TEAM #75

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 Order of the United States District Court for the District of New Union, Civ. No. 149-2012, Dated June 1, 2012.

BRIEF FOR THE NEW UNION DEPARTMENT OF ENVIRONMENTAL PROTECTION

Intervenor-Appellant

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JURISDICTIONAL STATEMENT

This case involves a timely appeal from a judgment of the United States District Court for the District of New Union. (R. at 1). The district court had jurisdiction under 33 U.S.C. § 1365 (2006), the citizen suit provision of the Clean Water Act (CWA), and 28 U.S.C. § 1331 (2006). On June 1, 2012, the district court granted Jim Bob Bowman's motion for summary judgment. The order of the district court is a final decision, and the United States Court of Appeals for the Twelfth Circuit has jurisdiction over any appeals from a final decision of the United States District Court for the District of New Union. 28 U.S.C. § 1291 (2006).

STATEMENT OF THE ISSUES

I. Whether New Union Wildlife Federation has standing to sue under § 505 of the Clean Water Act when its members have alleged that their recreational interests have been harmed by the pollution from Bowman's unpermitted land-clearing activities.

II. Whether there is a continuing or ongoing violation as required by § 505(a) of the Clean Water Act for subject matter jurisdiction when Bowman ceased his activities on July 15, 2011 and signed an agreement prohibiting further violation.

III. Whether New Union Wildlife Federation's citizen suit has been barred by diligent prosecution as set out in § 505(b) of the Clean Water Act when New Union Department of Environmental Protection formed a consent decree with Bowman and brought suit against Bowman to enforce this decree.

IV. Whether Bowman violated §§ 301(a) and 404 of the Clean Water Act when he used bulldozers to move dredged and fill material from one part of a wetland adjacent to navigable water, and to redeposit the dredged spoil in another part of the same wetland, thereby leveling the area and converting it to dry land for farming use.

STATEMENT OF THE CASE

The New Union Wildlife Federation (NUWF) filed an action against Jim Bob Bowman under 33 U.S.C. § 1365 (2006), the citizen suit provision of the Clean Water Act (CWA), in the United States District Court for the District of New Union, for filling

wetlands without a permit in violation of §§ 301(a) and 404 of the CWA. *Id.* §§ 1311(a), 1344. The New Union Department of Environmental Protection (NUDEP) filed a motion to intervene in this action, which was granted. After discovery, NUWF and Bowman filed cross motions for summary judgment. The district court granted Bowman's motion on all counts, and denied NUWF's motion on all counts. NUWF and NUDEP each filed a Notice of Appeal. NUDEP appeals the decisions of the district court that NUWF did not have standing to bring its citizen suit and that Bowman did not violate § 404 of the CWA, *id.* § 1344.

STATEMENT OF FACTS

Bowman owns one thousand acres of wooded or previously wooded land adjacent to the Muddy River in the State of New Union. (R. at 3). The property is wholly within the one hundred year flood plain, and portions of the property are flooded every year when the river is high. (R. at 3). Parties do not dispute that the entire property is a wetland under the jurisdiction of the U.S. Army Corps of Engineers. (R. at 4). On June 15, 2011, Bowman began clearing the property. (R. at 4). He used bulldozers to topple trees, level vegetation, and push the resulting debris into piles. (R. at 4). He burned this debris, then dug trenches with the bulldozer, and pushed the remains into the trenches. (R. at 4). He leveled the field, pushing soil from high to low portions, and then dug a ditch from the back of the property to the river to drain the field into the Muddy. (R. at 4). He completed these activities on July 15, 2011. (R. at 4). He left a strip of land adjacent to the Muddy to clear after it had drained. (R. at 4).

NUDEP sent Bowman a notice informing him that he had violated state and federal law by clearing the field without a permit. (R. at 4). Bowman entered into a

settlement agreement with NUDEP, and agreed not to clear any more wetlands in the area, and to convey to NUDEP a conservation easement on the uncleared property adjacent to the Muddy plus an additional 75-foot buffer zone between it and the new field. (R. at 4). He agreed to construct and maintain a year-round wetland on the buffer zone, and to allow public entry for appropriate day-use recreational purposes. (R. at 4). The agreement was incorporated into an administrative order issued by NUDEP to Bowman on August 1, 2011. (R. at 4). The order forbids any further development of the easement area or the buffer zone other than constructing and maintaining the artificial wetland. (R. at 4). On August 10, 2011, NUDEP brought suit in federal court for the violation, and on September 5, 2011, NUDEP filed a motion to enter a decree with terms identical to the administrative order, to which Bowman consented. (R. at 5).

NUWF is a non-profit membership organization, funded by members' dues and contributions. Members elect its Board of Directors as a representative governing body, and this Board elects officers, including the President. The organization's purpose is to protect the fish and wildlife of the State of New Union by protecting their habitats. (R. at 4). NUWF members Dottie Milford, Zeke Norton, and Effie Lawless alleged that they use the Muddy for recreational boating and fishing, and often picnic on its banks in the vicinity of Bowman's property. (R. at 6). They are aware that wetlands such as Bowman's property serve a valuable function in maintaining the integrity of the Muddy by acting to absorb sediment and pollutants and serving as a buffer to flooding. (R. at 6). They are aware of the differences and feel the loss caused by the destruction of Bowman's wetlands, and fear that the Muddy is more polluted as a result. (R. at 6). Milford testified that the Muddy appears more polluted to her than it did prior to Bowman's activities. (R.

at 6). Norton testified that he has frogged the area for years for recreational and subsistence purposes, and he is now able to find fewer frogs than before. (R. at 6).

