Team 74

C.A. No. 13-1246

# In the United States Court of Appeals for the Twelfth Circuit

**NEW UNION WILDLIFE FEDERATION,**

*Plaintiff-Appellant,*

v.

**NEW UNION DEPARTMENT OF ENVIRONMENTAL PROTECTION,**

*Intervenor-Appellant,*

v.

**JIM BOB BOWMAN,**

*Defendant-Appellee*

ON APPEAL FROM
THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW UNION

**BRIEF FOR THE NEW UNION DEPARTMENT OF ENVIRONMENTAL PROTECTION**

*Intervenor-Appellant*

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## JURISDICTIONAL STATEMENT

Appellant New Union Wildlife Federation filed a Complaint in the United States District Court for the District of New Union seeking review under 33 U.S.C. § 1365 (2006). On June 1, 2012, the district court granted the Defendant Mr. Jim Bob Bowman's motion for summary judgment on the Clean Water Act counts and denied New Union Wildlife Federation's summary judgment motion. The district court's order is a final decision, and jurisdiction is proper in this court pursuant to 28 U.S.C. § 1291 (1982).

## STATEMENT OF THE ISSUES

I. Whether New Union Wildlife Federation ("NUWF") has standing to a bring a Clean Water Act ("CWA") § 505 citizen suit against Mr. Jim Bob Bowman ("Bowman") for violating the CWA.

II. Whether there is a continued ongoing violation of the CWA as required by § 505(a) for subject matter jurisdiction to bring a claim against Bowman.

III. Whether, under § 505(b) NUWF's citizen suit has been barred by New Union Department of Environmental Protection's ("NUDEP") diligent prosecution of Bowman.

IV. Whether Bowman's activities on his wetlands were dredge and fill activities and a violation of §§ 301(a) and 404 of the CWA.

## STATEMENT OF THE CASE

This is an appeal from a final order of the District Court for the District of New Union granting the Defendant Mr. Jim Bob Bowmans' ("Bowman") motion for summary judgment and denying New Union Wildlife Federation's ("NUWF") motion for summary judgment. Dist. Court Order at 3. Between June 15, 2011 and July 15, 2011 Bowman conducted land clearing

activities on his property that resulted in the alteration of wetlands and the deposit of fill materials. *Id.* at 4; see Appendix 1. Pursuant to § 505 the citizen suit provision Clean Water Act, 33 U.S.C. § 1365, NUWF sent a notice of intent to Bowman on July 1, 2011. *Id.* New Union Department of Environmental Protection ("NUDEP") contacted Bowman shortly after NUWF sent its notice of intent to sue. *Id.* NUDEP and Bowman entered into an agreement to mediate the actions on Bowman's property, and incorporated that agreement into an administrative order on August 1, 2011. *Id.* The agreement did not have civil penalties. *Id.* NUDEP then filed a complaint in federal court on August 10, 2011with its powers as a state under § 505 of the CWA, 33 U.S.C. §§ 1365(g) 1362(5) (2006). *Id*. at 5. On September 5, 2011 NUDEP filed a motion to enter a decree with the same terms as the August 1 administrative order. *Id.* This motion is still pending. *Id.* On September 15, 2012, NUWF filed a motion to intervene in this action. *Id.*

On August 30, 2011 NUWF filed a complaint with the District of New Union Court under § 505 of the CWA seeking civil penalties and an order to mandate Bowman to remove the fill material and restore the wetlands. *Id.* In its September 15, 2012 motion to the federal court NUWF asked to consolidated the NUDEP and NUWF actions, and opposed the entry of the proposed decree filed on September 15,2011. *Id.* NUDEP shortly thereafter filed a motion to intervene in the District of New Union action. *Id.*

On November 1, 2011 the District of New Union Court notified the parties that it would no act on the motions from either the NUDEP case filed in the federal court or the NUWF case filed in District of New Union Court; except for NUDEP motion to intervene in the NUWF case was granted. *Id.*

After discovery, Bowman filed a motion for summary judgment. NUWF and NUDEP both filed cross-motions for summary judgment. *Id.* On June 1, 2012 the district court granted the Bowman's motion and found that NUWF lacks standing to bring its claim; that the violations are wholly past and NUWF lacks subject matter to bring its claim; NUWF's citizen suit was barred NUDEP's diligent prosecution of Bowman; and Bowman did not violate §§ 301(a) and 404 of the CWA when he performed landmoving activities on his wetlands *Id.*

NUWF and NUDEP each filed a Notice of Appeal. R. at 1. NUWF and NUDEP appeals the district court's holding that NUWF lacked standing to bring its claim. *Id.* NUWF also appeals the court's finding that the violations are wholly past and NUWF lacks subject matter to bring its claim. R. at 2. NUWF also takes issue with the court's holding that the NUDEP diligently prosecuted Bowman. *Id*. NUWP and NUDEP both appeal the court's finding that Bowman did not violate §§ 301(a) and 404 of the CWA. *Id*. This Court granted review on September 14, 2012. *Id.*

## STATEMENT OF FACTS

Bowman owns one thousand acres of wooded wetland adjacent to the Muddy River, which includes 650 feet of shoreline, near the town of Mudflats in the State of New Union. Dist. Court Order 3; see *Appendix* 1. 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. *Id.* The river is at least six feet deep where it borders Bowman's property. *Id.* People use the river for recreation both upstream and downstream from Bowman's property. *Id.*

The entirety of Bowman's property is within the one hundred year flood plain of the river. *Id.* Every year, parts of the flood plain are inundated every year when the river is high. *Id.* Therefore, Bowman's property is hydrologically connected to the Muddy and is covered with

trees and other vegetation characteristic of wetlands. *Id.* All parties agree that Bowman's property is a wetland as determined by the U.S. Army Corps of Engineers' Wetland's Determination Manual. *Id.* at 4.

On June 15, 2011, Bowman began to clear the wooded land on his property in order to create an open field that would allow him to plant wheat. *Id.* He used bulldozers to knock down all of the trees, and then leveled remaining vegetation. *Id.* He pushed the trees and vegetation into windrows, and then he burned the trees and vegetation. *Id.* He used a bulldozer to dig trenches, then pushed the ashes made up of the remains from the leveled vegetation and trees into the trenches, creating a field. *Id.* He again leveled the resulting field, pushing soil from the high portions of the field into the trenches and low portions of the field. *Id.* Finally, he formed a ditch that ran from the back of his property to the river in order to drain the newly created field into the Muddy River. *Id.* This project was completed on or about July 15, 2011.

Bowman left a strip of land approximately 150 feet wide adjacent to the Muddy River. *Id.* see *Appendix* 1. This strip runs along the 650 foot length river frontage on his property, and obstructs any view of Bowman's field from the Muddy River. *Id.* see *Appendix* 1

NUWF is a non-profit corporation organized under the laws of New Union. *Id.* NUWF's purpose is, among other things, to protect the fish and wildlife of the state of New Union by protecting their habitats. *Id.* The EPA has properly delegated authority to NUDEP to administer the CWA in New Union. *Id.*

## STANDARD OF REVIEW

This case involves an appeal from the District Court of New Union's grant of summary judgment. Summary judgment is appropriate if "there is no genuine issue as to any material fact and . . . the moving party is entitled to judgment as a matter of law." FED. R. CIV. P. 56(c).

Therefore, the issues before this Court are questions of law and should be reviewed de novo. *Pierce v. Underwood*, 487 U.S. 552, 557 (1988). Accordingly, this Court should afford no deference to the opinions and conclusions of the lower court. *Id.*

**SUMMARY OF THE ARGUMENTS**

The District Court erred in holding that NUWF does not have standing. The District Court also erred in finding that Bowman did not violate §§ 301(a) and 404 of the CWA. The District Court was correct in finding that there was no subject matter jurisdiction for NUWF because there is no continuing or ongoing violation as requited by § 505 on Bowman's property. The District Court was also correct in finding that NUWF's citizen suit is barred because NUDEP diligently prosecuted Bowman as set out in § 505(b).

