged material in violation of the CWA. Bowman does not dispute that he dug trenches and a ditch, which necessarily included digging up soil. Nor does he dispute that he redeposited the material back into the wetland. That this constitutes the "redeposit" of "dredged or excavated material" is made even clearer by examining similar cases. In Avoyelles, the court noted "the landowners' activities included the digging of ditches and holes, which would constitute 'dredging,'" though the court did not reach the issue, having already found a discharge of fill material. 715 F.2d at 901. In Deaton, the

defendant was found to have violated the Act "by sidecasting dredged material as they dug a drainage ditch through a wetland." 209 F.3d at 332. Such a result was found more recently in United States v. Hummel, where the court found a violation of the Act where a defendant dug trenches in a wetland, then "placed the materials excavated from the trenches, which included dirt and wetland plants, back into the wetland to seal and close the trenches." 2003 WL 1845365 (N.D. Ill. Apr. 8, 2003).

The precedential value of these holdings is not affected by the new Water Transfers Rule, and the court below wrongly dismissed these findings because they lacked a discussion of the EPA's "outside world" and "unitary waters" definitions of "addition." As will be discussed below, such a discussion would have been neither relevant nor appropriate in these cases. Moreover, both Deaton and Avoyelles *do* discuss these considerations before dismissing them. Deaton, 209 F.3d at 336 (applying "outside world" theory to "dredged spoil" defeats Congressional intent); Avoyelles, 715 F.2d at 924 ("[D]redged" material is by definition material that comes from the water itself. A requirement that all pollutants must come from outside sources would effectively remove the dredge-and-fill provision from the statute.). These cases therefore should be followed by this reviewing court.

ii. The court below erred in finding no "addition" of fill material as raking, burning and burying of vegetation and other debris in order to level the wetlands and convert them to arable field clearly falls within the Corps' definition of "addition of fill material."

The Corps' regulations define "fill material" as "material placed in waters of the United States where the material has the effect of… [r]eplacing any portion of a water of the United States with dry land; or [c]hanging the bottom elevation of any portion of a water of the United States." 33 C.F.R. § 323.2. It then provides a non-exhaustive list of possible fill materials, which includes "rock, sand, soil, …wood chips, [and] overburden from…excavation activities."

Id. The regulations also defines the "discharge of fill material" as "the addition of fill material into waters of the United States." Id. A similarly non-exhaustive list of examples of an "addition" of "fill materials" includes "site-development fills for recreational, industrial, commercial, residential, or *other* uses." Id. Specifically, the regulations requires permits for conversion of wetland property to new uses such as farming." 33 C.F.R. § 323.4.

As with the Corps' interpretation of "dredged" material and the "addition" thereof, this construction of "addition" of "fill material" has consistently been upheld as reasonable by reviewing courts. In Avoyelles, the Fifth Circuit found that "'addition', as used in the definition of the term "discharge," may reasonably be understood to include 'redeposit,'.[... T]his reading of the definition is consistent with both the purposes and legislative history of the statute." 715 F.2d at 923. The Eleventh Circuit followed suit in M.C.C. of Fla., Inc. 772 F.2d 1501. As did the Fourth Circuit in Deaton and the Tenth Circuit in United States v. Hubenka. 209 F. 3d at 335-36; 438 F. 3d 1026 (2006). See also Sinclair Oil, 767 F. Supp. at 204 (describing near-unanimous circuit adoption of Avoyelles deference to Corps definition of "addition" as including "redeposit" of native materials). Indeed, not a single court reviewing the Corps' construction of the "fill" permitting provision have found this construction unreasonable. Given the reasonableness of this construction, the court below erred in not deferring to it. Once this construction is properly applied, it becomes clear that the lower court's findings must be reversed.

Under this definition, it is clear that Bowman's activities added fill material to his wetland property in violation of the Act. The ashes, trees and other debris Bowman buried increased the bottom elevation of the wetland, and replaced an inundated wetland with land that was dry enough to sow wheat. These facts are strikingly similar to those in United States v.

Huseby. 862 F. Supp. 2d 951, 956 (D. Minn. 2012). There, the defendant landowner undertook similar land-clearing and filling activities, which included raking and burning piles of brush, then burying the ashes into wetland property in order to prepare the site for silviculture. Despite a factual dispute as to whether the defendant graded or level the property, the court granted summary judgment against the defendant on the issue an illegal discharge of fill material from a point source. Huseby, 862 F. Supp. 2d at 962. See also Avoyelles, 715 F.2d at 921 (redeposit and burying of vegetation and burned debris and spreading of native soils to level wetland is an "addition" of "fill material"); Sinclair Oil, 767 F. Supp. at 204 (regulation does not distinguish between indigenous material and foreign materials).

Conclusion

As there is ample evidence that Bowman committed a past violation by discharging fill and dredge material into a water of the United States, violating the CWA, the defendant fails to establish the necessary elements for summary judgment in his favor. NUDEP respectfully requests that the decision as to injury in fact and violation of the CWA be reversed.

DATED: November 29, 2012

Respectfully submitted,

New Union Department of Environmental Protection
Attorneys for Intervenor-Appellants
7500 Crittenden Street, Suite 500
New Union City, NU 01234
(123) 456-7890