STANDARD OF REVIEW

This case involves an appeal from a district court's grant of summary judgment. Summary judgment is appropriate if "there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). Consequently, the issues on appeal are questions of law, and should be reviewed de novo, with no deference to the conclusions of the lower court. *First Options of Chi., Inc. v. Kaplan*, 514 U.S. 938, 948 (1995).

SUMMARY OF THE ARGUMENT

NUWF has standing to bring suit against Bowman under 33 U.S.C. § 1365 (2006), the citizen suit provision of the CWA, because members of the organization have suffered injuries to their recreational and aesthetic interests due to the pollution of the Muddy caused by Bowman's land clearing activities. The penalties sought by NUWF would redress these injuries because they would discourage further violation of the CWA.

Although NUWF did have standing, this suit was barred on other grounds. Bowman's violations were not continuous or ongoing, because his activities were completed in one month, and were unlikely to recur since he had signed a settlement agreement prohibiting any further construction outside of the artificial wetland creation. This settlement agreement, finalized by administrative order and being enforced in federal court, also shows the diligent prosecution by NUDEP, which acts as a government action barring citizen suits.

Although Bowman's redistribution of dredged spoil in clearing, filling, leveling, and draining the field did constitute a violation of § 404 of the CWA, 33 U.S.C. § 1344 (2006), this violation is being prosecuted by NUDEP, and allowing citizen suit at this point would be an unnecessary interference. NUDEP respectfully requests that this court overturn the lower court decisions on standing and Bowman's violation of the CWA, but uphold the decisions that there was no continuing violation, and NUDEP has diligently prosecuted the past violation, thus barring a citizen suit.

ARGUMENT

I. Through its individual members, NUWF has standing to bring a citizen suit against Bowman under Clean Water Act (CWA) § 505, 33 U.S.C. § 1365 (2006), because its members have suffered injury to their recreational and aesthetic interests.

Article III, section 2 of the United States Constitution limits the jurisdiction of federal courts to "cases" and "controversies." U.S. Const. art. III, § 2. Standing serves to identify "those disputes that are appropriately resolved through the judicial process," and is thus an essential part of Article III requirements for jurisdiction. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992). The citizen suit provision of the Clean Water Act extends standing to the bounds of the Constitution. *Ecological Rights Found. v. Pacific Lumber Co.*, 230 F.3d 1141, 1147 (9th Cir. 2000) (citing *Middlesex Cnty. Sewerage Auth. v. Nat'l Sea Clammers Ass'n,* 453 U.S. 1, 16 (1981)).

To satisfy the requirements for standing, the plaintiffs must have suffered an actual or imminent injury in fact that is concrete and particularized, fairly traceable to the challenged action of the defendant, and likely to be redressed by favorable judicial action. *Defenders of Wildlife*, 504 U.S. at 560-61. Actual damage to the environment need not be proven; the relevant showing for Article III standing is the demonstration of injury to the

plaintiff. *Friends of the Earth v. Laidlaw Envtl. Servs. (TOC) Inc.*, 528 U.S. 167, 181 (2000). This injury can be adequately documented by specific testimony that the challenged activities, and the plaintiffs' reasonable concerns about the effects of those activities, directly affected recreational, aesthetic, economic, or other judicially cognizable interests of the plaintiff. *Id.* at 183. These effects must be more than "general averments," "conclusory allegations" or " 'some day' intentions," *Id.* at 184, but they "need not be large[;] an identifiable trifle will suffice." *Sierra Club v. U.S. Army Corps of Eng'rs.*, 645 F.3d 978, 988 (8th Cir. 2011) **(**internal citations omitted). Because aesthetic and recreational interests are personal and subjective, the Constitution does not prescribe any particular formula for finding sufficient impairment to support standing. *Ecological Rights Found.*, 230 F.3d at 1150.

An association has standing to bring suit on behalf of its members when those members would have individual standing to sue, the interests at stake are relevant to the organization's purpose, and neither the claim asserted nor the relief requested requires the individual members' participation in the lawsuit. *Laidlaw*, 528 U.S at 181 (citing *Hunt v. Wash. State Apple Adver. Comm'n,* 432 U.S. 333, 343 (1977)). Here, the New Union Wildlife Federation (NUWF) is a representative organization, so that the participation of individual members in the lawsuit is not required, and the interests at stake, in wetlands protection, are central to NUWF's purpose of protecting fish and wildlife by protecting their habitats. (R. at 4). Therefore, to demonstrate standing NUWF need only prove the individual standing of its members. Only one individual plaintiff must show standing to support the jurisdiction of the federal courts. *Sierra Club v. U.S. Army Corps of Eng'rs.*, 645 F.3d at 986 (citing *Watt v. Energy Action Educ. Found.,* 454 U.S. 151, 160 (1981)).

The failure to follow procedures designed to prevent harm can constitute an injury in and of itself, if that failure directly affects the plaintiff's interests. *Defenders of Wildlife*, 504 U.S. at 572.