The District Court erred in holding that NUWF does not have standing. Under the standard set forth in *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992), NUWF has standing because it has demonstrated (1) an injury in fact that is (2) traceable to Bowman's violation of the CWA, and (3) that is redressable by this Court. Although NUWF is an association, an association has standing to assert the claims of its members "when its members would otherwise have standing to sue in their own right, the interests at stake are germane to the organization's purpose, and neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit." NUWF has done just that, by submitted affidavits from three of its members, Dottie Milford, Zeke Norton, and Effie Lawless. Dist. Court Order. at 6. Each of these members would have standing to sue in their own right under the CWA citizen suit provision.

The District Court determined that NUWF does not have standing to sue Bowman for violating the CWA because (1) the only direct injury was found to be illegal; and (2) all other

injuries are speculative. This is incorrect. NUWF submitted testimony of a member who had noticed that the river appeared more polluted after Bowman began clearing activity on the wetlands. Another member who enjoys frogging in the Muddy River noticed that the population in the area had been significantly depleted. NUWF also submitted testimony of members who regularly enjoy the aesthetic and natural values of the Muddy. The District Court's ruling that the "only direct injury is that one of NUWF's members can no longer illegally use the cleared area for frogging" ignores the extensive recreational and aesthetic harms suffered by NUWF members. Dist. Court Order at 6. The other elements of *Lujan* also have been proven by NUWF.

NUDEP, however, does not take issue with all of the District Court's holdings. The district Court was correct in holding that Bowman's land clearing activities lasted from June 15, 2011 until July 15, 2011. These activities ceased on July 15, 2011, are wholly past, and are not a "continuing violation" in light of the Supreme Court's holding in *Chesapeake Bay Foundation v. Gwaltney of Smithfield*, as is required by the CWA's citizen suit provision, § 505(a). 484 U.S. 49 (1987).

After Bowman completed all of the work on July 15, 2011, he was left with a field that made it possible for him to sow and harvest wheat. Dist. Court Order at 7. At that point, Bowman had no reason to clear any more land, and does not plan to do so. *Id.* Bowman intends to continue planting and harvesting wheat on this land, and will use a previously constructed drain to facilitate this, but "[n]either [the planting or harvesting of wheat] constitutes adding dredged spoil or fill to the property, nor do Plaintiffs allege that they constitute such an addition." *Id* There is no indication that Bowman plans to engage in any more land clearing activities. *Id.*

As a result, NUWF is incorrect in their assertion that Bowman is engaged in a continuing violation of the CWA, as required by CWA § 505. NUWF's assertion relies entirely on the argument that the continued presence of dredged and fill material in the former wetland, which is now a field, constitutes an ongoing violation. This assertion is inaccurate and the District Court was correct in ruling against NUWF in summary judgment. The Court should therefore affirm the District Court's holding that there is no continuing violation by Bowman.

The District Court was also correct in determining that NUWF's citizen suit is barred under § 505(b)(1)(B); because NUDEP has commenced and is diligently prosecuting a civil action against Bowman by its pending motion to enter a consent decree. NUDEP's civil action requires Bowman to cease further violations, to deed a conservation easement, and to construct and maintain a year-round wetland on his property. Alternatively, if the Court questions the Districts Court's conclusion regarding NUDEP's diligent prosecution of Bowman, the Court should find that NUWF's citizen suit is barred under § 309(g)(6)(A) because NUDEP issued an administrative order under a New Union statute virtually identical to § 309, imposing the same requirements as the consent decree. The Court should therefore affirm the District Court's holding that NUWF's citizen suit is barred both by NUDEP's ongoing prosecution of Bowman in federal Court, and by it's completed action under State law.

Finally, the District Court erred in finding that Bowman did not violate §301(a) and §404. Bowman violated the CWA when he moved vegetative material, soil, and materials from one part of the wetland adjacent to the Muddy River and then redeposited them in another part of the same wetland. The District Court thus erred when it determined that Bowman's activities were not classic dredge and fill activities and did not violate the CWA. For Bowman's actions to be legal, a CWA Section § 404 permit, administered by the Army Corps. of Engineers ("Corps"),

would have been needed to govern the earth moving activities on his property. The District Court's application of case law and regulations that pertain to § 402 permits was also incorrect; applying § 404 case law and regulations would have been proper. The District Court ignored the CWA's primary purpose of preserving the waters of the United States in not protecting the wetland on Bowman's property. Allowing Bowman to not be held accountable for his dredge and fill activated would defeat the purpose of the CWA and essentially negate Congress's intent in enacting the CWA. Therefore, the decision of the District Court that there was not dredge and fill activated on Bowman's wetlands must be overturned.

## ARGUMENTS

### I. The New Union Wildlife Federation has standing to bring suit.

NUWF has standing to sue Bowman for violating the CWA. An association has standing to assert the claims of its members "when its members would otherwise have standing to sue in their own right, the interests at stake are germane to the organization's purpose, and neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit." *Hunt v. Washington State Apple Advertising Comm'n,* 432 U.S. 333, 343 (1977). Further, under the standard set forth in *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992), NUWF has standing because it has demonstrated (1) an injury in fact that is (2) traceable to Bowman's violation of the CWA, and (3) that is redressable by this court. The Court should therefore find that the District Court erred in granting Bowman's motion for summary judgment on this issue.

#### A. NUWF has standing in order to assert the claims of its members.

On August 30, 2012, NUWF filed a complaint with the District Court seeking civil penalties and an order requiring Bowman to remove the fill material and restore the wetlands.

Dist. Court Order at 5. To establish standing, NUWF submitted affidavits from three of its members, Dottie Milford, Zeke Norton, and Effie Lawless. *Id.* at 6. Each of these members would have standing to sue in their own right under the citizen suit provision of the CWA, which provides that "any citizen may commence a civil action on his own behalf 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).

NUWF is an environmental organization whose purpose is to "protect the fish and wildlife of the state by protecting their habitats, among other things." Dist. Court Order at 4. As members of NUWF, Milford, Norton, and Lawless each pay dues and vote for the organization's Board of Directors. *Id.* at 6. The individual interests that these members assert in this action are germane to the organization's purpose. Neither the claim asserted (violation of the CWA) nor the relief requested (civil penalties and an order requiring Bowman to remove the fill material and restore the wetlands) require the participation of individual members in the lawsuit. Therefore, the Court should grant NUWF standing to allow it to assert the claims of its members.

**B. The standing requirement set forth in *Lujan v. Defenders of Wildlife* is the appropriate standard for the present case.**

In *Lujan v. Defenders of Wildlife*, the respondents (Defenders of Wildlife, joined by other interested organizations) sought declaratory and injunctive relief to require the Secretary of the Interior to promulgate a new rule restoring the initial interpretation of § 7(1)(2) of the Endangered Species Act (ESA). 504 U.S. 555, 559 (1992). Respondents argued that the ESA should extend to activities abroad that may threaten endangered species, as the original rule stated, not just to activities within the United States and on the high seas, as the rule was later amended. *Id.* Specifically, Respondents were concerned that the United States' involvement in the construction of a dam on the Nile River would threaten an endangered species of crocodile.

*Id.* at 563. Plaintiffs had not visited the Nile or the region that was home to the crocodile's habitat, and did not have any concrete plans to do so. *Id.* Rather, they expressed only a general interest in the protection of endangered species and in traveling to regions that are home to endangered species, and concern that those interests might be adversely affected by the construction of the dam. *Id.* In determining whether Respondents had standing to bring suit in Federal court, the Court announced that the "irreducible constitutional minimum of standing contains three elements." *Id.* at 560. First, the plaintiff must have suffered an injury in fact. *Id*. This injury must be a concrete, particularized invasion of a legally protected interest, and must also be actual or imminent. *Id*. Second, there must be a causal connection between the injury and the challenged conduct of the defendant. *Id*. Third, it must be likely that the complained of injury will be redressed by a favorable decision. *Id*. The Court held that under the three-pronged test, the respondents had not demonstrated an injury in fact, and that the hypothetical injuries alleged to occur at some point in the future were not actual or imminent. *Id.* at 566. Thus, respondents lacked standing to bring the suit, and the case was remanded for summary judgment proceedings. *Id*. at 578.