In *Defenders of Wildlife*, 504 U.S. 555, the U.S. Supreme Court found that plaintiffs did not have standing to challenge a rule limiting the protections of the Endangered Species Act (ESA) to actions within the United States or on the high seas. Allegations that plaintiffs had traveled to foreign countries and observed endangered species habitat, and intended to do so again at some unspecified point in the future, did not state an injury sufficiently actual or imminent to support standing. Although the inter-agency consultation procedure of the ESA had not been followed, this did not here constitute a procedural injury, because the plaintiffs failed to show that the lack of consultation threatened their interests. *Id.*

However, in *Laidlaw*, 528 U.S. 167, the Court held that members of environmental groups had standing to sue under the Clean Water Act (CWA), based on their unfulfilled desires to engage in recreational activities in the area of discharge. These plaintiffs made specific allegations that the water looked and smelled polluted, and that they would like to fish, camp, swim, boat, hike, and picnic in the area, but did not do so because they were concerned about pollution. These were not the same as the "some day intentions" found insufficient in *Defenders of Wildlife*, because they referred to specific activities in a particular location that the Plaintiffs would like to engage in on a regular basis. Because the aesthetic and recreational interests of the Plaintiffs were adversely affected by the challenged activity, these allegations were sufficient, regardless of actual environmental harm, to find injury in fact fairly traceable to the Defendant's conduct. The

deterrent effect of civil penalties made this injury redressable by judicial action. *Id.*

In *White Tanks Concerned Citizens, Inc. v. Strock*, 563 F.3d 1033 (9th Cir. 2009), the court found standing based on use, through a presumption that this use would be impaired. There, the organization's director submitted an affidavit alleging that members lived near the area and used it regularly for recreational purposes, including hiking, horseback riding, and other activities. Because of the organization's purpose in preserving the area, the members were assumed to have recreational and aesthetic interests in preserving the undeveloped nature of the land, and this connection was sufficient injury for standing even without individual testimony as to how those interests were impaired by the Defendant's activities. *Id.*

In addition, even though unsuccessful in *Defenders of Wildlife*, the failure to follow procedures can constitute an injury when that failure puts an interest of the plaintiff at risk. In *Sierra Club v. U.S. Army Corps of Engineers*, 645 F.3d 978, plaintiffs participated in recreational activities close to a power plant, and alleged that the plant was permitted without the proper environmental impact assessment required under the National Environmental Policy Act. Because they participated in outdoor activities in the area that would be harmed should a permit be issued incorrectly, they had concrete interests directly affected by the failure to follow harm-prevention procedures in the issuance of the permit. This is in contrast to *Summers v. Earth Island Institute*, 555 U.S. 488 (2009), where the failure to follow notice and comment procedures in issuing new Forest Service regulations did not confer standing. In that case, the plaintiffs originally alleged that had the requisite procedures been followed, they would have been able to oppose a project that could interfere with their plans to visit and observe nature on Burnt

Ridge. This injury would have conferred standing, but because they settled the claim out of court, they no longer had an interest that was at risk, and so had no standing to continue their challenge of the regulations in the abstract, with no other concrete injury.

Here, Plaintiffs have adequately demonstrated injury to their interests. NUWF members testified that they use the area in the vicinity of Bowman's property for boating, fishing, and picnicking, that they believe the water is more polluted now, and that they suffer feelings of loss from the wetlands destruction. These are concrete, actual injuries, not the future speculation of *Defenders of Wildlife*. By emphasizing that actual environmental harm is irrelevant, *Laidlaw* demonstrates that the concerns of the Plaintiffs are the true focus of the standing inquiry, and feelings of loss, when tied to specific locations and activities, are cognizable injuries. These feelings lessen Plaintiffs' enjoyment of the area due to their reasonable fears, in light of the wetlands' function to absorb sediment and pollutants and serve as buffers for flooding. The expert testimony that the artificial wetland will mitigate these effects later does not amend the harm suffered by the Plaintiffs today, since speculation about possible future benefit is as insufficient to remove injury as speculation of future harm was to incur it in *Defenders of Wildlife*, and, under *Laidlaw*, actual environmental harm is not the issue.

Also, the testimony of specific plaintiffs further supports the finding of injury in fact. Milford testified that the water looked more polluted to her than it did prior to Bowman's activities. This testimony represents injury to her aesthetic interests, more specific than that found to be sufficient in *White Tanks*. Contrary to the district court's opinion, the visible pollution in the water means that the conservation easement along the river did not adequately protect Plaintiffs' aesthetic interests. Also, since Bowman's

activity is of the type that can cause this pollution, and in the area where it appears, it shows that her injury is fairly traceable to the Defendant.

Finally, Norton testified that he has frogged in the area for years, and he now has difficulty finding frogs. Although he may have trespassed on Bowman's property in the past, the district court was incorrect to discount his injury because of this. His frogging was not limited to illegal areas, and the adverse effects of wetlands destruction on his interest will likewise not be limited to this area. As in *Laidlaw*, Norton's frogging is a recreational interest that has been adversely affected by the defendant's actions. The possibility that this harm could be rectified later by the construction of the artificial wetland does not remove the harm done already.

Alternatively, Bowman's failure to follow permitting procedures has caused injury to Plaintiffs because it has put their interests at risk. As in *Sierra Club v. U.S. Army Corps of Engineers*, the Plaintiffs participate in outdoor activities that will be harmed by the environmental pollution and wetlands destruction that Section 404 permits are designed to prevent. In that case, a permit was issued without conducting all the proper analysis, whereas here a permit was not even issued, resulting in even less oversight of possible harm. This is not like *Summers*, where failure to follow regulations was found not to be an injury in the abstract, but is instead like that case prior to settlement of the Burnt Ridge issue, where, as the government conceded and the Supreme Court commented, the plaintiffs would have had standing because of the neglected procedures' potential to protect their interests in observing nature. Here, the procedural protections of a Section 404 permit could have protected Plaintiffs' interests in preserving the wetlands they use for recreational activities. Therefore, through Bowman's failure to obtain a

Section 404 permit, Plaintiffs have suffered an injury in fact fairly traceable to Defendant's conduct. As established in *Laidlaw*, the deterrent effect of civil penalties makes this injury redressable by favorable judicial action. NUDEP requests that this court reverse the lower court's decision to deny NUWF's standing.

II. There is no continuing or ongoing violation as required by Section 505(a) of the CWA for subject matter jurisdiction, because the violation was a single, wholly past act, and because Bowman entered into a consent order with NUDEP whereby any possibility of a future recurrence/violation is effectively neutralized.

Section 505(a) of the CWA permits private citizens to file suit "against any person… who is alleged to be in violation of… an effluent standard or limitation under this Act…." 33 U.S.C. Section 1365(a). When a person ceases to be in violation of the Act is an issue that the Supreme Court has not clearly ruled on. The U.S. Supreme Court in *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Found., Inc.*, 484 U.S. 49, 57 (1987), held that Congress, by using the present tense phrase "in violation," did not intend to permit citizen suits based on "wholly past violations" of the CWA. Instead, the Court reasoned that because the language and structure of the citizen suit provision is "primarily forward-looking" or preventative, *id.* at 59, the most natural reading of Section 505(a)(1) requires "citizen-plaintiffs [to] allege a state of either continuous or intermittent violation-that is, a reasonable likelihood that a past polluter will continue to pollute in the future." *Id.* at 57. Thus, to establish jurisdiction, citizen-plaintiffs need only make good-faith allegations of continuous or intermittent violations. *Id.* at 64. Accordingly, the longstanding interpretation of Section 505 has been that it was "intended to abate pollution and to enjoin continuous or intermittent violations, not to remedy wholly past violations." *Id.* at 50. However, "a continuing violation also may be demonstrated

through acts that occurred after the filing of the complaint or through acts from which a reasonable trier of fact could find a continuing likelihood of intermittent or sporadic violations. *Natural Res. Def. Council v. Sw. Marine, Inc.,* 236 F.3d 985, 998 (9th Cir. 2000). Ongoing but sporadic violations do not cease to be considered ongoing until there is no real likelihood of repetition. *Id.* In this vein, a court may evaluate the defendant's remedial efforts to determine if a continuing violation has indeed ceased." *Ctr. for Biological Diversity v. Marina Point Dev. Assocs.*, 434 F. Supp. 2d 789, 797 (C.D. Cal. 2006).

Lower courts are split in their interpretation of when a violation ceases to continue and becomes wholly past. Most courts agree, however, that "[A] citizen plaintiff may prove ongoing violations 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." *Sierra Club v. Union Oil Co.*, 853 F.2d 667, 671 (9th Cir.1988). Intermittent or sporadic violations "do not cease to be ongoing until the date when there is no real likelihood of repetition." *Id.* at 671. The split exists in cases "where the conduct that gave rise to the violation has ceased, but the effects continue." *City of Mountain Park v. Lakeside at Ansley, LLC*, 560 F.Supp.2d 1288, 1293 (N.D. Ga. 2008). Some courts (Fourth, Eighth, Ninth, and Eleventh Circuits) have interpreted *Gwaltney* expansively, holding that violations are considered to be ongoing or continuous so long as the effects continue. Other courts (First, Second, Fifth, Sixth, and Tenth Circuits) have interpreted *Gwaltney* stringently, holding that regardless of whether effects of a violation continue, such violation is still wholly past. *See City of Mountain Park*, 560 F.Supp.2d at 1293;

Union Oil, 853 F.2d at 793. These courts have declared that "past violations-whatever the continuing consequences-cannot form the bases of CWA citizen suits." *City of Mountain Park*, 560 F.Supp.2d at 1294.

In *North Carolina Wildlife Federation. v. Woodbury*, 87-584-CIV-5, 1989 WL 106517 (E.D. N.C. Apr. 25, 1989), the Court held that defendant had committed a continuing violation for failure to remove dredged and fill material from the wetlands for six years: "the failure to take remedial measures as a continuing violation is eminently reasonable." *Id.* at *3. The Court stated "this is because it is not the physical act of discharging dredge wastes itself that leads to the injury giving rise to citizen standing, but the consequences of the discharge in terms of lasting environmental degradation." *Id*. The Court cited to Justice Scalia's concurrence in *Gwaltney*: "When a company has violated an effluent standard or limitation, it remains, for purposes of Section 505(a), 'in violation' of that standard or limitation so long as it has not put in place remedial measures that clearly eliminate the cause of the violation." *Id.* (citing *Gwaltney*, 484 U.S. at 69).

Another expansive view of *Gwaltney* was expressed in *City of Mountain Park*, 560 F. Supp. 2d at 1296, when the Court held: "the fill materials at issue in this case do not significantly dissipate or dissolve over time. Instead, these fill materials, when discharged into a system such as the plaintiff's lakes, stay intact over time and thus continue to have roughly the same net polluting effect years or even decades after the time of their deposit." The defendant in *City of Mountain Park* had developed sub-divisions near a lake, and the plaintiff argued that silt and sediment had been deposited directly into the water. The interpretations adopted by the Courts in *North Carolina*

Wildlife and *City of Mountain Park* have been rejected by some courts as having "stretched the present-tense 'to be in violation' language of the Act to the conceptual breaking point, potentially running afoul of *Gwaltney's* 'wholly past' prohibition." *City of Mountain Park*, 560 F. Supp. 2d at 1296. Such interpretation "holds the potential to raise additional practical concerns for the courts: what, for instance, is the threshold quantity of existing polluting substances necessary to trigger jurisdiction? Would trace amounts suffice?" *Id.* One Court noted that "the fact that courts have the statutory authority to issue injunctions requiring violators to remedy the effects of their violations instead of paying monetary damages does not mean that the violations themselves are 'continuing'." *U.S. v. Rutherford Oil Corp.*, 756 F. Supp. 2d 782, 792 (S.D. Tex. 2010).