**1. NUWF has established injury in fact by demonstrating that its members have been adversely affected by Bowman's activities.**

In order to assert standing on behalf of its members, NUWF must first establish that those members have suffered an injury in fact. *Lujan*, 504 U.S. at 560. An injury in fact is "an invasion of a legally protected interest which is (a) concrete and particularized." *Id*. The testimony of NUWF's members who use the Muddy River for specific recreational purposes, including boating, fishing, picnicking, and frogging shows that these individuals regularly utilize the Muddy River for many purposes. After Bowman commenced land clearing operations on June 15, 2012, which are described above, one of NUWF's members testified that the Muddy

River looks more polluted than it did before that date. This loss in aesthetic value alone is sufficient to establish injury in fact. *Friends of the Earth, Inc. v. Laidlaw Envtl. Services (TOC), Inc.*, 528 U.S. 167 (2000).

In *Laidlaw*, as in the present case, petitioners, Friends of the Earth and other organizations (FOE), brought an action pursuant to the citizen suit provision of the CWA, alleging violation of a NPDES permit. 528 U.S. at 167. The respondent, Laidlaw, operated a hazardous waste incinerator facility, and obtained a permit to discharge treated water from that facility into the North Tyger River. *Id.* FOE supported its assertion of standing by submitting affidavits of its individual members whose interests were adversely affected by Laidlaw's activities. *Id.* at 177. The Court held that "[t]he relevant showing for purposes of Article III standing . . . is not injury to the environment but injury to the plaintiff." *Id.* at 181. Concluding that Laidlaw's activities had impaired the members' "recreational, aesthetic, and economic interests," the Court held that FOE had standing to assert the interests of its members. *Id.* at 184.

In light of the ruling in *Laidlaw*, NUWF has demonstrated an injury in fact. NUWF submitted testimony of a member who had noticed that the river appeared more polluted after Bowman began clearing activity on the wetlands. Another member who enjoys frogging in the Muddy River noticed that the population in the area had been significantly depleted. NUWF also submitted testimony of members who regularly enjoy the aesthetic and natural values of the Muddy River and who are aware that wetlands serve valuable functions in maintaining the integrity of the rivers, including the Muddy, both acting to absorb sediment and pollutants and serving as buffers for flooding. These members' enjoyment and use of the Muddy is adversely affected by the environmental impacts of Bowman's activities. These members are concerned that the Muddy River is more polluted as a result of Bowman's activity, and that the Muddy will

be far more polluted if other adjacent wetlands are cleared and drained for agricultural uses. Moreover, the District Court's ruling that the "only direct injury is that one of NUWF's members can no longer illegally use the cleared area for frogging" ignores the extensive recreational and aesthetic harms suffered by NUWF members. In fact, the record shows that Zeke Norton regularly enjoys frogging not just on Bowman's property, but throughout the Muddy River, and has valid concerns that the frog population throughout the river is in jeopardy because of Bowman's activity. Thus, the injuries cited by NUWF are concrete, supported by facts, and more than sufficient to establish the "injury in fact" element of standing.

**2. NUWF has established that the injuries are fairly traceable to Bowman's conduct.**

NUWF must also show that there is a "causal connection between the injury and the conduct complained of." *Lujan*, 504 U.S. at 560. The Court has held that, to satisfy the causation prong of the standing test, "'plaintiffs must allege some threatened or actual injury resulting from the putatively illegal action.'" *Simon v. E. Kentucky Welfare Rights Org.*, 426 U.S. 26, 41 (1976) (quoting *Linda R.S. v. Richard D.*, 410 U.S. 614, 617 (1973)).

In *Simon*, Plaintiffs brought suit against the Secretary of the Treasury and the Commissioner of Internal Revenue, asserting that the IRS violated the Internal Revenue Code of 1954 and the Administrative Procedure Act by issuing a Revenue Ruling allowing favorable tax treatment to a nonprofit hospital that offered only emergency room services to indigents. 426 U.S. at 28. The asserted injury was the indigent plaintiffs' lack of opportunity and ability to receive hospital services in nonprofit hospitals which receive tax benefits as charitable organizations. *Id.* at 32-33. Because the organizations that took advantage of these favorable tax treatments had a duty to provide services to indigent patients, the plaintiffs argued that the IRS regulation allowing "charitable organization" tax benefits to hospitals that limited treatment

available for the poor was an injury caused by the IRS's regulation. *Id.* at 33. The Court held that, while the low quality of health care available to indigents was an injury, the connection between the IRS's regulation and that injury was too speculative. *Id.* at 45-46. Thus, *Simon* illustrates the type of causal connection that is too attenuated to establish causation for standing purposes.

In contrast to *Simon*, NUWF is challenging Bowman's clearing of the wetlands as directly causing injury to NUWF's members. The members who suffered the injuries described above regularly recreate Muddy River and have done so over time, so they are very familiar with the conditions of the river, the wildlife on the river, and to some extent, the hydrology of the river. Each member began to notice specific adverse impacts soon after Bowman began clearing the wetlands. Their concerns about the hydrologic health of the Muddy River, throughout the river as well as near Bowman's property, are fully attributable to Bowman's activities. Thus, the injury in this case is traceable to Bowman's conduct, and therefore satisfies the second element of the *Lujan* test.

**3. The injuries to NUWF's members would be redressed by this Court's favorable decision.**

To satisfy *Lujan's* third prong, NUWF must show that its members' injuries would be redressed if the relief sought (civil penalties and an order requiring Bowman to remove the fill material and restore the wetlands) is granted. "[I]t must be 'likely,' as opposed to merely 'speculative,' that the injury will be 'redressed by a favorable decision.' " *Lujan*, 504 U.S. at 561 (quoting *Simon v. Eastern Ky. Welfare Rights Or.*, 426 U.S. 26, 41-42). The relief sought in this case would deter Bowman from taking future action to damage the wetlands and the hydrology of the Muddy. Additionally, by requiring Bowman to restore the wetlands, some of the harm that has already been done could be mitigated. While nothing can completely remedy

the damage that has been done, the relief requested would help lessen the harm, both in the short-term and over time.

In *Massachusetts v. EPA*, the Supreme Court considered whether requiring the EPA to re-evaluate regulations under the Clean Air Act would redress the injuries suffered as a result of climate change and global warming. 549 U.S. 497, 525 (2007). Despite the global impacts of climate change, the countless contributors to the problem, and the virtual impossibility of remedying the damage, the Court found that the alleged injuries due to climate change were redressable by the EPA's reconsideration of a regulation under the CAA. *Id.* at 526. The Court held that, "[w]hile it may be true that regulating motor-vehicle emissions will not by itself *reverse* global warming, it by no means follows that we lack jurisdiction to decide whether EPA has a duty to take steps to *slow* or *reduce* it." *Id.* at 525. The Court further held that " '[a] plaintiff satisfies the redressability requirement when he shows that a favorable decision will relieve a discrete injury to himself. He need not show that a favorable decision will relieve his *every* injury.'" *Id.* (quoting *Larson v. Valente,* 456 U.S. 228, 244 (1982)).

Requiring Bowman to restore the wetlands and to pay a civil penalty would effectively redress the injuries suffered by NUWF. Unlike *Mass. v. EPA*, where the injury was on a global scale, caused by countless contributors, and unlikely to be substantially remedied, the injuries caused by Bowman's activities could be promptly and substantially redressed by the requested relief. While no court order could entirely undo environmental damages that have already been done, the relief sought would substantially relieve the injuries to NUWF's members. Further, granting the requested relief would further the objectives of the CWA by discouraging Bowman and other potential violators from conducting activities in violation of the Act. Thus, the Court

should hold that NUWF has standing because the relief it requests, if granted, would redress injuries to its members and would prevent future injuries from occurring.

**II. There is no continuing or ongoing violation as required by § 505 of the CWA and therefore no subject matter jurisdiction.**

Bowman's land clearing activities lasted from June 15, 2011 until July 15, 2011. These activities ceased on July 15, 2011, are wholly past, and are not a "continuing violation" in light of the Supreme Court's holding in *Gwaltney of Smithfield v. Chesapeake Bay Foundation*, as is required by the CWA's citizen suit provision, § 505(a). 484 U.S. 49 (1987).