In *Sierra Club v. El Paso Gold Mines, Inc.*, 421 F.3d 1133, 1140 (10th Cir. 2005), while the Tenth Circuit Court of Appeals held there was subject matter jurisdiction, the Court noted that most ongoing migration cases "involve an identifiable discharge from a point source that *occurred in the past,* whether it be a spill, the accidental leakage at a chemical plant, the discharge of lead shot and clay targets at a firing range, or dumping of waste rock at a mine. At the time of suit, the discharging activity *from a point source* in all of these cases had ceased; all that remained was the migration, decomposition, or diffusion of the pollutants into a waterway." *Id.*

In *Connecticut Coastal Fishermen's Ass'n v. Remington Arms Co.*, 989 F.2d 1305 (2d Cir. 1993), the Second Circuit dismissed for lack of subject matter plaintiff's complaint alleging that defendant's shooting range was discharging pollutants (lead shot and clay targets) into a wetland, because "the defendant had persuasively shown that it made a 'final irrevocable decision' never to reopen the shooting range after being ordered

by a state environmental agency order to cease all discharges of lead shot" by a specific date. *Id* at 1312. The Court emphasized that "the present violation requirement of the Act would be completely undermined if a violation included the mere decomposition of pollutants." *Id.* at 1313.

Courts have emphasized that when a past violator becomes compliant with the state regulatory body charged with enforcing the CWA, there is no continuing violation. In *Coon v. Willet Dairy, LP*, 5:02-CV-1195 (FJS/GJD), 2007 WL 2071746 (N.D.N.Y. 2007), *aff'd*, *sub nom. Coon ex rel. Coon v. Willet Dairy, LP*, 536 F.3d 171 (2d Cir. 2008), the court held that a citizen suit should be dismissed when a state regulatory body charged with implementing CWA and a violator enter into a consent order regarding the same subject matter, as long as the settlement reasonably assures that the violations have ceased and will not recur. In *Ctr. for Biological Diversity*, 434 F. Supp. 2d at 797, the court noted that the past violations, when considered with Defendant's apparent contempt for the regulations, suggested a strong likelihood of future violations. Such emphasis gives weight to the notion that when a past violator becomes compliant with the state regulatory body charged with implementing the CWA, the violator reasonably assures that no more violations will recur. Some courts have even held that a defendant's post-complaint compliance might invoke mootness principles when there were clearly ongoing violations at the time suit was filed. *St. Johns Riverkeeper, Inc. v. Jacksonville Elec. Auth.*, 3:07-CV-739-J-34TEM, 2010 WL 745494 (M.D. Fla. 2010).

In the present case, Bowman's violation of the CWA began and ended in one month. Neither a continuing act nor a likelihood of reoccurrence exists here. As the court below stated, "the idea that a CWA violation continues unless and until it is undone…

would render without meaning the jurisdictional requirement for a continuing violation, since all violations would be continuing." (R. at 7). The second method for proving an ongoing violation—evidence from which a trier of fact could find a continuing likelihood of recurrence—does not apply, because NUWF offers no evidence that Bowman will be performing any more construction on the land at issue. In fact, there is evidence to the contrary: Bowman has agreed to cease any actions that might constitute a violation.

NUWF's assertion that the continued presence of dredged and fill material in the former wetland constitutes a continuing or ongoing violation is an interpretation that has been adopted in some cases, but should not be adopted here. Unlike the facts presented in *North Carolina Wildlife*, Bowman has taken remedial measures; he has placed the only remaining land he owns in the area in a conservation easement with NUDEP. (R. at 4). Like the defendant in *Connecticut Coastal*, Bowman has made the equivalent of a final, irrevocable decision not to discharge dredged or fill material into the wetlands at the request of NUDEP. Like the court in *Connecticut Coastal*, this court should not set a standard whereby the "mere composition" of fill or dredged material constitutes an ongoing violation. If this court adopts the expansive interpretation of *Gwaltney,* there will undoubtedly be an influx of cases filed over a range of activity that occurred in the past. Finally, the court's reasoning in *Coon* is helpful in the present case: because NUDEP is charged with implementing the CWA and has entered into a consent order with Bowman to cease work on and preserve the wetland area. This court should find in favor of NUDEP and Bowman with regard to being reasonably sure that no more construction (intermittent or sporadic) will occur. NUDEP urges this court to affirm the district court's ruling that Bowman's violation is wholly past.

III. NUDEP has diligently prosecuted the CWA violations because the organization entered into a settlement agreement with Bowman, issued an administrative order finalizing the agreement, and has sued and requested a consent decree in federal court.

Citizen suits are barred **"**if the Administrator or State has commenced and is diligently prosecuting a civil or criminal action in a court of the United States, or a State to require compliance with the standard, limitation, or order." 33 U.S.C. § 1365(b)(1)(B). Any citizen suing under this citizen suit provision has the burden of proving subject matter jurisdiction exists, meaning it must prove that the government entity has not diligently prosecuted the alleged CWA violation. *Piney Run Pres. Ass'n v. Cnty. Comm'rs Of Carroll Cnty.*, MD, 523 F.3d 453, 459 (4th Cir. 2008).