Between June 15, 2012 and July 15, 2012, Bowman "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 to drain the field into the Muddy." Dist. Court Order at 4.

After Bowman completed all of this work, he was left with a field that made it possible for him to sow and harvest wheat. At that point, Bowman had no reason to clear any more land, and does not plan to do so. Bowman intends to continue planting and harvesting wheat on this land, and will use a previously constructed drain to facilitate this, but "[n]either [the planting or harvesting of wheat] constitutes adding dredged spoil or fill to the property, nor do Plaintiffs allege that they constitute such an addition." *Id.*

> "[Bowman] also agreed to convey to NUDEP a conservation easement on the still wooded part of his 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."

*Id.* There is no indication that Bowman plans to engage in any more land clearing activities.

As a result, NUWF's assertion that Bowman is engaged in a continuing violation of the CWA, as required by § 505, relies entirely on the argument that the continued presence of dredged and fill material in the former wetland, which is now a field, constitutes an ongoing violation.

The District Court relied heavily on *Gwaltney* in granting summary judgment against NUWF on this issue. In G*waltney*, defendant Gwaltney, a company that operated a meat-packing plant on the Pagan river, violated its permit under the CWA by repeatedly exceeding permitted effluent limitations. Between 1981 and 1984, Gwaltney violated the CWA well over one hundred times. Then, in 1984, Gwaltney installed a new monitoring system and did not violated the CWA again. After the new monitoring system had been installed, Plaintiff organizations filed suit under § 505(a) of the CWA, the citizen suit provision.

The citizen suit provision provides that a citizen may commence a civil action on his own behalf against any person who is "*alleged to be in violation of*" the CWA. 33 U.S.C. § 1365 (West) (emphasis added). Because Gwaltney's last violation of the CWA happened before Plaintiffs filed the suit, Gwaltney argued that they were no longer "in violation" of the CWA. Gwaltney argued that their violation was wholly past and that asked that the case be dismissed for lack of subject matter jurisdiction. *Gwaltney at* 54.

The Supreme Court held that the citizen suit provision did not allow citizen suits for past violations. Notably, the court did not distinguish between citizen suits for violations of § 402

and § 404 when interpreting the phrase "in violation," as NUWF asks this court to distinguish in the present case, but considered the purpose of § 505 as it relates to the CWA generally.

Specifically, the *Gwaltney* Court analyzed to the plain meaning of the statute's language, statutory intent, legislative history, and policy implications in making a determination that § 505 does not apply to past violations.

The Court relied heavily on the practical implications of considering a past violation to be "ongoing." The Court wrote, "the purpose of notice to the alleged violator is to give it an opportunity to bring itself into complete compliance with the Act and thus likewise render unnecessary a citizen suit. If we assume, as respondents urge, that citizen suits may target wholly past violations, the requirement of notice to the alleged violator becomes gratuitous." *Gwaltney* at 60.

The Court also relied on the case in controversy requirement, which is intended to "prevent the maintenance of a suit when 'there is no reasonable expectation that the wrong will be repeated." *Gwaltney* at 66. "Mootness doctrine thus protects defendants from the maintenance of suit under the Clean Water Act based solely on violations wholly unconnected to any present or future wrongdoing, while it also protects plaintiffs from defendants who seek to evade sanction by predictable 'protestations of repentance and reform.'" *Id.* (citing *United States v. Oregon State Medical Society,* 343 U.S. 326, 333, 72 S.Ct. 690, 696, 96 L.Ed. 978 (1952).

Most significantly, the Court considered that the purpose of the citizen suit provision is to "to supplement rather than to supplant governmental action." *Gwatley* at 60. The Court suggests that dispensing of the "ongoing violation" element of the jurisdictional requirement under § 505 presents a "disturbing anomaly." *Id.*

> This danger is best illustrated by an example. Suppose that the Administrator identified a violator of the Act and issued a compliance order under § 309(a). Suppose further that

> the Administrator agreed not to assess or otherwise seek civil penalties on the condition that the violator take some extreme corrective action, such as to install particularly effective but expensive machinery, that it otherwise would not be obliged to take. If citizens could file suit, months or years later, in order to seek the civil penalties that the Administrator chose to forgo, then the Administrator's discretion to enforce the Act in the public interest would be curtailed considerably.

*Id*. at 60-61. This example illustrates that the Supreme Court was concerned with precisely the situation that this Court faces in the present case. Namely, NUDEP identified Bowman's CWA violation and facilitated an agreement wherein Bowman would cease activities that were in violation of the CWA, and remedy his past damages. Bowman agreed to NUDEP's proposal, an agreement that he was not obliged to take. Now, NUWF seeks to file a citizen suit, which curtails NUDEP's discretion to enforce the CWA in the public interest and resolve the issue expeditiously."

The holding in *Gwaltney* is instructive in the present case, and indicates that Bowman's wholly past activities cannot be seen to render him currently "in violation of" the CWA.

Plaintiffs look to *Sasser v. Administrator* in the argument that any dredge and fill activity is "in violation of" the CWA unless and until it is undone. *Sasser v. Adm'r*, U.S. E.P.A., 990 F.2d 127, 129 (4th Cir. 1993). While *Sasser* deals with dredge and fill material on a wetland, it does not involve a violation of the CWA or a citizen suit under § 505, and is not relevant to the present case.

In *Sasser*, the Defendant, Sasser completed a highly protested dredge and fill project in violation of the CWA. The Army Corps of Engineers referred the matter to the EPA, who issued an order requiring Sasser to restore the wetlands and submit a restoration plan. Sasser refused to reply, the EPA issued another order, and Sasser refused to comply. The EPA fined Sasser, and was authorized to impose a civil penalty "not to exceed $10,000 for each day of the continuing violation, subject in the case of an administrative assessment to a maximum penalty of

$125,000." *Sasser* at 129. Each day that Sasser allowed the dredge and fill material to remain the wetland, he was in violation of an EPA order to remove the dredge and fill material from that wetland.

*Sasser* is entirely different than the present case, in which Bowman engaged in land clearing, ceased his activities within two weeks after receiving notice of a lawsuit, and then entered into a voluntary agreement with NUDEP to remedy his past violation. Bowman's violation was the dredge and fill activity, which he quickly took steps to remedy, whereas the violation that *Sasser* addresses was a repeated refusal to comply with an EPA order to remove dredge and fill material. The *Sasser* court's holding that the presence of dredge and fill material in Sasser's wetland was "in violation" of an EPA order is not instructive as to whether Bowman's dredge and fill material is "in violation" of § 404 of the CWA.

Bowman's activities ceased on July 15, 2012, he is no longer engaged in activities that violate the CWA, he does not plan to engage in activities that violate the CWA in the future, and his actions since July 15, 2012 indicate a commitment to complying with the CWA and remedying his past violation. The presence of dredge and fill materials from a past action do not constitute an ongoing violation as required by the citizen suit provision of the CWA. Furthermore, considering the presence of dredge and fill materials a continuing violation of the CWA in the present case would render the citizen suit's provision requiring that a citizen provide notice to a violator within 60 days of the "ongoing violation" meaningless. Consequently, the District Court was correct in granting summary judgment on this issue.

**III. NUDEP's actions were a "diligent prosecution" of Bowman's violations of the CWA, thus barring Bowman's § 1365 citizen suit.**

Under the Clean Water Act (CWA) § 505, citizens may bring a civil action against alleged violators of an effluent standard or limitation. 33 U.S.C. § 1365(a) (2006). However,

citizen suits are barred in two situations, partly in order to "recognize, preserve, and protect *the primary responsibilities and rights of States* to prevent, reduce, and eliminate pollution." 33 U.S.C. § 1251 (2006) (emphasis added). First, under § 505(b)(1)(B), no action may be commenced "if the . . . State has commenced and is diligently prosecuting a civil or criminal action in a court of the United States." 33 U.S.C. § 1365(b)(1)(B) (2006). Second, § 309(g)(6)(A) provides that any violation--

> (ii) with respect to which a State has commenced and is diligently prosecuting an action under a State law comparable to this subsection, or (iii) for which . . . the State has issued a final order not subject to further judicial review and the violator has paid a penalty assessed under this subsection, or such comparable State law, as the case may be, shall not be the subject of a [ § 1365 citizen suit].

33 U.S.C. § 1319(g)(6)(A) (2006). Thus, the Court should find that NUWF's citizen suit is barred under § 505(b)(1)(B); because NUDEP has commenced and is diligently prosecuting a civil action against Bowman by its pending motion to enter a consent decree. NUDEP's civil action requires Bowman to cease further violations, to deed a conservation easement, and to construct and maintain a year-round wetland on his property. Alternatively, the Court should find that NUWF's citizen suit is barred under § 309(g)(6)(A) because NUDEP issued an administrative order under a New Union statute virtually identical to § 309, imposing the same requirements as the consent decree. The Court should therefore affirm the district court's holding that NUWF's citizen suit is barred both by NUDEP's ongoing prosecution of Bowman in federal court, and by it's completed action under State law.

**A. Courts are highly deferential to states' prosecution of CWA violations, and such prosecution is presumed to bar § 1365 citizen suits.**

Citizen-plaintiffs acting under § 505's citizen suit provision bear the heavy burden of proving that a state agency's prosecution is not or has not been "diligent." *Arkansas 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), *cert. denied*, 513 U.S. 1147 (1995); *see also Connecticut Fund for the Environment v. Contract Plating Co.*, 631 F.Supp. 1291, 1293 (D. Conn. 1986) (holding that diligence is to be presumed absent persuasive evidence that the state has engaged in a pattern of conduct that is "dilatory, collusive or otherwise in bad faith"). Moreover, deference to enforcement agencies is particularly appropriate under the CWA because the Act delegates primary enforcement responsibility to these agencies. *See Friends of the Earth, Inc. v. Laidlaw Environmental Services (TOC), Inc.*, 890 F.Supp. 470, 487 (D.S.C. 1995) (holding that CWA § 505 citizen suits are meant to supplement governmental action, and that limitations on citizen suits were designed to give the governmental agencies the "first shot" at enforcement and to encourage out-of-court settlement between agencies and polluters).

In *Arkansas Wildlife Fed'n*, the district court granted summary judgment for the defendant, holding that the citizen suit was barred under CWA § 309(g). 842 F.Supp. at 1150. The district court also held that state enforcement agencies must be given "great deference to proceed in a manner it considers in the best interest of all parties." *Id.* at 1147. The court of appeals affirmed, holding that the Arkansas Department of Pollution Control and Ecology (ADPC&E) (the agency charged with enforcing the CWA), had commenced and diligently prosecuted a civil action by entering a Consent Administrative Order. The Consent Administrative Order required the alleged violator to pay a civil penalty of $1,000, to report on its remedial actions, and to come into compliance within thirty days or to submit a revised plan if compliance was not achieved within thirty days. 29 F.3d at 377-78. The court reasoned that states are afforded discretion in implementing and enforcing the CWA. *Id.* at 380. So long as the state law contains comparable penalty provisions, has the same overall enforcement goals as the CWA, and adequately safeguards the legitimate interests of concerned parties, a state agency

is given latitude in its implementation of the Act. *Id.* at 381. Under those circumstances, state enforcement schemes should be presumed to be comparable to the CWA unless it is shown that the state denied an interested party a meaningful opportunity to participate in the enforcement process. *Id.* at 382.

Like ADPC&E, NUDEP should be afforded wide discretion in its enforcement of the CWA and New Union's virtually identical program. NUDEP's proposed consent order demonstrates that the enforcement here was conducted in compliance with the CWA. In *Arkansas Wildlife Fed'n*, the consent order allowed for revision of the compliance plan if the thirty day limit was not met. NUDEP's proposed consent order affords Bowman no such discretion in complying. Rather, it prohibits, without exception, additional violations of § 404. Further, the consent order requires Bowman to deed a conservation easement for public enjoyment, which he has done. Bowman's obligations, however, do not stop there. After Bowman constructs a wetland on the 75 foot buffer zone, as required by the consent order, he is under an on-going commitment to maintain this wetland. Moreover, there is no concern here that NUDEP failed to protect NUWF's interests because NUWF was aware of Bowman's violations before NUDEP. In fact, NUWF alerted NUDEP as to the violations. Additionally, in negotiating the settlement with Bowman, NUDEP took affirmative steps to safeguard NUWF's interests by securing from Bowman the conservation easement which will allow NUWF's members entry for recreational purposes. Finally, NUDEP is continuing to protect NUWF's interests by joining NUWF's argument that it has standing in this case. Thus, the Court should find that NUDEP appropriately applied its administrative discretion in entering into a settlement with Bowman, and that the consent order fully satisfies the CWA's requirement of diligent prosecution.

**B. NUDEP properly applied its regulatory discretion in entering into a settlement agreement and decree with Bowman, and in declining to assess penalties under that agreement.**

NUDEP's proposed consent order is the summation of a diligent prosecution of Bowman. An important factor in determining whether a state's prosecution was diligent is whether the prosecution in fact prevented a continuation of violations. *North and South Rivers Watershed Ass'n, Inc. v. Town of Scituate*, 949 F.2d 552, 557 (1st Cir. 1991). State administrative enforcement actions may foreclose a citizen suit even without the assessment of penalties. *Id.* at 556; *see also Sierra Club v. Colorado Refining Co.*, 852 F.Supp. 1476, 1485 (D. Colo. 1994) (holding that a state need not attempt to assess penalties to satisfy the prosecution requirement of § 1319(g)(6)(A)(ii)). As long as a state's enforcement scheme gives an agency the power to seek penalties, the agency may use its regulatory discretion not to do so. *Scituate*, 949 F.2d at 556; *see also Friends of Milwaukee's Rivers v. Milwaukee Metropolitan Sewerage Dist.*, 382 F.3d 743, 762 (7th Cir. 2004) (holding that levying penalties on violators who are already undertaking remedial action will not increase compliance, and may in fact impede remedy efforts).

In *Scituate*, the state environmental protection agency issued an administrative order to the town of Scituate under a state law that closely paralleled the Federal Clean Water Act. 949 F.2d at 553-54. Although the state law permitted assessment of penalties up to $25,000 a day, the State declined to assess any penalties in the order. *Id.* at 554. The court upheld the district court's grant of summary judgment for the defendant-appellee, holding that the State's order, despite the absence of penalties, represented "a substantial, considered and ongoing response to the violation, and that the [State's] enforcement action does in fact represent diligent prosecution." *Id.* at 557. The court reasoned that "[w]here an agency has specifically addressed the concerns of an analogous citizen's suit, deference to the agency's plan of attack should be

particularly favored." *Id.* In finding the prosecution to be diligent, the court emphasized the fact that actions taken under the order showed that "Scituate [was] well into the process of diligently complying" with the order. *Id.*

Like *Scituate*, NUDEP's prosecution of Bowman represents a "substantial, considered and ongoing response to the violation." Bowman's obligations under the order are substantial. Not only must he cease violations immediately and permanently, he must take affirmative steps to construct a new year-round wetland on his property and to maintain it indefinitely. He has conveyed a conservation easement to NUDEP for public benefit, which he is required to keep in its natural state. While NUDEP could have simply assessed monetary penalties[1], it properly applied its administrative discretion and expertise to decide that obtaining a conservation easement from Bowman would better achieve the purpose of the CWA, and would provide a greater public benefit than collection of penalties.[2] Thus, the consent order was carefully "considered" by NUDEP, imposes on Bowman "ongoing" duties, and provides a significant public benefit. Because the order specifically addresses the concerns of NUWF's members, the Court should give deference to NUDEP's plan of attack. Moreover, to the extent that diligence is to be determined by actual compliance, the Court should approve the consent order to give Bowman the opportunity to comply.[3]

**C. NUWF's citizen suit is not permitted on the theory that NUDEP is not currently prosecuting Bowman, because § 505 bars citizen suits for past violations that have been diligently prosecuted.**

[1] It is not clear, however, that Bowman had the financial resources to pay a civil penalty. What was clear to NUDEP was that Bowman's property was of considerable value for recreational and conservation purposes.