This citizen suit provision is meant to serve as a check on what is usually the duty of the state and federal governments to diligently prosecute CWA violations, "although the primary responsibility for enforcement rests with the state and federal governments." *Sierra Club v. Hamilton Cnty. Bd. of Cnty. Comm'rs,* 504 F.3d 634, 637 (6th Cir. 2007). The purpose of the citizen suit provision is to permit citizens "to abate pollution when the government cannot or will not command compliance." *Gwaltney*, 484 U.S. at 62. As the Supreme Court noted in *Gwaltney*,

> The bar on citizen suits when governmental enforcement action is under way suggests that *the citizen suit is meant to supplement rather than to supplant governmental action*. The legislative history of the Act reinforces this view of the role of the citizen suit. The Senate Report noted that "[t]he Committee intends the great volume of enforcement actions [to] be brought by the State," and that citizen suits are proper only "if the Federal, State, and local agencies fail to exercise their enforcement responsibility." S.Rep. No. 92–414, at 64 (1971). *Id.* (emphasis added).

"A CWA 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,' and ... diligence is presumed. …Citizen-plaintiffs must meet a high standard to demonstrate that [a government agency] has failed to prosecute a violation diligently." *Piney Run Pres. Ass'n*, 523 F.3d at 459 (internal citations omitted).

> Section 1365(b)(1)(B) does not require government prosecution to be far-reaching or zealous. It requires only diligence. Thus, 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.* (internal quotes and citations omitted).

In determining whether a government agency has diligently prosecuted a CWA violation, courts give agencies wide discretion to set the terms of settlement agreements as they see fit. These agreements often ultimately take the form of consent decrees. "[T]he fact that an agency has entered into a consent decree with a violator that establishes a prospective schedule of compliance does not necessarily establish lack of diligence…Indeed, when presented with a consent decree we must be particularly deferential to the agency's expertise, and we should not interpret §1365 in a manner that would undermine the [government's] ability to reach voluntary settlements with defendants." *Id.* (internal quotes and citations omitted). As the Supreme Court has acknowledged, "If citizens could file suit ... in order to seek the civil penalties that the Administrator chose to forgo, then the Administrator's discretion to enforce the Act in the public interest would be curtailed considerably." *Gwaltney*, 484 U.S. at 61.

"Enforcement actions typically result, by consent or otherwise, in a remedial order setting out a detailed schedule of compliance designed to cure the identified violation of the Act." *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 318 (1982) (internal quotation marks omitted). However, nowhere in the statute is there any requirement that there be a court-approved consent order for there to be diligent prosecution. Prosecution

in a court of the United States is all that is required, which makes sense, given that the legislature chose the word "prosecution" rather than "order" or "conviction" or "victory in court." Courts have found "court" in the statute to carry its plain meaning. *Sierra Club v. Chevron U.S.A., Inc.*, 834 F.2d 1517, 1524 (9th Cir. 1987).

In *Piney Run Pres. Ass'n*, the court found diligent prosecution even assuming the alleged violator in that case, a county government, had *asked* the state agency to pursue the enforcement action, presumably in order to avoid being sued by any private organizations. 523 F.3d at 460. Further, the court, in deferring to the state agency's judgment, stated that an agreement to lower the county's fine was nonetheless diligent prosecution when it appeared to be "nothing more than a concession on the part of [the state agency] in exchange for other obligations that are imposed on the County." *Id*. at 461. The court stated that absent any clear evidence of the state agency's intention to act irresponsibly, there was diligent prosecution. *Id.*

Here, NUDEP's prosecution of the matter through the administrative process would be diligent even had NUDEP not sued in federal court as well. In issuing administrative orders regarding CWA violations, NUDEP is granted authority by statute to include an administrative penalty of up to $125,000 to violators. In exchange for not issuing such a penalty, NUDEP required compliance with the CWA. Bowman has agreed not to clear more wetlands in the area. As the district court described the settlement agreement, Bowman

> 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. (R. at 4).

This agreement alone, enforced by NUDEP's authority to issue a fine, is capable of requiring compliance with the Act and is in good faith calculated to do so.

However, NUDEP has not stopped there in its prosecution of Bowman. It has also sued in federal court under the citizen suit provision. It has filed a motion to enter a decree with identical terms to its administrative order. Bowman has already consented to both the motion and the decree—all that is left is judicial approval.

These two actions—the administrative order and the federal suit and motion to enter a consent decree—provide independent rationales for this court to hold NUDEP has diligently prosecuted this action. On appeal, NUDEP therefore respectfully asks that this court uphold the district court's decision to bar NUWF's action and hold that NUDEP has diligently prosecuted this matter.

IV. Bowman violated section 301(a) of the CWA when he moved dredged and fill material from one part of a wetland adjacent to navigable water to another part of the same wetland without a permit issued under section 404.

Section 301(a) of the CWA prohibits "the discharge of any pollutant by any person," except in compliance with a permit issued under §§ 402 or 404 of the CWA. 33 U.S.C. § 1311(a). Section 502(12) of the CWA defines "discharge of a pollutant" to mean "any addition of any pollutant to navigable waters from any point source." *Id.* at § 1362(12). Section 502 of the CWA defines "pollutant," navigable waters" and "point source." *Id.* at § 1362. It is not contested that Bowman's actions met these definitions.

Section 404 of the CWA authorizes the U.S. Army Corps of Engineers to issue permits "for the discharge of dredged or fill materials into the navigable waters." *Id.* at §

1344. Although the term "addition" is not specifically defined, the "addition of dredged material" includes redeposit, other than incidental fallback, into waters of the United States which is incidental to any activity, including mechanized land clearing, ditching, channelization, or other excavation. 33 C.F.R. § 323.2(d)(1) (2012). The person proposing to undertake this activity bears the burden of demonstrating that such activity would not destroy or degrade any area of waters of the United States. *Id.* at § 323.2 (d)(3)(i). An activity associated with a discharge of dredged material destroys an area of waters of the United States if it alters the area in such a way that it would no longer be a water of the United States. *Id.* at § 323.2 (d)(4). An activity associated with a discharge of dredged material degrades waters of the United States if it causes an identifiable individual or cumulative adverse effect on any aquatic function. *Id.* at § 323.2 (d)(5).