[2] The conservation easement is arguably a "penalty." However, NUDEP does not rely on this definition, because assessment of a penalty is not necessary to bar a citizen suit.

[3] In this sense, NUWF's citizen suit may not be ripe for judicial review.

NUDEP's diligent prosecution of Bowman is ongoing. First, NUDEP's Sept. 5 motion to enter a decree is pending. Second, under that decree, as well as the state administrative order entered into on Aug. 1, Bowman is under a continuing obligation to refrain from clearing more wetlands, and to construct and maintain new wetlands. Thus, NUDEP is presently "diligently prosecuting" its case against Bowman. However, to the extent that the Court finds that NUDEP has concluded its diligent prosecution, NUWF's citizen suit is nonetheless barred by § 505(b)(1)(B), which bars citizen suits where the enforcement agency "has commenced and is diligently prosecuting" a judicial action against the violator. 33 U.S.C. § 1365(b)(1)(B) (2006). The potentially absurd results of giving plain meaning to § 505's "diligently prosecuting" language has been commented on extensively.[4] Courts have held that the "diligently prosecuting" requirement, though phrased in the present tense, does not merely bar citizen suits and state enforcement suits from proceeding simultaneously. *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Found., Inc.*, 484 U.S. 49 (1987). The bar to citizen suits does not simply expire once the government has concluded its prosecution. *Id.*; *see also Friends of the Earth, Inc. v. Laidlaw Environmental Services (TOC), Inc.,* 890 F.Supp. 470, 485 (D.S.C. 1995) (holding that §505's prohibition on citizen suits applies to cases where the governmental enforcement agency has concluded its diligent prosecution of a particular violator).[5]

[4] See, e.g., Jeffrey G. Miller, *Overlooked Issues in the "Diligent Prosecution" Citizen Suit Preclusion*, 10 Widener L. Rev. 63 (2003-2004); Derek Dickinson, *Is "Diligent Prosecution of an Action in a Court" Required to Preempt Citizen Suits under the Major Federal Environmental Statutes?*, 38 Wm. & Mary L. Rev. 1545 (1997).

[5] Courts have also held citizen suits barred by the common law doctrine of res judicata. See, e.g., *U.S. EPA v. City of Green Forest, Ark.*, 921 F.2d 1394, 1404 (8th Cir. 1990) (holding that a consent decree entered into by a state representing its citizens in a parens patriae suit is conclusive and binding upon those citizens). Similarly, NUDEP's state administrative order and proposed consent decree preclude NUWF's citizen suit, and it should therefore be dismissed as moot.

In *Gwaltney*, the Court held that § 505 does not permit citizen suits for wholly past violations that the government has already prosecuted. 484 U.S. at 63. Examining Congress' intent in providing for citizen suits, the Court found that "citizen suits are proper only 'if the Federal, State, and local agencies fail to exercise their enforcement responsibility.' " *Id.* at 60 (quoting S. Rep. No. 92-414, at 64 (1971), *reprinted in* 1972 U.S.C.C.A.N. 3668, 3730). The Court reasoned that if §505(b)(1)(B) was read to allow citizen suits after the government had completed its prosecution of a violator, then the government's "discretion to enforce the Act in the public interest would be curtailed considerably," and "the scope of the citizen suit would change the nature of the citizens' role from interstitial to potentially intrusive." *Id.* at 61. Thus, although § 505(b)(1)(B) is phrased in the present tense, it also bars citizen suits where the government has concluded its prosecution of a violator.

Like *Gwaltney*, NUDEP's prosecution of Bowman bars any further suits for the same violations. In issuing the Aug. 1 administrative order, NUDEP arguably concluded its prosecution of Bowman under State law. Nonetheless, § 505(b)(1)(B) does not simply expire, thereby allowing NUWF to now bring a citizen suit for the same violations. As the *Gwaltney* Court cautioned, holding Bowman subject to a citizen suit would considerably curtail NUDEP's discretion to enforce the CWA, as future violators would be unwilling to settle claims by the government if they could be subject to the same claims in a subsequent citizen suit.[6] Moreover,

[6] Other courts and commentators have recognized problems arising from permitting citizen suits where an agency has concluded prosecution of the same violations. As one court held, "[t]o require an agency to commence any form of proceeding would be senseless where the agency has already succeeded in obtaining the respondent's agreement to comply with the law in some enforceable form." *Gardeski v. Colonial Sand & Stone Co.*, 501 F. Supp. 1159, 1166 (S.D.N.Y. 1980); see also *Robert D. Snook, Environmental Citizen Suits and Administrative Discretion: When Should Government Enforcement Bar a Citizen Suit?* Nat'l Envtl. Enforcement J., Apr. 1995, at 11-12 (arguing that citizen suits are the functional and practical equivalent of diligent

allowing NUWF's citizen suit to proceed would surely change the citizens' role from interstitial to intrusive, giving citizens, rather than States, primary enforcement authority under the CWA. Such was clearly not the intent of Congress. The Court should therefore dismiss NUWF's citizen suit for lack of subject matter jurisdiction because it is barred under § 505(b)(1)(B) by NUDEP's diligent prosecution of Bowman.

**IV. Bowman violated the CWA when he performed earth moving activities on his property without a § 404 permit.**

Bowman violated the CWA when he moved vegetative material, soil, and materials from one part of the wetland adjacent to the Muddy River to another part of the same wetland. The District Court thus erred when it determined that Bowman's activities did not violate the CWA. For Bowman's actions to be legal, a CWA Section § 404 permit, administered by the Army Corps. of Engineers ("Corps"), would have been needed to govern the earth moving activities on his property. The District Court's application of case law and regulations that pertain to § 402 permits was also incorrect; applying § 404 case law and regulations would have been proper. Finally, the District Court ignored the CWA's primary purpose of preserving the waters of the United States in not protecting the wetland on Bowman's property.

Section § 301(a) of the CWA prohibits the discharge of any pollutant except as in compliance with a CWA permit or exception. 33 U.S.C. § 1311(a) (2006). For NUWF to meet its burden of proof for a CWA section 301(a) violation it must be shown that Bowman (1) discharged (2) a pollutant (3) from a point source into (4) waters of the United States (5) without

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agency prosecution, and would therefore result in duplicate litigation when addressing the same factual concerns).

a §§ 402 or 404 permit.[7] *Committee to Save Mokelumne River v. East Bay Municipality Utility. Dist.,* 13 F.3d 305, 309 (9th Cir.1993).

The District Court's decision that elements two, three, four, and five are satisfied is uncontested by the parties. Dist. Court Order at 8-9. However, the parties dispute whether element one is satisfied; whether Bowman's actions from June 15 to July 15, 2011 constituted the actual discharge of a pollutant. The dispute hinges on the word "addition." A polluting material was added to Bowman's wetland in the form of redeposit. Therefore, Bowman's activities did amount to the discharge of a pollutant.

**A. Legal precedent and Federal regulations have found that Bowman's actions are the addition of dredge and fill materials to a water of the United States.**

§ 502 of the CWA defines "discharge of a pollutant" as "*any addition* of any pollutant to navigable waters from any point source." 33 U.S.C. § 1362(12) (2006) (emphasis added). "Addition" to a navigable water was not defined by Congress. The determination of the court below regarding whether an addition occurred when Bowman performed earth moving activities was incorrect. Bowman's activities constitute an "addition" that qualifies as the discharge of a pollutant and requires a § 404 permit.

Bowman's activities include the removal of vegetation, piling windrows,[8] digging trenches, draining sediment and vegetation into the Muddy River, along with bulldozing and leveling the wetlands on his property adjacent to the Muddy. These are classic dredge and fill activities. The disturbance to the wetland and the runoff from the channels are the addition of dredge and fill material to waters of the United States.

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[7] "Point source" is defined as "any discernible, confined and discrete conveyance." 33 U.S.C. § 1362(14) (2006). For purposes of the CWA, "waters of the United States" includes "all interstate waters, including wetlands . . . all other waters such as intrastate lakes, rivers, [and] streams." 40 C.F.R. § 122.2 (2000).

[8] A long line of vegetation materials laid out in stacks to dry in the wind.

When Congress enacted the CWA it gave the Corps the authority to administer the § 404 permitting program. 33 U.S.C. § 1344 (2006). The EPA has oversight and the ability to veto § 404 permits, but the Corps has the ultimate authority to run the program. *Id*. With this authority the Corps promulgates rules regarding § 404 permits. The Corps has defined fill material as:

> [M]aterial placed in waters of the United States where the material has the effect of: (i) Replacing any portion of a water of the United States with dry land; or (ii) Changing the bottom elevation of any portion of a water of the United States. (2) Examples of such fill material include, but are not limited to: rock, sand, soil, clay, plastics, construction debris, wood chips . . . (3) The term fill material does not include trash or garbage.

40 C.F.R. § 232.2 (2008). Dredged materials are materials that are excavated or dredged from waters of the United States. *Id.* The discharge of fill material means that there is an "addition" of fill material into waters of the United States. *Id.* The Corps provides a non-exhaustive list of examples of "addition." *Id*. Discharge of dredged material is defined by the EPA as "[a]ny addition, including *redeposit* . . . into waters of the United States which is incidental to any activity, including mechanized land clearing, ditching, channelization, or other excavation." 40 C.F.R. § 232.2(1)(iii) (2000) (emphasis added).

Only the discharge of dredge material specifically defines "redeposit" as an "addition." But courts have held that redepositing vegetation, leveling, disking and digging of channels on wetlands are the addition of a dredge and fill material and a pollutant and thus required a § 404 permit. In *Avoyelles Sportsmen's League, Inc. v. Marsh*, the private wetland owner defendants removed vegetation, raked the vegetation into burrows, and then disked the materials back into the wetlands; they then leveled the wetland and dug a drainage ditch. 715 F.2d 897, 901 (5th Cir. 1983). The defendant landowners argued, like Bowman, that the mere removal and redeposit of vegetation that was already on the wetlands was not an "addition" of a new pollutant. *Id.* at 921. The Fifth Circuit concluded that the word "addition" as used in the Corps

definition of "discharge of fill material"[9] included the redeposit of vegetation materials into wetlands. *Id.* at 923. Because of their activities, the defendants in *Avoyelles* were found to have violated the CWA by discharging fill material without a § 404 permit. *Id.* at 925. The court reasoned that filling in sloughs, discing the land, and burying discarded vegetative material changed the bottom elevation of the waterbody, thus constituting a dredge and fill activity. *Id.* at 924. The court noted that excluding redeposit from the definition of addition would "effectively remove the dredge-and-fill provision from the statute." *Id.*

Redepositing and channeling activities such as those conducted by the defendant in *Avoyelles* and by Bowman, without a § 404 permit, have been found to be a violation of CWA by numerous other courts. In *U.S. v. M.C.C. of Florida, Inc.*, the court held that the river bed sediment dug up by boat propellers and then flung onto nearby sea grass beds was an "addition" because it was the redeposit of materials. 772 F.2d 1501 (11th Cir. 1985). Further expanding on the fact that a redeposit satisfies the "addition" requirement of a § 404 permit, the Seventh Circuit in *Greenfield Mills, Inc. v. Macklin*, stated that "the court of appeals have consistently recognized that materials that have been scooped up and then redeposited in the same waterbody can result in a discharge of a pollutant." 361 F.3d 934, 948 (7th Cir. 2004). The *Greenfield* court noted why redepositing materials in the same wetland required a § 404 permit: (1) that requiring a § 404 permit for redeposit upholds the purpose of the CWA to "restore and maintain the chemical, physical and biological integrity of the Nation's waters," 33 U.S.C. § 1251(a) (2006); (2) that distributing soil and vegetation across a wetland would inevitably disturb the ecological balance of a waterway; and (3) that the *Avoyelles* court was correct in its reasoning

[9] 33 C.F.R. § 323.2(f) (2008).

that excluding redeposit as an addition would "effectively remove the dredge-and-fill provision from the statute." *Greenfield*, 361 F.3d at 948-49 (quoting *Avoyelles,* 715 F.2d at 924).

Like in Bowman's case and in the various other cases discussed, when materials located within a wetland are moved across a property and redeposited at a different location of the wetland, it is considered an "addition" and a § 404 permit is required. See *Borden Ranch Partnership v. United States Army Corps of Engineers*, 261 F.3d 810, 812 (9th Cir. 2001), aff'd per curiam, 537 U.S. 99 (2002) (finding a violation of the CWA where a ranch performed deep ripping and landmoving that significantly altered a wetland, but did not add any new material to the wetland, because the soil was so altered it became a pollutant); *U.S. v. Deaton,* 209 F.3d 331 (4th Cir. 2000) (finding a violation where property owners dug a channel across wetlands and piled the material without a § 404 permit because the redeposit was an addition to the wetland); *U.S. v. Cundiff,* 555 F.3d 200 (6th Cir. 2009) (excavating drainage ditches and clearing trees to make the wetlands suitable for farming was found to be an addition of dredge and fill materials even though there were no *new* materials added to the wetlands).

Reiterating these numerous cases that are counter to Bowman's argument may seem redundant, but it is necessary to show that the court below erred in finding no violation of the CWA simply because Bowman added no new materials to the wetland. Bowman's attempts to circumvent the requirements of § 404 by claiming there is no actual addition to his wetland are unavailing. Numerous appellate courts have found that redeposit alone is sufficient to be an addition of pollution and dredge and fill material. Bowman cannot ignore case law and federal regulations that are analogous to the facts of his case. Contrary to the holding of the court below, Bowman's activities are an addition that resulted in the discharge of a pollutant.

**B. The application of case law and EPA regulations governing dam discharges and § 402 permits is not applicable to the facts in this case.**

The district court below relied on the wrong permitting scheme to decide that Bowman did not need a § 404 Permit. Case law, rules and regulations applicable to CWA § 402 were used to determine that Bowman did not need a § 404 permit. § 402 gives the EPA the authority to issue permits, but § 404 forbids it from exercising permitting authority, because that is "provided [to the Corps] in" § 404 by Congress. *Coeur Alaska, Inc. v. Se. Alaska Conservation Council*, 557 U.S. 261, 273 (2009). The EPA's own regulations provide that "[d]ischarges of dredged or fill material into waters of the United States which are regulated under section § 404 of CWA . . . do not require [§ 402] permits." 40 CFR § 122.3 (2008)*; Coeur Alaska*, 557 U.S. at 274. Applying § 402 regulations and case law to a § 404 dispute obviously does not match the intent of Congress. Furthermore, it is looking at the problem through the wrong "lens"; a § 404 permit requires land movement or excavation in some way, while a § 402 permit simply requires the discharge of a pollutant. Any reliance on *National Wildlife Federation v. Gorsuch* or the 2008 Waters Transfer Rule in a § 404 dispute is not logical and must be reversed.

**1. *National Wildlife Federation v. Gorsuch* is not applicable to this case because that case was related to CWA § 402 and dam discharges; our case involves § 404 and dredge and fill activities.**

The case relied upon by the district court below to articulate the "outside world" theory, *National Wildlife Federation v. Gorsuch*, 693 F.3d 156 (D.C.Cir. 1982), is not relevant to our case. *Gorsuch* revolved around dam discharges and § 402 permitting, not dredge and fill materials and § 404 permitting. *Id.* at 175. Applying common law precedent created by a case regarding dam water transfers is not prudent because dam discharges do have materials that are being actively "dredged" or "excavated," and those activities are the basis for the entire structure of the § 404 permit system. *See* 33 U.S.C. § 1344 (2006); *Froebel v. Meyer,* 13 F. Supp. 2d 843, 868 (E.D. Wis. 1998) aff'd, 217 F.3d 928 (7th Cir. 2000).

In *Froebel*, the court refused to apply § 404 case law to a dispute that was more akin to a § 402 activity. *Froebel,* 13 F. Supp. 2d at 869. The plaintiff in *Froebel* argued that a § 402 permit should regulate an inoperable dam that was releasing riverbed sediment into a water body. *Id.* at 864. To support his claim, the plaintiff relied upon a case that interpreted "addition" in the context of a § 404 permit, not a § 402 permit.[10] *Id.* at 865. The court rejected the plaintiff's attempt to apply addition in the context of dredge and fill material. *Id.* at 865-66.