The "addition of fill material" replaces any portion of a water of the United States with dry land. *Id.* at § 323.2 (e)(1). This includes site-development fills for recreational, industrial, commercial, residential, or other uses. *Id.* at § 323.2 (f). Although normal farming activities such as plowing and seeding are exempt from permit requirements, these activities must be established and ongoing, and are not exempt when the area on which they are conducted has been converted to another use. 33 C.F.R. § 323.4(a)(1) (2012). Plowing does not include redistribution that changes any waters of the United States to dry land. *Id.* at § 323.4(a)(1)(D). Any discharge, even incidental to normal farming activities, must have a permit if its purpose is to convert waters of the United States to a new use where flow or circulation may be impaired, or reach of the waters may be reduced. *Id.* at § 323.4(b). Discernible alteration results in a presumption of

impairment. *Id.* Conversion of a wetland to a non-wetland is a change in the waters of the United States. *Id.*

The EPA did interpret "addition" in its Water Transfer Rule to incorporate the "unitary navigable waters" theory, under which all navigable waters are one for the purposes of § 301(a) of the CWA. National Pollutant Discharge Elimination System (NPDES) Water Transfer Rule, 73 Fed. Reg. 33,697 (June 13, 2008) (codified at 40 C.F.R. pt. 122). However, this rule, even if entitled to judicial deference, focused "exclusively on water transfers" under the National Pollutant Discharge Elimination System (NPDES) permitting program, 33 U.S.C. § 1342 (2006), and was not intended to have any effect on other activities subject to an NPDES permit, or on any activities regulated under section 404 of the CWA. *Id.* The EPA itself stated, "today's rule has no effect on the 404 permit program, under which discharges of dredged or fill material may be authorized by a permit." *Id.* Water transfers are associated only with non-point source pollution, and thus are outside of the intended focus of section 301(a). *Id.*

The intention of *Chevron* deference is to give effect to agency interpretation made with the force of law under Congressionally delegated authority. *U.S. v. Mead*, 533 U.S. 218, 227 (2001). Any ensuing valid regulation is binding on the courts. *Id.* In its Water Transfers Rule, the EPA interpreted "addition" only in regards to water transfers, and thus it is only in this context that it should be binding. Furthermore, the EPA interpretation of its own rule as having no effect on 404 is entitled to even greater deference, and is controlling unless plainly erroneous or inconsistent with the regulation. *Auer v. Robbins*, 519 U.S. 452, 461 (1997). The exclusion of section 404 from the Water Transfers Rule is not plainly erroneous or inconsistent, because section 404 deals with

point source pollution from dredged and fill material, rather than the non-point source pollution associated with water transfers.

Likewise, the EPA definition of a pollutant as "from the outside world" also applies to section 402 activities only. The lower court may be correct that the "outside world" definition of "addition," under which the dredged or fill material must come from somewhere other than the wetland into which it is being placed to require a section 404 permit, would not read section 404 out of the statute, but only result in a narrower application of the permitting program. (R. at 9). However, it would directly contradict the rules of both the Corps, 33 C.F.R. § 323.2, and the EPA, 40 C.F.R. § 232.2 (2012), in their inclusion of "redeposit" within the "addition of dredged material," and thereby contradict express Congressional intent that the CWA be administered by the EPA "except as otherwise expressly provided." 33 U.S.C. § 1251(d). Additionally, the "outside world" definition was adopted informally, and thus is not deserving of *Chevron* deference. *Catskill Mountains Ch. Trout Unlmtd. v. City of N.Y.*, 273 F.3d 481 (2nd Cir. 2001) (citing *Mead*, 533 U.S. 218).

The lower court was incorrect to rely on EPA definitions formulated regarding activities subject to regulation under section 402 instead of 404. The EPA itself has echoed the Corps definitions in 33 C.F.R. § 323.2, discussed above, in its own regulation of the same date. 40 C.F.R. § 232.2. This rule defines the "addition of dredged material" to include redeposit other than incidental fallback, and unlike the Water Transfer Rule, was intended to effect section 404 regulations. Although Congress has not provided for alternate meanings of "addition" in the different sections of the CWA, Congress did not define the term "addition" at all. Instead, this definition was left to the agencies, and

proper deference should be given to the agency decision, as expressed in the Water Transfer Rule, that section 402 and 404 involve different meanings of the term. These interpretations are supported by the purpose of the CWA, to eliminate the discharge of pollutants into navigable waters, and with the broad grant of authority to the EPA to administer the CWA "except as otherwise expressly provided." 33 U.S.C. § 1251(a)(1), (d). The Supreme Court has recognized that the EPA can interpret the same ambiguous term differently when it is used in separate statutory provisions with different policy dynamics. *See Envtl. Def. v. Duke Energy Corp.,* 549 U.S. 561, 576 (2007) (concluding that incorporating a definition from one Clean Air Act program in another did not remove agency discretion to consider surrounding context in resolving questions about definition). This reasoning applies equally to the different provisions of the CWA under sections 1342 and 1344, with their differing policies of EPA and Corps administration. *Sorenson v. Secretary of the Treasury of the U.S.*, 475 U.S. 851, 859-860 (1986), is not controlling here, because the earned income credit at issue there had been specifically characterized as an "overpayment," the term "overpayment" had been specifically defined, and the interception provision specifically applied to "any overpayment." Here, on the other hand, Congress has not defined "addition," and proper deference should be given to the reasonable interpretation put forth by both the Corps and the EPA that the "dissimilar connections" of section 402 and 404 warrant the conclusion that the meanings too should differ. *Sorenson*, 475 U.S. at 860.