Therefore, since dredging and filling is clearly a different activity from passive dam discharges, *Gorsuch* and it's "outside world" requirement have no place in this dispute.

**2. The 2008 Water Transfers Rule is inapplicable to this case for the same reasons *National Wildlife Federation v. Gorsuch* is inapplicable; at issue in this case is § 404, not § 402.**

Further confusing the dichotomy between the § 402 and the § 404 permitting scheme, the district court below relied upon EPA's interpretation of "addition" as it is described in the 2008 Water Transfer Rule, which is the EPA's codification of the holding in *Gorsuch* and a regulation designed to protect fairly routine water transfers from the mandates of a § 402 permit. M. Rhead Enion, *Rethinking National Wildlife Federation v. Gorsuch: The Case for NPDES Regulation of Dam Discharge*, 38 Ecology L.Q. 797, 822 (2011). The District Court relied on a regulation not relevant to the statutory law of this dispute. Like *Gorsuch* and the "outside world" definition, the Water Transfer Rule is not applicable to a § 404 permit and the movement of fill material.

NUDEP does not challenge the Water Transfer Rule. NUDEP instead argues that the Water Transfer Rule is not applicable to this dispute because this case does not involve water transfers or § 402 permits. This case is an application of a § 404 permit and the line of cases

[10] United States v. Sinclair Oil Co. 767 F.Supp. 200 (D.Mont.1990)

interpreting "addition" in the dredge and fill context. Therefore, the District Court's decision must be reversed because its was based on law that was not applicable to this dispute.

**C. Condoning Bowman's non-permitted actions violates the CWA's objective of maintaining the integrity of waters of the United States.**

Finally, the district court below found that there was no CWA violation by Bowman because the soil he moved was already in the wetland. Dist. Court Order at 10. The District Court's logic for stating that "[n]or does it matter that the defendant's actions changed the nature of some of the material from living to dead" flies in the face of Congress' purpose in enacting the CWA and preserving the wetlands that are within a navigable water's ecosystem. The CWA was created to "restore and maintain the chemical, physical and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a) (2006). Wetlands, because of their role in maintaining the ecological health of traditionally navigable waters, are also protected under the CWA. *Rapanos v. U.S.*, 547 U.S. 715 (2006). The Supreme Court explains ecological importance of wetlands:

> [Wetlands] may serve to filter and purify water draining into adjacent bodies of water, and to slow the flow of surface runoff into lakes, rivers, and streams and thus prevent flooding and erosion. In addition adjacent wetlands may serve significant natural biological functions, including food chain production, general habitat, and nesting, spawning, rearing and resting sites for aquatic species.

*U.S. v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 134-35 (1985) (internal citations and quotations omitted); *see also* 40 C.F.R § 230.41(b)(2003) (final rule explaining the importance of protecting wetlands from destruction because they improve the ecological value of waters of the United States). Bowman's activities clearly disrupt the ecological health of the wetland. The Supreme Court and appellate courts have recognized that Congress's purpose of "restor[ing] and maintain[ing] the chemical, physical and biological integrity of the Nation's waters" should be given a broad interpretation for protecting wetlands from destruction. *See, e.g., Borden Ranch P'ship v. U.S. Army Corps of Engineers*, 261 F.3d 810, 812 (9th Cir. 2001), aff'd per curiam, 537

U.S. 99 (2002); *Avoyelles Sportsmen's League,* 715 F.2d at 916; *Greenfield Mills, Inc.*, 361 F.3d at 948 (7th Cir. 2004). Because of Congress's intent to protect wetlands, redeposit qualifies as an addition under § 404's permitting scheme. Because Bowman's activities were dredge and fill activities, they must be regulated as such. All the elements required for a violation of § 301(a) and § 404 have been met, and the Court should therefore reverse the decision below court below.

**CONCLUSION**

NUWF has standing under CWA § 505, the citizen suit provision, because NUWF has suffered an injury in fact, that is traceable to Bowman's actions; and that is redressable by this court. However, Bowman's violations are not continuing or ongoing as required by § 505. Thus there is no subject matter jurisdiction. NUDEP has diligently prosecuted Bowman and entered a motion for a consent decree to require compliance, therefore under § 505(b), NUWF's citizen is barred. Bowman's actions, however, are dredge and fill activities and a violation of CWA §§ 301(a) and 404. For the foregoing reasons, NUDEP respectfully asks this Court to reverse the decision of the district court denying NUWP's standing claim, uphold the finding that there is no subject matter jurisdiction because there is not a continuing violation as required by a § 505(a) of the CWA, uphold the finding that NUDEP satisfied the diligent prosecution requirement of § 505(b) and reverse the District Court's determination there was no violation of § 301(a) and § 404 because Bowman performed dredge and fill activities on his wetlands.

Respectfully Submitted,

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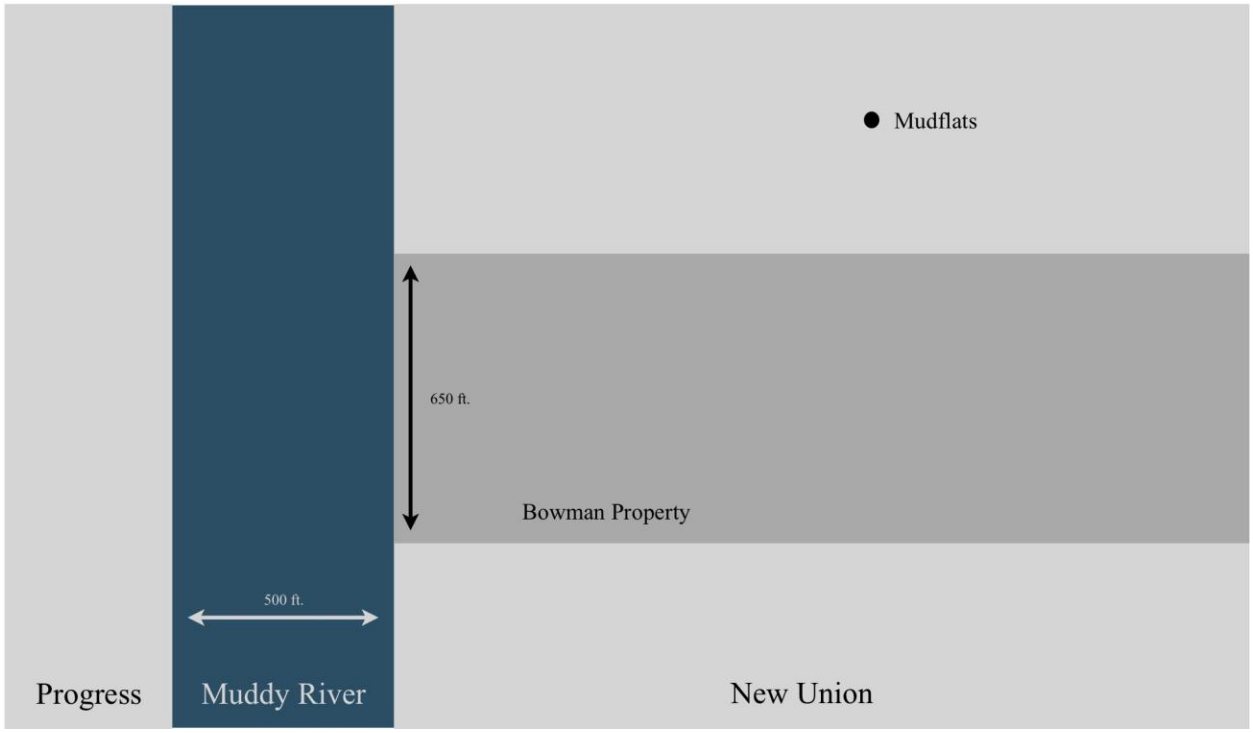
Counsel for New Union Department of Environmental Protection

**APPENDIX 1**


Mudflats
650 ft.
Bowman Property
500 ft.
Progress
Muddy River
New Union