As the lower court stated, there are "any number of decisions holding that land clearing activities violate the CWA without a section 404 permit." (R. at 10). The Fifth Circuit found that, "'dredged' 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." *Avoyelles Sportsmen's League, Inc. v. Marsh,* 715 F.2d 897, 924 n.43 (5th Cir. 1983). This reading has been confirmed in more recent cases, and affirmed by the Supreme Court. *Borden Ranch P'ship v. U.S. Army Corps of Eng'rs,* 261 F.3d 810, 815 (9th Cir. 2001), *aff'd,* 537 U.S. 99 (2002) (affirmance by an divided Court) (Use of bulldozers to wrench up, move around, and redeposit soil in wetlands constituted the discharge of a pollutant). *See also United States v. Brace,* 41 F.3d 117, 121 (3d Cir. 1994) (farmer violated the CWA when he cleared, leveled, and drained a former wetland without a 404 permit, converting it to dry land to bring it into farming use, and thus not meeting the exemption for normal farming activities); *United States v. Deaton,* 209 F.3d 331, 335-36 (4th Cir. 2000) (developer violated the CWA when he dug a ditch across wetland and piled the excavated dirt to the sides, converting undisturbed dirt and vegetation into dredged spoil, so that "its redeposit in that same wetland *added* a pollutant where none had been before.") (emphasis in original); *Greenfield Mills, Inc. v. Macklin,* 361 F.3d 934, 947-49 (7th Cir. 2004) (following *Avoyelles* and the position of the EPA in amicus curiae, expressly rejecting the "outside world" theory and holding that the discharge of dredged material into contiguous waters was an "addition."); *Green Acres Enterprises, Inc. v. U.S.,* 418 F.3d 852, 856 (8th Cir. 2005) (requiring a 404 permit for bulldozer work where soil was redeposited and so involved more than incidental fallback); *United States v. Hubenka,* 438 F.3d 1026, 1035 (10th Cir. 2006) (Use of a bulldozer to construct dikes from river bottom materials was the discharge of a pollutant); *United States v. Cundiff,* 555 F.3d 200, 213 (6th Cir. 2009) (sidecasting from ditches to drain and fill wetland was the addition of a pollutant*).*

The legislative history of the CWA also supports this reading. Congressional sponsors of the Act stated that the discharge of dredged material, which was to fall under the Corps' permitting authority, involved "moving spoil material from one place in the waterway to another, without the interjection of new pollutants." 117 Cong. Rec. 38853 (Nov. 2, 1971). Congress acted in reliance on this when they adopted the exemptions that were part of the 1977 Amendments, several of which involve the relocation of dredged material within the same water body, such as discharges associated with "plowing" and "the maintenance of drainage ditches." 33 U.S.C. § 1344(f)(1)(A), (C).

The only case to question this view does not discredit it, but merely clarifies the limitation of Corps regulatory authority to discharges involving more than incidental fallback. *National Mining Ass'n v. U.S. Army Corps of Eng'rs,* 145 F.3d 1399 (D.C. Cir. 1998). There, the court determined that the Corps overstepped its statutory authority in promulgating the Tulloch rule, which defined the "discharge of dredged material" to include incidental fallback. However, the court specifically limited its holding so as not to prohibit the regulation of any redeposit other than incidental fallback. In addition, the Corps has acted since this decision to clarify that redeposit not determined to be incidental fallback are properly regulated. 33 C.F.R. § 323.2. The Eleventh Circuit decision relied on by the lower court, in *Friends of the Everglades v. South Florida Water Management District*, 570 F.3d 1210 (11th Cir. 2009), is not to the contrary, because that case dealt with a water transfer under the NPDES permitting program, properly covered by the Water Transfer Rule and not section 404 of the CWA.

Bowman's actions here, in clearing the land, burning the vegetation, & spreading it around to level the land, constituted the redeposit of dredged and fill material that is

considered to be a discharge under existing case law, agency regulation, and Congressional intent. Bowman does not contest that his property was a wetland properly falling under Corps regulation, or that he used bulldozers to knock down trees and level vegetation, then to push the debris into piles, which he burned, before using the bulldozers to ditch trenches, fill them with the ashes and vegetation, and further level the resulting field by pushing the soil around. He also does not deny that he dug a wide ditch across his property to the river, in order to drain it. These actions resulted in the redeposit of dredged spoil across his property and were therefore a discharge necessitating a permit under section 404 of the CWA. Because his property had not previously been used for farming, and his purpose was to drain the area and convert it from a wetland to dry, Bowman's actions do not fall into the exemption for "normal farming activities" allowed under 33 U.S.C. § 1344(f)(1)(A). Therefore, these actions were a violation of the CWA, and the summary judgment as to this issue should be reversed.

CONCLUSION

By clearing wetlands without a permit, Jim Bob Bowman violated the CWA. As a representative organization whose members suffered injuries due to this violation, NUWF has standing to bring a citizen suit over this violation. NUDEP respectfully ask this court to reverse the lower court's grant of summary judgment on these issues. However, because the violation is wholly past and being diligently prosecuted by NUDEP, the suit is barred on other grounds, and NUDEP asks that summary judgment on those issues be upheld.

Respectfully submitted,

Team #75